



THE INHERENTLY POLITICAL NATURE OF THE
FOREIGN AGENTS REGISTRATION ACT: A STATUTE
IN NEED OF IMPROVEMENT

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“Against the insidious wiles of foreign influence (I conjure you to believe me, fellow citizens) the jealousy of a free people ought to be *constantly* awake, since history and experience prove that foreign influence is one of the most baneful foes of republican government.”¹

“Incontrovertible evidence has been submitted to prove that there are many persons in the United States representing foreign governments or foreign political groups, who are supplied by such foreign agencies with funds and other materials to foster un-American activities, and to influence the external and internal policies of this country, thereby violating both the letter and the spirit of international law, as we as the democratic basis of our own American institutions of government.”²

I. INTRODUCTION

The 75th Congress enacted the Foreign Agents Registration Act (“FARA”) on June 8, 1938, to promote transparency with respect to foreign propaganda circulating within the United States.³ Subsequent amendments altered its breadth and application to focus on transparency of lobbying activities undertaken on behalf of a foreign client.⁴ Since its enactment, FARA has spanned various political climates and Congress substantively amended FARA three times.⁵ As a result, the Department of Justice (“DOJ”) has applied FARA unevenly. Because of FARA’s broad scope and lack of clarity as to whom the statute applies, a large number of actors and entities could fall subject to FARA’s requirements.⁶

The FARA Unit of the Counterintelligence and Export Control Section in the DOJ’s National Security Division states that the

¹ UNITED STATES SENATE HISTORICAL OFFICE, WASHINGTON’S FAREWELL ADDRESS TO THE PEOPLE OF THE UNITED STATES, S. Pub. 115-5 (2017) at 20-21.

² H.R. REP. NO. 1381, at 2-3 (1937).

³ H.R. 1591, 75-583, 52 Stat. 631 (1938).

⁴ See Registration Statement, Pub. L. No. 75-583, ch.11, 52 Stat. 631 (1938) (codified as amended at 22 U.S.C. §§ 612 (2018)).

⁵ JACOB STRAUS, CONG. RSCH. SERV., TE10072, ENHANCING THE FOREIGN AGENTS REGISTRATION ACT OF 1938 4-5 (2022).

⁶ 22 U.S.C. § 611 (2022).

Unit's main goal is "encouraging voluntary compliance to all parties to which FARA would be applicable."⁷ The critical question is: to whom does FARA apply? Unfortunately, the answer is not so easy. FARA is a broad and largely vague statute that contains the potential to apply to a broad scope of actors. FARA's scope is restricted through several exemptions and situations when a "principal-agent" nexus is established between the potential FARA registrant and a "foreign principal."⁸ FARA has a history of being unevenly enforced within different political climates—or sometimes not being enforced—but today, FARA criminal and civil prosecutions are thriving.⁹ This Comment asks how FARA arrived to where it is today and what the future of FARA's enforcement will entail.

This Comment sets out to first explain how FARA's enforcement arrived to where it is today. Section II of this Comment begins by tracing FARA's legislative history. This part addresses the critical discussions on the House floor and the notorious Committee on Un-American Activities, which initially recommended FARA, and the evolution of FARA through three phases of amendments that changed FARA's operation in several critical ways that resulted in the statutes in place today. Next, Section II of this Comment continues by breaking down the statute's language by discussing various requirements and definitions—to whom does FARA apply and in what circumstances? Section II briefly addresses the numerous exemptions to the FARA's registration requirements and to whom they are applicable. Section II concludes by discussing the tremendous amount of prosecutorial discretion that enforcers of FARA possess, noting some of the trends and phases of FARA criminal and civil prosecutions up until today, and analyzing how that affects the number of registrants under FARA each year.

⁷ U.S. Dep't of Just., Just. Manual, Crim. Res. Manual § 2062, <https://www.justice.gov/archives/usam/criminal-resource-manual-2062-foreign-agents-registration-act-enforcement> (last visited Mar. 22, 2023) ("The cornerstone of the Registration Unit's enforcement efforts is encouraging voluntary compliance.").

⁸ 22 U.S.C. § 611; see *infra* Section II.D.

⁹ *Criminal Enforcement Summaries*, CAPLIN & DRYSDALE, <https://fara.us/criminal-enforcement-summaries/> (last visited Mar. 22, 2023).

Section III discusses three civil cases in various procedural postures and with different defenses and the strategies pursued by those being asked to register under FARA. These cases illustrate other countries being targeted at different moments in American history based on the political climate at the time of prosecution.¹⁰ Section III discusses the political contexts of the cases, what triggered these investigations, what evidence and arguments were required to sustain compliance with FARA, and what defenses and objections defendants attempted to raise to avoid having to comply with FARA.

This Comment argues that FARA is unevenly applied based on the political context at the time of FARA's enforcement, which the statute's broad and inherently political language enables prosecutors to do with little to no oversight. This Comment discusses the current proposed amendments Congress is considering and the value they would add to FARA's enforcement and compliance. This Comment goes on to discuss other proposals that may help further an evenhanded and depoliticized FARA enforcement mechanism, including incorporation of an oversight mechanism to eradicate political and historical-based targeting. Finally, this Comment concludes with what the future of FARA enforcement will look like, given its trajectory thus far.

II. BACKGROUND

A. *Requirements & Definitions*

Simply put, FARA requires certain agents of foreign principals to register with the federal government if they are engaging in certain activities.¹¹ To understand FARA, one must first understand the definition of "foreign principal" encompasses foreign governments, foreign political parties, any organization organized under a foreign country's laws or has their principal place of business in a foreign country, and any person outside of the United States, unless they are a domiciled U.S. citizen.¹² This definition casts a wide

¹⁰ *Id.*

¹¹ Foreign Agents Registration Act, U.S. DEP'T OF JUST., <https://www.justice.gov/nsd-fara> (last visited April 20, 2023); 22 U.S.C. §§ 611-12.

¹² See 22 U.S.C. § 611(b) (2018).

net over many different entities. Under FARA, these entities would include “corporations, nonprofits, foundations, media organizations, and most persons based outside of the United States.”¹³

To be an “agent of a foreign principal,” an individual within the United States is either (1) engaging in “political activities”; (2) collecting, soliciting, or disbursing things of value; (3) acting as a “public-relations counsel, publicity agent, information-service employee[,] or political consultant for or in the interests of [the subject] foreign principal”; or (4) representing “the interests of [the subject] foreign principal before any agency or [a United States Government] official.”¹⁴ While succinctly written in the statute as “political activities,” such definition covers a broad range of behavior. Political activities are 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 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.¹⁵

This expansive definition does not simply cover lobbying, rather it engulfs most advocacy efforts by any agents of foreign principals seeking to engage with the public.¹⁶

FARA requires that an agent or agents of a foreign principal participating in any of the covered activities and who do not qualify for any of the enumerated exemptions register under oath with the Justice Department.¹⁷ Agents of a foreign principal must comply with the disclosure requirements, which include providing a detailed and updated disclosure statement once every six months to the Justice

¹³ Nick Robinson, “Foreign Agents” in an Interconnected World: FARA and the Weaponization of Transparency, 69 DUKE L.J. 1076, 1097 (2020).

¹⁴ 22 U.S.C. § 611.

¹⁵ Id. at § 611(o) (emphasis added).

¹⁶ Robinson, *supra* note 13 at 1097-98.

¹⁷ 22 U.S.C. § 612(a) (2011).

