

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

NICK ROBINSON†

ABSTRACT

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 by reference to 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

Copyright © 2020 Nick Robinson.

† Legal Advisor, International Center for Not-for-Profit Law (“ICNL”). Affiliated Fellow, Harvard Law School Center on the Legal Profession. I would like to thank Doug Rutzen, David Pozen, Marc Wu, Aziz Rana, Brett Gary, William Youmans, Ben Freeman, Claire Finkelstein, Matthew Harding, Matt Sanderson, and Natasha Bourjaily for feedback and conversations on this Article. I also received valuable feedback at a workshop organized by the Center for Ethics and the Rule of Law at the University of Pennsylvania Law School. All opinions and errors are my own.

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 unlikely to be effective and presents a high risk of politicized abuse. Based on these insights, it suggests three potential strategies for FARA reform.

TABLE OF CONTENTS

Introduction	1077
I. FARA's Global Influence	1084
A. "Foreign Agent" Type Laws in Other Countries	1086
B. The Weaponization of Transparency.....	1090
II. FARA's Breadth and Vagueness.....	1092
A. Historical Evolution of FARA	1092
B. Foreign Principal and Covered Activities	1097
C. Principal-Agent Relationship.....	1099
1. <i>Request</i>	1100
2. <i>Subsidized in Whole or in Major Part</i>	1102
D. Registration and Reporting Requirements.....	1103
E. Exemptions	1104
1. <i>Diplomatic or National Security Exemptions and</i> <i>Commercial Exemptions</i>	1104
2. <i>Religious, Academic, Fine Arts, or Humanitarian</i> <i>Exemptions</i>	1106
3. <i>Lobbyists and Lawyers</i>	1106
4. <i>"Other activities not serving predominantly a foreign</i> <i>interest"</i>	1108
5. <i>"Bona Fide" Domestic Media</i>	1110
F. Actors Particularly Vulnerable to Politicized Enforcement	1111
1. <i>Nonprofits</i>	1111
2. <i>Media</i>	1113
3. <i>Public officials</i>	1115
III. The Politicized Enforcement of FARA.....	1116
A. W.E.B. Du Bois and the Peace Information Center	1118
B. House Committee Investigation of Environmental Nonprofits	1121
C. RT TV America and Foreign Media	1124
IV. FARA's Potential Constitutional Defects.....	1130

V. Targeting FARA.....	1135
A. Clarifying FARA’s Purpose.....	1136
1. <i>Foreign Lobbying</i>	1136
2. <i>Foreign Electioneering</i>	1138
3. <i>Foreign Disinformation</i>	1140
B. Reform Strategies	1144
Conclusion.....	1146

INTRODUCTION

The Foreign Agents Registration Act (“FARA”) is a public-disclosure statute enacted in 1938 to combat foreign propaganda in the United States.¹ It 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.² Violations of the Act can result in fines or up to five years in jail.³

FARA has a remarkably sweeping ambit, but until recently, it has existed in relative obscurity. Between 1966 and 2015, the Justice Department only brought seven criminal prosecutions and seventeen civil cases under the Act.⁴ One can easily get through law school without its mention, and there is relatively little academic scholarship

1. Foreign Agents Registration Act of 1938, ch. 327, 52 Stat. 631 (codified as amended at 22 U.S.C. §§ 611–621 (2018)); OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, AUDIT OF THE NATIONAL SECURITY DIVISION’S ENFORCEMENT AND ADMINISTRATION OF THE FOREIGN AGENTS REGISTRATION ACT 2 (2016) [hereinafter IG FARA REPORT] (“From its passage in 1938 until amendments made in 1966, FARA primarily focused on propagandists.”).

2. 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).

3. 22 U.S.C. § 618(a)(2).

4. IG FARA REPORT, *supra* note 1, at 8 (“[B]etween 1966 and 2015, the Department . . . [brought] seven criminal FARA cases – one resulted in a conviction at trial two pleaded guilty to violating FARA, two others pleaded guilty to non-FARA charges, and the remaining two cases were dismissed.”); U.S. DEP’T OF JUSTICE, 2062. *Foreign Agents Registration Act Enforcement*, CRIMINAL RESOURCE MANUAL, in U.S. ATTORNEYS’ MANUAL (2018) [hereinafter DOJ ENFORCEMENT STRATEGY], <https://www.justice.gov/usam/criminal-resource-manual-2062-foreign-agents-registration-act-enforcement> [<http://perma.cc/D7WC-R55Q>] (“[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.”).

on the Act itself.⁵ Although there are perennial complaints by members of Congress, transparency groups, and others about FARA's underenforcement,⁶ there is also longstanding confusion about what is actually covered by the Act, or even its purpose. Today, many see it primarily as a tool to provide transparency for lobbyists of foreign governments.⁷ Some continue to view it as a way to undermine propaganda or disinformation.⁸ And still others see FARA as a way to combat foreign interference in U.S. elections.⁹ 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."¹⁰

Recent concern about foreign influence in U.S. democracy has thrust FARA into the spotlight of national politics. Special Counsel Robert Mueller, who investigated Russian interference in the 2016 U.S. presidential election, brought multiple charges, including failure

5. Legal scholarship on FARA is generally dated and has frequently been driven by student notes. *See, e.g.*, Michael I. Spak, *America for Sale: When Well-Connected Former Federal Officials Peddle Their Influence to the Highest Foreign Bidder—A Statutory Analysis and Proposals for Reform of the Foreign Agents Registration Act and the Ethics in Government Act*, 78 KY. L.J. 237 (1989) (suggesting a proposal to reform FARA to better address lobbying by former public officials); Jihad Atieh, Note, *Foreign Agents: Updating FARA to Protect American Democracy*, 31 U. PA. J. INT'L L. 1051 (2010) (arguing for increasing disclosure requirements of lobbying activities under FARA); Charles Lawson, Note, *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) (observing changes made to FARA in 1995 amendments); Ava Marion Plakins, Note, *Heat Not Light: The Foreign Agents Registration Act After Meese v. Keene*, 11 FORDHAM INT'L L.J. 184 (1987) (reviewing FARA's legislative history and calling for the end of labeling covered material "political propaganda").

6. *See, e.g.*, Lydia Dennett, Opinion, *The 'Foreign Agents' Law Paul Manafort Is Charged with Breaking Is Wildly Underenforced*, VOX (Nov. 3, 2017, 8:30 AM), <https://www.vox.com/the-big-idea/2017/11/3/16596484/fara-foreign-agents-registration-manafort-enforcement-scandal> [<https://perma.cc/P89L-GCA7>] (reporting statements from an advocate from Project on Government Oversight calling for strengthened enforcement of FARA and noting both longstanding underenforcement of FARA and complaints about it).

7. DOJ ENFORCEMENT STRATEGY, *supra* note 4 (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 V.A.1.

8. *See infra* Part V.A.3.

9. *See infra* Part V.A.2.

10. *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 Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 102d Cong. 28 (1991) (statement of Rep. Dan Glickman, Member, H. Comm. on the Judiciary).

to register under FARA, against Paul Manafort,¹¹ Richard Gates,¹² and members of Russia’s Internet Research Agency.¹³ In November 2017, at the request of the Justice Department, RT TV America and Sputnik, both of which are media organizations funded by the Russian government that operate in the U.S., registered as “foreign agents” under the Act.¹⁴ Certain members of Congress have written to the Justice Department asking it also to investigate whether Chinese media organizations,¹⁵ Al Jazeera,¹⁶ and even former Secretary of State John Kerry¹⁷ should have to register as well. After this congressional prodding, in September 2018, the Justice Department asked two

11. Indictment at 26, *United States v. Manafort*, No. 1:17-cr-00201-ABJ (D.D.C. filed Oct. 30, 2017). Paul Manafort was the Chairman of Donald Trump’s presidential election campaign from June to August of 2016. *US Election: Trump Campaign Chairman Paul Manafort Quits*, BBC NEWS (Aug. 19, 2016), <https://www.bbc.com/news/world-us-canada-37134440> [<https://perma.cc/T22V-MRME>].

12. Indictment at 26, *Manafort*, No. 1: 17-cr-00201-ABJ. Richard Gates was a business associate of Paul Manafort and his deputy when Manafort was Chairman of Trump’s presidential election campaign. Josh Gerstein, *Former Manafort Deputy Rick Gates Testifies Against Greg Craig*, POLITICO (Aug. 22, 2019, 4:05PM), <https://www.politico.com/story/2019/08/22/rick-gates-trial-greg-craig-1471698> [<https://perma.cc/7MAZ-XKWC>]. 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 & Matthew Goldstein, *Law Firm To Pay \$4.6 Million in Case Tied To Manafort and Ukraine*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/us/politics/skadden-arps-ukraine-lobbying-settlement.html> [<https://perma.cc/HP9M-L8T4>].

13. Indictment at 19–20, *United States v. Internet Research Agency*, No. 1:18-cr-00032-DLF (D.D.C. filed Feb. 16, 2018) [hereinafter IRA Indictment].

14. Megan R. Wilson, *Russian News Outlet Sputnik Registers with DOJ as Foreign Agent*, HILL (Nov. 11, 2017, 1:15 PM), <http://thehill.com/business-a-lobbying/business-a-lobbying/360912-russian-news-outlet-sputnik-registers-with-doj-as> [<https://perma.cc/MK5F-SAF9>].

15. Letter from Sen. Patrick Leahy et al. to Att’y Gen. Jeff Sessions (Jan. 16, 2018), https://www.rubio.senate.gov/public/_cache/files/eccdcf1b-82d0-47f3-90a4-3d01635d1255/B457BF238E2795509242A4E24CDB54CF.011618-pjl-letter-to-doj.pdf [<https://perma.cc/NT32-RNBA>].

16. Letter from Rep. Josh Gottheimer et al. to Att’y Gen. Jeff Sessions (Mar. 6, 2018) [hereinafter Congressional Letter concerning Al Jazeera], https://zeldin.house.gov/sites/zeldin.house.gov/files/3.6_zeldin_gottheimer_cruz_letter_pdf.pdf [<https://perma.cc/YSS2-CUFC>].

17. Senator Kerry was accused of needing to register for meeting with a delegation from Iran. Letter from Sen. Marco Rubio to Att’y Gen. Jeff Sessions (Sept. 18, 2018) [hereinafter Rubio Letter], 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://perma.cc/7G7M-EDDT>].

Chinese media organizations, Xinhua News Agency and China Global Television Network, to register under FARA.¹⁸

Members of Congress from both sides of the aisle have proposed strengthening the enforcement of FARA, broadening the reach of the statute, or both.¹⁹ In fact, in the 115th Congress alone, 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.²⁰

Since FARA has recently become one of the most prominent and central responses of policymakers to address a range of forms of foreign influence in U.S. politics, it is worth asking how the Act actually operates. On its face, FARA is startlingly broad: it applies equally to "agents" of a foreign government—like Saudi Arabia—or of 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 such as *The Guardian*.²¹ Covered activity under the Act includes attempts to influence U.S. public opinion on any foreign or domestic policy issue;²² soliciting or disbursing anything of value;²³ or disseminating oral, visual, or written information of any kind for or in

18. Kate O'Keeffe & Aruna Viswanatha, *Justice Department Has Ordered Key Chinese State Media Firms To Register as Foreign Agents*, WALL ST. J. (Sept. 18, 2018, 3:50 PM), <https://www.wsj.com/articles/justice-department-has-ordered-key-chinese-state-media-firms-to-register-as-foreign-agents-1537296756> [<https://perma.cc/55WD-QR76>].

19. For a list of FARA-related bills introduced in the 115th and 116th Congresses, see INT'L CTR. FOR NOT-FOR-PROFIT L., <http://www.icnl.org/programs/US%20Programs/FARA%20home.html> [<https://perma.cc/6S76-6NKA>]. For example, in the 116th Congress, Senate Bill 1762 is co-sponsored by Republican Senator Grassley and Democratic Senator Feinstein, among others. *S.1762 – Foreign Agents Disclosure and Registration Enhancement Act of 2019*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/1762> [<https://perma.cc/46RB-NFHC>].

20. See INT'L CTR. FOR NOT-FOR-PROFIT L., <http://www.icnl.org/programs/US%20Programs/FARA%20home.html> [<https://perma.cc/6S76-6NKA>] (listing previously introduced FARA legislation such as H.R. 5336, which would limit the exemption for academic activity, *H.R.5336 – Foreign Influence Transparency Act*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/5336> [<https://perma.cc/VVX2-BZYD>], and H.R. 4170, which would provide the Justice Department with civil demand authority to investigate FARA violations, *H.R.4170 – Disclosing Foreign Influence Act*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/4170> [<https://perma.cc/UJD7-VDJC>]).

21. 22 U.S.C. § 611(a) (2018); see also *infra* Part II.B (describing the definition of foreign principal under the FARA).

22. See 22 U.S.C. § 611(c)(1)(i); *id.* § 611(o); see also *infra* Part II.B (describing covered activities under FARA).

23. 22 U.S.C. § 611(c)(1)(iii).

the interest of a foreign principal.²⁴ 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 the United States acts at the mere “request” of a foreign principal.²⁵ 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”: in setting the public meeting, the Chicago nonprofit would be attempting to influence U.S. public opinion on a domestic policy issue at the “request” of a foreign principal—the Canadian nonprofit.

Admittedly, there are important exemptions to registering under the Act, including those for many commercial, religious, or academic activities.²⁶ However, these exemptions still leave a broad swath of behavior covered by FARA, particularly for nonprofits, media organizations, and public officials.²⁷ 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 makes a different argument. It claims that FARA’s broad language makes it particularly susceptible to politicized enforcement. Although 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 needs only to look abroad. In the past decade, analogous legislation has been adopted in a number of countries, including Russia and Hungary, where it has often been used to stigmatize and marginalize civil society.²⁸ This has forced many

24. *See id.* § 611(c)(1)(ii); *id.* § 611(h).

25. *Id.* § 611(c)(1); *see also infra* Part II.C (describing the principal–agent relationship under FARA).

26. *See infra* Part II.E (describing exemptions to FARA).

27. *See infra* Part II.F (describing why nonprofits, media organizations, and public officials are particularly susceptible to falling under the requirements of FARA).

28. *See* INT’L CTR. FOR NOT-FOR-PROFIT L., FARA’S DOUBLE LIFE ABROAD 1 (Nov. 2017), https://www.icnl.org/wp-content/uploads/FARA-briefing_Final_c.pdf [<https://perma.cc/>

nonprofits in countries like Russia to either shut down or dramatically alter their operations.²⁹ In defending their legislation, the governments of these countries have frequently pointed to FARA for justification and legitimacy.³⁰ Although there are important differences between FARA and these other acts, these extraterritorial examples 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 United States in the future.

Indeed, history indicates that when enforcement of FARA has strengthened, the government has used the Act to target dissenting voices. For example, W.E.B. Du Bois, the noted early civil rights leader, was prosecuted for failure to register under FARA in 1951 when he reprinted and circulated antinuclear literature and petitions that had originated abroad. These materials were viewed by some as undermining U.S. foreign policy.³¹ 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 potential “foreign agents” based on these organizations’ cross-border connections and criticisms of U.S. environmental policy.³²

Meanwhile, the targeting of RT TV America and Sputnik under the Act has raised questions about why other media organizations that seemingly fall under FARA’s purview have not been similarly asked to register.³³ It has also highlighted how registration under FARA can

WC86-6MR3] (explaining that it is common for governments to use these laws to “constrain[] civil society and dissent,” especially targeting groups that receive international funding).

29. *Id.* (saying, for example, that thirty groups in Russia shut down rather than register as foreign agents).

30. *Id.* at 1–2 (providing examples of how FARA has been used to justify foreign-agent legislation in other countries).

31. For a brief description of these events, see Andrew Lanham, *When W.E.B. Du Bois Was Un-American*, BOS. REV. (Jan. 13, 2017), <http://bostonreview.net/race-politics/andrew-lanham-when-w-e-b-du-bois-was-un-american> [<http://perma.cc/7MXE-JA6A>].

32. For a description of this investigation, see Dino Grandoni, *The Energy 202: Republicans Want To Know if Environmental Groups Are Really Foreign Agents*, WASH. POST (Sept. 6, 2018), <https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2018/09/06/the-energy-202-republicans-want-to-know-if-environmental-groups-are-really-foreign-agents/5b9007281b326b3f31919f99> [<https://perma.cc/Q7EJ-7ZD6>].

33. See Alexandra Ellerbeck & Avi Asher-Shapiro, *Everything To Know About FARA, and Why It Shouldn’t Be Used Against the Press*, COLUM. JOURNALISM REV. (June 11, 2018), <https://www.cjr.org/analysis/fara-press.php> [<https://perma.cc/G2QA-N22Q>] (“FARA experts

have secondary effects beyond transparency. For example, RT TV America's Capitol Hill press credentials were revoked after it registered, and companies that Sputnik did business with in the United States were asked to register under the Act as well, creating substantial barriers just to broadcast in the United States.³⁴

FARA's overbreadth not only can lead to politicized targeting but can also create confusion about who should register. This uncertainty can chill transnational cooperation, as nonprofits, media outlets, and others may avoid a broad range of cross-border relationships that could potentially make them vulnerable to being tarred as a "foreign agent." FARA's overbreadth also arguably makes key provisions of the Act unconstitutional under the Supreme Court's emerging First Amendment jurisprudence,³⁵ 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 FARA's statutory language should be amended to better define what "foreign influence" the Act is meant to 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 of these different types of influence raise the same concerns nor is the bluntness of FARA 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 whether one is under contract with a foreign government or simply acting at the "request" of a small international nonprofit.³⁶ In short, FARA must more clearly identify the specific types of "influence" and "foreign" connections that it is meant to target.

worry that, the way the law is written, it doesn't draw clear distinctions that set apart the BBCs of the world from outlets that overtly mix propaganda and journalism.").

