

FARA in Focus: What can Russia's Foreign Agent Law tell us about America's?

Samuel Rebo *

Abstract

In 2012, the Russian government passed Russia's first-ever Foreign Agent Law, a key part of Vladimir Putin's push to limit foreign influence in Russia during his 3rd term as president. American and other western analysts described the law as an attempt to destroy his opposition and stymie civil society; after the law's passing, many NGOs were forced to close. Interestingly, the Russian government pushed back, arguing that it had modeled the Foreign Agent Law after the American Foreign Agents Registration Act (FARA) passed in 1938. Indeed, on their face the Laws seem similar. Their implementation, however, has differed. While Russia has actively used its Law, the U.S. Department of Justice launched only a single criminal prosecution under the Act from 1990 to 2010. However, since Russian interference in the 2016 American Presidential Election, DOJ prosecutors have turned once again to FARA, and brought more cases between 2016–2019 than they had in the past 50 years combined. As a result, a renewed focus on the Act raises fresh questions about its scope and effects from a civil liberties perspective. Comparing FARA to its Russian counterpart, we see that the Russian law contains significantly more substantive limitations on the functioning of "foreign agents" than does FARA. However, both laws are broad and can sweep in legitimate civil society groups that should not be labeled "foreign agents" in light of the purposes of each Act. Thus, DOJ discretion is the main barrier stopping America from replicating aspects of the negative Russian experience. Given that First Amendment rights are at stake, this reliance on the DOJ is insufficient. With lessons from this comparison in mind, Congress should amend FARA to narrow its breath and clarify its scope.

* Sam Rebo is Editor-in-Chief of the Harvard National Security Law Journal and a law student at Harvard Law School. Prior to law school, he worked for former Ambassador to Russia Michael McFaul at Stanford University and the Eurasia Group political risk consultancy in Washington, D.C. He holds a B.A. from Stanford University in International Relations.

Table of Contents

INTRODUCTION 3

I. HISTORY AND CURRENT IMPLEMENTATION 7

 A. *THE RUSSIAN FOREIGN AGENT LAW*..... 7

 1. History of the Act..... 7

 2. Implementation: How the Russian Foreign Agent Law Stymies Dissent..... 12

 B. *THE FOREIGN AGENTS REGISTRATION ACT* 16

 1. History of the Act..... 17

 2. Current enforcement and pressures on FARA 20

II. COMPARING THE RUSSIAN AND AMERICAN FOREIGN AGENT LAWS 24

 A. *SCOPE* 25

 1. Domestic Parties Covered..... 25

 2. Activities Covered 27

 3. Foreign Nexus Required 30

 B. *REGISTRATION AND MAINTENANCE REQUIREMENTS*..... 32

 C. PUNISHMENTS 35

 D. SUMMARY OF THE LAWS' SIMILARITIES AND DIFFERENCES 36

 1. Similarities 37

 2. Differences 37

III. ANALYSIS: FARA'S STRENGTHS AND WEAKNESSES 38

 A. *TAKEAWAY: RUSSIA'S LAW EXPOSES FARA'S RISKS* 38

 1. FARA protects civil liberties better RFAL..... 38

 2. Yet, both Laws are overbroad..... 39

 3. Both Laws stigmatize "foreign agents" 40

 4. FARA's First Amendment Implications..... 40

 5. Rebutting Counterarguments 44

 B. *RECOMMENDATIONS* 45

CONCLUSION..... 47

INTRODUCTION

December 2011 bore witness to Russia's largest protests since the fall of the Soviet Union. After allegations of fraud marred the 2011 elections for the federal legislature (Duma), up to 100,000 people filled Moscow's streets to demand fair elections.¹ Despite the protest's large numbers, then-Prime Minister Putin saw the United States' hand behind them. "[Hillary Clinton] set the tone for some opposition activists, gave them a signal, they heard this signal and started active work" said Putin in December 2011.² In response, Russia's legislature soon passed the Foreign Agent Law,³ which mandated any NGO participating in "political activities" and receiving any foreign funding to register as a "foreign agent."⁴ In addition to imposing audit requirements, the Foreign Agent Law labeled NGOs as "foreign agents," a moniker in Russia synonymous with "spy."⁵

But Russia did not develop its Foreign Agent Law (RFAL) on a blank slate. Rather, Duma members stated that they based their Law on the United States's Foreign Agents Registration Act (FARA),⁶ originally passed in 1938.⁷ Indeed the Acts bear similarities. Both mandate that "foreign agents" register with law enforcement,⁸ both subject them to audit requirements,⁹ and both require "foreign agents" to mark all publications with a "foreign agent" stamp.¹⁰ While no scholar has conducted an in-depth analysis of the Laws' similarities and differences, those who have compared the Laws have come to different conclusions on their resemblance.¹¹

¹ Ellen Barry, *Rally Defying Putin's Party Draws Tens of Thousands*, N.Y. TIMES (Dec. 10, 2011), <https://www.nytimes.com/2011/12/11/world/europe/thousands-protest-in-moscow-russia-in-defiance-of-putin.html>.

² Steve Gutterman & Gleb Bryanski, *Putin says U.S. stoked Russian protests*, REUTERS (Dec. 8, 2011), <https://www.reuters.com/article/us-russia/putin-says-u-s-stoked-russian-protests-idUSTRE7B610S20111208>.

³ Federal'nyi Zakon RF "O vnesenii izmenenii v otdel'nye zakonodatel'nye akty Rossiiskoi Federacii v chasti regulirovaniya deatel'nosti nekommercheskih organizacii, vypolnjajushhiih funkcii 'inostrannovo agenta'" [Federal Law "On changes to individual legal acts of the Russian Federation in the regulation of activities of non-commercial organizations performing the functions of a 'foreign agent,'"] Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2012, No. 30, Item 4172 [hereinafter: 2012 Foreign Agent Law].

While this article will discuss the Foreign Agent Law as if it were one cohesive law, the current "Foreign Agent Law" is actually a collection of multiple amendments passed to multiple different Acts. *See* Callahan, *infra* note 11, at 1227. Thus, this paper will consider all amendments to Russian laws that affect the status of "foreign agents" as components of the current "Foreign Agent Law." To not do so would narrow the scope of this paper and result in a descriptive analysis not reflective of the true experiences of "foreign agents" in Russia.

⁴ 2012 Foreign Agent Law, *supra* note 3.

⁵ Jacqueline Vade de Velde, *The "Foreign Agent Problem": An International Legal Solution to Domestic Restrictions on Non-Governmental Organizations*, 40 CARDOZO L. REV. 687, 701 (2018).

⁶ 22 U.S.C. §§ 611–621 (2020).

⁷ Vade de Velde, *supra* note 5, at 701. One should also note that Russia is not the only country to claim to have copied FARA: "Hungary, Ukraine, and Israel all cited FARA in passing legislation requiring foreign civil society organizations to register with the government." Ellerbeck & Asher-Schapiro, *infra* note 159. In turn, many countries copied Russia's Act, specifically: "Azerbaijan, Kyrgyzstan, Kazakhstan, Tajikistan, Belarus, and Uzbekistan" Vade de Velde, *supra* note 5, at 703.

⁸ 22 U.S.C. § 612; NGO Law, *infra* note 34, art 13.1(9).

⁹ 22 U.S.C. § 612; NGO Law, *infra* note 34, art. 32.

¹⁰ 22 U.S.C. § 614; NGO Law, *infra* note 34, art. 24(1).

¹¹ *See, e.g.* Alexandra V. Orlova, "Foreign Agents," *Sovereignty, and Political Pluralism: How the Russian Foreign Agents Law is Shaping Civil Society*, 7 PENN. ST. J.L. & INT'L AFF. 382, 410–12 (2019) (arguing that the laws are

No matter the Laws' similarities on paper, in practice they have looked different. Russia has actively enforced its Law,¹² using it as a political tool to shut down domestically operated NGOs with opposition views.¹³ For example, Russia's Ministry of Justice first targeted for registration "Golos," one of Russia's few independent election watch dogs, and one intimately connected to the December 2011 protests.¹⁴ As a result of the Law, a "significant" number of NGOs have shut down.¹⁵

By contrast, until recently the U.S. government had seemingly forgotten that FARA existed.¹⁶ Between 1966 and 2015, the U.S. Department of Justice (DOJ) brought only seven prosecutions under FARA, of which courts dismissed two.¹⁷ Between 1974 and 2014, at least six separate Government Accountability Office (GAO) and NGO reports found serial under-enforcement of the statute.¹⁸

But FARA is dormant no more. In 2016, the Russian government coordinated an intricate hacking and disinformation campaign that might have influenced the U.S. Presidential election.¹⁹ The U.S. intelligence community found that "Moscow's influence campaign . . . blend[ed] covert intelligence operations—such as cyber activity—with overt efforts by Russian Government agencies, state-funded media, third-party intermediaries, and paid social media users or 'trolls.'"²⁰ DOJ responded to these serious threats by, in part, leaning on FARA. Between 2016 and 2019,

different); Thomas M. Callahan, *Cauldron of Unwisdom: The Legislative Offensive on Insidious Foreign Influence in the Third Term of President Vladimir V. Putin, and ICCPR Recourse for Affected Civil Advocates*, 38 FORDHAM INT'L L.J. 1219, 1227 (2015) ("In language and spirit, the Foreign Agent Law mirrors a 1938 US Statute called the Foreign Agents Registration Act.") (emphasis added).