Department as to which foreign principal they are employed by and for what purposes.¹⁸ Additionally, the Attorney General may request a “conspicuous statement” that will apply to any materials distributed by the agent on behalf of the foreign principal, which the Attorney General may define.¹⁹ If a foreign agent fails to register or makes false statements or omissions related to registration, the foreign agent may be subject to a punishment of up to \$10,000 or up to five years in jail.²⁰

The other definitions contained within what makes an agent of a foreign principal under FARA are just as expansive. A “political consultant” includes “any person who engages in informing or advising any other person with reference to the domestic or foreign policies of the United States or the political or public interest, policies, or relations of a foreign country or of a foreign political party.”²¹ A “publicity agent” includes “any person who engages directly or indirectly in the publication or dissemination of oral, visual, graphic, written, or pictorial information or matter of any kind”²² An “information-services employee” includes persons “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

¹⁸ See 22 U.S.C. § 612(a)(3). “A comprehensive statement of the nature of registrant’s business; a complete list of registrant’s employees and a statement of the nature of the work of each; the name and address of every foreign principal for whom the registrant is acting, assuming or purporting to act or has agreed to act; the character of the business or other activities of every such foreign principal, and, if any such foreign principal be other than a natural person, a statement of the ownership and control of each; and the extent, if any, to which each such foreign principal is supervised, directed, owned, controlled, financed, or subsidized, in whole or in part, by any government of a foreign country or foreign political party, or by any other foreign principal.” *Id.*

¹⁹ 22 U.S.C. § 614(b). “It shall be unlawful for any person within the United States who is an agent of a foreign principal and required to register under the provisions of this subchapter to transmit . . . any informational materials for or in the interests of such foreign principal without placing in such informational materials a conspicuous statement that the materials are distributed by the agent on behalf of the foreign principal The Attorney General may by rule define what constitutes a conspicuous statement for the purposes of this subsection.”

²⁰ 22 U.S.C. § 618(a).

²¹ 22 U.S.C. § 611(p).

²² *Id.* § 611(h).

any country other than the United States”²³ These broad definitions provide the government latitude within a wide scope to apply to any number of people who could fit these definitions, so long as the activity is “for or in the interests of a foreign principle.”²⁴

The level of control a foreign principal must have over an agent to cover an activity “for or in the interests of a foreign principal” remains undefined and unclear.²⁵ The original enactment of FARA had the principal-agent relationship defined solely through employment,²⁶ but the 1966 Amendments blurred this distinction.

B. Legislative History

FARA was born out of the recommendation of the Special Committee on Un-American Activities during the 73rd Congress in 1933.²⁷ This Committee was chaired by Representative John McCormack of Massachusetts, who later brought this recommendation to life as a bill.²⁸ Representative McCormack’s recommendation was one of four recommendations on this topic to emerge from this Committee.²⁹ The Committee conducted an investigation and held hearings that resulted in a final report that concluded persons acting on behalf of foreign governments and

²³ *Id.* § 611(i).

²⁴ *Id.* § 611(c)(1)(i)-(iii).

²⁵ See Karlie D. Schafer, *The Foreign Agents Registration Act in the Age of the Russian Federation: Combating Interference by Russian Media in the United States*, 25 Sw. J. INT’L L. 447, 450 (2019).

²⁶ See Enhancing the Foreign Agents Registration Act of 1938, Pub. L. No. 75-583, 52 Stat. 631.

²⁷ See H.R. REP. NO. 1381, at 1 (1937) (“This bill was introduced as a result of recommendations of the special committee that was appointed in the Seventy-third Congress to investigate un-American activities in the United States. A very careful study was made of the organizations in this country which organizations aimed arbitrarily to group certain American citizens and persons in the United States, and to inculcate such principles and teachings in these persons as to influence the internal and external political policies of our country.”). See generally H.R. RES. 198, 73rd Cong. (1934) (stating that this Committee was created during the rise of Nazism in 1930s Germany and was partially tasked with investigating “the extent, character, and objects of Nazi propaganda activities in the United States”).

²⁸ H.R. REP. NO. 153, at 9 (1935).

²⁹ *Id.*

foreign political parties were spreading fascist and communist propaganda throughout the United States.³⁰

Subsequently, a bill was proposed. Representative McCormick introduced H.R. 1591 in the House of Representatives on January 5, 1937, to the 75th Congress.³¹ The purpose of the bill was to promote transparency for the American people and inform them of who in the United States was representing foreign interests and “[a]ll that is required is to label the sources of pernicious propaganda.”³² The bill was not meant to shame or offend any person, group, or nationality. Anyone providing “private, nonpolitical, financial, mercantile, commercial, or other activity in furtherance of bona-fide trade or commerce of a foreign principal”³³ would not be required to register under the bill. The writers of the bill did not intend to infringe on constitutional rights, such as freedom of speech and the right to a free press.³⁴ And while the writers did not prohibit such propaganda under the bill, Congress felt that “the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda.”³⁵

Congress debated the bill right before the height of the McCarthy era and before the United States fully emerged into World War II.³⁶ During this time, Congress expressed great concern about Nazi Germany influencing American politics from within America and caused little objection from any of the Representatives because of this accusatory and tense political climate.³⁷

³⁰ H.R. REP. NO. 74-153, at 1-2 (1935).

³¹ H.R. 1591, 75th Cong. (1937).

³² H.R. REP. NO. 1381, at 2 (1937).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ To Require the Registration of Certain Persons Employed by Agencies to Disseminate Propaganda in the United States and for Other Purposes: Hearings on H.R. 1591 Before the H. Comm. on the Judiciary, 75th Cong. 4 (1937) (statement of Representative McCormick). “I say Nazi, not German, because the Nazi party is in control of the German government at the present time. That is a problem for the German people. But in America it is a problem for us, as to whether or not those in control are doing anything in this country which violates either international law or the spirit, and intent of our institutions of government. We showed that they were

The Chairman: What you propose to do is to give publicity so that the people may know persons who are engaged in this country by a foreign agent.

Mr. McCormack: Exactly. That is the substance of the Bill. They simply must register.

The Chairman: And what you require of them is that they shall register.

Mr. McCormack: That is correct. And that is all there is to this Bill.³⁸

When asked by Representative Hancock about how many people this bill would affect once enacted, Representative McCormack responded that there existed a list of 400 suspected foreign agents at the time, but there probably was more than that.³⁹ The House passed H.R. 1591 on in August 1937.⁴⁰ The Senate then passed a different version of the bill in May 1938.⁴¹ Congress reconciled the differences between their two bills and President Franklin D. Roosevelt signed FARA into law on June 9, 1938.⁴²

C. Amendments

Before Congress had even signed off on the original FARA, a second Committee on Un-American Activities convened to continue the previous investigations and recommended how to strengthen FARA after its enactment.⁴³ Then, one year after enactment of FARA,

using tactics in America, not for the purpose of obtaining control of government, but for the purpose of influencing the policies, external and internal, of this country, through group action. They were employing the same methods that they had employed in Germany for the purpose of obtaining control of the government over there.” *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See JACOB R. STRAUS, CONG. RSCH. SERV., R46435, FOREIGN AGENTS REGISTRATION ACT (FARA): BACKGROUND AND ISSUES FOR CONGRESS 5 (2020).

⁴¹ *Id.*

⁴² *Id.* at 1.

⁴³ See INVENTORY OF RECORDS OF THE SPECIAL COMMITTEE ON UN-AMERICAN ACTIVITIES 3 (1938-45) (elaborating on “investigations of un-American activities in the United States, domestic diffusion of such propaganda, and all other questions

Congress amended FARA to incorporate technical changes, including broadening the definition of “foreign principal” to include domestic entities funded by foreign principals (i.e., no employment or contractual relationship have to exist for FARA to apply).⁴⁴ Following the initial technical amendments, were several significant amendments that changed the scope and power of FARA during the years 1942, 1966, and 1995.⁴⁵

In 1941, in efforts to protect national defense and security and foreign relations, a representative introduced H.R. 6269 to amend FARA to require public disclosure for *all* persons engaged in “propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals . . .”⁴⁶ By the time these amendments were proposed, World War II had begun.⁴⁷ Despite passing the legislature, President Roosevelt vetoed H.R. 6269 over concerns of the effect of the H.R. 6269 amendment on vital wartime partnerships with the 25 united nations and other nations with whom the United States was actively cooperating to ensure national defense.⁴⁸ President Roosevelt was clear in his veto message that now was not the time to stigmatize foreign allies. In response to President Roosevelt’s veto, Congress passed a new amendment to FARA that created an exemption for specific groups of individuals including but not limited to, “accredit diplomats or consular officers,” and “agents of countries deemed vital to the defense

relating thereto”); JACOB R. STRAUS, CONG. RSCH. SERV., R46435, FOREIGN AGENTS REGISTRATION ACT (FARA): BACKGROUND AND ISSUES FOR CONGRESS 6 (2020).