34. *Id.* (discussing how RT TV America's Capitol Hill press credentials were revoked); Casey Michel, *A New Lawsuit Claims that Companies Helping Russian Propaganda in the U.S. Aren't All Foreign Agents*, THINKPROGRESS (Oct. 31, 2018, 4:03 PM), <https://thinkprogress.org/u-s-company-working-with-russian-propaganda-outlet-fights-foreign-agent-status-in-new-lawsuit-c5ea15f642c4> [<https://perma.cc/L85T-69L4>] (discussing a legal challenge by RM Broadcasting to registering under FARA for providing commercial services to Sputnik).

35. *See, e.g.*, Toni M. Massaro, *Foreign Nationals, Electoral Spending, and the First Amendment*, 34 HARV. J.L. & PUB. POL'Y 663, 686 (2011) (suggesting that restrictions that chill the speech of certain categories of speakers, like FARA does, would face significant scrutiny after *Citizens United v. FEC*, 558 U.S. 310 (2010)).

36. *See infra* Part II.B & Part II.C (describing that both foreign governments and nonprofits are considered foreign principals under FARA and that acting at a foreign principal's "request" can create an agency relationship under the Act).

To guide this reform, this Article posits that FARA, and other disclosure tools directed at foreign influence, 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; or (2) when the covered activity involves core democratic processes aimed at directly influencing the government, such as lobbying or electioneering. This Article warns that using FARA to target disinformation is generally unlikely to be effective and presents a substantial risk of politicized abuse.

The Article proceeds in five parts. Part I describes the spread of laws analogous to FARA in other countries and how these laws were justified, at least in part, by reference to FARA itself. It then discusses 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 far-reaching set of nonprofits, media organizations, and public officials, creating confusion and a fertile environment for the politicized enforcement of the Act. Part III uses three examples to show how FARA's enforcement has been politicized in the past and examines why increased enforcement in the future will likely lead to further politicization of the Act. 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 have, on average, seen a decline in political and civil liberties, including restrictive regulations on nonprofits.³⁷ One of the most widespread types of restriction has been on foreign funding of

37. From 2006 to 2017, 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 8 (2018), https://freedomhouse.org/sites/default/files/FH_FITW_Report_2018_Final_SinglePage.pdf [<https://perma.cc/J5ZJ-LUCB>]. On the rise in laws and regulations of nonprofits globally, see Michael Schuman, *An Increasingly Uncivil World*, U.S. NEWS & WORLD REP. (July 31, 2017, 10:37 AM), <https://www.usnews.com/news/best-countries/articles/2017-07-31/growing-number-of-countries-are-clamping-down-on-civil-society-groups> [<https://perma.cc/BL6J-3ETC>].

nonprofits, including through “foreign agent” laws.³⁸ Governments have repeatedly used such restrictions as a tool to control, delegitimize, or undercut nonprofits.³⁹

Several of these “foreign agent” laws in other countries have been justified in part by citing to FARA for precedent.⁴⁰ In the 1990s and 2000s, the United States was well known for exporting the Freedom of Information Act to other countries, leading to many countries adopting similar laws.⁴¹ Today, the United States has turned to inadvertently—and sometimes purposefully—exporting FARA.⁴²

However, there are key differences between these “foreign agent” laws in other countries and FARA. For one thing, FARA is broader: it is not targeted just at nonprofits but instead extends to any individual or entity engaged in a covered activity.⁴³ FARA is also not focused specifically on foreign funding.⁴⁴ Perhaps most importantly, the political context is significantly different between the United States and some of these other countries. In the United States, the openness

38. See 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 fifty countries have increased restrictions on domestic nongovernment organizations receiving funding from outside their home country); Douglas Rutzen, *Aid Barriers and the Rise of Philanthropic Protectionism*, 17 INT’L J. NOT-FOR-PROFIT L. 5, 5–20 (2015) (describing the rise of restrictions on foreign funding of nonprofits globally).

39. Rutzen, *supra* note 38, at 12–13 (describing how “foreign agent” laws in the former Soviet Union have been used to stigmatize nonprofits). Doug Rutzen documents at least ten different types of mechanisms that governments have used to control foreign funding. These include requiring prior government approval for an organization to receive international funding—such as in India—caps on international funding—as in Ethiopia—or burdensome reporting requirements—like in Turkey. *Id.* at 6–16.

40. See KATERINA LINOS, *THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY AND EMPLOYMENT LAWS 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).

41. See David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1106 (2017) [hereinafter Pozen, *Freedom of Information*] (“FOIA has become one of the United States’ leading legal exports abroad.”).

42. See *infra* Part I.A. Although the U.S. government did not actively export FARA to Russia or Hungary, it did so with Australia. See AUSTRL. PARLIAMENTARY JOINT COMM. ON INTELLIGENCE AND SEC., *ADVISORY REPORT ON THE FOREIGN INFLUENCE TRANSPARENCY SCHEME BILL 2017*, at 35 (2018), http://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024192/toc_pdf/AdvisoryReportontheForeignInfluenceTransparencySchemeBill2017.pdf [https://perma.cc/29ZF-5HRL] (describing close consultations with the U.S. Justice Department in drafting the Australian bill).

43. See *infra* Part II.B (describing covered activities under FARA).

44. See *id.* (describing covered activities, none of which reference foreign funding).

of political discourse has led to more limited enforcement of FARA than its text would allow.⁴⁵

This Part briefly examines the rise of analogous laws to FARA in other countries, focusing on Russia and Hungary as examples where these types of laws have been used to target nonprofits. It then discusses the recent passage of similar laws in two historical democracies: Israel and Australia. This Part finally situates these “foreign agent” laws as examples of a broader phenomenon in which transparency measures are “weaponized” to target civil society.

A. “Foreign Agent” Type Laws in Other Countries

Russia and Hungary provide 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.”⁴⁶ Failure to register can lead to fines, jail time, and other penalties.⁴⁷

In Russia, registering as a “foreign agent” carries a stigmatizing label. Perhaps most poignantly, “foreign agent” is closely associated with “spy” in Russian.⁴⁸ Human rights groups like Amnesty International and Human Rights Watch have detailed how many nonprofits have chosen either to shut down or to stop receiving foreign funding—and thereby dramatically curtail their operations—instead of

45. NICK ROBINSON, INT’L CTR. FOR NOT-FOR-PROFIT L., LEGAL AND REGULATORY CHALLENGES FACING CIVIL SOCIETY ORGANIZATIONS IN THE UNITED STATES 1, 4 (2018), https://www.icnl.org/wp-content/uploads/Legal-and-Regulatory-Change-in-U.S.-2-20.pdf?_ga=2.56079147.1254041628.1577571517-1632587217.1577571517&_gl=1*1h0zz5p*_ga*MTYzMjU4NzIxNy4xNTc3NTcxNTE3 [https://perma.cc/22CU-ST8D] (noting that the U.S. has a vibrant civil society and a regulatory environment that has generally been open to international civil-society organizations).

46. AMNESTY INT’L, AGENTS OF THE PEOPLE: FOUR YEARS OF “FOREIGN AGENTS” LAW IN RUSSIA: CONSEQUENCES FOR THE SOCIETY 4 (2016), <https://www.amnesty.org/download/Documents/EUR4651472016ENGLISH.PDF> [https://perma.cc/X299-7G8K].

47. Daria Skibo, *Five Years of Russia’s Foreign Agent Law*, OPENDEMOCRACY (Aug. 14, 2017), <https://www.opendemocracy.net/en/odr/five-years-of-russia-s-foreign-agent-law/> [https://perma.cc/5ACN-CRPZ] (noting that failure to register can be punished with two years in jail, fines, and community work).

48. AMNESTY INT’L, *supra* note 46, at 31; Michael Abramowitz & Nate Schenckan, *How Illiberal Leaders Attack Civil Society*, FOREIGN AFF. (Apr. 6, 2018), <https://www.foreignaffairs.com/articles/central-europe/2018-04-06/how-illiberal-leaders-attack-civil-society> [https://perma.cc/7L4K-8VJG].

registering under Russia's law.⁴⁹ The Russian government has also prosecuted leaders of nonprofits, such as human rights groups, for allegedly not complying with the law.⁵⁰

Russia's foreign-agent law has been heavily criticized. Notably, in responding to such criticism, Russia has repeatedly claimed that it is designed to achieve the same purposes as FARA.⁵¹ Further, in 2017, after RT TV America and Sputnik were asked to register as "foreign agents" in the United States under FARA, the Russian government reciprocated by passing a law that allowed it to designate foreign-funded media organizations in Russia as "foreign agents."⁵² Russia has designated Voice of America and Radio Free Europe, among others, as agents under the law, and in some cases, it has issued fines for noncompliance.⁵³

In a similar vein, Hungary's parliament passed a law in 2017 entitled the "Law on the Transparency of Organizations Funded from Abroad,"⁵⁴ which requires organizations that receive more than a certain amount in foreign funding to register as "foreign-supported" or else face closure by the Hungarian government.⁵⁵ Hungary has responded to criticisms from the U.S. Department of State regarding its transparency law by claiming it is similar to FARA and that the United States was applying a double standard.⁵⁶

49. AMNESTY INT'L, *supra* note 46, at 14; *Russia: Government vs. Rights Groups*, HUM. RTS. WATCH (June 18, 2018, 5:30 AM) [hereinafter HRW], <https://www.hrw.org/russia-government-against-rights-groups-battle-chronicle> [<https://perma.cc/HBX8-SPGS>].

50. HRW, *supra* note 49.

51. 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> [<https://perma.cc/2YKC-4JJ9>] (noting that FARA has been "a favorite trope" of the Russian Ministry of Justice in defending their law).

52. *Russia Declares Nine US Media Outlets 'Foreign Agents'*, BBC NEWS (Dec. 5, 2017), <https://www.bbc.com/news/world-europe-42234582> [<https://perma.cc/4NZD-A4S7>].

53. Max Greenwood, *Russian Court Fines US-Funded Outlets for Violating Foreign Agents Laws*, HILL (July 5, 2018, 3:06 PM), <http://thehill.com/homenews/media/395655-russia-court-fines-us-funded-outlets-for-violating-foreign-agents-laws> [<https://perma.cc/GF78-8WNW>].

54. *Hungary: Ngo Law a Vicious and Calculated Assault on Civil Society*, AMNESTY INT'L (June 13, 2017), <https://www.amnesty.org/en/latest/news/2017/06/hungary-ngo-law-a-vicious-and-calculated-assault-on-civil-society> [<https://perma.cc/K86Q-5BHM>].

55. Yasmeen Serhan, *Hungary's Anti-Foreign NGO Law*, ATLANTIC (June 13, 2017), <https://www.theatlantic.com/news/archive/2017/06/hungarys-anti-foreign-ngo-law/530121> [<https://perma.cc/F2WC-GS79>].

56. Pablo Gorondi, *Hungary Rejects US Criticism of Law on Foreign-Funded NGOs*, AP NEWS (June 20, 2017), <https://www.apnews.com/1722c34b948447bba1d9a42dec3c8f88> [<https://perma.cc/9EUP-9LSS>].

Both the Russian and Hungarian laws on foreign funding of nonprofits have been challenged in international forums.⁵⁷ In 2014, the Venice Commission found the Russian statute violated the freedom of association. The Commission ruled that labeling organizations that received foreign funding as “foreign agents” is not necessary to assure financial transparency in a democracy and that this practice unfairly stirs “suspicion and distrust” of these entities, which could chill their activity.⁵⁸ 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 European Convention on Human Rights (“ECHR”) because of the “virulent campaign” by some public officials to portray organizations that receive foreign funding “as acting against the interests of society.”⁵⁹ After the law was enacted, the European Commission referred the Hungarian law to the Court of Justice of the European Union.⁶⁰ The Commission determined that the law “indirectly discriminate[d against] and disproportionately restrict[ed] donations from abroad to civil society organisations” by placing administrative burdens on the recipient.⁶¹ It further found that these burdens were “liable to have a stigmatising effect on both recipients and donors.”⁶²

“Foreign agent” 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

57. The UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association has noted that “stigmatizing or delegitimizing the work of foreign-funded CSOs by requiring them to be labeled as ‘foreign agents’ or other pejorative terms” is “problematic” under international law. Maina Kiai (Special Rapporteur on the Rights to Freedom of Peaceful Assembly & of Ass’n), *Rep. of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Ass’n*, ¶ 20, U.N. Doc A/HRC/23/39 (Apr. 24, 2013).

58. VENICE COMM’N, 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 CODE (“LAW ON TREASON”) OF THE RUSSIAN FEDERATION 14 (June 13–14, 2014), [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) [<https://perma.cc/U7NA-SF2A>].

59. VENICE COMM’N, PRELIMINARY OPINION ON THE DRAFT LAW ON THE TRANSPARENCY OF ORGANISATIONS RECEIVING SUPPORT FROM ABROAD 16 (June 2, 2017), [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) [<https://perma.cc/JQ6R-7378>].

60. *Id.*

61. European Commission Press Release IP/17/5003, Infringements -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 [<https://perma.cc/RNZ9-BN6C>].

62. *Id.*

foreign governments to report this information in their communications with the public.⁶³ According to Israel's Justice Ministry at the time, the law would cover twenty-five groups, most of which were critical of the government in power, including human rights organizations as well as research and advocacy groups associated with the political opposition.⁶⁴ In discussing an earlier version of the bill, Foreign Minister Avigdor Lieberman argued, in part to justify the bill, that it was a “direct translation” of FARA.⁶⁵

In 2018, Australia enacted the Foreign Influence Transparency Scheme Act (“FITS Act”).⁶⁶ The Australian government consulted heavily with the U.S. Department of Justice when drafting the bill,⁶⁷ and the Australian Prime Minister referred to the bill as an “improved version” of FARA.⁶⁸ 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.⁶⁹ Like FARA, the FITS Act potentially requires a broad set of actors to register under the law if they are engaged in covered activities.⁷⁰

A wide cross-section of Australian nonprofits, universities, and legal professionals came out strongly against the legislation, viewing it as a direct threat to civil society and free speech and fearing it would

63. Peter Beaumont, *Israel Passes Law To Force NGOs To Reveal Foreign Funding*, GUARDIAN (July 12, 2016, 4:12 AM), <https://www.theguardian.com/world/2016/jul/12/israel-passes-law-to-force-ngos-to-reveal-foreign-funding> [<https://perma.cc/C4D5-AF98>].

64. *Israel: Law Targets Human Rights Groups*, HUM. RTS. WATCH (July 13, 2016, 12:00 AM), <https://www.hrw.org/news/2016/07/13/israel-law-targets-human-rights-groups> [<https://perma.cc/HJ7Q-XSZK>].

65. *ACRI to Foreign Minister: Description of Foreign Funding Bill Is Misleading*, ASS'N FOR C.R. ISRAEL (Nov. 27, 2011), <http://www.acri.org.il/en/2011/11/27/acri-to-foreign-minister-description-of-foreign-funding-bill-is-misleading> [<https://perma.cc/Y3U6-KBLN>].

66. *Foreign Influence Transparency Scheme Act 2018* (Austl.).

67. See sources cited *supra* note 42.

68. Cat Barker, Deirdre McKeown, & Jaan Murphy, *Foreign Influence Transparency Scheme Bill 2017 and Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017*, in PARLIAMENTARY LIBRARY BILLS DIGEST 9 (Bills Digest No. 87, 2018–18, 2018), https://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/5849247/upload_binary/5849247.pdf [<https://perma.cc/J37V-9ZPQ>].

69. AUSTRAL. PARLIAMENTARY JOINT COMM. ON INTELLIGENCE AND SEC., *supra* note 42, at 39–40 (noting that the report makes provision by provision comparisons throughout to FARA).

70. *Foreign Influence Transparency Scheme Act 2018* pt 2 (Austl.). (explaining that the bill required anyone engaged in covered activities to register).

limit civil society's ability to engage across borders.⁷¹ As a result of this and other criticism, the original bill was significantly amended,⁷² notably by adding an exemption for many activities of nonprofits and by substantially narrowing who is defined as a "foreign principal."⁷³

B. *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, Israeli Prime Minister Benjamin Netanyahu justified Israel's "foreign agent" law because it will "increase transparency" and "strengthen democracy,"⁷⁴ and advocates for Russia's 2012 "foreign agent" law justified it to the public by claiming "[y]ou have the right to know who is trying to influence your opinion."⁷⁵ Facially, such transparency arguments are logical, but as the examples in this Section demonstrate—particularly from Russia and Hungary—transparency measures can be weaponized against civil society. In particular, burdensome disclosure requirements and stigmatizing labels can be used to target dissent.

Though transparency measures are frequently vital to good government, their use is ultimately a political tool that can empower certain actors over others. There is a growing recognition in the literature that statutes aimed at creating more transparency in

71. See Paul Karp, *Fear 'Rushed' Foreign Influence Bill Will Harm Freedom of Speech*, GUARDIAN (Jan. 22, 2018, 9:00 PM), <https://www.theguardian.com/australia-news/2018/jan/23/fear-rushed-foreign-influence-bill-will-harm-freedom-of-speech> [<https://perma.cc/4KHF-9MMW>] (noting the opposition of Australian universities and legal groups to the draft foreign transparency bill); Wendy Williams, *How Do Australia's Foreign Interference Laws Compare to Draconian States?*, PRO BONO AUSTRAL. (Mar. 29, 2018, 8:55 AM), <https://probonoaustralia.com.au/news/2018/03/australias-foreign-interference-laws-compare-draconian-states> [<https://perma.cc/EEM5-KA3N>] (describing opposition to the foreign transparency bill from a coalition of nonprofits called Hands Off Our Charities).