¹² See generally COMM'R FOR HUM. RIGHTS, COUNCIL OF EUR., CommDH(2017)22, THIRD PARTY INTERVENTION BY THE COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS ¶¶ 19–23 (2017) (discussing enforcement practices).

¹³ See *id.*

¹⁴ Dmitry Kolbasin, *Analiz pravoprimeritel'noy praktiki Federal'nogo zakona ot 20 iyulya 2012 goda № 121-FZ «O vnesenii izmeneniy v ot del'nyye zakonodatel'nyye akty Rossiyskoy Federatsii v chasti regulirovaniya deyatel'nosti nekommercheskikh organizatsiy, vpolnyayushchikh funktsii inostrannogo agenta»* [Analysis of the law enforcement practice of the Federal Law of July 20, 2012 No. 121-Φ3 "On Amending Certain Legislative Acts of the Russian Federation Regarding the Regulation of the Activities of Non-Profit Organizations Performing the Functions of a Foreign Agent"], MOSCOW HELSINKI GROUP, 5 (Jun. 30, 2013) (Russ.); *Russia NGO law: Election watchdog Golos fined*, BBC (Apr. 25, 2013), <https://www.bbc.com/news/world-europe-22291563> ("[T]he NGO did much to expose fraud at the 2011 parliamentary election, when it charted abuses across Russia, notably through its online 'map of violations.'").

¹⁵ COMM'R FOR HUM. RIGHTS, COUNCIL OF EUR., CommDH(2015)17, OPINION OF THE COMMISSIONER FOR HUMAN RIGHTS; LEGISLATION AND PRACTICE IN THE RUSSIAN FEDERATION ON NON-COMMERCIAL ORGANISATIONS IN LIGHT OF COUNCIL OF EUROPE STANDARDS: AN UPDATE ¶ 66 (Jul. 9, 2015).

¹⁶ See Zephyr Teachout, *How Mueller revived a law that protects us all against foreign money*, WASH. POST (Apr. 19, 2019), <https://www.washingtonpost.com/outlook/2019/04/17/how-mueller-revived-law-that-protects-us-all-against-foreign-money/> (The DOJ previously referred to FARA as a "malum prohibitum [law], little known outside of the legal community.").

¹⁷ U.S. DEPT. OF JUSTICE OFFICE OF THE INSPECTOR GEN., AUDIT OF THE NAT'L SEC. DIV.'S ENF'T AND ADMIN. OF THE FOREIGN AGENTS REGISTRATION ACT, i (Sept. 2016), <https://oig.justice.gov/reports/2016/a1624.pdf> [hereinafter: OIG 2016 Audit].

¹⁸ *Id.*, at 27–28.

¹⁹ NAT'L INT. COUNCIL, ICA 2017-01D, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS ii (Jan. 6, 2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf.

²⁰ *Id.*

DOJ brought more FARA prosecutions than in the fifty years prior.²¹ As a result, many more lobbyists registered,²² and those who formerly considered FARA “a complete joke” started taking FARA seriously for the first time in decades.²³

But as FARA enforcement actions increase, so too do civil liberties concerns. The Act has been dormant for so long that few know how its active enforcement might develop.²⁴ While DOJ has tried to clarify its enforcement practices by publishing advisory opinions, confusion about FARA’s application persists, both outside of and within DOJ.²⁵ Compounding concerns about substantive vagueness, some have accused DOJ of politicized targeting.²⁶

Thus we must ask: in the face of serious foreign threats, could the United States replicate aspects of Russia’s negative experience? Could it use FARA as a weapon of politicized enforcement? If FARA does, in fact, resemble RFAL, is DOJ discretion the only factor stopping abuse of the statute?²⁷

These questions implicate fundamental First Amendment rights.²⁸ In Russia, the Law’s implementation forced many civil society groups to shut down. In the US, provisions for freedom of association have protected civil society groups, preserving their role as critical intermediaries between the government and US citizens, permitting political debate and discourse.²⁹ FARA also

²¹ Kai Bernier-Chen, *Lobbying Disclosure Exemption Allows for Continued Foreign Influence in U.S. Politics*, CENTER FOR AMERICAN PROGRESS (Dec. 13, 2019), <https://www.americanprogress.org/issues/democracy/news/2019/12/13/478745/lobbying-disclosure-exemption-allows-continued-foreign-influence-u-s-politics/>.

²² Joshua R. Fattal, *FARA on Facebook: Modernizing the Foreign Agents Registration Act to Address Propagandists on Social Media*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 903, 915 (2018/2019) (“These cases have led to increased efforts by many former lobbyists to disclose their activities to avoid public scrutiny.”)

²³ See Miles Parks, *A 'Toothless' Old Law Could Have New Fangs, Thanks To Robert Mueller*, NPR (Nov. 17, 2017), <https://www.npr.org/2017/11/17/563737981/a-toothless-old-law-could-have-new-fangs-thanks-to-robert-mueller>.

²⁴ Statement by Claire Finkelstein, Video tape: Protecting Democracy: Modernizing the Foreign Agents Registration Act, held by the Ctr. for Ethics and the Rule of Law, U. Pa., and the Am. Enterprise Inst., (Apr. 17, 2019), <https://www.law.upenn.edu/institutes/cerl/conferences/fara/schedule.php> (DIGITAL RECORDING 35:50).

²⁵ See Lydia Dennett, *Justice Department Reveals (Some) of How It Interprets Foreign Influence Law*, PROGRAM ON GOV. OVERSIGHT (Jun. 15, 2018), <https://www.pogo.org/investigation/2018/06/justice-department-reveals-some-of-how-it-interprets-foreign-influence-law/> (citing the 2016 DOJ audit which found confusion among FARA unit members concerning FARA’s scope, and calling for “Congress to step in and clarify FARA’s registration requirement since the Justice Department is unwilling or unable to do so.”).

²⁶ See Nick Robinson, “*Foreign Agents*” in *an Interconnected World: FARA and the Weaponization of Transparency*, 69 Duke L.J. 1075, 1124 (2020) (discussing the cases of RT (Russia Today) and other foreign media).

²⁷ See Statement by Claire Finkelstein, *supra* note 24, at (DIGITAL RECORDING 15:15).

²⁸ See *infra* Section III(a)(iv) (“FARA’s First Amendment Implications”).

²⁹ See *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has [recognized] by remarking upon the close nexus between the freedoms of speech and assembly.” (alteration in original)). Nor does the fact that foreigners have limited First Amendment rights in the political sphere affect this case, because FARA applies fully to U.S. citizens. *C.f.* *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. Aug. 8, 2011) (*affirmed by* 565 U.S. 1104 (2012) (per curiam)) (finding that “the government may bar foreign citizens (at least those who are not lawful permanent residents of the United States) from participating in the campaign process that seeks to influence how voters will cast their ballots in the elections.”). *Bluman* made an important distinction between those who *are* part of the American political community, such as U.S. citizens, corporations, and minors, and those who are not: “aliens.” *Id.*, at 290. The alternative reading, that U.S. citizens give up core First Amendment rights when

applies to individuals and media organizations, and as it regulates the political speech of U.S. citizens, it could chill “core” First Amendment speech.³⁰ Thus, FARA’s scope should concern all Americans.

By comparing FARA’s text to RFAL’s, this article attempts to identify what the Russian Law’s infirmities can tell us about FARA and civil liberties. This approach is unique. Although others have remarked on the similarity of the two laws, none have demonstrated that similarities between the Laws can function as a warning to the US to revise FARA, and thereby protect the US against practices that could undermine US democracy.

The article finds that the Russian Foreign Agent Law piles restrictions on “foreign agents” beyond those imposed by FARA and that these restrictions may burden “foreign agents” to the point of their shutting down. This is a significant difference. At the same time, the laws share an overly broad scope that leaves prosecutorial discretion as the main barrier protecting citizens from abuse of the statute. While such discretion is important in light of changing security threats, the article will argue that FARA strikes an unsatisfactory balance; its vagueness leaves it susceptible to an overly broad interpretation that could sweep in legitimate press organizations and civil society groups, similar to what has happened in Russia. Furthermore, both Laws share language that stigmatizes those branded “foreign agents.” With these problem areas in focus, this article proposes possible amendments to FARA with the aim of avoiding Russia’s experience—stymying legitimate opposition voices—in the United States.

Part I compares the histories of both laws and discuss current enforcement practices. Part II compares the text of each law, focusing on 1) the definition of “foreign agent,” 2) the registration and maintenance requirements, and 3) the punishments for violators. Finally, Part III analyzes the findings, identifies problem areas, rebuts counterarguments, and proposes possible amendments.

Two distinct and important terms—vagueness and overbreadth—must be foregrounded to conduct this analysis. Because this article is not limited to *unconstitutional* vagueness and overbreadth (it considers the terms in a *statutory* sense), it thus does not adopt the Supreme Court’s narrower definitions of unconstitutional vagueness and overbreadth. Rather, for their conciseness and general similarity to the Supreme Court’s definitions, this article uses the Bouvier Law Dictionary’s definition of the terms.³¹ *Bouvier* defines vagueness as: “An uncertain meaning in a

registering under FARA, renders the Act suspect by limiting the First Amendment rights of those in the American political community. Furthermore, the alternative reading defies the Act’s purpose as a disclosure statute without substantive limitations (*see* H.R. REP. NO. 1381, 75th Cong., 1st Sess. 2–3 (1937)).