⁴⁴ JACOB R. STRAUS, CONG. RSCH. SERV., R46435, FOREIGN AGENTS REGISTRATION ACT (FARA): BACKGROUND AND ISSUES FOR CONGRESS 5 (2020); H.R. REP. NO. 711, at 1-2 (1939).

⁴⁵ *Statutory Chronology*, CAPLIN & DRYSDALE, <https://www.fara.us/resources-statutory> (last visited April 3, 2023).

⁴⁶ JACOB R. STRAUS, CONG. RSCH. SERV., R46435, FOREIGN AGENTS REGISTRATION ACT (FARA): BACKGROUND AND ISSUES FOR CONGRESS 7 (2020).

⁴⁷ See *id.* H.R. 6269 passed in January 1942 and World War II began in September 1939. *Id.*

⁴⁸ *Id.* at 7.

of the U.S.”⁴⁹ The revised amendments to FARA quelled Roosevelt’s concerns and, on April 29, 1942, he signed the bill into law.⁵⁰

Decades after World War II, in 1966, Congress acted to shift the focus of FARA, via amendment, toward advocacy efforts (i.e., foreign lobbying) and away from curbing the spread of propaganda.⁵¹ This was in response to foreign governments engaging in lobbying efforts relating to U.S. Amendments.⁵² The 1966 amendments expanded definitions (“foreign principal” and “agent of a foreign principal”) and added new definitions (“political activities” and “political consultant”); clarified exemptions for both individuals and companies; clarified guidance regarding the registration timeline, required content disclosure in registration and disclosure statements, including any campaign contributions; changed the requirements for labeling and filing political propaganda; and revised the Attorney General’s role in the process.⁵³ Unlike the 1942 amendments, the 1966 amendments did not suffer a presidential veto; it was signed into law by President Johnson on June 30, 1966.⁵⁴

Four additional FARA amendments were enacted in 1995 through the Lobbying Disclosure Act (“LDA”).⁵⁵ LDA, which is current law, has a primary focus of domestic lobbying. However,

⁴⁹ *Id.* at 8. The revised amendments also expanded the definition of “persons who are considered to be foreign principals and foreign agents. *Id.* Further the amendments provided a definition of “political propaganda”; expanded requirements for initial registration statements and supplemental disclosures; created requirements for submission of propaganda materials to government entities and preservation of records for public inspection; and established penalties for noncompliance. JACOB R. STRAUS, CONG. RSCH. SERV., R46435, FOREIGN AGENTS REGISTRATION ACT (FARA): BACKGROUND AND ISSUES FOR CONGRESS 8 (2020).

⁵⁰ *Id.*

⁵¹ JACOB R. STRAUS, CONG. RSCH. SERV., R46435, FOREIGN AGENTS REGISTRATION ACT (FARA): BACKGROUND AND ISSUES FOR CONGRESS 9 (2020).

⁵² *Id.* (noting lobbying by foreign governments while Congress considered the Sugar Act Amendments of 1962). On the Senate floor, Senator Fulbright explained, “[t]he place of the old foreign agent has been taken by the professional lobbyists and public opinion manipulators whose object is not [to] subvert the Government but to influence its policies to the satisfaction of his client.” *Id.* (citing 111 CONG. REC. 6984 (1965) (statement of Sen. James Fulbright)).

⁵³ *Id.* at 10.

⁵⁴ *Id.* at 9.

⁵⁵ *Id.* at 10-11.

Congress recognized four amendments to FARA.⁵⁶ First, FARA applies only to agents of foreign governments and political parties, whereas “[l]obbyists of foreign corporations, partnerships, associations and individuals and individuals” would need to register under LDA.⁵⁷ The second and third amendments eliminate the “U.S. subsidiary exemption” and narrow the “lawyers’ exemption.”⁵⁸ Finally, the LDA replaces the term “political propaganda” with the less descriptive term, “informational materials.”⁵⁹

D. Exemptions to Registration

Registration under FARA is based on self-determination of applicability.⁶⁰ For example, if a potential agent thinks they may qualify to register under FARA and subsequently determines that they qualify for an exemption, the agent is not required to register with the DOJ.⁶¹ There are multiple exemptions to the self-reporting requirement.⁶² Foreign governments with official representatives in the United States may qualify for an exemption if they are recognized by the Department of State as diplomatic staff.⁶³ If a foreign principal is a government of a foreign country, any person of the foreign principal is exempt if the foreign country is deemed to be, in the words of President Roosevelt, “vital to the defense of the United States” along with other requirements.⁶⁴ However, such exemption may be terminated by the Attorney General with the approval of the Secretary of State.⁶⁵ A commercial exemption that applies to agents of foreign principals engaged in “private and nonpolitical” activities that further

⁵⁶ *Id.* at 11.

⁵⁷ JACOB R. STRAUS, CONG. RSCH. SERV., R46435, FOREIGN AGENTS REGISTRATION ACT (FARA): BACKGROUND AND ISSUES FOR CONGRESS 11 (2020).

⁵⁸ 22 U.S.C. § 613(g).

⁵⁹ H.R. REP. NO. 104-339, at 21.

⁶⁰ 22 U.S.C. § 613.

⁶¹ *Id.*

⁶² *Id.* The Congressional Research Service outlined these exemptions to FARA. *Id.* at 14. Anyone who thinks they may qualify for an exemption may confirm their exemption by consulting legal counsel or soliciting the free advice of the DOJ. See Department of Justice, *Advisory Opinions* (Nov. 8, 2021, 9:44PM), <https://www.justice.gov/nsd-fara/advisory-opinions>.

⁶³ *Id.* § 613(a)-(c).

⁶⁴ *Id.* § 613(f).

⁶⁵ *Id.*

“the bona fide trade or commerce of [a] foreign principal.”⁶⁶ The DOJ subsequently clarified that if a foreign principal is owned or controlled by a foreign government, the DOJ would consider these activities “private” so long as such activities do not “directly promote the public or political interest of [a] foreign government.”⁶⁷ FARA provides an exemption for persons engaged in “bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts”⁶⁸ so long as these persons do not engage in “political activities” as defined under the FARA⁶⁹ and persons “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.”⁷⁰ Partial exemptions exist for lobbyists already registered under the LDA for the same lobbying activity⁷¹ and lawyers’ communications with agency officials regarding judicial proceedings, law enforcement proceedings, and official agency proceedings.⁷² However, if the lobbyist’s foreign principal is a foreign government or political party or if the principal beneficiary of their lobbying services is a foreign government or political party, they must still register under FARA.⁷³ Additionally, if a lawyers’ communications attempting to “influence” officials outside any of the three enumerated official proceedings, the exemption does not apply.⁷⁴ Finally, an exemption for “other activities not serving predominately a foreign interest.”⁷⁵ This exemption can provide the widest scope but is the most likely to be misinterpreted.⁷⁶ Scholars after reviewing FARA’s legislative history and statutory interpretation have said “§ 613(d)(2) today could be interpreted to mean that commercial actors do not need to register if they engage in public or

⁶⁶ *Id.* § 613(d).

⁶⁷ 28 C.F.R. § 5.304(b) (2023).