72. Paul Karp, *Charities, Unions and Arts Bodies Win Reprieve from Foreign Influence Register*, GUARDIAN, (June 25, 2018, 2:16 AM), <https://www.theguardian.com/australia-news/2018/jun/25/charities-unions-and-arts-bodies-win-reprieve-from-foreign-influence-register> [<https://perma.cc/6FTR-P5LQ>] (noting amendments for exemptions for run-of-the-mill representations made in accordance with the organization's purpose).

73. *Foreign Influence Transparency Scheme Act* 10–11 (limiting foreign principals to a foreign government, foreign government related entity, foreign political organization, or foreign government related individual); *id.* at 32–33 (creating a limited exemption for charities).

74. Beaumont, *supra* note 63.

75. Miriam Elder, *Russia Plans To Register 'Foreign Agent' NGOs*, GUARDIAN (July 2, 2012, 8:07 AM), <https://www.theguardian.com/world/2012/jul/02/russia-register-foreign-agent-ngos> [<https://perma.cc/7EDU-JBBN>].

government can sometimes disproportionately assist those with more resources to undermine the functioning of government to their advantage.⁷⁶ For example, when these statutes allow corporations to flood administrative agencies with transparency requests, corporations are able to consume agency resources and potentially find technical violations of procedure on which to challenge regulation.⁷⁷ Similarly, transparency tools may inadvertently, but unfairly, cast more scrutiny—and derision—on civilian government than on national security agencies or the military, which often do not face the same disclosure requirements.⁷⁸ This can unjustly empower the latter in relation to the former.

Concerns about inadvertently empowering certain actors over others are particularly acute when transparency measures are targeted at civil society.⁷⁹ For example, legislation in India was passed in 2013 that requires those managing certain nonprofit organizations to disclose their personal assets.⁸⁰ In Ukraine, a similar measure was passed in 2017 that requires management of certain nonprofits and some investigative journalists to disclose their personal assets.⁸¹ Such measures create scrutiny and compliance burdens on certain active

76. See generally David E. 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).

77. *Id.*

78. See Pozen, *Freedom of Information*, *supra* note 41, at 1112–36 (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 & Nawreen Sattar, *When Corruption Is an Emergency: "Good Governance" Coups and Bangladesh*, 35 FORDHAM INT'L L.J. 737 (2012) (describing how anticorruption campaigns directed at civilian government can inadvertently empower militaries in countries with histories of military coups such as Bangladesh, Pakistan, and Thailand).

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

80. Liz Mathew & Manoj C G, *Asset Disclosure by Govt Staff, NGOs: Deadline Extended Indefinitely*, INDIAN EXPRESS (July 28, 2016, 12:51 PM), <https://indianexpress.com/article/india/india-news-india/asset-disclosure-government-staff-ngo-deadline-extended-modi-2939653> [perma.cc/V37P-ZTKQ] (describing the 2013 Lokpal Act that requires senior management of nonprofits that receive government grants or foreign funding to disclose their assets).

81. Melinda Haring, *Presidential Administration Says Law Requiring Activists To Disclose Assets Is Invalid and Unenforceable, but Ukraine's Activists Aren't Buying It*, KHARKIV HUM. RTS. PROTECTION GROUP (Apr. 17, 2018), <http://khpg.org/en/index.php?id=1523912040> [https://perma.cc/32ST-RSTZ] (describing 2017 legislation that requires management of anticorruption nonprofits and some investigative journalists to disclose assets).

members of civil society that can undermine their ability to hold government accountable.⁸²

“Foreign agent” laws are similarly not aimed at government but rather target nonstate actors such as 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. Nonstate actors generally have fewer resources to comply with these regulations or to combat political opponents who use these laws to create misleading narratives.

The next Part 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, thus making them particularly vulnerable to selective and politicized enforcement.

II. FARA’S BREADTH AND VAGUENESS

This Part analyzes FARA’s breadth and vagueness. It begins by briefly describing the historical evolution of the Act. It then 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 FARA’s reporting requirements and exemptions. Establishing the scope of FARA’s key provisions makes clear why a broad swath of nonprofits, media organizations, and public officials arguably need to register and why they are more vulnerable to enforcement, including politicized enforcement, than other actors, such as multinational companies.

A. *Historical Evolution of FARA*

FARA⁸³ had its genesis in the recommendations of a special committee to investigate “un-American” activities appointed by the

82. The enforcement of these provisions in both laws is currently suspended. *Id.*; Mathew & C G, *supra* note 80.

83. When referring to the “Foreign Agents Registration Act,” this Article is referencing only 22 U.S.C. §§ 611–621 (2018). Another part of the federal code, 18 U.S.C. § 951 (2018), requires an “agent of a foreign government” to notify the Attorney General if they act “within the U.S. subject to the direction or control of a foreign government or official” and do not fall under an exemption. *Id.* § 951(d). Some recent prominent charges have also been brought under 18 U.S.C. § 951 against alleged Chinese and Russian agents. *See, e.g.*, Matthew Kahn, *Document: Justice Department Charges Russian National for Conspiracy To Act as a Foreign Agent*, LAWFARE (July

73rd Congress.⁸⁴ This committee was chaired by Representative John McCormack, who would later become Speaker of the House.⁸⁵ It conducted an investigation and held hearings throughout 1934⁸⁶ and ultimately released a report in 1935 that found evidence of persons in the United States spreading fascist and communist propaganda on behalf of foreign governments and political parties.⁸⁷

This concern with propaganda was representative of the era. The 1920s and 1930s saw immense debate among U.S. academics and policymakers about how to address propaganda in a democracy, particularly from domestic outlets backed by industrialists. Walter Lippman famously argued during this period that to respond to propaganda, the government should support 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.⁸⁸

Perhaps drawing on Lippman's call for creating more transparency around propaganda, the McCormack Report recommended that Congress enact a law requiring all "publicity,

16, 2018, 3:11 PM), <https://www.lawfareblog.com/document-justice-department-charges-russian-national-conspiracy-act-foreign-agent> [<https://perma.cc/Q4ZV-5ZJQ>] (outlining the criminal complaint against a Russian national, Mariia Butina, for being an unregistered "foreign agent"); Sophia Yan, *US Arrests Chinese 'Spy Recruit' as Ties Deteriorate Further Between Beijing and Washington*, TELEGRAPH (Sept. 26, 2018, 7:11 PM), <https://www.telegraph.co.uk/news/2018/09/26/us-arrests-chinese-spy-recruit-ties-deteriorate-beijing-washington> [<https://perma.cc/ZQ2H-4T3H>] (describing the arrest of a Chinese "spy recruit" under FARA). The Justice Department also provides a list of "other federal statutes aimed at persons loosely called foreign agents." DOJ ENFORCEMENT STRATEGY, *supra* note 4.

84. JACOB R. STRAUS, CONG. RESEARCH SERV., IF10499, FOREIGN AGENTS REGISTRATION ACT: AN OVERVIEW (Mar. 7, 2019).

85. Richard L. Lyons, *Ex-House Speaker John McCormack Dies*, WASH. POST (Nov. 23, 1980), https://www.washingtonpost.com/archive/local/1980/11/23/ex-house-speaker-john-mccormack-dies/a866f94f-df9b-4719-b7af-6cad9717c1b3/?utm_term= [<https://perma.cc/HV48-QLY5>].

86. See H.R. REP. NO. 74-153, at 1-2 (1935) (describing the authority and work of the committee).

87. *Id.* at 22.

88. See WALTER LIPPMANN, THE PHANTOM PUBLIC 103 (1993) ("No ordinary bystander is equipped to analyze the propaganda by which a private interest seeks to associate itself with the disinterested public."); *id.* at 102 ("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."). John Dewey also found, like Lippmann, that there had been an "unprecedented" increase in the use of propaganda. However, he disagreed that the answer lay in a heavy government role in managing national debate. 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. JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 182, 203-19 (1946).

propaganda, or public-relations agents . . . [representing] any foreign government or a foreign political party or foreign industrial or commercial organization” to register with the federal government.⁸⁹ Based on the Report, Representative McCormack introduced what would become the Foreign Agents Registration Act.⁹⁰ The proposed legislation would not ban speech outright. Rather, as a report of the House Judiciary Committee claimed in 1937, the idea was to let “the spotlight of pitiless publicity . . . serve as a deterrent to the spread of pernicious propaganda.”⁹¹ In 1938, the Foreign Agents Registration Act was signed into law.⁹²

FARA’s current reputation for being notoriously vague and sweeping⁹³ should perhaps not be surprising given its historical context. The law was initially passed while the United States was ramping up for World War II. To respond to this looming threat, it provided the

89. H.R. REP. NO. 74-153, at 23. The McCormack Committee Report also made recommendations that Congress make it unlawful for a person to advocate for the violent overthrow of the U.S. government, which helped result in the creation of two other key internal security statutes: the Voorhis Act and the Smith Act. *See id.* at 24. The Voorhis Act required registration of certain organizations subject to foreign control that advocated the violent overthrow of the U.S. government. Act of Oct. 17, 1940 (Voorhis Act), Pub. L. No. 76-870, 54 Stat. 1201 (codified as amended at 18 U.S.C. § 2386 (2018)). The Smith Act, among other measures, created criminal penalties for anyone who advocated the violent overthrow of the U.S. government. Alien Registration Act of 1940 (Smith Act), Pub. L. No. 76-670, 54 Stat. 760 (codified as amended at 18 U.S.C. § 2385 (2018)). 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. Internal Security Act of 1950 (McCarran Act), Pub. L. No. 81-831, 64 Stat. 987 (codified as amended at 52 U.S.C. § 781 (2018)). The Supreme Court eventually struck—or read—down key uses of the Smith and McCarran Acts. *See* *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 78 (1965) (finding the McCarran Act’s requirement that members of the Communist Party register with the government unconstitutional); *Yates v. United States*, 354 U.S. 298, 327 (1957) (finding that the First Amendment only allowed the Smith Act to apply when there was advocacy for action to overthrow the government and noting that such cases would be “few and far between”).

90. H.R. 1591, 75th Cong. (1937).

91. H.R. REP. NO. 75-1381, at 2 (1937).

92. Foreign Agents Registration Act of 1938, ch. 327, 52 Stat. 631 (codified as amended at 22 U.S.C. §§ 611–621 (2018)).

93. *See, e.g.*, Robert Kelner, Brian D. Smith, Zachary G. Parks & Derek Lawlor, *The Foreign Agents Registration Act (“FARA”): A Guide for the Perplexed*, NAT’L L. REV. (Jan. 11, 2018), <https://www.natlawreview.com/article/foreign-agents-registration-act-fara-guide-perplexed> [<https://perma.cc/DJ6X-ZGEN>] (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 say”); *Taking Stock of Newly Released FARA Advisory Opinions*, PERKINS COIE (June 18, 2018), <https://www.perkinscoie.com/en/news-insights/taking-stock-of-newly-released-fara-advisory-opinions.html> [<https://perma.cc/H6CC-KZSX>] (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”).

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 seditious speech,⁹⁴ it still had a suppressive effect. In the run-up to and during World War II, FARA was successfully used to help silence many of the most active pro-Nazi voices in the United States through prosecutions, investigations, and demanding registration requirements.⁹⁵ 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.”⁹⁶

FARA has been amended a number of times, including major amendments in 1942, 1966, and 1995.⁹⁷ Particularly in recent years, the Justice Department has relied largely on voluntary compliance and has rarely prosecuted FARA cases.⁹⁸ As a result, 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 propaganda,⁹⁹ but this goal fell out of favor in the 1950s amidst the abuses of FARA in the

94. Inst. of Living Law, *Combatting Totalitarian Propaganda: The Method of Exposure*, 10 U. CHI. L. REV. 107, 107–08, 138 (1943) (describing disclosure laws like FARA as a “democratic way[] of defending democracy” and commenting that they have been administered so as not to “interfere with the civil liberties of any one”); see BRETT GARY, *THE NERVOUS LIBERALS: PROPAGANDA ANXIETIES FROM WORLD WAR I TO THE COLD WAR 195* (1999) (discussing how registration and disclosure requirements were seen as “democracy-enhancing techniques” and “led speech-protective liberals to support this form of propaganda control”).

95. DOJ ENFORCEMENT STRATEGY, *supra* note 4 (noting that FARA was used in the World War II era to successfully prosecute twenty-three criminal cases); GARY, *supra* note 94, at 210–11, 214–15 (describing that during the World War II period some 7,600 individuals and organizations registered under the Act, providing the Justice Department with vast amounts of information).

96. GARY, *supra* note 94, at 215–16; see also Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 22 (1991) (“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.” (footnotes omitted)).

97. See, e.g., Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691; Foreign Agents Registration Act of 1938, Amendments, Pub. L. No. 89-486, 80 Stat. 244 (1966); Foreign Agents Registration Act of 1938, as Amended, Pub. L. No. 77-532, 56 Stat. 248 (1942).

98. See *supra* note 4 (noting that between 1966 and 2015 there were only seven criminal cases and seventeen civil cases brought by the Justice Department under FARA).

99. IG FARA REPORT, *supra* note 1, at 2.

McCarthy era.¹⁰⁰ 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.¹⁰¹ Nevertheless, the Act 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 toward those attempting to influence U.S. public opinion more generally.

As of the end of 2017, there were 411 entities or persons representing 612 foreign principals registered under the Act.¹⁰² Those registered were mostly providing lobbying, public relations, legal, consulting, or tourism-promotion services for foreign governments.¹⁰³ There were also groups registered that support political parties or candidates abroad¹⁰⁴ and a handful of media organizations linked closely to foreign governments.¹⁰⁵

Under its current incarnation, FARA's registration requirements follow 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 with the Justice

100. See *infra* Part III.A (discussing the prosecution of W.E.B. Du Bois).

101. *United States v. McGoff*, 831 F.2d 1071, 1073–74 (D.C. Cir. 1987) (“Over the years, FARA’s focus has gradually shifted from Congress’ original concern about the political propagandist or subversive seeking to overthrow the Government to the now familiar situation of lobbyists, lawyers, and public relations consultants pursuing the less radical goal of ‘influenc[ing] [Government] policies to the staisfaction [sic] of [their] particular client.’” (alterations in original) (footnote omitted)).

102. U.S. DEP’T. OF JUSTICE, REPORT OF THE ATTORNEY GENERAL TO THE CONGRESS ON THE ADMINISTRATION OF THE FOREIGN AGENTS REGISTRATION ACT OF 1938, AS AMENDED, FOR THE SIX MONTHS ENDING DECEMBER 31, 2017, at 2 (2018), <https://www.justice.gov/nsd-fara/page/file/1085771/download> [<https://perma.cc/RJ68-DLZX>].

103. See *id.* (listing the nature of the services provided by each registrant); see also Anna Massoglia & Geoff West, *Foreign Interests Have Spent over \$530 Million Influencing US Policy, Public Opinion Since 2017*, OPENSECRETS (Aug. 8, 2018), <https://www.opensecrets.org/news/2018/08/foreign-interests-fara-lobby-watch-exclusive> [<https://perma.cc/DNK3-S9DM>] (providing a breakdown of the largest foreign principals and agents by money spent).

104. See, e.g., U.S. Department of Justice, Registration Statement of All Pakistan Muslim League LLC (Feb. 15, 2011), <https://www.fara.gov/docs/6019-Registration-Statement-20110215-1.pdf> [<https://perma.cc/L9W6-HLJW>] (describing the activities of the All Pakistan Muslim League LLC as “support[ing] the principles and the mission of the All Pakistan Muslim League, a political party organized in Pakistan”). See generally, U.S. DEP’T OF JUSTICE, *supra* note 102, (listing such registrants).

105. Ellerbeck & Asher-Schapiro, *supra* note 33 (noting that “a few media outlets are registered,” including China Daily, South Korea’s KBS America, and Japan’s NHK Cosmomedia).

Department.¹⁰⁶ 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.¹⁰⁷ The rest of this Part examines the key terms in the Act in more detail and articulates why nonprofits, media organizations, and public officials are particularly susceptible to needing to register.

B. Foreign Principal and Covered Activities

Under FARA, a “foreign principal” includes: a foreign government or political party; any entity organized under the laws of a foreign country or having its principal place of business there; or any person outside the United States, unless they are a domiciled U.S. citizen.¹⁰⁸ This expansive definition means a broad range of actors fall under the definition of “foreign principal,” including corporations, nonprofits, foundations, media organizations, and most persons based outside of the United States.

Covered activities under FARA include: (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.”¹⁰⁹

Although there are a number of covered activities in FARA, the term “political activities” is among the most expansive. It is defined 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*

106. 22 U.S.C. § 611 (2018).

107. *Id.* § 618(a). The Justice Department can also seek injunctive relief to stop someone from continuing to commit any activities that are violating FARA. *Id.* § 618(f). In *Lambert v. California*, 355 U.S. 225 (1957), the Supreme Court held that willfulness in the context of a registration program requires “actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply.” *Id.* at 229.

108. 22 U.S.C. § 611(b).

109. *Id.* § 611(c)(1)(i)–(iv).

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.¹¹⁰

In other words, “political activities” includes not just lobbying U.S. government officials, but, arguably, it covers almost any advocacy efforts that engage with the public. It also seemingly includes most reporting by journalists, if the journalist “influence[s]” U.S. public opinion on a policy issue, even if it is just through factual reporting to create a more informed debate.

While the breadth of “political activities” in FARA is striking, 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.¹¹¹ Significantly, a number of covered activities do not have to be political in nature to trigger coverage under the Act.¹¹² For example, soliciting or disbursing anything of value is a covered activity under the Act.¹¹³ 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.¹¹⁴ Acting as an “information-service employee” is another covered activity. Information-service employee is defined with an absurdly 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

110. *Id.* § 611(o) (emphasis added). 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) (2018).

111. 22 U.S.C. § 611(p).

112. Kelner et al., *supra* note 93 (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,” but “[i]n recent interactions with the FARA Unit . . . staff have called into question the validity of such prior guidance”).