³⁰ *See* Meese v. Keene, 481 U.S. 465, 492 (1987) (Blackmun, J., dissenting) (arguing that FARA disclosure requirements could having a “chilling effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association.”). Political speech is considered “core” to the First Amendment. *See, e.g.* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 167 (2014) (referring to core speech as “political.”). *But c.f.* Holder v. Humanitarian Law Project, 561 U.S. 1, 31–32 (2010) (upholding a law that banned US citizens from providing assistance to foreign terrorist organizations from a First Amendment challenge on the grounds that the banned speech was “coordinated” and not “independent.”). For a discussion of how the Russian restrictions, if applied in the US, might not be upheld under *Holder*, *see infra*, note 284.

³¹ *See* Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (discussing vagueness: “It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a

text or statement.”³² Overbreadth is defined as: “A law that reaches conduct beyond that intended . . . [or one] that reaches constitutionally protected conduct.”³³ Both vagueness and overbreadth allow for significant prosecutorial discretion when charging alleged violators.

I. HISTORY AND CURRENT IMPLEMENTATION

A. *The Russian Foreign Agent Law*

In general terms, the Russian Foreign Agent Law (RFAL) requires any NGO, media company, or individual who engages in “political activity” and accepts any funding from abroad to register as a “foreign agent.”³⁴ The Russian government originally passed RFAL in response to December 2011’s large-scale anti-government protests; then-Prime Minister Vladimir Putin claimed foreign powers were responsible for the large turnout.³⁵ The government aimed RFAL’s enforcement against NGOs critical of State policies, and within a few years amended RFAL to strengthen the Ministry of Justice’s enforcement power, increase RFAL’s scope to include both media companies and private individuals, and include substantive limitations on “foreign agents”’ actions. After implementation, RFAL’s ultimate effect was to shutter 30% of Russian NGOs³⁶ and stymie legitimate voices of domestic opposition.

1. History of the Act

RFAL was formed as a by-product of Russia’s tenuous political situation in early 2012. Serious irregularities marred the 2011 State Duma (national legislature) elections.³⁷ In a series of mass protests throughout December 2011, tens of thousands of Russians marched across the country demanding new elections and political reform in general.³⁸ Then-Prime Minister Vladimir Putin

vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.” (internal citations omitted)); *id.* at 114–15 (discussing overbreadth: “A clear and precise enactment may nevertheless be overbroad if in its reach it prohibits constitutionally protected conduct . . . The crucial question, then, is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments.”).

³² *Vagueness*, BOUVIER LAW DICTIONARY (Desk ed. 2012).

³³ *Overbreadth*, BOUVIER LAW DICTIONARY (Desk ed. 2012).

³⁴ Federal’nyi Zakon RF o Nekomerscheskih Organizatsii [Federal Law of the Russian Federation on Non-commercial organizations], SOBRANIE ZAKONODATEL’STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1996, No. 3, Item 145, Red. Ot. Dec. 30, 2020 [As amended Dec. 30, 2020], Art. 2, ¶ 6 (NGOs) [hereinafter: NGO Law]; Federal’nyi Zakon RF o Strdsvakh Massovoi Informatsii [Federal Law of the Russian Federation on Mass Media], ROSSIISKAIA GAZETA [ROS. GAZ.] Dec. 27, 1991, Red. Ot. Mar. 1, 2020 [As amended Mar. 1, 2020], art. 6 (media and individuals) [hereinafter: Mass Media Law].

³⁵ Gutterman & Bryanski, *supra* note 2.

³⁶ Digges, *infra* note 62.

³⁷ Case of Davydov and Others v. Russia, App. No. 75947/11, ¶ 336 (Eur. Ct. H.R. May 30, 2017) (finding that Russian officials did not properly investigate reports of serious election irregularities).

³⁸ Barry, *supra* note 1.

blamed the United States for the protests.³⁹ He claimed that foreign grant recipients were following “the instructions of foreign governments” and interfering in the Russian political process.⁴⁰

Heeding Putin’s warning, Russian legislators swiftly passed RFAL “to protect Russia from outside attempts to influence internal politics.”⁴¹ When passing the law, Russian officials justified it by comparing it to FARA.⁴² As Foreign Minister Sergei Lavrov noted, “Not only the term, but the very concept of who constitutes ‘foreign agents’ among NGOs, and what rights and responsibilities they have, we borrowed entirely from the American law.”⁴³

Thus, in 2012 the Russian government passed its original Foreign Agent Law. The Law required all NGOs to register with the Ministry of Justice if engaged in “political activity” and accepting any foreign funding (no minimum).⁴⁴ The 2012 Law defined “political activity” broadly: any activity that aimed to influence the policy of government organs, either directly or by influencing public opinion.⁴⁵ If registered as a “foreign agent,” the NGO needed to: label all public materials as originating from a foreign agent; separate its foreign and domestic funding in different bank accounts; submit biannual activity reports, quarterly spending reports, and annual audits; and allow unscheduled audits at the government’s discretion.⁴⁶ The government could impose a fine, up to three years of probation, imprisonment, or forced labor for failing to register or not complying with these requirements.⁴⁷

Russian NGOs pushed back against the law, viewing it as restricting their ability to function. Despite potentially serious sanctions, many NGOs refused to register therein.⁴⁸ Some were domestic organizations that happened to accept a small amount of foreign funding, and therefore did not feel they merited the stigma and negative Soviet-era connotations that came along with the title “foreign agent.”⁴⁹ Others may have chaffed at the label of “foreign”—implying that they did

³⁹ Gutterman & Bryanski, *supra* note 2.

⁴⁰ *Russia: Stop Harassing Election Monitors, Release Demonstrators*, HUMAN RIGHTS WATCH (Dec. 5, 2011), <https://www.hrw.org/news/2011/12/05/russia-stop-harassing-election-monitors-release-demonstrators>.

⁴¹ *Russian parliament adopts NGO ‘foreign agents’ bill*, BBC (Jul. 13, 2012), <https://www.bbc.com/news/world-europe-18826661>.

⁴² Vade de Velde, *supra* note 5, at 701.

⁴³ Rafael Saakov, *The State Duma approved the law on NGO’s and “foreign agents,”* BBC (Jul. 6, 2012), https://www.bbc.com/russian/russia/2012/07/120706_ngo_law_duma_hearings.

⁴⁴ 2012 Foreign Agent Law, *supra* note 3; *see also* Orlova, *supra* note 11, at 393–94.

⁴⁵ 2012 Foreign Agent Law, *supra* note 3, art. 2(2) (“Political activity does not include activities [in] science, culture, art, healthcare, protecting the health of citizens, providing ‘social’ support to citizens, protecting mother and childhood, supporting the disabled, promoting a healthy lifestyle, promoting physical education and sports, protecting flora and fauna, and involvement in charitable activity broadly defined.”).

⁴⁶ 2012 Foreign Agent Law, *supra* note 3, art. 2(4)–(5).

⁴⁷ *Id.*, art. 3(2).

⁴⁸ Orlova, *supra* note 11, at 394; *Russia’s prosecutor general lashes out at NGOs*, THE OKLAHOMAN (Jul. 9, 2013), <https://oklahoman.com/article/feed/563765/russias-prosecutor-general-lashes-out-at-ngos>, (Russia’s head prosecutor believed that some 215 NGOs fell within the law’s scope but remained unregistered).

⁴⁹ *See Russia: Harsh Toll of ‘Foreign Agents’ Law*, HUMAN RIGHTS WATCH (Jun. 25, 2013), <https://www.hrw.org/news/2013/06/25/russia-harsh-toll-foreign-agents-law> (noting that the government argued “Golos” received foreign funding in the form of the Andrei Sakharov Freedom Award, even though Golos returned the prize money); Daria Skibo, *Five years of Russia’s Foreign Agent law*, OPEN DEM. (Aug. 14, 2017), <https://www.opendemocracy.net/en/odr/five-years-of-russia-s-foreign-agent-law/>

not work on behalf of the Russian people.⁵⁰ Others may have been concerned with the onerous audit requirements the bill imposed.⁵¹ Russian prosecutors demurred, unsure of how to respond, and the law lay dormant for about a year.⁵²

Then, during 2013's yearly review of the FSB (federal security service), President Putin warned that foreign enemies were aiming to use "various instruments of pressure [against Russia], including mechanisms of so-called 'soft-power.'"⁵³ The Ministry of Justice sprang into action one month later. Seemingly acting on his suggestion, the Ministry investigated NGOs that it believed fell within the Law's scope, and ordered them to register as "foreign agents" or face prosecution.⁵⁴ Human Rights Watch described the targeted NGOs as those that "conduct a wide range of human rights, public outreach, or environmental work, and many are critical of government practices."⁵⁵ Some of the organizations targeted included the election watchdog "Golos," the anti-discrimination organization "Memorial," and the police-reform organization "Public Verdict Foundation."⁵⁶ As a result of their new "foreign agent" status, these, as well as other NGOs, suffered serious harassment.⁵⁷

In 2014, the Russian government twice amended RFAL to strengthen the enforcement power of the Ministry of Justice and to further restrict the functioning of "foreign agents."⁵⁸ First, a June 2014 amendment gave the Ministry of Justice the ability to register NGOs as "foreign agents"

("According to surveys conducted by the Russian Public Opinion Research Center in 2012 or Levada Center in 2017, Russian citizens surveyed view the term "foreign agent" negatively."); *Russia's Putin Signs Law to Label People Foreign Agents*, VOA NEWS (Dec. 2, 2019), (publishing a picture of the human rights NGO "Memorial" spray-painted with the words "Foreign Agent (Loves) USA" near its entrance).

