



April 4, 2022

The Honorable Steve Cohen  
Chair  
Committee on the Judiciary  
Subcommittee on the Constitution, Civil  
Rights, and Civil Liberties  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Mike Johnson  
Ranking Member  
Committee on the Judiciary  
Subcommittee on the Constitution, Civil  
Rights, and Civil Liberties  
U.S. House of Representatives  
Washington, D.C. 20515

Re: Hearing on Enhancing the Foreign Agents Registration Act of 1938, April 5, 2022

Dear Chairman Cohen and Ranking Member Johnson:

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of approximately 10,000 direct members, and tens of thousands more affiliate members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

Though well-intentioned, the Foreign Agents Registration Act (FARA) is a broad and vague statute and any efforts should be focused on narrowing and clarifying its nebulous rules. NACDL believes that existing Department of Justice (DOJ) enforcement authority is sufficient to enforce the statute, as recent high-profile cases have shown, and that granting additional enforcement tools is neither warranted nor worth the risk of overreach.

The risk of overreach is not merely hypothetical. The regime's ambiguity, and the narrow interpretation of the exemptions, has led to unfortunate enforcement decisions that have placed burdens upon and threatened to chill the lawful and laudable activities of nonprofit organizations and think tanks. In one well-known case, a venerable and decades-old U.S.-based nonprofit was



required to register under FARA after receiving a grant from a foreign government.<sup>1</sup> Such enforcement also seems to have little benefit for FARA’s goal of educating the public about the political activities of certain actors.

### **FARA is Vague and Overbroad**

To begin, FARA’s definition of who constitutes an “agent of a foreign principal” is both confusing and overbroad. FARA prohibits a “person” from acting as an “agent of a foreign principal” without first registering.<sup>2</sup> 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.<sup>3</sup> Beyond that, the scope of covered activities under FARA’s registration requirement is dangerously expansive. The statute contains no *de minimis* threshold—it can be triggered by even the slightest activity that meets any one of the statutory triggers. For instance, a single meeting with a U.S. official by an executive whose company is headquartered outside the United States, or by its U.S. subsidiary on behalf of the foreign parent, may trigger the requirement to register. This expansive definition means that a broad range of actors are subject to, and fall within the scope of, the definition of “foreign principal,” including corporations, nonprofits, foundations, public-relations firms, tourism bureaus, economic-development organizations, and most persons based outside the United States.<sup>4</sup>

Moreover, the principal–agent relationship in FARA is much broader than how principal–agent relationships are defined under traditional principles of agency law, which adds another layer of confusion. For instance, under the Restatement (Third) of Agency, an agent and his or her principal must agree that the agent will act on behalf of, and be subject to the control of, the principal.<sup>5</sup> FARA’s “agency” relationship, by contrast, is much wider and more ambiguous. An

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<sup>1</sup> Axios, Nonprofits sound alarm on DOJ foreign agent rule (Feb. 20, 2022), <https://www.axios.com/the-foreign-agent-trap-04348a4a-b049-4741-a356-a4670a4f2eed.html>.

<sup>2</sup> 22 U.S.C. § 612(a) (2021).

<sup>3</sup> *Id.* § 611(b).

<sup>4</sup> For example, the mere act of hosting a conference, disseminating a policy report, requesting a meeting, or reaching out to opinion leaders on behalf of a foreign principal could presumably satisfy the “political activities” threshold.

<sup>5</sup> Restatement (Third) of Agency § 1.01 (Am. L. 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



“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 foreign principal, and who directly or through any other person [engages in covered activities in the Act].”<sup>6</sup>

While this definition may be sufficiently clear where it is consistent with traditional agency principles, it is significantly less clear at its margins. The statute differentiates between following a foreign principal’s “order” and following a foreign principal’s “request,” but the term “request” is not defined or otherwise explained. The U.S. Court of Appeals for the Second Circuit recognized this significant ambiguity and cautioned that “[t]he exact perimeters of a ‘request’ under the Act are difficult to locate, falling somewhere between a command and a plea,” but it “caution[ed] that this word is not to be understood in its most precatory sense. Such an interpretation would sweep within the statute’s scope many forms of conduct that Congress did not intend to regulate.”<sup>7</sup> The Second Circuit construed this word narrowly to avoid a situation where “[w]hen members of a large religious, racial, or ethnic group respond to pleas for contributions or generalized political support, they do not thereby become “agents” under the Act. To so hold would make all Americans who sent money, food, and clothing to the Italian earthquake victims ‘agents’ of the Italian Government.”<sup>8</sup> Ultimately, the Department of Justice agreed with the Second Circuit that “request” “should be read to fall ‘somewhere between a command and a plea,’”<sup>9</sup> but there is no guidance or regulation that suggests where that line should be drawn. Without this guidance, there is insufficient notice to the public of precisely what separates innocent conduct from a potentially criminal failure to register under the Act.