⁶⁸ 22 U.S.C. § 613(e).

⁶⁹ 28 C.F.R. § 5.304(d).

⁷⁰ 22 U.S.C. § 613(d).

⁷¹ 22 U.S.C. § 613(h).

⁷² *See* 22 U.S.C. § 613(g).

⁷³ *Id.*

⁷⁴ *See id.*

⁷⁵ *Id.* at § 613(d).

⁷⁶ *See id.*

political activity as long as that activity does not directly promote the interest of a foreign government or political party.⁷⁷

E. Prosecutorial Discretion

History has often dictated FARA's various enforcement strategies. The first two enforcement periods took place during the beginning of the Cold War and World War II.⁷⁸ Between these times, the DOJ chose to primarily prosecute the principal-agent relationships under countries either dominated by communism or dictatorships.⁷⁹ The third enforcement period took a civil, rather than a criminal, approach to prosecuting cases, likely because of the change in the political climate.⁸⁰ The fourth and current enforcement period focused on Russia primarily due to its confirmed interference in the United States 2016 presidential election.⁸¹ The countries and their representatives operating within the United States who are targeted during these different enforcement periods relate directly to the political climate at the time of enforcement.⁸²

The DOJ brought the first FARA case in history in 1939 against three Soviet propagandists.⁸³ During the World War II era (1938-1945), there were 19 criminal cases brought against 61 individuals and organizations, resulting in 36 convictions, 3 hung juries, and 13 dropped charges.⁸⁴ Of the cases brought during this period, 3 involved principal-agent relationships with the Soviet government, and 11 involved principal-agent relationships with Nazi Germany's government.⁸⁵ At this time, the Allied Forces were at war with Nazi Germany, both physically against combat forces and

⁷⁷ Robinson, *supra* note 13, at 1109.

⁷⁸ See CAPLIN & DRYSDALE, *supra* note 9.

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ See Matthew Sanderson, *A History of the FARA Unit* (May 5, 2020), <https://www.fara.us/a-history-of-the-fara-unit>.

⁸² See *id.*

⁸³ See CAPLIN & DRYSDALE, *supra* note 9.

⁸⁴ See *id.*

⁸⁵ See *id.*

ideologically against Nazi propaganda and ideology spreading in America.⁸⁶

During FARA's second enforcement period post-World War II and pre-1966 amendments (1946-1966), 12 criminal cases were brought against 27 individuals and organizations, resulting in 13 convictions, one acquittal, 11 dropped charges, one granted motion to dismiss, and one charged individual fleeing and never being caught.⁸⁷ Of the principal-agent relationship charges brought by the DOJ during this period, three were against individuals working with the Soviet Union, three were against individuals working with the Cuban government (the Cuban Missile Crisis took place in 1962), three were against individuals working with the Dominican Republic (under a dictatorship at the time), and one was against an individual working with the Haitian government (also under a dictatorship at the time).⁸⁸

During FARA's third enforcement period (1967-1987), the DOJ only brought two criminal cases.⁸⁹ One was time-barred by the statute of limitations, and the other defendant pled out.⁹⁰ Still, the DOJ brought significantly more civil actions against defendants than it had in the past two enforcement periods.⁹¹ The cases during this period applied to a variety of countries acting as principals.⁹² Most of these civil cases resulted in settlement agreements, injunctions, or consent decrees that required the agent to register under FARA, properly label their material disseminated and covered under FARA, and in some cases meet increased disclosure requirements.⁹³

Lastly, from 1988 until 2020, the “[DOJ] brought 13 criminal FARA cases against 14 organizations and individuals,” resulting in 13

⁸⁶ U.S. HOLOCAUST MUSEUM, *How the United States Unmasked Foreign Agents in Our Midst* (May 18, 2019), <https://us-holocaust-museum.medium.com/how-the-united-states-unmasked-foreign-agents-in-our-midst-fa16bdf7e483>.

⁸⁷ *Id.*

⁸⁸ See CAPLIN & DRYSDALE, *supra* note 9.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *id.*

⁹² See *id.*

⁹³ *Civil Enforcement*, CAPLIN & DRYSDALE, <https://fara.us/resources-civil> (last visited Mar. 25, 2023).

convictions.⁹⁴ Only one conviction was overturned, and the DOJ eventually dropped the FARA charges.⁹⁵ Notably, all of the criminal FARA cases during this period involved lobbyists.⁹⁶ Keeping in mind that Congress passed the LDA in 1995, Congress and the DOJ shifted its focus from targeting propaganda and advertisements to targeting lobbying often done by Americans on behalf of foreign governments.⁹⁷ The DOJ prosecuted and convicted several of former President Trump's political fundraisers, campaigners, and associates under FARA, including Paul Manafort, Richard Gates, Imaad Zuberi, and Elliott Broidy, between 2018 and 2020.⁹⁸ These prosecutions came from referrals from Robert Mueller's thorough investigation into Russian interference in the 2016 United States presidential election.⁹⁹

Additionally, these prosecutions should have put lobbyists who failed to register according to FARA on notice. These prosecutions breathed more life into FARA, giving FARA more life than its previous 81 years since becoming law. The *Manafort* case sent lobbyists a message that FARA had some teeth.¹⁰⁰ Notably, after

⁹⁴ CAPLIN & DRYSDALE, *supra* note 9.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ CAPLIN & DRYSDALE, *supra* note 9. Manafort, former Trump campaign chairman, was eventually pardoned by President Trump. *Id.* Gates was sentenced to 45 days in jail and 3 years probation due to his role as a cooperating witness in other cases." *Id.*; Spencer S. Hsu, et al., *Rick Gates Sentences to 45 Days in Jail, 3 Years Probation for Conspiracy and Lying to FBI in Mueller Probe*, WASH. POST (Dec. 17, 2019), https://www.washingtonpost.com/local/legal-issues/rick-gates-faces-sentencing-for-conspiracy-and-lying-to-fbi-in-mueller-probe/2019/12/16/8e0aa3ac-2033-11ea-a153-dce4b94e4249_story.html. Zuberi was sentenced to 12 years in prison for committing crimes, including contributing \$900,000 to President Trump's 2017 inaugural committee, and violating FARA. CAPLIN & DRYSDALE, *supra* note 9; *Trump Administration: 2017 Inauguration Donors*, OPEN SECRETS (Nov. 8, 2021, 9:37PM), <https://www.opensecrets.org/trump/inauguration-donors>. Broidy was pardoned by President Trump despite being scheduled to be sentenced. CAPLIN & DRYSDALE, *supra* note 9; Lachlan Markay, *Trump Pardons Former GOP Fundraiser Elliott Broidy*, AXIOS (Jan. 20, 2021), <https://www.axios.com/2021/01/20/trump-elliott-broidy-pardon>.

⁹⁹ See MUELLER, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 182-183 (2019).

¹⁰⁰ See Sharon LaFraniere, *Manafort Case Puts New Scrutiny on Foreign Lobbying Law's Shortcomings*, N.Y. TIMES (Nov. 8, 2021, 9:34 PM),

Manafort, the number of new FARA registrations jumped 50% from the previous year's filings.¹⁰¹ By way of background, the number of total FARA registrants decreased from over 2000 in 1993 to less than 1500 in 1995 following the passage of LDA and creation of the commercial exemption, also known as the "LDA exemption," to FARA.¹⁰² However, the LDA exemption does not account for the increase in FARA registrants today because of the 2016 investigations by Robert Mueller.

History shows that the enforcers of FARA consider the political and historical climate in which the law is being prosecuted.¹⁰³ Different climates exist where FARA was either dormant or very much alive.¹⁰⁴ A variety of civil and criminal tools exist for prosecutors to apply so all potential agents to whom FARA is applicable can ultimately register with the DOJ.¹⁰⁵ In all FARA cases, there is a political undertone relating to why the case was brought in the first place lending credence to the argument that FARA enforcement is somewhat unpredictable and unevenly applied.