⁵⁰ Callahan, *supra* note 11, at 1244.

⁵¹ See Kolbasin, *supra* note 14, at 10 (noting that registered "foreign agents" are faced with complex reporting rules).

⁵² See Callahan, *supra* note 11, at 1244.

⁵³ *Id.*

⁵⁴ *Russia: Harsh Toll of 'Foreign Agents' Law*, *supra* note 49 ("Four months into the campaign, at least 62 groups have received warnings or orders to register as 'foreign agents'").

⁵⁵ *Id.* For a full list of the first organizations targeted, see *infra* note 81.

⁵⁶ *Id.*

⁵⁷ *Id.* ("For example, the words, 'Foreign Agents!' were daubed on the building of Baikal Environmental Wave in Irkutsk; the office lease of Human Rights House in Voronezh was terminated; and ultranationalists assaulted staff members of the Komi Human Rights Commission 'Memorial' in Syktyvkar. In a particularly disturbing case, on the night of June 21-22 in central Moscow, under pretext of an allegedly terminated lease agreement, law enforcement officials forcibly occupied the office of the Movement for Human Rights, a leading human rights group, and physically removed activists from the premises, injuring several of them.")

⁵⁸ See Federal'nyi Zakon RF "O vnesenii izmenenij v otdel'nye zakonodatel'nye akty Rossijskoj Federacii v chasti regulirovanija dejatel'nosti nekommercheskih organizacii, vypolnjajushih funkcii 'inostrannogo agenta'" [Fed. Law of the Russian Fed'n "On changes to individual legal acts of the Russian Federation in the regulation of activities of non-commercial organizations performing the functions of a 'foreign agent,'" Sobranie Zakonodatel'stva Rossijskoj Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2014, No. 23, Item 2932 [hereinafter: June 2014 Foreign Agent Law]; Federal'nyi Zakon RF o Vnesenii Izmenenii v Otdel'nye Zakonodatel'nye Akty Rossijskoj Federatsii po Voprosu Finansovoyi Otchetnosti Politicheskikh Partii, Izbiratel'nikh Obyedinenii, Kandidatov na Vyborakh v Organy Gosudarstvennoi Vlasti i Mestnogo Samovupravleniya [Fed. Law of the Russian Fed'n on Amendments to Certain Legislative Acts of the Russian Fed'n on the Question of Fin. Reporting of Political Parties, Electoral Ass'ns, Candidates in the Elections of State Auth.s and Local Gov'ts], Sobranie Zakonodatel'stva Rossijskoj Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2014, No. 48, Item 6636 [hereinafter: November 2014 Foreign Agent Law].

without their consent.⁵⁹ In 2012, NGOs were foreign agents only if they registered themselves; in 2014, the Ministry of Justice could self-register NGOs as foreign agents.⁶⁰ Next, a November 2014 amendment further limited how “foreign agents” could operate. The amendment banned foreign agent NGOs from participating in Russian electoral and referendum campaigns, and specifically banned them from contracting with or giving donations to political parties.⁶¹ Overall, this legislation directly or indirectly forced many NGOs to close: by 2015, Russia had 33% fewer NGOs than it had had prior to the 2012 Foreign Agent Law.⁶²

In 2015, the Russian government passed the next significant amendment to RFAL, which allowed NGOs designated as foreign agents to petition the court to remove themselves from the register.⁶³ No mechanism existed in the original law for NGOs to petition for removal if they ceased accepting foreign funding. The system was clunky enough that the Ministry of Justice did not remove NGOs from the list even after they shutdown.⁶⁴ NGOs soon took advantage of the amendment, and by 2017 the Ministry of Justice was unregistering more organizations than registering them.⁶⁵

Soon thereafter, the government amended RFAL multiple times to broaden its scope. Following the U.S. Department of Justice forcing Russian media company “RT” to register as a foreign agent, in 2017 the Russian government added media companies to those in RFAL’s scope.⁶⁶ Deputy Speaker of the Duma Peter Tolstoy stated that these changes “mirror” those in the U.S. (increasing the scope to include media companies) and that in fact the Russian government will only apply them to U.S. media in Russia.⁶⁷ The Law, however, did not distinguish

⁵⁹ June 2014 Foreign Agent Law, *supra* note 58.

⁶⁰ *Russia’s Foreign Agent Law: Violating human rights and attacking civil society*, NORWEGIAN HELSINKI COMM., 3 (Aug. 21, 2014),

https://www.nhc.no/content/uploads/2018/08/NHC_PolicyPaper_6_2014_Russiasforeignagentlaw.pdf (“This shifts the burden, forcing organizations to go to court in order to prove that they are not ‘foreign Agents’ instead of prosecutors having to prove that they are.”).

⁶¹ November 2014 Foreign Agent Law, *supra* note 58.

⁶² Charles Digges, “*Foreign Agent’ Law Has Put 33 Percent of Russia’s NGOs Out of Business*,” BELLONA (Oct. 20, 2015), <http://bellona.org/news/russian-human-rights-issues/russian-ngo-law/2015-10-foreign-agent-law-has-put-33-percent-of-russias-ngos-out-of-business>.

⁶³ Federal’nyi Zakon RF “O vnesenii izmenenii v stati 27 i 38 Federal’novo zakona ‘Ob obshestvenikh obedeneniyakh’ i statioo 32 Federal’novo zakona ‘O nekommersheskikh organizatsiyakh’” [Fed. Law of the Russian Fed’n “On amendments to statute 27 and 38 of the Federal law ‘On general organizations’ and statute 32 of the Federal law ‘On NGOs’”], Sobranie Zakonodatel’sтва Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 10, Item 1413.

⁶⁴ See Skibo, *supra* note 49.

⁶⁵ *Id.*

⁶⁶ Federal’nyi Zakon RF “O vnesenii izmeneniy v stat’i 10-4 i 15-3 Federal’novo zakona “Ob informatsii, informatsionnykh tekhnologiyakh i o zashchite informatsii” i stat’yu 6 Zakona Rossiyskoy Federatsii “O sredstvakh massovoy informatsii” [Fed. Law of the Russian Fed’n “On Amending Articles 10-4 and 15-3 of the Federal Law ‘On Information, Information Technologies and protection of information’ and Article 6 of the Law of the Russian Federation ‘About the media’] Sobranie Zakonodatel’sтва Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2017, No. 48, Item 7051 [hereinafter: 2017 Foreign Agent Law], art. 2.

Duma Organichit Rabotu Amerikanskikh SMI na Onvet na Prichesleniya RT k inoagentam [The Duma will Limit the work of American news agencies in response to the inclusion of RT as a foreign agent], BBC (Nov. 10, 2017) (Russ.), <https://www.bbc.com/russian/news-41940245>.

⁶⁷ *Duma Organichit Rabotu Amerikanskikh SMI na Onvet na Prichesleniya RT k inoagentam*, *supra* note 66.

nationalities, and could thus apply to any media organization operating in Russia that accepts foreign funding.⁶⁸

In 2019, the government again broadened RFAL's scope. This time, it acted in response to the U.S. DOJ's prosecution of Maria Butina, and added individuals as well as mass media to the list of parties subject to RFAL.⁶⁹ Any individual or media company that accepts foreign funding and publishes information on mass media must register as a "foreign agent."⁷⁰ Like they did in 2017, Russian lawmakers claimed the amendments brought Russia's law in line with the U.S. FARA.⁷¹

Finally, the Russian government most recently amended RFAL in December 2020. The government claimed that the amendments comprised part of its "gradual[] expan[sion]" of the law, but they also may have been partially in response to the international scrutiny Russia received after opposition leader Alexey Navalny's poisoning in August 2020.⁷² The amendments added, non-exhaustively: penalties for media companies publishing information about foreign agents without mentioning the party's foreign agent status, a ban on foreign agents from appointments to state and local government bodies, new audit requirements, and a new "foreign agent" definition that includes NGOs who accept money or property from foreign agents or intermediaries of foreign agents.⁷³ Previously, the law had included only those parties which accepted money or property directly from foreign principals. The amendment's effects have yet to be seen, but analysts have already condemned the Law as "creat[ing] yet another repressive tool the government can use to harass independent groups, interfere with their work, and ultimately shut them down."⁷⁴

⁶⁸ 2017 Foreign Agent Law, *supra* note 66, art. 2.

⁶⁹ Federalnii Zakon RF "O vnesenii izmeneniy v Zakon Rossiyskoy Federatsii 'O sredstvakh massovoy informatsii' i Federal'nyy zakon 'Ob informatsii, informatsionnykh tekhnologiyakh i o zashchite informatsii' [Fed. Law of the Russian Fed'n "On Amending the Law of the Russian Federation 'On Mass Media' and the Federal Law 'On Information, Information Technologies and the Protection of Information'"] Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2019, No. 49, Item 6985 [hereinafter: 2019 Foreign Agent Law]. Anton Troianovski, *In Russia, an Updated Law With New Restrictions on Freedom of Speech*, N.Y. TIMES (Dec. 2, 2019), <https://www.nytimes.com/2019/12/02/world/europe/russia-foreign-agents-law.html>.

⁷⁰ 2019 Foreign Agent Law, *supra* note 69.