113. 22 U.S.C. § 611(c)(1)(iii).

114. *Id.* § 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 . . .”).

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 country¹¹⁵

In other words, providing someone in the United States with 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.

To be clear, for any of these activities above to be considered a covered activity for the purposes of FARA, they must be undertaken “for or in the interests” of a foreign principal.¹¹⁶ 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—the activity merely has to be indirectly beneficial to the foreign principal. The next Section addresses these issues as it considers what it means to act as an “agent of a foreign principal” under FARA.

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 his or her principal must agree that the agent will act on the behalf of, and be subject to the control of, the principal.¹¹⁷ Under FARA, that “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

115. *Id.* § 611(i).

116. *See id.* § 611(c)(1)(i)–(iii) (noting that each covered activity must be “for or in the interests of such foreign principal”).

117. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006) (“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”).

foreign principal, and who directly or through any other person [engages in covered activities in the Act.]¹¹⁸

This is a convoluted definition. However, it is important to note 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.¹¹⁹ 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.”¹²⁰

Notably, under the text of the Act, someone can become an agent by simply acting at a foreign principal’s “request.”¹²¹ Furthermore, a person can become an intermediary by merely being financed or subsidized in “major part” by a foreign principal.¹²² Neither “request” nor “major part” is defined further in the Act or its regulations. The implication of these provisions is that a person can become an agent or an intermediary of a foreign principal without consenting to such designation. 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 “request” in the Act’s definition of the agency relationship. The word “request” has only been directly interpreted once by the federal courts in *Attorney General v. Irish Northern Aid Committee*.¹²³ In that case, the Justice Department claimed the Irish Northern Aid Committee was an “agent” of the Irish Republican Army under FARA.¹²⁴ The Irish Northern Aid Committee argued that the agency requirement in FARA should be interpreted to be the same as the Restatement of Agency definition.¹²⁵ However, this approach was rejected by both the Southern District of New York and on appeal by the Second Circuit.

118. 22 U.S.C. § 611(c)(1).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Attorney Gen. v. Irish N. Aid Comm.*, 530 F. Supp. 241 (S.D.N.Y. 1981), *aff’d*, 668 F.2d 159 (2d Cir. 1982).

124. *Id.* at 246–47.

125. *Id.* at 256.

Both courts found it was sufficient to establish agency if an individual or entity acts simply at a foreign principal's "request."¹²⁶

What "request" means is ambiguous, however. The Second Circuit found that the "exact perimeters of a 'request' under the Act are difficult to locate, falling somewhere between a command and a plea"¹²⁷ and should be interpreted through the lens of the "informative purposes of the Act."¹²⁸ The court noted, for example, that an unspecified plea by the Italian government to the Italian American community to send aid to earthquake victims would not make individual Americans "agents" under FARA if they responded.¹²⁹ Contrarily, if a foreign principal asked identifiable individuals to act, these persons may be fairly viewed as "in some way authorized to act for or to represent the foreign principal."¹³⁰ The Second Circuit continued: "Once a foreign principal establishes a 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."¹³¹

This interpretation by the Second Circuit 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—a "foreign principal"—asked an American family member to transport a birthday gift back to a sibling in the United States, and if that family member complied with the request, the American relative would seemingly be an "agent of a foreign principal" and need to register under FARA as she would be engaged in covered activity by disbursing something of value for a foreign principal and following through on a "particular course of conduct" requested by the foreign relative.¹³²

126. *Attorney Gen. v. Irish N. Aid Comm.*, 668 F.2d 159, 161 (2d Cir. 1982) (affirming the district court decision and noting that FARA agency's definition is not the same as the Restatement's with its focus on "control"); *Irish N. Aid Comm.*, 530 F. Supp. at 257 (explaining that the plaintiff does not have to show "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.'" (omission in original) (footnote omitted)).

127. *Irish N. Aid Comm.*, 668 F.2d at 161.

128. *See id.*

129. *Id.* at 161.

130. *Id.*

131. *Id.* at 162.

132. In the 1940s, the Institute of Living Law noted with concern how FARA might inadvertently capture cross-border loans within a family. Inst. of Living Law, *supra* note 94, at 120. Congress has not rectified this problem.

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 amount of foreign-principal subsidization would constitute a “major part” of funding. Members of Congress have proposed clarifying this definition. For example, in 1991, 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 person or, subject to rebuttal evidence, if the foreign principal held at least 20 percent” equitable ownership.¹³³

Second, the relationship between funding and the creation of an agency relationship has been filled with confusion. In the only case discussing the issue, *Attorney General of the United States v. Irish People, Inc.*,¹³⁴ the D.C. Circuit, drawing on a House Judiciary report, found that when Congress amended FARA in 1966, it meant to make clear that the mere receipt of a subsidy should not require the recipient to register as a “foreign agent.”¹³⁵ Instead, the subsidy has to be part of creating direction or control of the foreign principal over the recipient.¹³⁶ However, the House report seems to be confusing the situation. Under the text of FARA, subsidization has nothing to do with creating a relationship between a foreign principal and an agent. Instead, someone who receives money from a foreign principal can become an intermediary who can subsequently create an agency relationship between the foreign principal and other actors. For example, if a U.S. nonprofit working on human trafficking is subsidized

133. H.R. 1725, 102d Cong. (1991).

134. *Attorney Gen. v. Irish People, Inc.*, 796 F.2d 520 (D.C. Cir. 1986) (per curiam).

135. *Id.* at 524. Judges Scalia, Bork & Gesell noted that when Congress amended the definition of agent in 1966, they made clear that FARA “should not require the registration ‘of persons who are not, in fact, agents of foreign principals but whose acts may 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.” *Id.* They continued, “[m]oreover, ‘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.* (quoting H.R. REP. NO. 89-1470, at 5–6 (1966)); *see also* Michele Amoruso E Figli v. Fisheries Dev. Corp., 499 F. Supp. 1074, 1081–82 (S.D.N.Y. 1980) (holding that a corporation was not an agent under FARA despite receiving financial support from a foreign principal, noting that the corporation was not subject to the foreign government’s control, even though the corporation’s lobbying efforts benefited that entity).

136. *See Irish People, Inc.*, 796 F.2d at 524 (holding that mere financial subsidization of Irish People does not create an agency relationship).

in “major part” by a grant from a United Kingdom foundation with an antitrafficking mandate, the U.S. nonprofit would be considered an intermediary of the U.K. foundation. If the nonprofit then directed or requested that a partner organization, also in the United States, help publicize a report it had written using funding from the U.K. foundation on how to best stop human trafficking, and if the partner organization does so, then it would also seem to need to register. Under FARA’s text, the U.K. foundation does not itself even have to make a “request” to the U.S. nonprofit or its partner organization for this agency relationship to be created. It could simply finance the U.S. nonprofit, who then requests their partner to engage in a covered activity that is in the interests of the U.K. foundation.

The difference between the text of the Act and its legislative history, as recounted by the D.C. Circuit, is hard to explain. This lack of clarity further highlights the confusion around how an agency relationship is even created under FARA.

D. Registration and Reporting Requirements

The reporting requirements under FARA are extensive.¹³⁷ 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.¹³⁸ Registration materials are available to the public on the Justice Department’s website.¹³⁹ 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.”¹⁴⁰ Requiring a conspicuous statement that material is distributed on behalf of a foreign principal can be

137. 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)–(b) (2018). Individuals engaged in covered activity working for a registered entity must also complete a separate short-form registration. 28 C.F.R. § 5.202 (2018). 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).

138. *Id.* § 612(a)–(b).

139. *FARA Quick Search*, U.S. DEP’T OF JUST., https://efile.fara.gov/ords/f?p=185:1:0:::P1_DISPLAY [<https://perma.cc/5YAJ-6VBC>].

140. 22 U.S.C. § 614(b).

stigmatizing and implies that the registered “agent” is not acting independently but on behalf of a foreign interest.¹⁴¹

Despite FARA’s extensive reporting requirements, there is a long history of complaints, both that those who *should* register do not and that those who *do* register do not follow the reporting requirements.¹⁴² This has helped lead to the recent calls to strengthen enforcement of the Act.

E. 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. FARA contains a number of exemptions to registering, however.¹⁴³ These exemptions are significant and help exclude many of the activities of businesses, academics, religious institutions, lawyers, and others that might otherwise be covered. Although facially broad, these exemptions are frequently ambiguous and, as will be shown, do far less to exempt activities of nonprofits, media organizations, and public officials.

1. *Diplomatic or National Security Exemptions and Commercial Exemptions.* To address the need for foreign governments to have official representatives in the United States, there are a set of “diplomatic” exemptions for diplomatic staff and officials of foreign governments recognized by the Department of State.¹⁴⁴ The Attorney General, at the request of the Secretary of State, may also exempt an agent of a foreign government from registering whose defense the president determines is vital to the United States.¹⁴⁵

141. See, e.g., Kate Ackley, *Companies, Nonprofits Put Brakes on Foreign Lobbying Bills*, ROLL CALL (Mar. 2, 2018, 5:05 AM), <https://www.rollcall.com/news/politics/companies-nonprofits-put-brakes-foreign-lobbying-bills> [<https://perma.cc/4P3W-BRBV>] (noting that companies want to avoid the stigma of registering under FARA); Ellerbeck & Asher-Schapiro, *supra* note 33 (claiming that registration under FARA has a stigmatizing and punitive effect for media).

142. See, e.g., IG FARA REPORT, *supra* note 1, at 7–21 (finding deficiencies in identifying FARA registrants and in their registration and noting earlier General Accountability Office Reports from 1974, 1980, and 1990 that made similar complaints about the enforcement of FARA).

143. The primary exemptions to registration to FARA are provided in 22 U.S.C. § 613.

144. *Id.* § 613(a)–(c).

145. *Id.* § 613(f). Since it was included in FARA in 1942, this exemption has never been used. Letter from Heather H. Hunt, Chief, Registration Unit, Counterespionage Section, Nat’l Sec. Div., U.S. Dep’t of Justice, to [addressee deleted] (May 18, 2012), <https://www.justice.gov/nsd-fara/page/file/1038216/download> [<https://perma.cc/2ANR-ZLVW>].

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.”¹⁴⁶ This is a significant exemption for the business community, as otherwise a broad swath of business activity would fall under FARA’s registration requirements. However, this exemption, and the requirement that commercial activity be “private and nonpolitical,” has at times generated confusion, in particular with regard to the commercial activities of foreign governments or state-owned companies.¹⁴⁷ To help clarify, the Justice Department issued regulations stating that even if a foreign principal is owned or controlled by a foreign government, its actions will be considered “private” as long as they do not “directly promote the public or political interest of [a] foreign government.”¹⁴⁸

Still, the Justice Department has often had a limited interpretation of what is “private and nonpolitical.” For example, it has indicated that a public-relations firm hired by a foreign government to promote tourism to the country must register under FARA because tourism fosters economic development, which is in the public and political interests of a country’s government.¹⁴⁹

146. 22 U.S.C. § 613(d)(1).

147. 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. Letter from Heather H. Hunt, Chief, FARA Registration Unit, Nat’l Sec. Div., U.S. Dep’t of Justice, to [addressee deleted] (Feb. 9, 2018), <https://www.justice.gov/nsd-fara/page/file/1068636/download> [<https://perma.cc/3HHX-T4JK>]. 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.” Letter from [name deleted], Senior Trial Attorney, FARA Registration Unit, Nat’l Sec. Div., U.S. Dep’t of Justice, to [addressee deleted] (Dec. 21, 2017), <https://www.justice.gov/nsd-fara/page/file/1036096/download> [<https://perma.cc/4Z4W-5NM7>]. It is not obvious why being introduced to defense industry leaders is less “in the political interest” of a foreign government than educational outreach to U.S. financial institutions.

148. 28 C.F.R. § 5.304(b) states:

For the purpose of section 3(d) 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 interests of the foreign government.

28 C.F.R. § 5.304(b) (2018).

149. Letter from Joseph E. Clarkson, Chief, Registration Unit, Internal Sec. Section, Criminal Div., U.S. Dep’t of Justice, to [addressee deleted] (Jan. 20, 1984) [hereinafter *Advisory Opinion 1984*], <https://www.justice.gov/nsd-fara/page/file/1046156/download> [<https://perma.cc/34ED-RCSK>] (“Promoting tourism on behalf of [foreign government] through advertisements cannot be construed as private and nonpolitical activities.” (alteration in original)).

2. *Religious, Academic, Fine Arts, or Humanitarian Exemptions.*

Of particular importance to nonprofits, FARA also provides an exemption for “bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts.”¹⁵⁰ However, this provision has been interpreted by the Justice Department not to apply to persons engaged in “political activities” defined under the Act.¹⁵¹ It is not obvious how the Justice Department generates this distinction from the text of FARA; perhaps it does not consider religious or academic activity of a “political” nature to be “bona fide.” Under such a broad reading, a Catholic priest in the United States who, at the request of the Pope, calls for peace between all countries in his weekly sermon would seemingly be required to register under FARA 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 who wishes to discuss his new book on how to improve transatlantic trade relations may also have to register. In both cases, the “foreign agent”—the priest or the professor—is arguably acting at the request of a foreign principal to engage in “political activities.”¹⁵²

FARA’s “humanitarian” exemption 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.”¹⁵³ This exemption does not include the solicitation of funds in the United States meant for other humanitarian purposes, such as for housing or education, or for the *disbursement* of any humanitarian funds in the United States. As such, a nonprofit in the United States soliciting funds for building a school at the request of a partner organization in Central America would seemingly need to register under FARA. Similarly, an employee of a foreign foundation disbursing funds in the United States for hurricane relief would also seemingly fit under the Act’s registration requirements.

3. *Lobbyists and Lawyers.* There is a partial exemption for lobbyists under FARA. The Act was amended in 1995, when the

150. 22 U.S.C. § 613(e).

151. 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 in . . . the Act for or in the interests of his foreign principal.”).

152. See 22 U.S.C. § 611(c)(1)(i).

153. *Id.* § 613(d)(3).

Lobbying Disclosure Act (“LDA”) was enacted,¹⁵⁴ so that agents of foreign individuals or entities who register under the LDA would be exempt from also having to register under FARA for the same lobbying activity.¹⁵⁵ However, lobbyists for foreign governments or political parties still have to register under the more extensive and burdensome requirements of FARA regardless of whether they are registered under the LDA.¹⁵⁶ Furthermore, 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.¹⁵⁷

Notably, while the LDA has a *de minimis* exemption,¹⁵⁸ FARA does not.¹⁵⁹ 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.”¹⁶⁰

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 the individual is part of an official proceeding or inquiry.¹⁶¹ However, lawyers still must register if they attempt to

154. Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (codified as amended at 2 U.S.C. §§ 1601–12 & 22 U.S.C. §§ 611, 621 (2018)).

155. 22 U.S.C. § 613(h) (exempting from FARA registration “[a]ny 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.” (citation omitted)).

156. *See id.* (excluding agents of foreign principals under § 611(b)(1)—foreign governments and political parties—from the lobbying exemption).

157. 28 C.F.R. § 5.307 (“In no case where a foreign government or foreign political party is the principal beneficiary will the exemption . . . be recognized.”).

158. *See* 2 U.S.C. § 1602(10) (2018) (defining “lobbyist” under the LDA to exclude an individual whose lobbying activities constitute less than 20 percent of the services provided to a client over a three-month period).

159. 22 U.S.C. § 613 (providing exemptions under FARA, none of which is a *de minimis* exemption).

160. Observers have noted that the LDA exemption creates a potential loophole for escaping registration under FARA. Registering under the LDA seemingly provides an exemption to registering not just for lobbying activities but also for 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 FARA—one does not need to register under the Act if one is registered under the LDA. H.R. REP. NO. 104-339, at 29 (1995) (noting that 1995 FARA amendments would exempt many agents of foreign principals from registration under FARA if they were registered under the LDA).

161. 22 U.S.C. § 613(g).

“influence” officials outside an agency or judicial proceeding or a legal investigation.¹⁶²

4. “*Other activities not serving predominantly a foreign interest.*” Perhaps the least clear exemption in FARA is § 613(d)(2), which is also perhaps the most significant exemption that could be applied to nonprofits, the media, and public officials, among others. It provides an exemption for “other activities not serving predominantly a foreign interest.”¹⁶³ Although the Justice Department has provided little interpretation of this exemption,¹⁶⁴ there are at least three ways to interpret its language.

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,” 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 United States; would its interest be “predominant”? In short, reading § 613(d)(2) on its face could still lead to confusion, even if it would limit who must register.

Second, § 613(d)(2) could be interpreted to only apply to those engaged in commerce. It states an exemption for “other activities not serving predominantly a foreign interest,” but it is not clear what “other” refers to. Directly above § 613(d)(2), in § 613(d)(1), is the exemption for private and nonpolitical commercial activity.¹⁶⁵ Structurally, then, § 613(d)(2) could 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” or “public,” as long as they do not “serv[e] predominantly a foreign interest.”

162. *Id.*

163. *Id.* § 613(d)(2).

164. The Justice Department’s FAQ page does not even mention the exemption in § 613(d)(2). See *General FARA Frequently Asked Questions*, U.S. DEP’T OF JUST. (Aug. 21, 2017), <https://www.justice.gov/nsd-fara/general-fara-frequently-asked-questions> [https://perma.cc/73DD-ALDM].