Given that FARA places a regulatory burden, under pain of criminal penalty, on persons and groups exercising First Amendment-protected rights, it is understandable that the Act contains many exemptions: a legal exemption, a clerical exemption, a commercial exemption, and an exemption for religious, scholastic, scientific, or fine arts pursuits. But these exemptions do not

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act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”).

<sup>6</sup> 22 U.S.C. § 611(c)(1) (2021).

<sup>7</sup> *Att’y Gen. of United States v. Irish N. Aid. Comm.*, 668 F.2d 159, 161 (2d Cir. 1982).

<sup>8</sup> *Id.*

<sup>9</sup> Dept. of Justice, *The Scope of Agency under FARA*, at 3 (2020), <https://www.justice.gov/nsd-fara/page/file/1279836/download>.



apply if the speaker is engaged in “political activity” under the Act,<sup>10</sup> an odd exemption to the exemption given that much religious, scholastic, scientific, and artistic work is at least somewhat political in nature or at least cannot be separated from its political meaning and context. To avoid imposing potential criminal liability on these constitutionally protected activities, Congress should consider carving out a larger exemption and creating a *de minimis* threshold for criminal enforcement.

### **Existing Tools Are Sufficient to Enforce FARA**

NACDL does not see efforts to enhance government authority to pursue FARA cases as warranted or necessary. It has been widely observed that enforcement of FARA has been extremely sparse until recently.<sup>11</sup> From the 1966 amendments to FARA until 2015, DOJ brought only seven criminal FARA cases.<sup>12</sup> Historically, if a failure to register was discovered, the consequence was minor; DOJ’s FARA Unit would simply send a letter of inquiry and then permit a late registration.<sup>13</sup>

Nevertheless, there is no evidence, nor has it seriously been argued, that DOJ’s relative lack of FARA enforcement for decades was caused by a lack of enforcement authority. In fact, recent years have seen a relative flurry of FARA enforcement, spurred on by both a DOJ Office of Inspector General report criticizing past lax enforcement and by the Special Counsel Investigation led by Robert Mueller which saw a number of high profile FARA convictions<sup>14</sup> as well as

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<sup>10</sup> 28 C.F.R. § 5.304(d).

<sup>11</sup> *Hearing on “Oversight of the Foreign Agents Registration Act and Attempts to Influence U.S. Elections: Lessons Learned from Current and Prior Administrations” Before the S. Comm. on the Judiciary*, 115th Cong. 2 (2017) (statement of Sen. Chuck Grassley, Chairman, S. Comm. on the Judiciary) (“Ultimately, it appears that the Justice Department and FBI have been seriously lax in enforcing FARA for a long time.”), <https://www.judiciary.senate.gov/grassley-statement-at-hearing-on-enforcement-of-the-foreign-agents-registration-act>.

<sup>12</sup> Dept. of Justice, *Audit of the National Security Division’s Enforcement of the Foreign Agent’s Registration Act*, at 8 (Sept. 2016), <https://oig.justice.gov/reports/2016/a1624.pdf> [hereinafter *OIG Audit*].

<sup>13</sup> *Id.* at 13.

<sup>14</sup> *E.g.*, Dept. of Justice, Recent FARA Cases, <https://www.justice.gov/nsd-fara/recent-cases> (accessed March 30, 2022).



investigations of prominent lobbyists.<sup>15</sup> The fact that convictions were secured in these cases is an indication that existing tools are sufficient for DOJ to enforce the Act.

Given that existing tools have been sufficient, and particularly in light of the fact that FARA imposes burdens on constitutionally protected activities and that enforcement of FARA may be seen as increasingly politicized in recent years, we urge this Committee to avoid granting additional enforcement powers to the Department. In particular, because FARA includes both civil and criminal enforcement mechanisms, NACDL urges this Committee to be wary of granting even new civil enforcement tools as those may also assist the Government in eventual criminal cases but without the due process rights and protections that criminal inquiries confer. Moreover, the DOJ's past "voluntary compliance approach"<sup>16</sup> has been largely successful in achieving the primary aim of FARA, namely, providing public awareness of the advocacy and lobbying activities of foreign agents.

Respectfully,

Martín Antonio Sabelli  
President  
National Association of Criminal Defense Lawyers

cc: Members of the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties

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<sup>15</sup> NBC News, Justice Department ends investigation of Tony Podesta, Vin Weber without charges (Sept. 24, 2019), <https://www.nbcnews.com/politics/justice-department/justice-department-ends-investigation-tony-podesta-vin-weber-without-charges-n1058306>.

<sup>16</sup> OIG Audit, at 10.