⁷¹ Troianovski, *supra* note 69.

⁷² See *Russia Eyes Expansion to 'Foreign Agent' Law*, THE MOSCOW TIMES (Dec. 2, 2020), <https://www.themoscowtimes.com/2020/12/02/russia-eyes-expansion-to-foreign-agent-law-a72209>. Andreas Rinke & Alexander Marrow, *Germany says it will investigate Navalny poisoning case, if he agrees*, REUTERS (Sept. 15, 2020), <https://www.reuters.com/article/russia-politics-navalny-idUSKBN2620ZF>; Tim Lister, Clarissa Ward & Sebastian Shukla, *CNN-Bellingcat investigation identifies Russian specialists who trailed Putin's nemesis Alexey Navalny before he was poisoned*, CNN (Dec. 15, 2020), <https://www.cnn.com/2020/12/14/europe/russia-navalny-agents-bellingcat-ward/index.html>. The Ministry of Justice previously labeled Navalny's NGO (the Anti-Corruption Foundation) a foreign agent in 2019. *Russia: 'Foreign agent' blacklisting for the Anti-Corruption Foundation is latest attack on freedom of association*, AMNESTY INT'L (Oct. 9, 2019), <https://www.amnesty.org/en/latest/news/2019/10/russia-foreign-agent-blacklisting-for-the-anti-corruption-foundation-is-latest-attack-on-freedom-of-association/>.

⁷³ Federal'nyi Zakon RF O vnesenii izmeneniy v otdel'nyye zakonodatel'nyye akty Rossiyskoy Federatsii v chasti ustanovleniya dopolnitel'nykh mer protivodeystviya ugrozam natsional'noy bezopasnosti [Federal Law RF On amendments to certain legislative acts of the Russian Federation in terms of establishing additional measures to counter threats to national security], Rossiiskaia Gazeta [Ros. Gaz.] 11 Jan. 2021 [hereinafter: 2020 Foreign Agent Law].

⁷⁴ See, e.g. *Russia: New Effort to Stifle Independent Groups*, HUMAN RIGHTS WATCH (Nov. 12, 2020), <https://www.hrw.org/news/2020/11/12/russia-new-effort-stifle-independent-groups>; *What you need to know about*

In summary, RFAL applies to any NGO, media company, or individual that engages in “political activities” and accepts money or property from a foreign principal, foreign agent, or a foreign agent’s intermediary. It commands registered foreign agents to submit to regular and unscheduled audits.⁷⁵ It bans foreign agents from participating in “electoral or referendum campaigns,” from contracting with or donating to a political party,⁷⁶ or from joining state or local government bodies.⁷⁷ Finally, it requires registered parties to include a “foreign agent” mark on all published material,⁷⁸ and it punishes those who fail to register or fail to follow the rules once registered with fines, jail time, or forced labor.⁷⁹

2. Implementation: How the Russian Foreign Agent Law Stymies Dissent

Enforcement of the Foreign Agent Law has stymied dissent and marginalized opposition voices in Russia. All three branches of Russia’s government have contributed to these effects. The Executive has used the law to target perceived political enemies; the Judiciary has read RFAL broadly but Russian constitutional rights narrowly, and the Legislature has repeatedly expanded RFAL despite evidence of the Law’s abuse. As the previous section focused on legislative action, this section will highlight the roles of the Executive and Judicial branches.

The Executive Branch has enforced the law to target its perceived political enemies. The election watchdog “Golos,” for example, was the first NGO that the Ministry of Justice added to the “foreign agent” register. Its inclusion surprised few observers. One noted: “[Golos] is, unfortunately, involved in the most sensitive work from the position of the Russian government—election irregularities. For this reason, few were surprised that after the law’s entry into force, it was this NGO which became the first [‘foreign agent’].”⁸⁰

Golos was not alone. All of the first NGOs forced to register were those whose advocacy not only clashed with the government line but also promoted more “western” views.⁸¹ More recently, the Council of Europe reported:

Russia’s updated ‘foreign agent’ laws, MEDUZA (Dec. 28, 2020), <https://meduza.io/en/feature/2020/12/28/what-you-need-to-know-about-russia-s-updated-foreign-agent-laws> (“this new legislation puts almost everyone at risk of being labeled a foreign agent.”).

⁷⁵ NGO Law, *supra* note 34, art. 32, (1), (3).

⁷⁶ Federal’nyi Zakon RF o Politicheskikh Partiyakh [Federal Law of the Russian Federation on Political Parties], SOBRANIE ZAKONODATEL’STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2001, No. 29, Item 2950, Red. Ot. Dec. 2, 2019 [As amended Nov. 24, 2014], Art. 30(3)(n) (foreign agents banned from donating to political parties, art. 31(4.1)(e) (foreign agents banned from contracting with political parties) [hereinafter: Political Party Law].

⁷⁷ 2020 Foreign Agent Law, *supra* note 73, art. 5(8).

⁷⁸ NGO Law, *supra* note 34, art. 24(1); Mass Media Law, *supra* note 34, art. 27.

⁷⁹ UGOLOVNIY KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] art. 239, 330.1 (Russ.).

⁸⁰ Kolbasin, *supra* note 14, at 5.

⁸¹ See Callahan, *supra* note 11, at 1245 (“Human Rights Watch, Amnesty International, Transparency International . . .”); *Russia’s Foreign Agent Law: Violating human rights and attacking civil society*, *supra* note 60, at 3 (The first organizations registered were: “Association ‘Golos’ (Moscow) – June 9, 2014, Regional ‘Golos’ (Moscow) – June 9, 2014, Centre for Social Policy and Gender Studies (Saratov) – June 9, 2014, ‘Women of Don’ (Novocherkassk) – June 9, 2014, Kostroma Centre for Support of Public Initiatives (Kostroma) – June 9, 2014, Interregional Human Rights Association “Agora” (Kazan) – July 21, 2014, Regional public

Out of the 148 [NGOs] registered as Foreign Agents on December 2016, 121 groups (or 82%) were conducting activities such as: the promotion of democracy and the rule of law, humanitarian and social assistance, awareness-raising on environmental issues, promotion of independent media and journalism, civic education, and social research. Moreover, it is striking that human rights defenders constituted the largest single category of [NGOs] registered as foreign agents (44, or 30%).⁸²

Furthermore, when passing the amendment that added individuals to RFAL's scope, one of the amendment's drafters hinted that the government would apply the law in a targeted fashion. He stated that the government should apply the Law to just a "small circle of individuals."⁸³ To be sure, in 2017, less than 1% of all foreign funding received by Russian NGOs was received by those labeled foreign agents.⁸⁴ Together, this implies the government indeed focuses on registering a select group.

The Ministry of Justice targeted opposition NGOs despite minimal evidence that they were in fact foreign agents. In 2014, the Ministry of Justice launched an inspection of "Memorial," a Russian NGO that documents historical Stalinist repression.⁸⁵ It found no "political activity" but registered it anyway.⁸⁶ In a different episode, the Ministry of Justice declined to investigate the "Krasnodar Regional Social Organization of University Alumni" as a "foreign agent," but registered it anyway.⁸⁷ Rather, its inclusion was pre-emptory, in the context of "state supervision."⁸⁸ Similarly, it launched a case against the environmental club "Ulukitkan," without evidence of "political activity."⁸⁹ Ulukitkan's registration was a "prophylactic" measure, the court held, given "a provision in the group's charter" claiming "the right to participate in decision making by state authorities," and a previous foreign-funded 2011 journalism contest commemorating the 25th anniversary of the Chernobyl disaster.⁹⁰ Finally, the Ministry of Justice has brought claims against groups, like the anti-discrimination NGO "Memorial" (different that

organization 'Ecozaschita! – Women's Council' (Kaliningrad) – July 21, 2014, 'Public Verdict' Foundation (Moscow) – July 21, 2014, Human Rights Centre 'Memorial' (Moscow) – July 21, 2014, 'Lawyers for Constitutional Rights and Freedoms' / JURIX (Moscow) – July 21, 2014."); *see also* Kolbasin, *supra* note 14, at 9 (concluding that the Ministry of Justice intended to target these human rights groups for political reasons).

⁸² COMM'R FOR HUM. RIGHTS, COUNCIL OF EUR., CommDH(2017)22, *supra* note 12, ¶ 21.

⁸³ Troianovski, *supra* note 69.

⁸⁴ Elena Mukhametshina, *Chislo novikh inostrannikh agentov za god snizilos pochti v dvoe* [The number of new foreign agents fell by almost half], VEDOMOSTI (May 1, 2017), <https://www.vedomosti.ru/politics/articles/2017/05/02/688220-chislo-inostrannih-agentov> (Russ.).

⁸⁵ COMM'R FOR HUM. RIGHTS, COUNCIL OF EUR., CommDH(2015)17, *supra* note 15, ¶ 37.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* State supervision may be "the monitoring of the organisation's web-site by the Ministry on its own initiative."

⁸⁹ *Russia: Harsh Toll of 'Foreign Agents' Law*, *supra* note 49.