165. See *supra* notes 146–48 and accompanying text.

This reading of the provision also seems partially supported by legislative history. When § 613(d)(2) was added in 1966, § 1(q), which has since been removed,¹⁶⁶ was also added to clarify the provision.¹⁶⁷ Section 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.¹⁶⁸ This amendment was added to ensure that agents of multinational companies with substantial business in the United States would not have to register when contacting government officials just because such an interaction might benefit a foreign subsidiary or a foreign parent company.¹⁶⁹ As such, § 613(d)(2) today could be interpreted to mean that commercial actors do not need to register if they engage in public or political activity as long as that activity does not directly promote the interest of a foreign government or political party.¹⁷⁰ Under this interpretation, however, this exemption would presumably not apply to nonprofits, public officials, or other noncommercial actors.¹⁷¹

166. In 1995, when the LDA was passed and amendments were made to FARA, the focus of Congress was primarily on the lobbying aspects of FARA. S. REP. NO. 103-37, at 1–2 (1993). There had been complaints that having to determine whether a foreign company had a substantial business interest in the U.S. was confusing. *Id.* at 38–39. 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. *Id.* at 10, 38. As such, § 1(q) was removed as 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. *Id.* at 52.

167. H.R. REP. NO. 89-1470, at 7 (1966) (noting that § 1(q) “clarifies the meaning of ‘activities not serving predominantly a foreign interest’”).

168. Foreign Agents Registration Act of 1938, Amendments, Pub. L. No. 89-486, 80 Stat. 244, 245 (1966) (adding § 1(q) as an amendment to FARA).

169. H.R. REP. NO. 89-1470, at 10–11 (noting that § 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).

170. Today, the only Justice Department regulation related to § 613(d)(2) reads very similarly 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 of a foreign political party.” 28 C.F.R. § 5.304(c) (2018).

171. This interpretation of § 613(d)(2) as only being an extension of the commercial exemption in § 613(d)(1) may also be supported by a recent advisory opinion. Letter from Heather H. Hunt, Chief, FARA Registration Unit, Nat’l Sec. Div., U.S. Dep’t of Justice, to [addressee deleted] (Nov. 6, 2018), <https://www.justice.gov/nsd-fara/page/file/1112151/download> [<https://perma.cc/F7R5-2XPM>] (describing the commercial exemption as applying to anyone covered by § 613(d)(1)–(2)).

Finally, there is a third way of interpreting § 613(d)(2). Following the interpretation of § 613(d)(2) informed by § 1(q), today's exemption could be read as "in other activities not serving predominantly [the interest of a foreign government or of a foreign political party]." Under this broader reading, § 613(d)(2)'s exemption, interpreted through the lens of § 1(q), would apply not just to commercial actors but also to any actor covered by the Act.¹⁷² This would mean that the Chicago nonprofit in the example above would likely not need to register, as its 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 still be ambiguous.

5. "*Bona Fide*" *Domestic Media*. Finally, there is a long and confusingly written provision that exempts a news service or publication in the United States from registering if it is engaged in:

[B]ona 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].¹⁷³

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.¹⁷⁴ However, even a cursory reading shows the exemption would apply in very limited contexts. Putting aside the difficulty of

172. Lending support to this interpretation, a House Judiciary Committee report explained that as a result of the 1995 amendments, "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. REP. NO. 104-339, at 21 (1995). Although the focus in these amendments was on lobbying, this first sentence still seems to imply that Congress viewed the FARA as applying only to agents of foreign governments or political parties.

173. 22 U.S.C. § 611(d) (2018) (emphasis added).

174. See, e.g., David S. Cloud, Tracy Wilkinson & Joseph Tanfani, *FBI Investigates Russian Government Media Organizations Accused of Spreading Propaganda in U.S.*, L.A. TIMES (Sept. 13, 2017, 4:11 PM), <https://www.latimes.com/nation/la-na-russia-propaganda-20170913-story.html> [<https://perma.cc/45JK-E6KS>] (claiming that FARA provides an exemption for "any news or press service"—the language of 22 U.S.C. § 611(d)—as long as "its coverage is not directed by a foreign government").

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 News Corp, which owns *The Wall Street Journal*, is financed in part by foreigners and has foreigners among its officers and directors.¹⁷⁵ The same would likely be true of many media organizations operating in the United States.

F. Actors Particularly Vulnerable to Politicized Enforcement

Despite the hodgepodge of exemptions in FARA, a large number of actors are still covered by the Act. Rather than survey all of those potentially covered under FARA, this Section focuses on three types of actors—nonprofits, media organizations, and public officials—whose work may frequently be covered by the Act and who, because of their often controversial stances, may be particularly vulnerable to its politicized enforcement.

1. *Nonprofits*. 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.¹⁷⁶ Nonprofit or philanthropic work frequently involves covered activities that are in the interest of a foreign principal, like “soliciting” or “disbursing” funds;¹⁷⁷ “political activities,” such as advocacy;¹⁷⁸ or publishing materials on information related to a foreign country.¹⁷⁹

175. See *Board of Directors*, NEWS CORP, <https://newscorp.com/corporate-governance/board-of-directors> [<https://perma.cc/2DG4-HWEC>] (listing José María Aznar, the former president of Spain, as one member of the News Corp Board of Directors). News Corp is a publicly traded company that foreigners can buy shares in. See NEWS CORP, ANNUAL REPORT 2018, <https://newscorpcom.files.wordpress.com/2018/09/news-corp-2018-annual-report.pdf> [<https://perma.cc/X8NG-6N8N>].

176. 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 nonprofit activity cannot be considered in furtherance of “trade or commerce.”

177. See *id.* § 611(c)(1)(iii) (listing such activity as covered under FARA).

178. See *id.* § 611(c)(1)(i) (listing engaging in “political activities” as a covered activity under FARA).

179. See *id.* § 611(c)(1)(ii) (listing acting as an “information-service employee” as a covered activity under FARA).

Some examples help illustrate how the routine and beneficial work of many nonprofits might require registration. 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, those employees are arguably engaged in “political activity” for a foreign principal and so would need to register.¹⁸⁰ 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. This is because the U.S. branch may act at the “request” of the international headquarters in London in a manner that affects U.S. public opinion on a policy issue. By the same logic, a partner nonprofit, based entirely in the United States 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. This might occur, for instance, if the U.S. nonprofit organized a public meeting in the United States at the request of the London nonprofit where the London nonprofit released a report on the benefits of transparency.

As already discussed, the FARA exemptions for religious or academic institutions only apply to “bona fide” religious or academic activities, which do not include “political activities.”¹⁸¹ 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 disbursing funds in the United States or domestic organizations soliciting funds for foreign partners working on issues like education or women’s rights.¹⁸²

The broad wording of FARA, and its limited exemptions, risks deterring nonprofits’ work in the United States. In fact, this chilling effect may already be taking place. In 2016, the Inspector General’s report on FARA’s implementation explicitly called for greater powers to investigate nonprofits, universities, and think tanks for FARA

180. *See id.* § 611(c)(1)(i).

181. *See supra* Part II.E.2.

182. *See supra* Part II.E.2.

violations.¹⁸³ As detailed more in Part III, some nonprofits have already been targeted using the Act for seemingly ideological or partisan reasons.

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 antipropaganda measure. Furthermore, many current media actors are arguably more globalized than their predecessors were when FARA was written, making them more likely to be covered 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.”¹⁸⁴ As such, the exemption seemingly does not apply to journalistic activities because coverage of or opinions about political events would likely be considered “political activity” under FARA.¹⁸⁵

Further, many media organizations are arguably covered by 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.¹⁸⁶ 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.¹⁸⁷

Such a broad interpretation of covered activities arguably captures many foreign-based news organizations that publish or broadcast in the

183. IG FARA REPORT, *supra* note 1, at 18–19 (advocating for providing the Justice Department with civil investigative demand authority to better to investigate nonprofits, organizations at universities, think tanks, and others).

184. 22 U.S.C. § 613(d)(1).

185. See Advisory Opinion 1984, *supra* note 149 (noting, in the context of finding that tourist advertising for a foreign government requires registration, the Justice Department found that “[t]he dissemination of political propaganda automatically precludes a commercial exemption”).

186. 22 U.S.C. § 611(h).

187. *Id.* § 611(i). Indeed, the Justice Department asked RT TV America to register for engaging in all three of these covered activities. See *infra* Part III.C.

United States, like the BBC¹⁸⁸ or *The Guardian*.¹⁸⁹ It would also capture some media organizations that are based in the United States but have some foreign ownership, foreign offices, or foreign partners, meaning that they 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 replay *Downton Abbey* or *The Great British Bake Off* under a contract with the BBC, they might be considered either an “information-service employee”—because they are arguably broadcasting shows that describe the “conditions” of a foreign country¹⁹⁰—or a “publicity agent”—because they are distributing visual information for or in the interest of a foreign principal.¹⁹¹ Similarly, a Hollywood producer that distributes a Chinese-made film casting China in a positive 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 nonpolitical. As noted earlier, however, the Justice Department has found even tourism promotion to be “political.”¹⁹² Thus, it is unclear whether forms of soft power like *The Great British Bake Off* or a film that showcases China in a positive light could appropriately claim exemption as commercial enterprises. The lack of clarity about these definitional categories only highlights how FARA creates confusion and is susceptible to politicized enforcement.

188. BBC America broadcasts in the United States, but it 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*, TELEGRAPH (Oct. 24, 2014, 12:16 AM), <https://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/11184252/BBC-America-now-almost-half-owned-by-US-cable-company-AMC.html> [https://perma.cc/CXS6-CMNL]. The U.S. office of the BBC registered under FARA as late as 1986. See U.S. DEP’T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL TO THE CONGRESS OF THE UNITED STATES OF THE ADMINISTRATION OF THE FOREIGN AGENTS REGISTRATION ACT OF 1938, AS AMENDED, FOR THE CALENDAR YEAR 1986, at 259 (1986) [hereinafter 1986 FARA REPORT], <https://www.justice.gov/nsd-fara/page/file/991806/download> [https://perma.cc/N23X-NBY9] (listing records of FARA registration). It is not clear why it stopped registering.

189. *The Guardian* has an online U.S. edition, but Guardian News & Media is based in the United Kingdom. *Who Owns the Guardian? Our Unique Independent Structure*, GUARDIAN (Nov. 17, 2017, 11:16 AM), <https://www.theguardian.com/about/2017/nov/17/who-owns-the-guardian-our-unique-independent-structure> [https://perma.cc/R9KH-BXG6].

190. 22 U.S.C. § 611(i). Indeed, until at least 1986, some national public radio stations registered under FARA for marketing BBC content. See 1986 FARA REPORT, *supra* note 188, at 252 (disclosing the registration of Minnesota Public Radio for marketing BBC programs).

191. 22 U.S.C. § 611(h).

192. Advisory Opinion 1984, *supra* note 149.

3. *Public officials.* FARA also seemingly requires many public officials—including members of Congress, congressional staff, and members of the executive branch—to register if they act at the “request” of a foreign individual, company, or governments in a manner that is covered by the Act—a fact that is often overlooked by most commentators. U.S. public officials are not explicitly exempt from registering under FARA. In fact, any public official who registers as a “foreign agent” under FARA faces not only embarrassment but also up to two years of imprisonment.¹⁹³

In 1980, Philip Heymann, then Assistant Attorney General, testified before Congress that part of the reason the Justice Department did not then rely on the term “request” in FARA’s agency requirement in its enforcement decisions was to avoid officials being ensnared in the Act’s framework.¹⁹⁴ As Heymann noted, if “request” included simple forms of persuasion, then a member of Congress who was on a trip to Turkey who (1) was asked by Turkish government officials to promote policies favorable to Turkey and (2) subsequently supported these policies when he returned to Congress, would then become an unregistered “foreign agent” of the Turkish officials.¹⁹⁵

Similarly, 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, the congresswoman arguably would need to register under FARA, since the convening of local policymakers would be designed to influence a “section of the public . . . with reference to formulating” the domestic policies of the United States.¹⁹⁶

Perhaps recognizing this problem of overbreadth, when Australia adopted its transparency legislation in 2018, which was heavily

193. 18 U.S.C. § 219 (2018).

194. *Inquiry into the Matter of Billy Carter and Libya: Hearing Before the Subcomm. To Investigate the Activities of Individuals Representing the Interests of Foreign Gov’ts, of the S. Comm. on the Judiciary*, 96th Cong. 701 (1980) (statement of Philip B. Heymann, Assistant Att’y Gen.).

195. Former Assistant Attorney General Philip B. Heymann explained:

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.

Id.

196. 22 U.S.C. § 611(o) (defining “political activities”).

modeled on FARA, one of the key changes the Australian Parliament made was to add an exemption for statutory officeholders.¹⁹⁷

Although the Justice Department has traditionally interpreted FARA narrowly as it applies to public officials, a future Justice Department might not be so deferential. 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.¹⁹⁸ Senator Marco Rubio then sent a letter to the Justice Department asking it to investigate whether Kerry violated either FARA or the Logan Act.¹⁹⁹ In a climate of increased enforcement, U.S. politicians could more regularly use the wide and malleable language of FARA as a weapon against political opponents.

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: the Justice Department's prosecution of W.E.B. Du Bois and other officers of the Peace Information Center in the early 1950s; the investigation by the chairman of the House Natural Resources Committee in 2018 of four prominent U.S. environmental nonprofits; and the Justice Department's request that RT TV America register under FARA in 2017.

Though such politicized uses of FARA have been relatively rare in recent decades—in large part because the Act is so rarely enforced—these instances show how FARA might be used more aggressively in the future. 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,

197. *Foreign Influence Transparency Scheme Act 2018* pt. 2.25A (Austl.) (providing a limited exemption for members of the Parliament of Australia and statutory office holders).

198. William Cummings, *Trump, Pompeo Denounce Ex-Secretary of State John Kerry for Meetings with Iranians*, USA TODAY (Sept. 14, 2018, 4:21 PM), <https://www.usatoday.com/story/news/politics/2018/09/14/trump-pompeo-attack-kerry-iran-meetings/1306311002> [<https://perma.cc/XWX6-K39P>].

199. Rubio Letter, *supra* note 17. The Logan Act bars unauthorized U.S. citizens from negotiating with foreign governments over disputes with the U.S. government. Daniel J. Hemel & Eric A. Posner, *The Logan Act and Its Limits*, LAWFARE (Dec. 7, 2017, 12:07 PM), <https://www.lawfareblog.com/logan-act-and-its-limits> [<https://perma.cc/KLB9-JDRF>].

were not required by the Justice Department to register.²⁰⁰ At the same time, the Kashmiri American Council, an organization Smith claims had a similar relationship to a foreign government, was criminally prosecuted under the Act.²⁰¹ Smith complains that “FARA enforcement was never intended to be ‘optional’ or used as a political cudgel against an administration’s perceived enemies.”²⁰²

FARA has also been used to justify other legal measures that have undercut legitimate cross-border exchanges. 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.²⁰³ The overbroad program ended up catching Russian novels, Soviet scientific journals, and even copies of the London-based newspaper *The Economist* that were critical of U.S. government policy.²⁰⁴ These interceptions of mail undercut academic and political

200. See GRANT F. SMITH, *AMERICA’S DEFENSE LINE: THE JUSTICE DEPARTMENT’S BATTLE TO REGISTER THE ISRAEL LOBBY AS AGENTS OF A FOREIGN GOVERNMENT* 59–61 (2008) (detailing efforts by some in the Justice Department to have the American Zionist Council register under FARA).

201. Grant F. Smith, *Selective FARA Enforcement: Pakistan’s Alleged Agents Prosecuted, Israel’s Ignored*, WASH. REP. ON MIDDLE EAST AFFS. (Sept.–Oct. 2011), <https://www.wrmea.org/011-september-october/selective-fara-enforcement-pakistan-s-alleged-agents-prosecuted-israel-s-ignored.html> [<https://perma.cc/8XSZ-ZTJM>].

202. SMITH, *supra* note 200, at 60.

203. Murray L. Schwartz & James C. N. Paul, *Foreign Communist Propaganda in the Mails: A Report on Some Problems of Federal Censorship*, 107 U. PA. L. REV. 621, 626–27 (1959) (highlighting that Attorney General Robert H. Jackson’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 “nonmailable” under the Espionage Act of 1907 as the mail was designed or intended to violate a penal statute—FARA—in the aid of a foreign government). Professors 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. *See id.* (“Overlooked was the fact that the purpose of the Registration Act was disclosure, not censorship.”). 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. Timothy Zick, *The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941, 950–51 (2011).

204. Schwartz & Paul, *supra* note 203, at 622.

exchange, arguably contributing to U.S. policymakers being blindsided by the launch of Sputnik and other Soviet advances.²⁰⁵

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 national security acts.²⁰⁶ After the War, the Justice Department then turned this bureaucracy toward the threat of Communist infiltration in the United States.²⁰⁷

Du Bois was one of the original cofounders of the NAACP and a leading civil rights leader of his generation.²⁰⁸ Throughout his life, he was connected with international social movements related to race and peace.²⁰⁹ In April 1949, along with several other U.S. activists, Du Bois started the Peace Information Center (“PIC”).²¹⁰ The organization’s goal was to promote the peaceful resolution of international disputes and ban the first use of nuclear weapons.²¹¹ To achieve this end, the PIC published literature in the United States from across the world about international peace activities.²¹² It also circulated copies of the *Stockholm Appeal*, which called for a ban on nuclear weapons and eventually garnered over two million signatures in the United States.²¹³

The Justice Department saw the circulation of the *Stockholm Appeal* as a threat to national security because it encouraged denuclearization and “pacifism in the face of Soviet aggression.”²¹⁴ In

205. *Id.* at 636 (“The 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.”).

206. GARY, *supra* note 94, at 197 (discussing development of a bureaucracy to implement FARA and other internal security acts during World War II).

207. *Id.* at 243–51 (discussing how the Second Red Scare allowed the Justice Department to direct internal security acts toward the new threat of Communism).

208. *NAACP History: W.E.B. Du Bois*, NAACP, <https://www.naacp.org/naacp-history-w-e-b-dubois> [<https://perma.cc/K3JZ-HGWM>].