II. FARA CHALLENGES

A. *An Inherently Political Statute*

The DOJ has used the "publicity agent" in enforcement of FARA.¹⁰⁶ The *Peace Information Center* case explores the constitutional challenges raised by the defendants, where the court

<https://www.nytimes.com/2018/09/13/us/politics/paul-manafort-fara-foreign-lobbying-law.html>.

¹⁰¹ *See id.*

¹⁰² Off. of the Inspector Gen., Dep't of Just., Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act 5 (2016), <https://oig.justice.gov/reports/2016/a1624.pdf>.

¹⁰³ *See* CAPLIN & DRYSDALE, *supra* note 9.

¹⁰⁴ *Id.*

¹⁰⁵ *The Foreign Agents Registration Act (FARA): A Guide for The Perplexed*, COVINGTON (Jan. 31, 2023), <https://www.cov.com/en/news-and-insights/insights/2018/01/the-foreign-agents-registration-act-fara>.

¹⁰⁶ 22 U.S.C. § 611(c)(ii) ("[A]cts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal.").

determined how and why FARA is constitutional.¹⁰⁷ The *Irish People* case applies an “all the circumstances” approach to determine the principal-agent relationship between the parties.¹⁰⁸ The *RM Broadcasting* case questioned a contractual agreement between the parties and what FARA required from each party.¹⁰⁹ *RM Broadcasting* discusses how prosecutors use selective prosecution to selectively apply FARA to a defendant. Like *RM Broadcasting*, the U.S. District Court for the District of Columbia’s recent opinion in *Michel* describes how the selective prosecution defense is difficult for defendants to produce sufficient evidence to overcome this substantial burden.¹¹⁰

In *United States v. Peace Information Center*, the DOJ indicted the Peace Information Center for failing to register as an agent of a foreign principal under FARA.¹¹¹ The defendants raised several constitutional challenges to the statute under the First and Fifth Amendments. The first challenge arose under the First Amendment, with the defendant claiming that the statute was invalid.¹¹² The Supreme Court turned to Congress’s legislative purpose and intent at the time that Congress debated FARA to determine if the statute’s subject matter was within the legislative powers of Congress and if the statute transcended any limitation on exercising these powers.¹¹³ The Court concluded that Congress possessed broad authority to legislate on the subject matter of foreign relations.¹¹⁴ The Court went on to note that the federal government has not only the authority to regulate relations with foreign countries but also the broad power to prohibit any interference with external affairs, which includes regulating

¹⁰⁷ See *United States v. Peace Info. Ctr.*, 97 F. Supp. 255 (D.D.C. 1951).

¹⁰⁸ See *Att’y Gen. of United States v. Irish People, Inc.*, 595 F. Supp. 114, 116 (D.D.C. 1984).

¹⁰⁹ See *RM Broad., LLC v. United States Dep’t of Just.*, 379 F. Supp. 3d 1256 (S.D. Fla. 2019).

¹¹⁰ See *United States v. Michel*, No. 19-148-1, 2022 WL 4182342, at *6 (D.D.C. Sept. 13, 2022).

¹¹¹ *Peace Info. Ctr.*, 97 F. Supp. at 258.

¹¹² *Id.* at 262.

¹¹³ See *id.* at 258-59.

¹¹⁴ *Id.* at 259-60 (“It is an inherent power that came into being before the adoption of the Constitution and now exists outside of the fundamental instrument . . . [t]his doctrine was developed and approved by the Supreme Court in . . . *United States v. Curtiss-Wright Export Corp.*”).

relations between persons in the United States and foreign countries if the relationship is intended to influence that foreign country's relationship with the United States.¹¹⁵

Also, the court highlighted that Congress has the power to legislate on national defense due to its implied and enumerated powers found in the Constitution.¹¹⁶

The government has the power of self-preservation. It must have the capacity to protect itself from attempts to destroy it. It must assure its survival. Americans are a freedom-loving people. They want their liberty to endure permanently. They have a right to defend it against all efforts, be they open to insidious, to subvert or destroy it.¹¹⁷

The Court concluded that it is “clearly within the ambit of the powers relating to national defense to legislate concerning propaganda carried on in this country by foreign agents.”¹¹⁸

Next, the Peace Information Center challenged whether the statute transcended any limitations on the powers of Congress.¹¹⁹ This challenge included a First Amendment challenge raising a freedom of speech argument, a Fifth Amendment challenge raising the privilege against self-incrimination, and a Fifth Amendment challenge asserting that FARA was violative of the due process clause.¹²⁰ The defendants' strongest and most emphasized argument was on FARA violating the right to freedom of speech.¹²¹

While freedom of speech is a fundamental right guaranteed by the Constitution, it is not an “absolute and unlimited” right.¹²² The Court concluded that there was no violation of the defendants' First Amendment rights, stating that FARA “neither limits no[r] interferes

¹¹⁵ See *id.* at 260-61.

¹¹⁶ *Id.* at 261.

¹¹⁷ *Peace Info. Ctr.*, 97 F. Supp. at 261.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 262.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

with freedom of speech. It does not regulate expression of ideas...[i]t merely requires persons carrying on certain activities to identify themselves by filing a registration statement."¹²³ In other words, if FARA applies to an individual, the individual has to register and meet the reporting requirements.¹²⁴ The individual is not required to cease or change its speech or actions as it relates to the relationship between the foreign principle and its agent.¹²⁵ The Court rejected the defendants' arguments that claimed the registration requirement constituted a burden on its freedom of speech and compared FARA's registration requirement to registering under certain vocations, such as lawyers, physicians, or pharmacists.¹²⁶

The Court also rejected the only other two constitutional challenges raised under the Fifth Amendment.¹²⁷ The privilege against self-incrimination is a personal right that can be asserted or waived by an individual.¹²⁸ Still, it is not a basis for invalidating a statute and did not apply to the corporate defendant in the *Peace Information Center* case.¹²⁹ FARA does not require the disclosure of any non-voluntary information, and if such a privilege were to be invoked, the time to do so would be at the time of the registration filing.¹³⁰ The second objection in *Peace Information Center* that the defendants raised under the Fifth Amendment related to a lack of a precise standard of guilt under FARA, allegedly violating the due process clause.¹³¹ The Court concluded that because the statute clearly states what is required and defines a foreign principal and an agent of a foreign principal, the statute is sufficiently precise.¹³² Borderline cases where individuals may be unsure if they fall within the statute's terms are insufficient to

¹²³ *Peace Info. Ctr.*, 97 F. Supp. at 262.

¹²⁴ *See id.*

¹²⁵ *See id.*

¹²⁶ *Id.* at 262-63.

¹²⁷ *Id.* at 263-64.

¹²⁸ *See id.* at 263.

¹²⁹ *See Peace Info. Ctr.*, 97 F. Supp. at 263.

¹³⁰ *See id.*

¹³¹ *See id.*

¹³² *See id.* at 263-64.

vitiating the law.¹³³ For these reasons, the Court found FARA to be constitutionally sound.¹³⁴

B. *Publicity Agent, Selective Prosecution, and the “Irish Problem”*

In *Attorney General of United States v. Irish People*, the government asked the Court to require a New York corporation defendant that publishes *The Irish People*, a weekly newspaper, to register as a foreign principal under FARA.¹³⁵ The case demonstrates how neither a contractual obligation nor an employee-employer relationship is required to establish a sufficient level of control between a foreign agent and foreign principal (i.e., sharing office space, accepting payment towards rent, etc.). The government claimed that *The Irish People* was an agent of the Irish Northern Aid Committee (“INAC”), which was registered as an agent of the Irish Republican Army (“IRA”).¹³⁶ Under FARA, the three requirements the government must prove are: (1) the defendant “acted at the order, request, or under the direction or control of an entity;”¹³⁷ (2) “the entity must be a foreign principal;”¹³⁸ and (3) the “defendant must engage in the alleged political activity for, or in the interests of the foreign principal.”¹³⁹

In the *Irish People* case, the second requirement was not disputed because INAC was a registered agent of the IRA.¹⁴⁰ Regarding the first requirement, the principal-agent relationship test asked: “whether the action in question was undertaken at the ‘request’ of the foreign principal.”¹⁴¹ FARA did not need to meet the higher standard contained in the Restatement (Second) of Agency, as the defendant argued.¹⁴² The government made its case by establishing the principal-agent relationship in the managing personnel and

¹³³ See *id.* at 264.