⁹⁰ *Id.*

the “Memorial” that investigates Stalinist repression, above) that did not receive any foreign funding whatsoever.⁹¹

This targeting of opposition groups and individuals operates in tandem with RFAL’s harsh penalties, maintenance requirements and substantive limitations to exert a “chilling effect” on civil society. After the law’s passing, many organizations decided to self-censor, or in some cases, shut down.⁹² The law’s criminal penalties “play an important role in self-censorship.”⁹³ If they decide not to self-censor, “foreign agents” face an array of burdens once registered, including “a strict control regime, [] extensive annual audits, quarterly financial reporting and voluminous reporting on all activities every half year.”⁹⁴ They also face the possibility of additional unscheduled audits at the government’s discretion.⁹⁵ This is all in addition to the weighty substantive limitations RFAL imposes, including precluding registered “foreign agents” from concluding contracts with or donating to political parties,⁹⁶ participating in electoral or referendum campaigns,⁹⁷ and, as of December 2020, being appointed to state or local government bodies.⁹⁸ Finally, the label “foreign agent” carries with it intense stigma. Organizations branded “foreign agents” often lose valuable private and public partners with whom they previously worked.⁹⁹ Many are subject to severe harassment.¹⁰⁰

Finally, the Russian judicial system furnishes its imprimatur to the status quo. Of course, this would not surprise scholars of the Russian legal system—outsiders and the judiciary itself have

⁹¹ *Id.*

⁹² *Id.*, ¶¶ 65–67.

⁹³ *Id.*, ¶ 48.

⁹⁴ *Russia’s Foreign Agent Law: Violating human rights and attacking civil society*, *supra* note 60, at 1.

⁹⁵ NGO Law, *supra* note 34, art. 32(4.2) (the Russian government can in certain situation perform unscheduled audits of NGOs).

⁹⁶ Political Party Law, *supra* note 76, art. 30(3)(n) (“foreign agents” cannot donate to political parties); *id.*, art. 31(4.1)(e) (“foreign agents” cannot contract with political parties).

⁹⁷ Federal’nyi Zakon RF “Ob osnovnykh garantiyakh izbiratel’nykh prav i prava na uchastiye v referendumе grazhdan Rossiyskoy Federatsii” [Federal Law “On basic guarantees of voting and rights and rights for participation in referendums of citizens of the Russian Federation”] *Sobranie Zakonodatel’sтва Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 2002, No. 24, Item 2253, Red. Ot. Apr. 1, 2020 [As amended Apr. 1, 2020], art. 3(6) [hereinafter: Election Law].

⁹⁸ 2020 Foreign Agent Law, *supra* note 73, art. 5(8).

⁹⁹ COMM’R FOR HUM. RIGHTS, COUNCIL OF EUR., CommDH(2017)22, *supra* note 12, ¶¶ 33–34 (“Russian national human rights institutions have stated that the ‘foreign agent’ label amounts to a major blow to the reputation of civil society organisations.”).

¹⁰⁰ *Russia: Harsh Toll of ‘Foreign Agents’ Law*, *supra* note 49 (“For example, the words, ‘Foreign Agents!’ were daubed on the building of Baikal Environmental Wave in Irkutsk; the office lease of Human Rights House in Voronezh was terminated; and ultranationalists assaulted staff members of the Komi Human Rights Commission ‘Memorial’ in Syktyvkar. In a particularly disturbing case, on the night of June 21–22 in central Moscow, under pretext of an allegedly terminated lease agreement, law enforcement officials forcibly occupied the office of the Movement for Human Rights, a leading human rights group, and physically removed activists from the premises, injuring several of them.”).

long seen the Russian courts as a subservient branch of government.¹⁰¹ Here too, the judiciary has sanctioned a system that chills civil society and stymies the free expression of opinions.¹⁰²

In 2014, the Russian Constitutional Court reviewed and upheld RFAL.¹⁰³ The majority stated that the Law did not infringe upon the fundamental right to association, in part because the Law aimed to increase transparency rather than interfering in the activities of organizations designated as “foreign agents.”¹⁰⁴ The Court explained that, because the Ministry of Justice registers NGOs based only on the “actual fact” of receiving foreign funding, it identifies these groups as “special entities involved in political activity,” rather than as groups that pose a “threat” to the “public institutions.”¹⁰⁵

But the Court’s analysis came up short. It “fails to address many of the criticisms that were levelled at various provisions of the Russian Foreign Agents Law, particularly the vagueness of the term ‘political activity,’ the pejorative designation of ‘foreign agent,’ and the inclusion of all types and amounts of foreign financing”¹⁰⁶

If the Court reviewed RFAL again today, it would face a greatly expanded “foreign agent” program compared to the one that it sanctioned in 2014. The Court released its opinion before the 2014 amendments, which added substantive limitations on NGOs functioning, and the 2017 and 2019 amendments, which expanded RFAL’s scope by adding media companies and individuals to the list of parties covered, and the 2020 amendments which again broadened RFAL’s scope and increase substantive limitations on foreign agents. Nevertheless, the Court recently issued an advisory opinion to the Russian Duma which sanctioned the 2020 Amendments.¹⁰⁷ Thus, it would likely uphold the Law against a similar challenge.

Lower courts have similarly failed to check the political branches. Reports on lower court opinions identify a willingness to rule against the government’s administration of fines or “foreign agent” registration only on rare occasions. The lower courts have avoided any discussion of constitutional rights, and “despite the small number of cases, it can be said that Russia has

¹⁰¹ *Russian Federation*, INT’L COMM. OF JURISTS, 16 (Jun. 2014), <http://www.icj.org/wp-content/uploads/2014/06/CIJL-Country-Profile-Russian-Federation-June-2014.pdf> (“The ICJ has heard, including from judges themselves, that many judges continue to see themselves as agents of the State whose goal is to protect its interests, in Soviet tradition.”); *Russia*, FREEDOM HOUSE, 7 (2018), <https://www.justice.gov/eoir/page/file/1028706/download> (“The judiciary lacks independence from the executive branch, and career advancement is effectively tied to compliance with Kremlin preferences.”).

¹⁰² See COMM’R FOR HUM. RIGHTS, COUNCIL OF EUR., CommDH(2017)22, *supra* note 12, ¶ 38.

¹⁰³ Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 8 aprelya 2014 g. [Ruling of the Russian Federation Constitutional Court of Apr. 8, 2014], ROSSIISKAIA GAZETA [Ros. Gaz.] Apr. 18, 2014.

¹⁰⁴ *Id.*, ¶¶ 3.2–3.4; Orlova, *supra* note 11, at 399–401.

¹⁰⁵ Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 8 aprelya 2014 g., ¶ 3.1.

¹⁰⁶ Orlova, *supra* note 11, at 404 (she also added “Clearly, rather than ensuring greater transparency, the government’s aim in creating a registry of ‘foreign agents’ was to assert greater control over foreign-funded NGOs participating in transnational advocacy networks, as well as to create barriers inhibiting their effective operation.”).

¹⁰⁷ *V Gosdumu vnesli popravki ob ugovnoy otvetstvennosti inoagentov* [Amendments were made to the State Duma on the criminal liability of foreign agents] RIA NOVOSTI (Nov. 12, 2020), <https://ria.ru/20201211/inoagency-1588790837.html> (Russ.) (“The Supreme Court gave a positive opinion on a bill prepared by parliamentarians on the criminal liability of foreign agents who maliciously violate administrative legislation in this area, Andrei Klimov, head of the Federation Council commission for the protection of state sovereignty, told RIA Novosti on Friday.”).

developed a negative judicial practice regarding NGOs suspected of being foreign agents.”¹⁰⁸ Similarly, the Norwegian Helsinki Group human rights organization reported that, while some courts have ruled in favor of NGOs (regarding administrative fines or registration), no courts have ruled as a matter of law that the government’s legal interpretation of the foreign agent standard is overly broad or unconstitutional; rather, courts find that the facts of a particular case do not meet the prosecution’s standard.¹⁰⁹ Put differently, courts do not challenge the Ministry of Justice’s sometimes expansive legal arguments.¹¹⁰ And since the government expanded the definition of “political activity” in 2016, according to Chairman of the Russian Presidential Council for Civil Society and Human Rights Mikhail Fedotov, judicial practice has not improved; if anything, it has become worse.¹¹¹

In sum, harsh penalties, registration requirements, and substantive limitations have combined to result in RFAL application that has “silenced, marginalized and punished” the “legitimate activity” of parties branded “foreign agents.”¹¹²

B. *The Foreign Agents Registration Act*

The U.S. Foreign Agents Registration Act (FARA) requires any individual or legal entity to register as a “foreign agent” if the party acts under foreign control or at foreign request, and engages in political or other associated activities.¹¹³ Congress passed FARA in 1938 to “shine a spotlight of pitiless publicity” on Nazi propaganda in the United States.¹¹⁴ Congress thus amended FARA after World War II to account for the United States’ evolution into a global economic hegemon, but the Law subsequently fell into disuse.¹¹⁵ However, Russian interference in the 2016 presidential election prompted a reawakening of DOJ enforcement and Congressional interest in the Law.¹¹⁶ Today, legislators and prosecutors consider FARA a key tool to combat covert foreign influence in the U.S.

¹⁰⁸ Kolbasin, *supra* note 14, at 9–10.

¹⁰⁹ *Russia’s Foreign Agent Law: Violating human rights and attacking civil society*, *supra* note 60, at 3 (“[A]ll courts have so far failed to examine whether the restrictions imposed by the law are necessary and proportionate to a legitimate aim in a democratic society. In other words, the courts have failed to ensure that they honour human rights standards when applying the law in specific cases.”).