209. W.E.B. Du Bois, Speech at Philadelphia 3–4 (Apr. 29, 1951) [hereinafter Du Bois, Speech at Philadelphia], <http://credo.library.umass.edu/view/pageturn/mums312-b201-i063/#page/1/mode/1up> [<https://perma.cc/69XD-CHV7>].

210. *Id.* at 5–6. The group was initially called the Peace Information Bureau.

211. *Id.* at 5.

212. *Id.*

213. *Id.* at 6; Lanham, *supra* note 31.

214. Lanham, *supra* note 31.

August 1950, PIC received a letter from the Justice Department claiming it was engaged in activities that required registration under FARA.²¹⁵ PIC responded that it was comprised entirely of Americans and that it acted for no one but itself.²¹⁶ Nonetheless, its board shut down the organization in October 1950 to avoid having to register.²¹⁷ Even so, in February 1951, five officers of the PIC, including Du Bois, were indicted for their past failure to register under FARA.²¹⁸ The Justice Department did not allege PIC acted as an “agent” of any foreign government; rather, it argued that PIC worked on behalf of a group based in Paris called the Committee of the Congress of the World Defenders of Peace.²¹⁹ The indictment claimed that PIC published and disseminated the *Stockholm Appeal* and other antinuclear information at the “request” of this French-based group.²²⁰

The officers of PIC, including Du Bois, faced five years in jail and a \$10,000 fine.²²¹ The indictment alone inflicted a heavy cost. As Du Bois wrote in a memoir about 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.”²²²

Some newspapers, including many in the African American community, criticized the government’s charges against Du Bois.²²³ 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.²²⁴ Albert Einstein, a proponent of international peace, volunteered to be a character witness at his trial.²²⁵ However, other newspapers wrote stories that

215. W.E.B. DU BOIS, *IN BATTLE FOR PEACE: THE STORY OF MY 83RD BIRTHDAY* 34 (Henry Louis Gates, Jr. ed., 2007).

216. *Id.*

217. *Id.* at 37. PIC did continue some activities after October 1950. *Id.*

218. *Id.* at 36–37.

219. *Id.* at 36–37, 89–90.

220. *Id.* at 36–37.

221. Lanham, *supra* note 31.

222. DU BOIS, *supra* note 215, at 48.

223. *See id.* at 50–51 (noting some newspapers that defended Du Bois and called for withdrawal of the indictment).

224. Langston Hughes, *The Accusers’ Names Nobody Will Remember, but History Records DuBois*, *CHI. DEFENDER* (Oct. 6, 1951), <http://credo.library.umass.edu/view/pageturn/mums312-b286-i046/#page/1/mode/1up> [<https://perma.cc/7UST-MTUP>].

225. Lanham, *supra* note 31.

implied that Du Bois was a Soviet sympathizer.²²⁶ Du Bois himself was frustrated that many African American elites did not defend him more vigorously.²²⁷

During the trial of Du Bois and his codefendants 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.²²⁸ Ultimately, however, the government did not argue that PIC had ever acted even at the “request” of the Committee.²²⁹

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.”²³⁰ Du Bois would later write that the government essentially 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.²³¹ 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 United States during World War II.²³² Ultimately, the district court judge rejected the government’s theory of agency, found that the government had not

226. See DU BOIS, *supra* note 215, at 49–50 (noting that the *New York Herald Tribune* wrote that “[t]he Du Bois outfit was set up to promote a tricky appeal of Soviet origin”).

227. See *id.* at 52 (stating that many “educated and well-to-do Negro friends” did not speak out in Du Bois’s defense).

228. *Id.* at 94–96 (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 “denied that he had ever requested the Peace Information Center to disseminate the Stockholm Appeal”).

229. See *id.* at 99.

230. *Id.*

231. See *id.* (“[The prosecutor] replied that the Government insisted that the agency was implied by the similarity of ideas.”).

232. During World War II, Harold Lasswell had created “parallel tests to demonstrate the connections between [defendants in FARA prosecutions] and the official German propaganda line.” GARY, *supra* note 94, at 215.

presented sufficient evidence for a jury to convict the officers of PIC, and dismissed the case.²³³

Though Du Bois and his codefendants 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.²³⁴ Du Bois's reputation never recovered and he continued to face persecution from the U.S. government.²³⁵ And, of course, the prosecution of Du Bois and his codefendants by the Justice Department successfully led to the closure of PIC,²³⁶ signaling that the U.S. government would target organizations that took too strong a stance or were too successful in 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 increases the likelihood that the Act will be used in a politicized fashion.

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, and Chairman of the Subcommittee on Oversight and Investigations, Representative Bruce Westerman, sent letters to four prominent U.S. environmental organizations—NRDC, Center for Biological Diversity (“CBD”), the World Research Institute (“WRI”), and Earthjustice—asserting that

233. DU BOIS, *supra* note 215, at 101. 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*, 153 F.2d 860 (3d Cir. 1946), even though that case was interpreting the 1938 Act, not the expanded 1942 Act. *See id.* (“[A]pplying the test . . . in [*German-American Vocational League*] which, presumably, is the law of the land . . . the Government has failed to support . . . the allegations . . .”); *see also* HERBERT BROWNELL JR., ATTORNEY GEN., 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 JANUARY 1, 1950 TO DECEMBER 31, 1954, at 18–19 (1955) (“The defense motion upon which the judge ruled was based upon [*German-American Vocational League*] decided under [FARA] prior to the 1942 amendments . . .”).

234. DU BOIS, *supra* note 215, at 104.

235. *See* Lanham, *supra* note 31 (noting that “the trial and the publicity around it ruined [Du Bois]’ career” and that the U.S. government revoked his passport in 1952).

236. *See supra* note 217 and accompanying text.

they had failed to register as “foreign agents” under FARA.²³⁷ 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.”²³⁸

The letters implied that organizations that were critical of the U.S. government were suspicious. For example, perhaps the primary piece of evidence against NRDC supporting its need to register was that it had been more critical of the U.S.’s environmental policy than China’s. As the Committee Chairman, Representative Rob Bishop, 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.”²³⁹ He 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).²⁴⁰

237. See Letter from Rob Bishop, Chairman, House of Representatives Comm. on Nat. Res. & Bruce Westerman, Chairman, House of Representatives Subcomm. on Oversight and Investigations of the Comm. on Nat. Res., to Abigail Dillen, President, Earthjustice (Oct. 1, 2018) [hereinafter Earthjustice Letter], https://republicans-naturalresources.house.gov/uploadedfiles/2018-10-01_bishop_westerman_to_dillen_earthjustice_re_fara.pdf [https://perma.cc/8GTU-KFNE]; Letter from Rob Bishop, Chairman, House of Representatives Comm. on Nat. Res. & Bruce Westerman, Chairman, House of Representatives Subcomm. on Oversight and Investigations of the Comm. on Nat. Res., to Andrew Steer, President & CEO, World Res. Inst. (Sept. 5, 2018) [hereinafter WRI Letter], https://republicans-naturalresources.house.gov/uploadedfiles/bishop-westerman_to_steer_wri_re_fara_09.05.2018.pdf [https://perma.cc/9EFB-8QGC]; Letter from Rob Bishop, Chairman, House of Representatives Comm. on Nat. Res. & Bruce Westerman, Chairman, House of Representatives Subcomm. on Oversight and Investigations of the Comm. on Nat. Res., to Kierán Suckling, Exec. Dir., Ctr. for Biological Diversity, Inc. (June 20, 2018) [hereinafter CBD Letter], https://republicans-naturalresources.house.gov/uploadedfiles/letter_to_center_bio_diversity_06.20.18.pdf [https://perma.cc/X4AW-DJCL]; Letter from Rob Bishop, Chairman, House of Representatives Comm. on Nat. Res. & Bruce Westerman, Chairman, House of Representatives Subcomm. on Oversight and Investigations of the Comm. on Nat. Res., to Rhea Suh, President, Nat. Res. Def. Council (June 5, 2018) [hereinafter NRDC Letter], https://republicans-naturalresources.house.gov/uploadedfiles/bishop-westerman_to_nrdc_06.05.18.pdf [https://perma.cc/5HSF-YEGL].

238. Mark Hand, *Incoming House Committee Leader To Call Off ‘Witch Hunt’ Against Environmental Groups*, THINKPROGRESS (Dec. 3, 2018, 12:17 PM), <https://thinkprogress.org/house-democratic-leader-pledges-end-to-witch-hunt-against-environmental-groups-e011e256bd90> [https://perma.cc/3RKC-KUJ6].

239. NRDC Letter, *supra* note 237, at 3.

240. *Id.* at 4.

The letter provided several examples where the Committee claimed the NRDC was too lenient on Chinese environmental policy, but it provided no evidence of the Chinese government directing or requesting NRDC to take any action, or of NRDC complying with such requests. Instead, seemingly in an attempt to create an agency relationship, Chairman Bishop in the letter simply noted that “NRDC leadership regularly meets with senior Chinese and Communist Party officials.”²⁴¹

The letter to CBD focused on its advocacy, including litigation, in opposing the planned relocation of the Marine Base on Okinawa in Japan on environmental grounds.²⁴² 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.²⁴³

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.”²⁴⁴ In other words, Chairman Bishop 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 NRDC had openly criticized Bishop in their advocacy prior to being investigated for FARA violations. In 2017, CBD gave Bishop its annual Rubber Dodo Award, which “honors” the person that most aggressively sought to destroy the natural heritage of the United States or drive a species extinct.²⁴⁵ NRDC also publicly criticized his environmental record.²⁴⁶

241. *Id.* at 2–3.

242. CBD Letter, *supra* note 237, at 1.

243. *Id.* at 1–2.

244. WRI Letter, *supra* note 237, at 5–6 (alteration in original) (quoting 22 U.S.C. § 611(c)(1) (2018)); Earthjustice Letter, *supra* note 237, at 3 (same); NRDC Letter, *supra* note 237, at 4 (same); CBD Letter, *supra* note 237, at 5 (same).

245. Press Release, Ctr. for Biological Diversity, Utah Congressman Rob Bishop Wins Rubber Dodo Award: Extremist Agenda To Give Away Public Lands, Kill Off Endangered Species Cited (Jan. 5, 2017), https://www.biologicaldiversity.org/news/press_releases/2017/rubber-dodo-01-05-2017.php [<https://perma.cc/2ZJ9-Z2RC>].

246. See *The Real Lowdown: The Trump and Congressional Republican Assault on Our Environment*, Vol. 28, NAT. RESOURCE DEF. COUNCIL: EXPERT BLOG (Oct. 13, 2017), <https://www.nrdc.org/experts/nrdc/real-lowdown-trump-and-congressional-republican-assault->

The investigation of these four environmental organizations ended when Democrats took control of the House of Representatives in 2019.²⁴⁷ However, these organizations had to expend resources defending themselves from charges of being “foreign agents.” The investigation of these environmental organizations also sent a chilling message about how members of Congress can use FARA in a political manner to target entities with whom they disagree.

C. *RT TV America and Foreign Media*

At the request of the Justice Department, in November 2017, RT TV America, a Russian-government-funded media organization, registered under FARA.²⁴⁸ The targeting of Russian media organizations, while simultaneously ignoring other entities seemingly covered under the Act, has raised the specter of 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.²⁴⁹ RT is owned by TV-Novosti, a nonprofit news organization based in Russia.²⁵⁰ The Russian government is the primary funder of RT.²⁵¹ RT TV America hires many U.S. journalists and has been nominated for several Emmys.²⁵²

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.²⁵³

our-environment-vol-28 [https://perma.cc/ER6F-FRMW] (calling Representative Rob Bishop’s proposal to require local signoff on any national monument bigger than 640 acres “radical”).

247. See Hand, *supra* note 238 (noting plans to end the investigation).

248. Wilson, *supra* note 14; see Letter from Heather H. Hunt, Chief, FARA Registration Unit, Nat’l Sec. Div., U.S. Dept. of Justice, to RTTV America, Inc. (Aug. 17, 2017) [hereinafter RT TV America Letter], <https://www.politico.com/f/?id=00000160-79a9-d762-a374-7dfbebe30001> [https://perma.cc/NS64-CEB4] (“RTTV America has an obligation to register under FARA.”).

249. *Id.* at 2–3.

250. RT TV America Letter, *supra* note 248, at 3.

251. See *id.* at 2–3.

252. See *RT America Nominated for National Emmy News Award in US – Chief Editor*, SPUTNIK (Mar. 23, 2017, 6:22 PM), https://sputniknews.com/art_living/201703231051889022-rt-emmy-award [https://perma.cc/8T3B-LUR4] (announcing that RT TV America had been nominated for one American Emmy Award and noting it had previously been nominated for four International Emmy Awards).

253. See OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS 6–8 (2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf [https://perma.cc/8T3B-LUR4] (claiming

However, there is disagreement about how much of an audience RT TV America actually had during the election, whether its programming was designed to influence voters, whether the network was biased toward either candidate, and whether it had any actual influence on the election.²⁵⁴

In its letter to RT TV America asking it to register under FARA, the Justice Department claimed that the network operated as an agent of both TV-Novosti and RT, who were themselves “alter egos of the Kremlin.”²⁵⁵ 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 . . . [used] to undermine faith in the US Government and fuel political protest.’”²⁵⁶ The letter went on to find that “RT’s broadcasts consistently mirror the opinions of the Kremlin.”²⁵⁷ It provided a handful of examples to show how RT TV America’s programming paralleled the opinions of the Russian government, including its reporting on Iran’s ballistic-missile testing, criticism of NATO, and criticism of claims that the Russian government had interfered in the presidential election.²⁵⁸ Based on these examples and quoting from FARA, the Justice Department wrote that RT TV America sought to:

“[I]nfluence . . . 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

that RT sought to cast doubt on the integrity of the election process and conducted strategic messaging for the Russian government).

254. See Steven Erlanger, *Russia’s RT Network: Is It More BBC or K.G.B.?*, N.Y. TIMES (Mar. 8, 2017), <https://www.nytimes.com/2017/03/08/world/europe/russias-rt-network-is-it-more-bbc-or-kgb.html> [https://perma.cc/9Q29-3NDB] (interviewing commentators with differing views on RT TV America’s reach and influence); Danielle Ryan, *RT America Was Not ‘Pro-Trump,’* NATION (Jan. 10, 2017), <https://www.thenation.com/article/rt-america-was-not-pro-trump> [https://perma.cc/ZFC7-YS9R] (noting that many contributors to RT took positions against presidential candidate Donald Trump).

255. RT TV America Letter, *supra* note 248, at 6.

256. *Id.* at 5 (alteration in original).

257. *Id.* at 6.

258. *Id.* at 6–7.

interests of Russia, and is therefore engaged in “political activities” [under FARA].²⁵⁹

The Justice Department explained it did not matter whether RT TV America exercised editorial independence, as the outlet claimed; it would be a foreign agent under FARA if it acted at the order or request of TV-Novosti.²⁶⁰

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 United States that TV-Novosti used to distribute RT programming.²⁶¹ Further, it claimed that RT TV America was an “information-service employee” because, 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.”²⁶²

When RT TV America registered as a “foreign agent,” it protested that it was “inform[ing], not influenc[ing]” the U.S. public.²⁶³ Others also criticized the Justice Department’s use of FARA as harming journalistic integrity. For instance, 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 compromised.”²⁶⁴

Shortly after RT TV America registered under FARA, the Executive Committee of the Congressional Radio & Television Correspondents’ Galleries revoked RT TV America’s Capitol Hill press credentials because it was a “foreign agent.”²⁶⁵ The incident not

259. *Id.* at 7 (omissions in original).

260. *Id.* at 8.

261. *Id.*

262. *Id.*

263. U.S. DEP’T OF JUSTICE, EXHIBIT A TO T&R PRODUCTIONS LLC’S REGISTRATION STATEMENT PURSUANT TO THE FOREIGN AGENTS REGISTRATION ACT OF 1938, AS AMENDED 4 (Nov. 10, 2017), <https://www.fara.gov/docs/6485-Exhibit-AB-20171110-2.pdf> [<https://perma.cc/MSY8-4GP3>] (claiming that RT TV America’s programming is intended “merely to inform, not influence,” and not to “primarily benefit any foreign government or political party”).

264. Ellerbeck & Asher-Schapiro, *supra* note 33.

265. Hadas Gold, *Congressional Press Office Yanks RT’s Credentials*, CNN BUS. (Nov. 30, 2017, 10:49 AM), <http://money.cnn.com/2017/11/29/media/rt-capitol-credentials-revoked/index.html> [<https://perma.cc/YN2Z-QWGD>].

only limited the ability of RT TV America to report on affairs in the U.S. Congress but also 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.²⁶⁶ Some public officials may also stop conducting interviews with those registered under FARA.²⁶⁷ 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."²⁶⁸

Those who provide commercial services to media organizations registered under FARA have also faced consequences. In October 2018, RM Broadcasting LLC 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.²⁶⁹ 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.²⁷⁰ A judge dismissed RM Broadcasting's suit, finding that it rebroadcasted Sputnik and so was a "publicity agent" under FARA.²⁷¹

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 TV station based out of Washington, D.C., which RT TV America claimed was related

266. Aaron Maté, *RT Was Forced To Register As a Foreign Agent*, NATION (Nov. 16, 2017), <https://www.thenation.com/article/rt-was-forced-to-register-as-a-foreign-agent> [<https://perma.cc/R4QA-LA94>]. As an example, a staffer in a Georgia gubernatorial campaign was reportedly forced to resign for giving an interview to Sputnik. *Id.*

267. *Id.*

268. *Id.* (explaining that Twitter recently barred RT TV America and Sputnik from advertising).