¹³⁴ See generally *id.*

¹³⁵ See *Irish People*, 595 F. Supp. at 116.

¹³⁶ See *id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Irish People*, 595 F. Supp. at 117.

¹⁴² *Id.*

resources of INAC and *The Irish People*.¹⁴³ The government used the defendant's answers to interrogatories, an affidavit submitted by an attorney with the DOJ's Registration Unit, and documents produced through a search of INAC's files as evidence of this relationship.¹⁴⁴ This evidence revealed that INAC and the defendant shared the same office space and other facilities, telephone numbers, and officers.¹⁴⁵ Additionally, the evidence showed that the defendant received significant financial support from INAC.¹⁴⁶ The Court found the government sufficiently met the first prong.¹⁴⁷

Next, the Court addressed FARA's third requirement, the issue of whether the defendant engaged in political activities for or in the interest of INAC, noting it "is clearly not totally independent of the issue of control . . . [i]t is unlikely that the people who control *The Irish People* as well as the INAC, would allow more than isolated instances where the actions of the newspaper were contrary to the interests of INAC."¹⁴⁸ The government's submitted documents supported the conclusion that the editorial views between the defendant and INAC were no mere coincidence.¹⁴⁹ Overruling the defendant's objection on hearsay grounds, the Court stated the evidence was admissible under an exception and would be sufficient to meet FARA's second prong.¹⁵⁰

The defendant raised constitutional challenges under the First and Fourth Amendments—both of which the Court rejected.¹⁵¹ The Court turned to the legislative history of FARA, whereas a bill, FARA was "intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 118.

¹⁴⁶ *Id.* at 118.

¹⁴⁷ *Irish People*, 595 F. Supp. at 118-19.

¹⁴⁸ *Id.* at 119.

¹⁴⁹ *See id.* A letter signed on INAC stationery written by one of defendant's editorial board members stated: "We can't let the paper collapse without notice to our people at home (*as they are paying for it*) . . ." *Id.* at 119-120.

¹⁵⁰ *Id.* at 120.

¹⁵¹ *Irish People*, 595 F. Supp. at 120-121.

comes from a disinterested source.”¹⁵² The Court dismissed the First Amendment challenge because there was a compelling government interest in regulating the conduct of a nation’s foreign affairs.¹⁵³ The defendant also alleged a Fourth Amendment violation for a search without probable cause, which the Court dismissed, finding there was no search conducted under FARA.¹⁵⁴ Most interesting was the affirmative defense of selective prosecution, which was issued in a separate opinion.

In the *Irish People*, the defendant asserted the affirmative defense of selective prosecution, and the Court addressed the defense in a separate opinion.¹⁵⁵ To prove selective prosecution, the defendant must prove that “others similarly situated generally have not been prosecuted for conduct similar to that which he was prosecuted . . . [and] must show that his selection was based on an impermissible ground such as race, religion or the exercise of his first amendment right to free speech.”¹⁵⁶ Therefore, a selection and improper prong must be met for defendants to succeed on this defense.¹⁵⁷

The defendant attempted to meet his burden under the selection prong by arguing that “other individuals or groups who share at least the salient characteristics [sic] of the defendant so far as FARA is concerned, *apart from their disfavored political views*, are ‘similarly situated,’ and a proper measure of comparison for selective prosecution claims.”¹⁵⁸ The Court rejected the defendant’s comparison to the Community of the Peace People, which was another group involved in Northern Ireland that was registered under FARA, and who filed non-responsive registration statements that were not prosecuted because the defendant here never registered at all.¹⁵⁹ Additionally, defendant also argued that “FARA has not been enforced against the Catholic Bishops in the United States, Jewish

¹⁵² *Id.* at 121.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Irish People*, 612 F. Supp. at 648-49.

¹⁵⁶ *Id.* at 650 (internal citations omitted).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

American groups with close ties to Israel, and pro-Solidarity Polish-Americans,” which the Court did not decide because the improper motive prong was never met, as discussed further below.¹⁶⁰ While the Court did not decide on this issue raised by the defendant, it would be interesting to know how the Court would distinguish those unregistered and unprosecuted groups from the defendant, in this case, had the improper motive prong been properly met.

The improper motive prong for a *prima facie* case of selective prosecution must show the selection is “deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification . . . including the exercise of protected statutory and constitutional rights . . . the conscious exercise of some selectivity in prosecuting individuals for similar conduct *is* permissible.”¹⁶¹ Specifically, the Court recognized the legislative history of FARA, which permits the use of the DOJ’s limited resources to target agents perceived as the most dangerous or powerful.¹⁶² The Court, in its initial opinion, stated that “the very nature and purpose of the Act make it inevitable that the Justice Department will be called upon to make decisions to prosecute based on considerations which may result in ‘issues of constitutionality improper motivation surface[ing] disturbingly.’”¹⁶³

The defendant introduced circumstantial evidence to meet the improper motive prong, but the strongest evidence was the State Department’s interest in using FARA to solve the “Irish problem” and the use of the State Department’s powers to control entry into the United States.¹⁶⁴ An example of the defendant’s circumstantial evidence was an FBI memorandum memorializing a meeting where the FBI discussed FARA as an option to defeat the “Irish problem,” clearly stating the purpose of the meeting was to “review the responsibility of the various Government agencies regarding the investigation of Irish *militant* activities in the United States.”¹⁶⁵ The

¹⁶⁰ *Id.*

¹⁶¹ *Irish People*, 612 F. Supp. at 650-651 (internal citations omitted).

¹⁶² *Id.* at 651.

¹⁶³ *Id.* at 654 n.3 (internal citations omitted).

¹⁶⁴ *See id.*

¹⁶⁵ *Id.*

Court did not find these documents convincing enough to satisfy the defendant's burden for this prong, stating that these documents "which express explicitly concern over U.S. dollars being raised in this country by a foreign terrorist organization . . . [and does not raise] an inference that FARA is being used in this case to suppress the speech of *The Irish People*."¹⁶⁶ Ultimately, the defendant did not meet this high standard for selective prosecution, and after nine years of resistance, the defendant was ordered to register under FARA.¹⁶⁷

This circumstantial evidence spoke to its pro-IRA causes.¹⁶⁸ Additionally, the defendant provided facts that suggested internal FBI criticism of either the methods used or the conclusion that *The Irish People* is independent of INAC.¹⁶⁹ The Court dismissed the internal FBI conclusions because the Court deemed them "wholly irrelevant to a determination that this current case is improperly motivated" and claimed that the defendant mischaracterized some of the FBI documents.¹⁷⁰ The evidence of the State Department weaponizing FARA to solve the Irish problem did not provide supporting evidence that "the Irish problem was the speech of *The Irish People*, or its legitimate political fundraising."¹⁷¹ Most compelling was that the defendant's evidence suggested a perception by some of the United States's allies concern regarding money being raised in the United States to support terrorism in Northern Ireland.¹⁷² However, the Court concluded that because *The Irish People* is not explicitly mentioned in any of the State Department's documents regarding the Irish problem, the Court found that even if these documents did mention the defendant by name, the problem was neither the speech nor the legitimate political activity of the defendant.¹⁷³

This case demonstrates how difficult it is for defendants to prove selective prosecution under FARA. Even when the State

¹⁶⁶ *Id.* at 653.