¹¹⁰ RUSSIAN FEDERATION: REPORT ON THE CONSTITUTIONAL COURT PROCEEDINGS AND JUDGEMENT ON THE “FOREIGN AGENT” AMENDMENTS TO THE NGO LAW, INT’L COMM. JURISTS (Sept. 2014), ¶ 74, <https://www.icj.org/wp-content/uploads/2014/09/RUSSIA-FOREIGN-AGENTS-elec-version.pdf>. See also Kolbasin, *supra* note 14, at 3–5 (discussing the case of “Golos” and how the court accepted the Ministry of Justice’s argument that the law should apply retroactively).

¹¹¹ COMM’R FOR HUM. RIGHTS, COUNCIL OF EUR., CommDH(2017)22, *supra* note 12, ¶ 20. The Commissioner’s report continues to describe the types of organizations whose activity courts have deemed “political.” Some strain credibility. For instance, “Local prosecutorial authorities have even qualified a project for preventing HIV transmission – that included distribution of syringes and condoms (NCO Sotsium, in the city of Engels in the Saratov region) – as ‘political activity.’” *Id.*, ¶ 22.

¹¹² *Id.*, ¶ 38.

¹¹³ 22 U.S.C. § 611 (2020).

¹¹⁴ H.R. Rep. No. 1381, 75th Cong., 1st Sess., 1–2 (1937).

¹¹⁵ See generally OIG 2016 Audit, *supra* note 17.

¹¹⁶ See *infra*, notes 155–63 and accompanying text.

1. History of the Act

The U.S. Congress enacted FARA in 1938.¹¹⁷ The now-defunct Special Committee on Un-American Activities¹¹⁸ proposed FARA to monitor and expose the propaganda of Axis powers¹¹⁹ with the view that a forced transparency regime would deter that propaganda.¹²⁰ As such, FARA required “agent[s] of a Foreign principal” to register with the Secretary of State and to provide information regarding their contracts with the foreign party and compensation.¹²¹ It defined “agent of a foreign principal” as anyone who “acts or engages or agrees to act as a public-relations counsel, publicity agent, or as agent, servant, representative, or attorney for a foreign principal or for any domestic organization subsidized directly or indirectly in whole or in part by a foreign principal.”¹²²

In 1942, Congress transferred enforcement of FARA from the Department of State to the Department of Justice.¹²³ It also clarified FARA’s goal: to “protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure . . . [of] activities for or on behalf of foreign governments”¹²⁴

During the period immediately following World War II, FARA’s enforcement focus switched from Nazis to communists and communist sympathizers.¹²⁵ DOJ reported twelve FARA prosecutions in the time period from the end of World War II to 1963—they included three regarding the Soviet Union and five regarding Cuba.¹²⁶ It also provided the legal basis for some politically tinged prosecutions. In 1951, the Department of Justice charged W.E.B. DuBois, founder of the NAACP, with a FARA violation for not registering as a foreign agent of the Soviet Union after his organization published a newsletter on international peace movements.¹²⁷ A judge acquitted him as a matter of law because there was no agency between DuBois and the Soviet

¹¹⁷ CONG. RSCH. SERV., IF10499, FOREIGN AGENTS REGISTRATION ACT: AN OVERVIEW 1 (2019), <https://fas.org/sgp/crs/misc/IF10499.pdf>.

¹¹⁸ A committee “charged with identifying Communist threats to the United States.” *House Un-American Activities Committee*, TRUMAN LIBRARY (accessed Feb. 8, 2021), <https://www.trumanlibrary.gov/education/presidential-inquiries/house-un-american-activities-committee>.

¹¹⁹ Pub. L. 75-583 (1938); Jahad Atieh, *Foreign Agents: Updating FARA to Protect American Democracy*, 31 U. PA. J. INT’L L. 1051, 1056 (2010).

¹²⁰ Atieh, *supra* note 119, at 1057; Vade de Velde, *supra* note 5, at 700; “[A]s initially conceived, [FARA] would not prohibit political ‘propaganda’ activities, but rather require that individuals engaged in ‘propaganda’ on behalf of foreign governments and principals register with the government and disclose information about their clients, activities, and contract terms.” CONG. RSCH. SERV., IF10499, *supra* note 117, at 1.

¹²¹ Pub. L. 75-583 (1938).

¹²² *Id.*

¹²³ Atieh, *supra* note 119, at 1057.

¹²⁴ Preface of Act of April 29, 1942, ch. 263, 56 Stat. 248 (1942) (current version at 22 U.S.C. § 611 *et seq.* (2020)).

¹²⁵ Atieh, *supra* note 119, at 1057.

¹²⁶ Fattal, *supra* note 22, at 912. The others were “one Rumania, two the Dominican Republic, and one the Committee of World Congress of the Defenders of Peace.” Attorney Gen. of U.S. v. Irish People, Inc., 684 F.2d 928, 945 (D.C. Cir. 1982).

¹²⁷ Doug Rutzen and Nick Robinson, *The Unintended “Foreign Agents,”* JUST SECURITY (Mar. 16, 2018), <https://www.justsecurity.org/53967/unintended-foreign-agents/>.

Union.¹²⁸ Nevertheless, the negative press generated by his prosecution “ruined his career.”¹²⁹ In addition to founding the NAACP, DuBois had been the first African American to receive a Harvard doctorate, and was an anti-war advocate.¹³⁰ After his trial, which the NAACP called “one of the most ludicrous actions ever taken by the American government,”¹³¹ DuBois stopped “many of his anti-nuclear policies, and he was thereafter sidelined in U.S. politics.”¹³²

In 1966, Congress passed multiple amendments to FARA to account for the U.S.’s new economic hegemony and the subsequent growth of the lobbying industry. As the U.S. emerged as “the political and commercial focal point of the western world,” foreign governments began lobbying the U.S. Congress (often through intermediaries) to enact favorable laws.¹³³ As a Senate report explained: “The place of the old foreign agent has been taken over by the lawyer-lobbyist and public relations counsel whose object is not to subvert or overthrow the U.S. Government, but to influence its policies to the satisfaction of his particular client.”¹³⁴ To capture this growing influence, Congress amended FARA to focus on “those who promote the interests not only of foreign governments but also of foreign enterprises that are closely connected to a foreign government.”¹³⁵ The amendments redefined “political activity,”¹³⁶ increased FARA’s enforcement budget, added penalties for non-compliance,¹³⁷ and broadened registration exemptions to “ensure legitimate commercial activities were not burdened.”¹³⁸ At the same time, the amendments “narrowed the reach of FARA by requiring the government to prove that a foreign agent [was] acting at the order, request, or under the direction and control of a foreign principal.”¹³⁹ These amendments form the “core” of FARA today.¹⁴⁰

Due to this recalibration, FARA prosecutions dropped precipitously. From 1966 to 2015, DOJ prosecuted only seven FARA cases.¹⁴¹ “According to FARA Unit staff, the 1966 amendments

¹²⁸ Robinson, *supra* note 26, at 1120–21.

¹²⁹ Andrew Lanham, *When W.E.B. DuBois Was Un-American*, BOSTON REV. (Jan. 13, 2017), <http://bostonreview.net/race-politics/andrew-lanham-when-w-e-b-du-bois-was-un-american>.

¹³⁰ *NAACP History: W.E.B. DuBois*, NAACP (accessed Apr. 17, 2020), <https://www.naacp.org/naacp-history-w-e-b-dubois/>.

¹³¹ *Id.*

¹³² Nick Robinson, *The Foreign Agents Registration Act is Broken*, FOREIGN POLICY (Jul. 22, 2019), <https://foreignpolicy.com/2019/07/22/the-foreign-agents-registration-act-is-broken/>.

¹³³ See Yuk K. Law, *The Foreign Agents Registration Act: A New Standard for Determining Agency*, 6 FORDHAM INT’L L.J. 365, 368 (1982).

¹³⁴ S. Rep. No. 143, 89th Cong., 1st Sess., 4 (1965).

¹³⁵ *Id.*

¹³⁶ Roland A. Paul, *Foreign Agents Registration Act: The New Amendments*, 22 THE BUSINESS LAWYER 601, 604–06 (1967).

¹³⁷ Atieh, *supra* note 119, at 1058–59.

¹³⁸ CONG. RSCH. SERV., IF10499, *supra* note 117, at 1. At least one analyst described these amendments as the creation of “loopholes.” Atieh, *supra* note 119, at 1058–59.

¹³⁹ OIG 2016 Audit, *supra* note 17, at 2.