269. Michel, *supra* note 34.

270. *Id.*

271. See Eriq Gardner, *Justice Department Wins Lawsuit Demanding Radio Station Register As Russian Agent*, HOLLYWOOD REP. (May 7, 2019, 11:38 AM), <https://www.hollywoodreporter.com/thr-esq/justice-department-wins-lawsuit-demanding-radio-station-register-as-russian-agent-1208400> [<https://perma.cc/2UEL-VYN3>].

to its registration under FARA.²⁷² As such, requiring RT TV America and Sputnik to register under FARA resulted in far more than “transparency”; it undermined each organization’s ability to have their broadcasts transmitted and 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 probably need to register as well. For example, BBC America is the U.S. arm of a foreign-government-run news network and ostensibly 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 America do not at times “mirror” the views of the British government. BBC America also ostensibly acts as a “publicity agent” and “information-service employee.”

Fears of FARA’s politicized use were amplified in September 2018 when 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.²⁷³ It is not just Chinese news agencies that are targeted. Members of Congress have also called for other media organizations to register when they have connections to certain countries or controversial views. For example, Senator Marco Rubio, a frequent critic of China, “tweeted that a partnership between Politico and the South China Morning Post should possibly be registered under FARA.”²⁷⁴ In March 2018, members of Congress sent a letter to the Justice Department requesting they investigate whether Al Jazeera should register.²⁷⁵ In justifying their request, the congresspersons noted that Al Jazeera has a “record of radical anti-American, anti-Semitic, and anti-Israel broadcasts,”²⁷⁶ supporting the belief that FARA can be used to suppress dissident or unpopular voices.

272. Ben Finley & Jim Heintz, *Russia-Backed TV Channel Is Gone from DC-Area Broadcasts*, AP NEWS (Apr. 2, 2018), <https://www.apnews.com/d45ceac99c7747e9813b89932e84e05e> [<https://perma.cc/WF9W-3PZE>].

273. See John Bowden, *DOJ Orders Two Chinese State-Run Media Organizations To Register as Foreign Agents*, HILL (Sept. 18, 2018, 3:28 PM), <https://thehill.com/policy/national-security/407274-doj-orders-two-chinese-state-run-media-organizations-to-register-as> [<https://perma.cc/4G8A-85UD>] (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).

274. Ellerbeck & Asher-Schapiro, *supra* note 33.

275. See generally Congressional Letter concerning Al Jazeera, *supra* note 16.

276. *Id.* at 1.

* * *

These three examples show that the politicized use of FARA can come from both the Justice Department—the agency tasked with enforcing the Act—and individual members of Congress. In addition, the effects of such enforcement actions can be diverse: the targeted entity could be forced to shut down—as with PIC—or it could lose important industry access—like RT TV America. Notably, none of these examples featured the Act being applied to lobbying activities; rather, each instance involved entities allegedly attempting to influence the U.S. public more generally, whether by nonprofits or the media.

These examples of politicized use of FARA are relatively rare, in large part because the Act is not frequently enforced, particularly outside the lobbying context. Going forward, however, this could change. U.S. laws related to national security, such as FARA, are generally broad but historically underenforced.²⁷⁷ Scholars like Professor David Pozen have argued that the enforcement of such laws are driven by the incentives or political imperatives of the actors who enforce them.²⁷⁸ As such, enforcement tendencies can shift as political calculations change.

After the 2016 presidential election, there has been new attention focused on how an increasingly interconnected U.S. democracy may be susceptible to foreign influence, particularly when authoritarianism and illiberal democracy are enjoying political ascendance globally.²⁷⁹ Such a political environment arguably creates new political will to increase enforcement of FARA to target not only foreign lobbyists but

277. See David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 515 (2013) [hereinafter Pozen, *The Leaky Leviathan*] (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 B. Rice, *Nonenforcement by Accretion: The Logan Act and the Take Care Clause*, 55 HARV. J. ON LEGIS. 443, 445–46 (2018) (claiming that although there have been many opportunities to enforce the Logan Act, it has seemingly ceased to function as a criminal act); Kelner et al., *supra* note 93 (explaining how prosecutors “revived from hibernation” the Foreign Corrupt Practices Act “a decade ago”).

278. Pozen, *The Leaky Leviathan*, *supra* note 277, at 519 (arguing that enforcement of antileaking laws varies based on “personal incentives, bureaucratic politics, and functional system imperatives”).

279. See, e.g., Henry Farrell, *American Democracy Is an Easy Target*, FOREIGN POL’Y (Jan. 17, 2018), <https://foreignpolicy.com/2018/01/17/american-democracy-was-asking-for-it> [<https://perma.cc/47E2-REXH>] (discussing how Americans have become paranoid about foreign influence in their politics, particularly through the internet).

also foreign disinformation and electioneering activities. As was discussed in Part II, during World War II, FARA 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, in a domestically polarized environment²⁸⁰ where the enemies of the U.S. are less clear²⁸¹ and foreign disinformation campaigns often rely on amplifying existing U.S. voices, such as Black Lives Matter or the pro-gun lobby,²⁸² there are significant reasons to believe that the politicized use of FARA is particularly dangerous.

IV. FARA'S POTENTIAL CONSTITUTIONAL DEFECTS

This Part outlines how FARA's breadth arguably violates the First Amendment's free-speech principles and how it may be unconstitutionally vague. Though 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

280. See, e.g., *The Partisan Divide on Political Values Grows Even Wider*, PEW RES. CTR. (Oct. 5, 2017), <http://www.people-press.org/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider> [<https://perma.cc/FJ9A-HS2C>] (documenting increasing partisan divisions in the United States on political values between 1994 and 2017).

281. In U.S. politics, there are claims that numerous and varied forces are undermining U.S. interests, including major trading partners like China as well as significant allies like Saudi Arabia or Israel. See Rashid Khalidi, Opinion, *Unwavering Support of Israel Harms U.S. Interests, Encourages Extremism*, N.Y. TIMES (Aug. 6, 2014, 2:45 PM), <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> [<https://perma.cc/CZ65-B3W2>] (arguing that overly strong support of Israel harms U.S. interests); Aaron David Miller & Richard Sokolsky, Opinion, *The U.S.-Saudi Relationship Is Worth Preserving – But Not Under the Current Terms*, WASH. POST (Oct. 25, 2018, 3:27 PM), <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> [<https://perma.cc/53EU-YHLM>] (claiming arguing that Saudi Arabia undermines U.S. interests); Josh Rogin, Opinion, *China's Interference in U.S. Politics Is Just Beginning*, WASH. POST (Sept. 20, 2018 6:35 PM), 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 [<https://perma.cc/X3FJ-CZML>] (describing tactics the Chinese government uses to influence U.S. politics).

282. See, e.g., Tom Huddleston Jr., *Russian Facebook Ads Targeted Muslims, Gun Owners, Black Lives Matter*, FORTUNE (Oct. 2, 2017), <http://fortune.com/2017/10/02/facebook-russian-ads-congress> [<https://perma.cc/9CTE-WN88>] (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).

organizations, and others about whether they need to register. As a result, nonprofits based outside the United States may not engage in advocacy in the United States. 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 relationships across borders suspect, creating a world where each country has its own nonprofits and media, but it becomes difficult for a transnational civil society to develop in order to address global problems collectively. In this way, the broad provisions of FARA can curtail speech and undermine civil society's ability to address pressing national and global challenges.

In *Meese v. Keene*²⁸³ in 1987, the Supreme Court upheld as constitutional FARA's requirement at the time that materials covered by the Act be classified as "political propaganda."²⁸⁴ 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.²⁸⁵ The state senator claimed that by classifying informational materials using this term, the government undermined his speech and violated his First Amendment rights.²⁸⁶ In a 5–3 decision, Justice Stevens delivered the opinion of the Court upholding the requirement.²⁸⁷ He found that classifying these materials as "political propaganda" did not place them "beyond the pale of legitimate discourse"²⁸⁸ and that the public understood it is a "neutral," rather than "pejorative," term.²⁸⁹

In dissent, Justice Blackmun noted that the appellant claimed that the term "propaganda" created the perception that anything classified as such was "unreliable and not to be trusted."²⁹⁰ Justice Blackmun claimed: "By ignoring the practical effect of the Act's classification scheme, the Court unfortunately permits Congress to accomplish by

283. *Meese v. Keene*, 481 U.S. 465 (1987)

284. *See id.* at 479–85.

285. *Id.* at 467–68.

286. *Id.* at 473–74.

287. *Id.* at 467–85.

288. *Id.* at 480 (quoting *Keene v. Meese*, 619 F. Supp. 1111, 1126 (E.D. Cal. 1985)).

289. *See 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.")

290. *Id.* at 489 (Blackmun, J., dissenting).

indirect means what it could not impose directly—a restriction of appellee’s political speech.”²⁹¹ He opined that there was no compelling interest to classify such material as “political propaganda” and that the classification should be struck down.²⁹² In 1995, Congress amended the Act to remove the term “political propaganda.”²⁹³

Importantly, 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.”²⁹⁴ Since *Meese*, commentators have noted that the Supreme Court’s First Amendment jurisprudence has become more robust, and some have suggested the Court today would be skeptical of the constitutionality of key provisions of FARA.²⁹⁵ Specifically, FARA’s speech compulsion and its burdens on a category of speakers make it particularly vulnerable to First Amendment challenges.

First, FARA requires its registrants to engage in “compelled speech”—that is, they are forced to make affirmative statements regarding their status under the Act. FARA registrants must place a conspicuous statement on any 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.²⁹⁶ 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. Frequently, this may be a misleading characterization. Indeed, simply being required to register as an “agent” under FARA

291. *Id.* at 491.

292. *Id.* at 495–96.

293. Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, § 9, 109 Stat. 691, 699–700 (codified as amended at 22 U.S.C. § 611 (2018)).

294. *Meese*, 481 U.S. at 467.

295. *See, e.g.*, Massaro, *supra* note 35, at 686. *But see* Ronald J. Krotoszynski, Jr., *Transborder Political Speech*, 94 NOTRE DAME L. REV. 473, 475 (2018) (arguing that although the Rehnquist and Roberts Courts have dramatically expanded protected domestic speech activity, transborder speech activity has not been protected as strongly); Zick, *supra* note 203, at 944–45 (claiming that the Court has generally had a “provincial” understanding of the First Amendment that has limited its applicability to cross-border speech and arguing for a more cosmopolitan cross-border interpretation).

296. 22 U.S.C. § 614(b) (2018).

could itself be considered a form of compelled speech given how controversial the label is.²⁹⁷

Compelled speech has been particularly disfavored by the federal courts in recent years.²⁹⁸ For instance, in *National Institute of Family & Life Advocates v. Becerra*,²⁹⁹ 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.”³⁰⁰ Of course, many disclosure requirements are clearly constitutional, and *Citizens United v. FEC*³⁰¹ explicitly upheld a disclosure requirement for corporate political speech.³⁰² However, when a disclosure requirement functions like FARA to chill or undercut speech, it is likely to face scrutiny under the First Amendment.

Second, FARA does not regulate types of speech; it regulates categories of speakers, applying different regulations to the speech of “agents of foreign principals.” In *Citizens United*, the Court found “no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.”³⁰³ As Justice Stevens pointed out in dissent, however, such

297. The Supreme Court has struck down registration requirements for political speech in other contexts. See *Thomas v. Collins*, 323 U.S. 516, 539–41 (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).

298. See, e.g., *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 370, 373 (D.C. Cir. 2014) (striking down as unconstitutional and stigmatizing a requirement that companies disclose on their websites and in SEC filings whether they used conflict minerals), *overruled by* *Am. Meat Inst. v. U.S. Dep’t of Agric.* 760 F.3d 18 (D.C. Cir. 2014) (en banc); see also Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 339 (2016) (describing how claims of “compelled speech” have become a key tool for advocates of a deregulatory First Amendment).

299. *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

300. *Id.* at 2378.

301. *Citizens United v. FEC*, 558 U.S. 310 (2010).

302. *Id.* at 319 (“The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”).

303. *Id.* at 341. “Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.” *Id.* at 340; see also *Becerra*, 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.’” (citations omitted) (first quoting *Citizens United*, 558 U.S. at 341, then quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011))).

reasoning would seem to imply that foreign speakers should enjoy the same political-speech rights as domestic speakers.³⁰⁴ The majority did not refute Justice Stevens's 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."³⁰⁵ 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 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."³⁰⁶ FARA may well further a "compelling interest" of the government, specifically protecting democratic decision-making from undue foreign influence—although, as Part V explains, the goals of the Act can sometimes be unclear.³⁰⁷ However, it is hard to call the Act "narrowly tailored." As specified in Part II, FARA's provisions cover a wide range of actors, including media organizations, nonprofits, and public officials, and it often imposes significant burdens on those entities' speech. This is true even where these entities' activities are not aimed at influencing democratic decision-making or where the relationship between the foreign principal and domestic entity may be minor and not actually influencing the domestic entity's political speech. If FARA was not subject to strict scrutiny, it would likely face some variant of intermediate scrutiny.³⁰⁸

304. Dissenting in *Citizens United*, Justice Stevens stated:

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.

558 U.S. at 424 (Stevens, J., dissenting); *see also* Krotoszynski, *supra* note 295, at 512 (arguing that under the logic of *Citizens United*, "speech that originates outside the nation's borders should be no less protected than speech that originates within those borders [sic]").

305. *Citizens United*, 558 U.S. at 362.

306. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007).

307. *See infra* Part V.

308. Intermediate scrutiny has been used to strike down disclosure requirements in other contexts. *See, e.g., Becerra*, 138 S. Ct. at 2375; *see also Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 372 (D.C. Cir. 2014), *overruled by Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

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 unconstitutionally overbroad. As Justice Thomas wrote in *Washington State Grange v. Washington State Republican Party*,³⁰⁹ “[i]n the First Amendment context . . . a law may be overturned as impermissibly overbroad because a ‘substantial number’ of its applications are unconstitutional, ‘judged in relation to the statute’s plainly legitimate sweep.’”³¹⁰ 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.”³¹¹ As such, a paid lobbyist for a foreign government could make a First Amendment claim, arguing that the Act impermissibly chills the speech of activists, the media, or others who are, for example, acting at the request of a foreign individual, nonprofit, or company.

Finally, a point related to but separate from the First Amendment argument is that several of FARA’s key provisions are unclear, leading some commentators to suggest that they may be unconstitutionally vague.³¹² The 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 prohibited, so that he may act accordingly.”³¹³ Given FARA’s ambiguous, convoluted, and vague 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 to

309. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008).

310. *Id.* at 449 n.6 (quoting *New York v. Ferber*, 458 U.S. 747, 769–71 (1982)); *see also* *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citing *Wash. State Grange*, 552 U.S. 442).

311. *United States v. Sineneng-Smith*, 910 F.3d 461, 470 (9th Cir. 2018) (“To combat that chilling effect, even a person whose activity is clearly not protected may challenge a law as overbroad under the First Amendment.”).

312. *See, e.g.,* Ryan Lovelace, *Washington’s FARA Frenzy Spurs New Legal Business*, NAT’L L.J. (Sept. 27, 2018, 3:10 PM), <https://advance.lexis.com/search?crd=6ef66097-50b6-4d78-a8b2-3a4b25fe9fc1&pdsearchterms=LNSDUID-ALM-NTLA WJ-gml45ffldm&pdbyypasscitatordocs=False&pdmfid=1000516&pdisurlapi=true> [https://perma.cc/3L5W-M6XU] (quoting Covington & Burling partner Robert Kelner, who noted that FARA might be unconstitutionally vague).

313. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

serve the needs for which it was originally enacted. This last Part argues that to do so successfully requires clarifying the purpose of the Act. Based on insights gained from a discussion of what appropriate goals are for transparency statutes 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, it is important to note that not all these different types of foreign influence raise the same concerns, nor is the bluntness of FARA appropriate to address them. This Section examines three of the most prominent justifications for FARA: creating transparency around (1) foreign lobbying; (2) foreign electioneering activity; and (3) foreign disinformation. It claims that FARA, and transparency tools like it, are most appropriate, and on strongest ground, when applied to those who clearly are acting at the direction or control of a foreign government or political party and when the covered activity involves core democratic processes aimed at directly influencing government, such as lobbying or electioneering.

Drawing on this framework, this Section posits that certain types of lobbying activity by agents of foreign principals may beneficially fall under the disclosure requirements of the Act. Meanwhile, although electioneering could be regulated by FARA, this activity is so core to the democratic process that U.S. law already bars foreigners from engaging in much electioneering activity. As such, where there is inappropriate foreign influence in U.S. elections, it is generally better to bar this activity through other legislation rather than attempt to make it transparent through FARA. Finally, this Section argues that FARA is generally a poor tool to counter foreign disinformation. FARA's breadth both captures a wide range of legitimate and beneficial media and nonprofit advocacy activity, generating a high likelihood of politicized abuse, and it is frequently ineffective at countering genuine disinformation.

1. *Foreign Lobbying.* FARA is sometimes viewed as one of the earliest U.S. lobbying laws, enacted before the Regulation of Lobbying Act of 1946—which has since been repealed—the Lobbying Disclosure Act of 1995, and the Honest Leadership and Open Government Act of

2007.³¹⁴ 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.³¹⁵

There are good reasons for applying scrutiny to lobbyists of foreign governments and political parties. Lobbying is core to the U.S. democratic process as it involves concrete attempts to change legislation or policy, often with outsize effect, and is frequently undertaken outside the public eye.³¹⁶ The burden of registering under FARA is seemingly not as high for a lobbyist of a foreign government or political party as lobbyists are frequently sophisticated actors who already often have to register under the LDA. The stigma is also likely to be less significant as public officials are more likely to understand FARA's labeling requirements. On top of that, for many lobbyists, the label is seemingly accurate as they are engaged in attempting to influence U.S. government officials at the direction and control of foreign governments or political parties.

Importantly, foreign governments already have diplomatic staff who can engage with policymakers in the United States without having to register under the LDA or FARA, making it less clear why 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.