¹⁶⁷ *See Irish People*, 612 F. Supp. at 653.

¹⁶⁸ *See id.* at 651-652.

¹⁶⁹ *See id.*

¹⁷⁰ *Id.* at 652.

¹⁷¹ *Id.*

¹⁷² *See id.*

¹⁷³ *Irish People*, 612 F. Supp. at 652.

Department explicitly spoke of defeating the “Irish problem,” and the circumstantial evidence showed there were discussions within the State Department of using FARA to address this articulated problem, this was insufficient to make a *prima facie* case for selective prosecution.¹⁷⁴

C. *Publicity Agent and the “Russia Problem”*

In *RM Broadcasting, LLC v. United States Department of Justice*, RM Broadcasting sought a declaratory judgment stating that it did not have to register under FARA.¹⁷⁵ In response, the government filed a counter-claim, seeking for RM Broadcasting to register under FARA.¹⁷⁶ This case focuses on a service agreement (“Service Agreement”) between the Federal State Unitary Enterprise Rossiya Segodnya International Information Agency (“Rossiya Segodnya”) and RM Broadcasting, which involved RM Broadcasting having to “provide the Services . . . for broadcasting/transmission of Radio Programs’[s] around-the-clock except for hourly station identification, daily, from December 1, 2017, through December 31, 2020, on Washington DC radio channel AM 1390.”¹⁷⁷ In June 2018, the FARA Registration Unit of the National Security Division of DOJ notified RM Broadcasting that it was required to register under FARA because it was acting as both a publicity agent and information-service employee for a foreign principal.¹⁷⁸ RM Broadcasting disputed the claim, and this litigation resulted.¹⁷⁹ Both parties agreed that Rossiya Segodnya was a foreign principal under FARA.¹⁸⁰

Looking at the terms of the Services Agreement, the Court concluded that RM Broadcasting was acting “‘under the direction or control’ of Rossiya Segodnya” and that RM Broadcasting was “‘required to perform” a number of activities for Rossiya Segodnya.¹⁸¹

¹⁷⁴ *Id.*

¹⁷⁵ *RM Broad., LLC v. United States*, 379 F. Supp. 3d 1256, 1256 (2019).

¹⁷⁶ *Id.* at 1259.

¹⁷⁷ *Id.* at 1258.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1258-59.

¹⁸⁰ *Id.* at 1259.

¹⁸¹ *RM Broad.*, 379 F. Supp. 3d at 1260-61.

These activities related to broadcasting Rossiya Segodnya's radio programs, which Rossiya Segodnya was permitted to withhold payment for if these contractual obligations were not performed to Rossiya's Segodnya's satisfaction.¹⁸² Additionally, the Court found RM Broadcasting act as a publicity agent as defined by 22 U.S.C. § 611(h), which includes any person "engag[ing] directly or indirectly in the publication or dissemination" of any information, including broadcasts.¹⁸³

RM Broadcasting argued that "it simply buys and resells radio airtime and has resold some of that airtime to Rossiya Segodnya."¹⁸⁴ The Court rejected this argument by looking to the explicit language of the Services Agreement, which required RM Broadcasting to "broadcast/transmit Radio Programs."¹⁸⁵ RM Broadcasting also argued that it had "no knowledge of the content of Rossiya Segodnya's Radio Programs, no input in that content, and no intent to advance the interests of Rossiya Segodnya or Russia."¹⁸⁶ The Court rejected this argument because there is no requirement for knowledge, input, or intent in the FARA definitions of "agent of a foreign principal or a "publicity agent."¹⁸⁷ Lastly, RM Broadcasting expressed concern that FARA could be applied broadly.¹⁸⁸ The district court agreed with the D.C. Circuit Court's assessment that "[s]ection 611 defines the critical terms 'agents of foreign principals,' to include almost anyone who undertakes any public-related or financial activity on behalf of a foreign principal."¹⁸⁹ While the Court agreed that the statute was broad, it noted that its role was to apply the statute as written and not to rewrite it.¹⁹⁰ The Court concluded that, according to the terms it agreed to in its Service Agreement with a Rossiya Segodnya, RM Broadcasting was acting as a foreign agent on behalf of a foreign

¹⁸² *Id.* at 1261.

¹⁸³ *Id.* at 1258, 1260-61.

¹⁸⁴ *Id.* at 1261.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1262.

¹⁸⁷ *RM Broad.*, 379 F. Supp. 3d at 1262.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* (quoting *United States v. McGoff*, 831 F.2d 1071, 1074 (D.C. Cir. 1987)).

¹⁹⁰ *Id.*

principal as a publicity agent, and was required to register under FARA.¹⁹¹

While RM Broadcasting did not make any arguments related to selective prosecution in this case, this prosecution may not have occurred if it were not for the attention given to Russian interference in the United States as a result of Robert Mueller’s 2016 investigation.¹⁹² While the investigation, in this case, did not mention any “Russia problem” as discussed in *The Irish People* cases above, there certainly was a sense of a “Russia problem,” resulting in the DOJ putting pressure on different Russian-owned media companies at the time of this case.¹⁹³ The same week the DOJ requested RM Broadcasting to register as a foreign agent under FARA, the DOJ also requested the same from Sputnik.¹⁹⁴ Facially, Sputnik was a Russian state-owned news outlet, but the U.S. government recognized “the state-funded and state-directed media outlet[.]” as part of Russia’s “disinformation and propaganda ecosystem.”¹⁹⁵ Sputnik complied, and registered under FARA.¹⁹⁶ While the DOJ was within its prosecutorial discretion to implement FARA as it sought fit and because FARA is a very broad statute, it is difficult to dispel ideas that these and other Russian-owned media outlets were not targeted as a result of the on-going hostile political climate towards Russia due to Russia’s interference in the 2016 U.S. presidential election.¹⁹⁷

The constitutional challenge to FARA exemplifies that FARA is, by nature, susceptible to selective, arbitrary, and politically

¹⁹¹ *Id.* at 1260-61.

¹⁹² *See generally id.*

¹⁹³ *RM Broad.*, 379 F. Supp. 3d at 1258.

¹⁹⁴ Megan R. Wilson, *Russian news outlet Sputnik registers with DOJ as foreign agent*, THE HILL (November 17, 2017, 1:15 PM), <https://thehill.com/business-a-lobbying/business-a-lobbying/360912-russian-news-outlet-sputnik-registers-with-doj-as>.

¹⁹⁵ *See id.*; Other Release, Dep’t of Just., Report: RT and Sputnik’s Role in Russia’s Disinformation and Propaganda Ecosystem, (Jan. 20, 2022), <https://www.state.gov/report-rt-and-sputniks-role-in-russias-disinformation-and-propaganda-ecosystem/>.

¹⁹⁶ *Id.* (“Following the 2016 presidential elections, the U.S. intelligence community determined that the Russian government-owned Sputnik and RT helped with a disinformation campaign aimed at influencing the outcome of the election.”).

¹⁹⁷ *Id.*

motivated enforcement. The aforementioned cases illustrate that the political climate during the time of the prosecution or request for registration can guide the DOJ's attention to persons or entities that have not previously been on their radar. What began as a World War II statute intended to combat Nazi propaganda in the United States has transformed into a law to combat foreign lobbying in the United States.¹⁹⁸ Currently, FARA is being used to target Russian misinformation campaigns within the United States.¹⁹⁹ In response, representatives have proposed amendments for FARA.²⁰⁰

D. *Proposed Amendments*

FARA is an 83-year-old statute that has not been substantially updated in over 55 years, not discounting the amendments by way of LDA in 1995.²⁰¹ The DOJ Inspector General's 2016 Report revealed that FARA has been used in only a small number of prosecuted cases.²⁰² The representation led a number of senators and representatives to introducing the Foreign Agents Disclosure and Registration Enhancement Act which recommends a number of amendments to FARA.²⁰³ The proposed amendments would grant the DOJ new investigative powers; increase criminal and civil penalties for violations of FARA; and charge the Government Accountability Office

¹⁹⁸ See *Hearing on H.R. 1591 Before Subcomm. 1 of the Comm. On the Judiciary, 75th Cong. 4* (1937) (statement of Rep. John W. McCormack) (“What is the evidence; what is the necessity for this?[] We found . . . that one of the biggest and most powerful public relations firms in this country was indirectly in the employ of the German government.”).

¹⁹⁹ See Morgan Chalfant & Alex Gangitano, *Mueller Fuels Foreign Lobbying Crackdown*, THE HILL (Jan. 31, 2018, 6:00 AM), <https://thehill.com/business-a-lobbying/business-a-lobbying/423149-mueller-fuels-foreign-lobbying-crackdown/>.

²⁰⁰ See, e.g., Press Release, Sen. Chuck Grassley, *Senators Reintroduce Bill to Crack Down on Undisclosed Foreign Influence* (Jan. 24, 2023) (Quoting cosponsor Senator Sinema: “Our commonsense, bipartisan bill will keep America safe and secure by closing loopholes used by foreign adversaries like China and Russia to attempt to influence American policy.”).

²⁰¹ See 22 U.S.C. § 611 (1938).

²⁰² See Off. of the Inspector Gen., Dep't of Just., *supra* note 102. (“In addition to the declining trend in registrations, we also found that there historically have been very few FARA prosecutions.”).

²⁰³ See Foreign Agents Disclosure and Registration Enhancement Act, S. 1762, 116th Cong. (2019).

(“GAO”) to study whether, and to what extent, the LDA exemption to FARA registration is being abused.²⁰⁴

Additionally, the proposed amendments grant certain powers to the Attorney General. Under the amendments, the Attorney General would be able to issue civil investigative demands (“CIDs”); to compel the production of information, such as documentary material or oral testimony;²⁰⁵ and to determine whether certain activities undertaken by individuals or entities require FARA registration.²⁰⁶ As a method of checks and balances, the amendments provide a right of action where CIDs may be challenged in court by parties who believe the DOJ is misusing this power.²⁰⁷

The proposed amendments would help prosecutors investigate FARA violations further before deciding whether to bring a case against a party, increasing litigation costs. Also, the proposed amendment increases fines for certain willful FARA violations from \$10,000 to \$200,000; increases fines for deficient registration statements or unlawful contingent fee arrangements from \$5,000 to \$15,000; and implements new fines, ranging from \$1,000 to \$200,000, for failure to file timely or complete registration statements, failure to file timely or complete supplemental disclosures or failure to remedy deficient registration statements after notice.²⁰⁸ This helps serve as a deterrent for parties who believe that they can take a chance at not being detected with little financial consequence because they have not registered. Importantly, a foreign principal of the penalized agent may not pay the fine.²⁰⁹

Finally, the proposed amendments empower the DOJ to develop and implement a comprehensive strategy for improving compliance with and enforcement of FARA.²¹⁰ Such a strategy would

²⁰⁴ *See id.* § 7.

²⁰⁵ *See id.* at §§ 2, 9.

²⁰⁶ *See id.*

²⁰⁷ *Id.* at § 1(k)(2)(A).

²⁰⁸ *See* Foreign Agents Disclosure and Registration Enhancement Act, S. 1762, 116th Cong. §§ 3(a), 4(j) (2019).

²⁰⁹ *Id.* at § 4(j)(1)(A)(ii).

²¹⁰ *Id.*

be subject to GAO review and analysis.²¹¹ The GAO would be able to audit the current use of the LDA exemption to FARA registration to determine whether the exemption is operating as intended or creating opportunities for misuse.²¹² This audit is important and would provide valuable information because many parties decide to register under the LDA rather than FARA due to the LDA's less stringent reporting requirements, reduced stigma, and responsibility of registering as a foreign agent.²¹³

This amendment was introduced in 2019 and referred to the Committee on Foreign Relations.²¹⁴ The proposal died in Congress.²¹⁵ While this proposed amendment failed to make it through Congress, FARA is undoubtedly in need of reform. The amendments proposed by Senator Grassley would help fix some of the concerns addressed in this Comment, and the following Section discusses further recommendations.

III. FURTHER RECOMMENDATIONS

The LDA exemption to the FARA registration requirement is a serious problem that can be solved one of two ways: (1) through removing the LDA exemption altogether and incorporating its requirements into FARA, or (2) better harmonizing the two statutes more effectively. Scholars recommend that to complete the latter, filers under the LDA “who want to avail themselves of the FARA exemption for LDA registrants [should have] to affirmatively check indicating that they intend to do so” when completing the LDA registration form.²¹⁶ This affirmative indication may help clear up any confusion regarding who is seeking an exemption under FARA

²¹¹ *Id.*

²¹² *Id.*

²¹³ 2 U.S.C. § 1601.

²¹⁴ S. 1762 (116th): *Foreign Agents Disclosure and Registration Enhancement Act of 2019*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/1762/actions> (last visited April 21, 2022).

²¹⁵ *See id.*

²¹⁶ David H. Laufman & Matthew T. Sanderson, *FARA: Issues and Recommendations for Reform*, POLITICO (July 16, 2021), <https://www.politico.com/f/?id=0000017c-33cf-dddc-a77e-37df03770000>.

through the LDA registration and notify the DOJ of these potential agents' intentions in case further investigation is warranted.

A second approach includes revisions to clarify or eliminate some of FARA's broad and ambiguous language.²¹⁷ Scholars use the definition of "foreign principals" and the principal-agent relationship as examples.²¹⁸ The definition of "foreign principals" can be refined to include only foreign actors, like foreign governments or political practices and those acting on their behalf.²¹⁹ Additionally, Congress could re-address the issue of the principle-agent relationship. One option is for Congress to define the principal-agent relationship defined in the Restatement (Second) of Agency that was previously rejected by the courts.²²⁰ Finally, and arguably most mundane, but most influential in encouraging a higher level of registration compliance and transparency, Congress could revise the name of FARA and "agent of a foreign principal" to terms that are felt to be less stigmatizing.²²¹

As demonstrated in this Comment, some sort of oversight mechanism should be incorporated within DOJ and Congress to standardize and depoliticize prosecution of FARA so that it is not unevenly applied. While the DOJ will retain its prosecutorial discretion regarding the enforcement of FARA, this statute should be applied to *all* potential foreign agents and not just foreign agents subject to current political scrutiny given the political and international atmosphere. Whether amendments are adopted, or a new approach is defined, any Congressional action relating to FARA should ensure consistency and establish public trust in how FARA is enforced to protect the people of the United States. If implemented, the changes discussed above will make a registration for FARA easier and more comprehensible for potential registrants and make FARA enforcement more predictable, more evenly applied, and less inherently political.

²¹⁷ *Robinson, supra* note 13, at 1145.

²¹⁸ *Id.*

²¹⁹ *Robinson, supra* note 13, at 1145.

²²⁰ *Id.*; *Irish People*, 595 F. Supp. at 117.

²²¹ *Id.* at 1146.

IV. CONCLUSION

FARA is in much need of updating. Congress must clarify and unify the statutory language of FARA and roll back its exemptions. Prosecutorial enforcement needs to become more predictable and requires some oversight mechanism to ensure FARA's enforcement does not continue to become more over-politicized and unevenly applied within different political contexts.

FARA is an inherently political statute due to the behavior and actors it is designed to police. These changes should be adopted to ensure that FARA is not weaponized within different historical moments depending on which country is deemed a "problem" by the American public or DOJ, regardless of whether that country is a "problem" or not.