Although creating additional transparency requirements for lobbyists of foreign governments and political parties seems justifiable, this is not to say that even when FARA is used to create transparency in lobbying that it 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 for acting as a lobbyist, unfairly stigmatizing them. Consider, for instance, the example of the Center for Biological Diversity's work

314. See JACOB R. STRAUS, CONG. RESEARCH SERV., R44292, *THE LOBBYING DISCLOSURE ACT AT 20: ANALYSIS AND ISSUES FOR CONGRESS 6–12* (2015) (recounting the history of U.S. lobbying laws).

315. DOJ ENFORCEMENT STRATEGY, *supra* note 4.

316. See, e.g., Ben Freeman, *How Much It Costs To Buy US Foreign Policy*, NATION (Oct. 4, 2018), <https://www.thenation.com/article/how-much-it-costs-to-buy-us-foreign-policy> [<https://perma.cc/XU8Q-LYK8>] (using disclosures from FARA to show how Saudi Arabia has used lobbyists to attempt to influence members of Congress on key foreign policy issues).

in Okinawa, Japan, opposing moving a U.S. 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 acting independently. Congress should also be careful about the unintended consequences of using FARA to regulate lobbying in a way that would create additional burdens that could be unfair. In the 115th 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.³¹⁷ Eliminating the LDA exemption in FARA could be appropriate in some situations, but it 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.

2. *Foreign Electioneering.* FARA has been used to prosecute foreign individuals for improperly influencing a U.S. election. Special Prosecutor Robert Mueller brought two FARA-related charges in his indictment against members of Russia’s Internet Research Agency (“IRA”) for interfering in the 2016 U.S. presidential election.³¹⁸ First, the Special Prosecutor indicted IRA members for failing to report expenditures to the FEC and for not registering under FARA when producing, posting, and paying for online political advertisements.³¹⁹ 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

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

318. IRA Indictment, *supra* note 13, at 16–23.

319. *Id.* at 19–20.

media.³²⁰ It is important to note that neither charge hinged on a violation of FARA alone. Each also involved either violations of the Federal Election Campaign Act of 1971 (“FECA”) or using a false persona.

Indeed, most types of electioneering by foreigners today is illegal under U.S. law.³²¹ In 1966, in a set of amendments to FARA, Congress also changed U.S. election law to prohibit foreign agents from donating to U.S. election campaigns on behalf of a foreign principal.³²² This provision, and its reference to FARA, was removed after FECA was enacted, which bans campaign donations of money or other things of value by foreigners to election campaigns or political parties.³²³ Federal regulations also make it illegal for anyone—a U.S. citizen or otherwise—to provide “substantial assistance” to a foreigner in either contributing or dispersing money for a campaign purpose.³²⁴ As such, FARA is generally a superfluous 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 make it easier for foreign individuals or governments to bypass election-law restrictions. For example, there are concerns that foreigners can illegally route funds for election purposes through domestic subsidiaries of foreign companies³²⁵ or through “dark money” groups that do not have to report the source of their funds.³²⁶ FARA does not do much to combat

320. *Id.* at 20–23.

321. Myles Martin, *Foreign Nationals*, FED. ELECTION COMMISSION, (June 23, 2017), <https://www.fec.gov/updates/foreign-nationals> [<https://perma.cc/5UPE-DJV3>]. However, a foreigner may generally volunteer for a campaign as long as they are not compensated. *Id.*

322. Foreign Agents Registration Act of 1938, Amendments, Pub. L. 89-486, sec. 7, § 8, 80 Stat. 244, 248–49; Josh Gerstein, *The Legal Battle that Could Undermine Law at Center of Mueller Probe*, POLITICO (Dec. 8, 2018, 6:40 AM), <https://www.politico.com/story/2018/12/08/the-legal-battle-that-could-undermine-law-at-center-of-mueller-probe-1052217> [<https://perma.cc/N782-6UYE>].

323. 52 U.S.C. § 30121(a) (2018); Federal Election Campaign Act of 1971, Pub. L. 94-283, 90 Stat. 496.

324. 11 C.F.R. § 110.20(h) (2018).

325. IAN VANDEWALKER & LAWRENCE NORDEN, BRENNAN CTR. FOR JUSTICE, *GETTING FOREIGN FUNDS OUT OF AMERICA’S ELECTIONS* 18 (2018), https://www.brennancenter.org/sites/default/files/publications/Getting%20Foreign%20Funds%20Out%20of%20America%27s%20Elections.%20Final_April9.pdf [<https://perma.cc/DC3S-B7TW>].

326. *Id.* at 15; *see also* Lee Fang, *Saudi-Led Oil Lobby Group Financed 2012 Dark Money Attack Ads*, NATION (Nov. 29, 2012), <https://www.thenation.com/article/saudi-led-oil-lobby-group-financed-2012-dark-money-attack-ads> [<https://perma.cc/CM77-7HMR>].

these roundabout avenues of influence, however, because these actors are unlikely to register under the Act given that their actions are already illegal.

Given that most electioneering by foreigners is already illegal under U.S. law, FARA's role in combatting foreign influence in elections is minimal. The Act should focus on this more discreet role. In particular, FARA's requirement that those registered under it report all their campaign contributions³²⁷ can be appropriate in some situations. If a lobbyist has a contract from a foreign government, it would be useful to have the lobbyist report campaign contributions to help monitor whether she may be illicitly routing money from the foreign principal to political campaigns.

This more limited role is particularly appropriate because it is not clear whether 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 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.³²⁸ Although the Justice Department has suggested that covered activity outside the country with a nexus to the United States could require registration under FARA,³²⁹ 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, although there are sowers of foreign disinformation that have the goal of disrupting U.S. democracy,³³⁰ most foreign attempts to influence the opinion or ideas of those in the United States are beneficial or benign. Indeed, the United States has historically greatly benefited from the free exchange

327. For examples of such situations, see 22 U.S.C. § 612(a)(8) (2018).

328. *Id.* § 611(c)(1).

329. Kelner et al., *supra* note 93.

330. For examples of alleged interference, see IRA Indictment, *supra* note 13, at 13–23.

of ideas and opinions across borders, whether related to the abolition³³¹ or suffrage³³² movements, or the writing of the U.S. Constitution.³³³

As this Article has detailed, 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. 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. However, determining what is “nefarious” is tremendously ambiguous and a ripe environment for politicized enforcement.

Some additional background is helpful to understand why, although FARA was initially adopted as a more civil-liberties-friendly way to combat propaganda, this approach has ultimately proved dangerous.³³⁴ Part of the challenge the Justice Department faced during World War II in enforcing FARA was how to identify “nefarious” propaganda and show that those promoting it were doing so on behalf of a foreign source.³³⁵ Harold Lasswell, who would

331. See, e.g., Louis Billington, *British Humanitarians and American Cotton, 1840-1860*, 11 J. AM. STUD. 313, 313 (1977) (describing how transatlantic Quaker networks were vital to the early abolition movement in the United States).

332. See, e.g., Eliza Gray, *How British Suffragettes Radicalized American Women*, TIME (Oct. 23, 2015), <https://time.com/4084759/how-british-suffragettes-radicalized-american-women> [<https://perma.cc/5ELU-ACRY>] (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).

333. See, e.g., Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 194–95 (1984) (tracking the citation count of different European writers in American political writings between 1760 and 1805).

334. See GARY, *supra* note 94, at 195 (discussing how registration and disclosure requirements were seen as “democracy-enhancing techniques” and “led speech-protective liberals to support this form of propaganda control”).

335. 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:

[A]ny oral, visual, graphic, written, pictorial, or other communication or expression . . . which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to 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.

Foreign Agents Registration Act of 1938, Pub. L. No. 77-532, § 1(j), 56 Stat. 248, 250–51 (1942) (codified as amended at 22 U.S.C. §§ 611–612 (2018)).

become one of the great political scientists of his generation,³³⁶ developed what he termed a scientific method to detect “foreign” propaganda that was used in FARA prosecutions in at least four cases.³³⁷ These included the parallel test that compared themes in suspected propaganda with declared propaganda.³³⁸ Under the parallel test, he identified fourteen common themes of Nazi propaganda.³³⁹ 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 virtuous.”³⁴⁰ However, they also included many ideas that nonfascists might also share. For instance, one theme was that the United States and United Kingdom are “internally corrupt,” characterizing the countries as having “political and economic injustice” or “spiritual decay.”³⁴¹ Another theme emphasized that the president of the United States and the prime minister of the United Kingdom were “reprehensible,” describing both leaders as “responsible for suffering.”³⁴²

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 antinuclear propaganda abroad.³⁴³ Even today, the Justice Department has argued that RT TV America parallels the messaging of the Kremlin. In its letter to RT TV America, the Justice Department states

336. See Thomas W. Ennis, *Harold D. Lasswell, Dead at 76; Was Top U.S. Political Scientist*, N.Y. TIMES (Dec. 20, 1978), <https://www.nytimes.com/1978/12/20/archives/harold-d-lasswell-dead-at-76-was-top-us-political-scientist.html> [<https://perma.cc/CSN8-QQAK>] (“From 19:39 [sic] to 1946, Dr. Lasswell was the director of War Communication Research at the Library of Congress.”).

337. See Harold D. Lasswell, *Detection: Propaganda Detection and the Courts*, in LANGUAGE OF POLITICS: STUDIES IN QUANTITATIVE SEMANTICS 177 (Harold D. Lasswell & Saul K. Padover eds., 1949) (noting that Lasswell’s methods were used during the *Bookniga*, *Transocean*, *Auhegan*, and *Pelly* cases during World War II).

338. *Id.* at 177–78. The other four tests were the avowal test—explicit identification with one party in a controversy; the concealed source test—not disclosing that one is relying on one source in a controversy; the consistency test—consistency with declared propaganda; and the source test—whether one source in a controversy is overrelied on. *Id.*

339. *Id.* at 180–86.

340. *Id.* at 182.

341. *Id.* at 180–81.

342. *Id.* at 181–82.

343. DU BOIS, *supra* note 215, at 99 (describing the government’s argument that an agency relationship could be created under FARA when a domestic organization simply held a parallel view as that of a foreign organization).

that “RT’s broadcasts consistently mirror the opinions of the Kremlin.”³⁴⁴ 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.”³⁴⁵ 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 “[o]n important issues for Chinese leadership, WRI’s position appears to closely reflect China’s goals and objectives.”³⁴⁶

Although FARA can be easily politicized, the Act seems ill-suited to fight 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 prosecute them successfully and creating ambiguity about whether they even fall under FARA’s ambit.³⁴⁷

To address these concerns about the propagation of foreign misinformation, FARA’s broad provisions should be either eliminated as related to propaganda or much better targeted at specific groups, such as media organizations clearly produced by foreign governments. 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 as 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.

A law like FARA that casts wide swaths of the media and nonprofit sectors as “foreign agents” does not adequately combat the spread of foreign propaganda in American society and is too likely to be used to attack controversial speech or critics of the government. Just because FARA is a poor tool to address foreign disinformation does

344. RT TV America Letter, *supra* note 248, at 6.

345. *Id.*

346. WRI Letter, *supra* note 237, at 4. Similarly, the Chairman of the House Natural Resources Committee claimed that the “NRDC press releases, blog posts, and reports consistently praise the Chinese government’s environmental initiatives and promote the image of China as a global environmental leader.” NRDC Letter, *supra* note 237, at 3.

347. 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 et al., *supra* note 93.

not mean the government should not take other actions, however. Sensible interventions could include limitations on foreign ownership of broadcast-television networks,³⁴⁸ efforts to improve the public's media literacy,³⁴⁹ appropriate regulation of social media, or broader efforts to improve transparency in all online news.³⁵⁰

B. Reform Strategies

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, particularly lobbying, as well as either eliminating the provisions related to propaganda or ensuring they would only cover entities acting on behalf of foreign governments or political parties. This would 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.³⁵¹ 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 LDA 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 aims of

348. The Communications Act of 1934 allows only 25 percent foreign investment “in a U.S. broadcast, common carrier, or aeronautical fixed or en route radio licensee,” and FCC approval is required for more than 25 percent foreign investment. Brian Weimer & Drew Svor, *FCC Liberalizes Rules for Foreign Investment in U.S. Broadcast Licensees*, FCC L. BLOG (Oct. 10, 2016), <https://www.fclawblog.com/2016/10/articles/fcc/fcc-liberalizes-rules-for-foreign-investment-in-u-s-broadcast-licensees> [<https://perma.cc/7TM8-ZDKJ>].

349. IREX, for example, developed a model called “Learn to Discern” to counter disinformation in Ukraine. *Learn To Discern (L2D) – Media Literacy Training*, IREX, <https://www.irex.org/project/learn-discern-l2d-media-literacy-training> [<https://perma.cc/5A8G-RHPA>].

350. See, e.g., *A Multi-Dimensional Approach to Disinformation: Report of the Independent High Level Group on Fake News and Online Disinformation*, at 5–6 (Mar. 2018) <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation> [<https://perma.cc/4A6G-XJPR>] (follow “Report” hyperlink) (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).

351. See AUSTRAL. PARLIAMENTARY JOINT COMM. ON INTELLIGENCE & SEC., *supra* note 42, at 39–40 (noting that FARA was the only comparable transparency scheme in operation to FITSA).

FARA.³⁵² Similarly, Congress could take additional steps to ensure that FECA’s ban on electioneering activities by foreigners is fully enforced and to close pertinent loopholes in that statute, such as the anonymity of giving through “dark money” groups.³⁵³ The federal Communications Act’s restrictions on foreign ownership could be modified to adapt to new needs and evolving media platforms.³⁵⁴ Additionally, Congress could reexamine the legislative underpinnings of the Committee on Foreign Investment in the United States (“CFIUS”) to ensure that it acts aggressively and appropriately when reviewing the national security implications of foreign investments in the United States.³⁵⁵ 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.

Second, Congress could clarify, and in some cases eliminate, FARA’s vague or overbroad provisions. For example, the definition of “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.³⁵⁶ Similarly, Congress could better tailor the principal–agent relationship in FARA to reflect the Restatement of Agency definition, which requires a principal actually direct and control an agent and that both parties agree to the relationship.³⁵⁷ Additionally, the laundry list

352. See Tom Spulak, Opinion, *America’s Lobbying Laws Are Too Complex—Fixing FARA Won’t Be Easy*, HILL (Nov. 7, 2017, 4:00 PM), <https://thehill.com/opinion/white-house/359131-american-lobbying-laws-are-too-complex-fixing-fara-wont-be-easy> [https://perma.cc/9PXS-RQK9] (arguing for changing the LDA to require lobbyists of foreign entities to disclose more information).

353. See, e.g., DISCLOSE Act of 2017, S. 1585, 115th Cong. § 101 (proposing an amendment to FECA to ban campaign contributions and expenditures by corporations that are controlled, influenced, or owned by foreign nationals).

354. See Communications Act of 1934, Pub. L. No. 73-416, § 310, 48 Stat. 1064, 1086 (codified as amended at 47 U.S.C. § 310 (2018)) (listing the Communications Act’s foreign ownership restrictions).

355. See JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENTS IN THE UNITED STATES (Aug. 2019) (describing the legislative authority for CFIUS and general issues that have arisen surrounding it).

356. 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, at 73 (1993) (describing how S. 349 would have redefined the term “foreign principal” to “exclude entities other than foreign governments and political parties”).

357. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006); see also 18 U.S.C. § 951 (2018) (defining “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”).

of covered activities in the current Act, including “soliciting” or “disbursing” funds or acting as an “information-service employee,”³⁵⁸ could be removed or more narrowly defined, leaving only activities directly related to either lobbying or electioneering. FARA could also be amended to change both the name of the Act, and the label for registering under it, to something less stigmatizing than “foreign agent.”³⁵⁹

Third, Congress could create additional or broader exemptions. For example, when Australia drew on FARA to draft FITS Act, the Australian Parliament created a new limited exemption for charities, as well as a broad exemption for humanitarian activity and for public officials.³⁶⁰ FARA could similarly 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 are not controlled by foreign governments or to exempt public officials, as long as they are not acting as “agents” as defined under the Restatement of Agency.

Reforms like these would not only make FARA less likely to be abused but also would reduce confusion and uncertainty, thus increasing the likelihood that the Act will be enforced in a systematic way against types of foreign influence that do require attention. Although Congress may adopt a path different than those articulated here, whatever approach is adopted should recognize the high costs of FARA’s current broad language, have clearly defined goals, and be tailored to a legitimate problem.

CONCLUSION

FARA’s current language creates a significant danger of politicized enforcement. In a globalized world, the Act’s broad

358. *See supra* Part II.B.

359. For example, in 1991, a bill was introduced in Congress to 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. Subcomm. on Admin. L. & Governmental Relations of the H. Judiciary Comm.*, 102d Cong. 29 (1991) (Statement of Dan Glickman, Representative from Kansas).

360. *Foreign Influence Transparency Scheme Act 2018* (Austl.) pts 2.24, 2.25A, 2.29C. A limited nonprofit exemption under FARA has been previously introduced in Congress, but it never passed. For example, Representative 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, 102d Cong. § 1(a)(1)(B) (1991).

definition of who is a “foreign agent” captures numerous nonprofits, media organizations, and public officials. By covering so many actors with its sweeping provisions, FARA provides the government with too much discretion to target disfavored or dissident voices by imposing burdensome registration requirements and labeling them “foreign agents,” thereby marking them as less trustworthy, independent, and legitimate.

When there is evidence of foreign interference in U.S. democratic processes, it is easy to overreact and demand heavy regulation of foreign voices. However, 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 that help address the world’s many challenges. Amidst concern about “foreign influence” in the United States, it is important to better target FARA against foreign influence that is a true threat to democracy. Such a focused transparency approach both protects U.S. civil society and public officials from politicized attack and sets a positive example in a world where similar laws are being used to undermine democracy and civic engagement.