¹⁴⁰ *Id.*

¹⁴¹ Katie Benner, *Justice Dept. to Step Up Enforcement of Foreign Influence Laws*, N.Y. TIMES (Mar. 6, 2019), <https://www.nytimes.com/2019/03/06/us/politics/fara-task-force-justice-department.html>. Those included South Korea lobbyist Tongsun Park (1977), five Cuban intelligence officers (1998), and Russian spy Anna Chapman (2014). Art Pine, *Foreign lobbying regulation: A history*, SUNLIGHT FOUNDATION (May 7, 2014), <https://sunlightfoundation.com/2014/05/07/foreign-lobbying-regulation-a-history/>. Previously, “It was used in the

reduced the incidence of criminal FARA prosecutions while increasing civil and administration resolution of FARA violations.”¹⁴² The amendments increased the burden of proof for FARA prosecutions and also provided the DOJ a new civil injunctive remedy for possible violations, thus possibly explaining the drop in prosecutions.¹⁴³ But DOJ rarely imposed any penalties, even civil ones. From 1991 to 2019, DOJ’s FARA Unit—a section within the National Security Division responsible for FARA administration and enforcement¹⁴⁴—had used civil injunctive relief only once, and sought civil fines only twice, both times without success.¹⁴⁵

Congress passed two amendments to FARA in 1995. First, it limited FARA’s scope via the Lobbying Disclosure Act (LDA). The LDA mandated registration of lobbyists working “on behalf of a foreign commercial interest”¹⁴⁶ If a lobbyist registered under the LDA, he or she did not need to register under FARA.¹⁴⁷ After the LDA exception to FARA took effect, new FARA registrations declined about 30%.¹⁴⁸ Second, Congress replaced the more pejorative term “political propaganda” (contained in the original law) with the more neutral term “informational materials.”¹⁴⁹ Congress believed the term “propaganda” was “an unnecessary remnant of the original law and . . . the change to ‘informational materials’ reflected the shift in focus to the public disclosure of agents engaged in the U.S. political process.”¹⁵⁰

In summary, under current FARA requirements, any individual or legal entity must register as a “foreign agent” if the party acts under foreign control or at foreign request, and engages in political or other associated activities.¹⁵¹ Registered parties must renew their registration every six months.¹⁵² Registered parties must include a foreign agent mark on all published material and submit a copy of all published material to the DOJ within 48 hours of publication.¹⁵³ Violations of the Act may result in a fine, jailtime, or even deportation (if a foreign citizen).¹⁵⁴

World War II era to successfully prosecute some 23 criminal cases.” *Foreign Agents Registration Act Enforcement*, DEP’T OF JUSTICE ARCHIVE (accessed Feb. 9, 2021), <https://www.justice.gov/archives/usam/criminal-resource-manual-2062-foreign-agents-registration-act-enforcement>.

¹⁴² OIG 2016 Audit, *supra* note 17, at 2; *see also* Fattal, *supra* note 22, at 912 (FARA prosecutions “largely ceased, likely owing to the Act’s shifted focus onto lobbying . . .”).

¹⁴³ *See Foreign Agents Registration Act Enforcement*, *supra* note 141.

¹⁴⁴ For more information on the FARA Unit, see OIG 2016 audit, *supra* note 17, at 3–4 (“NSD’s Administration and Enforcement of FARA”).

¹⁴⁵ Press Release, Department of Justice, Court Finds RM Broadcasting Must Register as a Foreign Agent (May 13, 2019), <https://www.justice.gov/opa/pr/court-finds-rm-broadcasting-must-register-foreign-agent>; OIG 2016 Audit, *supra* note 17, at 12. DOJ’s general reluctance to enforcing FARA may have been due to a lack of resources, a lack of a clear legal mandate due to FARA’s self-policing nature, and “early political embarrassments from failed FARA enforcements” Atieh, *supra* note 119, at 1067–69.

¹⁴⁶ OIG 2016 Audit, *supra* note 17, at 2.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*, at 5. After DOJ filing fees in 1993, new registrations also declined 40%. *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*, at 2–3.

¹⁵¹ 22 U.S.C. § 611 (2020).

¹⁵² § 612.

¹⁵³ § 614.

¹⁵⁴ § 618.

2. Current enforcement and pressures on FARA

In just the last few years, high-profile FARA prosecutions have ended the Act's dormancy. In 2016, the U.S. intelligence community concluded that Russia interfered in the 2016 presidential election.¹⁵⁵ Then-Deputy Attorney General Rod Rosenstein appointed a special counsel, Robert Mueller, to fully investigate the matter.¹⁵⁶ Mueller placed FARA front and center during his investigation, indicting senior Trump Campaign officials Paul Manafort, Richard Gates, Michael Flynn, and four others under the Act.¹⁵⁷ Mueller's seven indictments equaled the total number of FARA charges from 1966 to 2017.¹⁵⁸ The DOJ previously referred to FARA as a law that was "little known outside of the legal community."¹⁵⁹ After these cases, lobbyists sat up and took notice.¹⁶⁰

Mueller's indictments produced three FARA innovations. First, Mueller may have expanded the material scope of conduct prohibited under the law. When charging Russian disinformation actors, he argued that the Russians had an obligation to register as "foreign agents" based on the information they disseminated on Facebook.¹⁶¹ This was the first time that FARA was applied to social media. Second, the relevant Mueller indictments "may represent the first time the DOJ has charged foreign nationals, operating predominantly from a *foreign country*, with criminal violations of FARA."¹⁶² Third, the government noted an intent to argue that certain defendants "conspired to *cause* a number of individuals or organizations to act as agents of a foreign principal, for which the individuals and organizations or the conspirators (or both) would have had a legal duty to register under FARA with the Justice Department."¹⁶³ This argument, too, is unprecedented. Indeed, the breadth of Mueller's indictments imply that FARA's previous failure to warn of Russian interference stemmed from, if anything, its underenforcement—not some possible statutory limitation.

Following Mueller's investigation, DOJ has re-emphasized FARA, albeit outside of the election-interference context. In 2017, it ordered Russian-state media outlets RT (Russia Today)

¹⁵⁵ NAT'L INT. COUNCIL, ICA 2017-01D, *supra* note 19, at ii.

¹⁵⁶ Press Release, Department of Justice, Appointment of Special Counsel (May 17, 2017), <https://www.justice.gov/opa/pr/appointment-special-counsel>. Attorney General Jeff Sessions had recused himself because the investigation implicated President Trump's campaign, of which Sessions had been part. Concerns about secret Russian influence implicated not only the presidential election but also the current presidential administration. FARA, whose purpose is to shine a "spotlight of pitiless publicity" on foreign influence, had failed to inform the public as intended.

¹⁵⁷ Teachout, *supra* note 16.

¹⁵⁸ *Id.* Since the 2016 Inspector General's report, DOJ has initiated more FARA prosecutions than it did the fifty years prior. Bernier-Chen, *supra* note 21.

¹⁵⁹ Teachout, *supra* note 16 (Teachout also quotes journalist Ken Silverstein: if FARA were properly enforced, "roughly half of Washington would be under arrest.").

¹⁶⁰ See Fattal, *supra* note 22, at 915 ("These cases have led to increased efforts by many former lobbyists to disclose their activities to avoid public scrutiny.").

¹⁶¹ Fattal, *supra* note 22, at 903–05.

¹⁶² *Id.* (emphasis added).

¹⁶³ Joshua R. Fattal, *The Justice Department's New, Unprecedented Use of the Foreign Agents Registration Act*, LAWFARE (Dec. 18, 2019), <https://www.lawfareblog.com/justice-departments-new-unprecedented-use-foreign-agents-registration-act>.

and Sputnik to register as foreign agents under FARA, and in 2018 it directed Chinese-state news agencies Xinhua and CGTN to do the same.¹⁶⁴ In March 2019, Assistant Attorney General for DOJ's National Security Division John Demers announced that DOJ was overhauling its FARA Unit, assigning a former member of Mueller's team as its chief and treating FARA registration as an "enforcement priority" instead of an "administrative . . . and regulatory obligation"¹⁶⁵ Shortly before, Demers had announced a settlement agreement with the global law firm Skadden, Arps, Meagher & Flom for its failure to register as a "foreign agent" when working for the government of Ukraine in 2012.¹⁶⁶ And in July 2020, Attorney General William Barr hinted at an even greater role for FARA when giving a speech on China. He stated: "America's corporate leaders might not think of themselves as lobbyists. You might think, for example, that cultivating a mutually beneficial relationship is just part of the 'guanxi' — or system of influential social networking — necessary to do business with the PRC [China]. But you should be alert to how you might be used, and how your efforts on behalf of a foreign company or government could implicate the Foreign Agents Registration Act."¹⁶⁷

Since DOJ's FARA re-emphasis, some have questioned how DOJ determines who to target for registration. "[T]he FARA unit openly recognizes that it bases its requests on media reports and public outcry," and "the most politically charged cases are the ones that end up being registered."¹⁶⁸ Indeed, in September 2020, DOJ ordered AJ+, an Al Jazeera subsidiary, to register as a foreign agent.¹⁶⁹ AJ+'s registration might raise eyebrows, insofar as it took place only after congresspeople pressured DOJ to investigate Al Jazeera.¹⁷⁰ In a letter obtained by the New York

¹⁶⁴ Kate O'Keefe and Aruna Viswanatha, Justice Department Has Ordered Key Chinese State Media Firms to Register as Foreign Agents, WALL ST. J. (Sept. 18, 2018), <https://www.wsj.com/articles/justice-department-has-ordered-key-chinese-state-media-firms-to-register-as-foreign-agents-1537296756>.

¹⁶⁵ Benner, *supra* note 141.

¹⁶⁶ Press Release, Department of Justice, Prominent Global Law Firm Agrees to Register as an Agent of a Foreign Principal (Jan. 17, 2019), <https://www.justice.gov/opa/pr/prominent-global-law-firm-agrees-register-agent-foreign-principal>. Note that the DOJ also brought charges for "willful" violation of the registration requirements against Gregory Craig (former White House Counsel and current Skadden partner), but the jury acquitted him. Jacob Rund, *Greg Craig Acquitted of Misleading U.S. Officials on Ukraine Work (1)*, BLOOMBERG L. (Sept. 4, 2019), <https://news.bloomberglaw.com/corporate-governance/greg-craig-acquitted-of-false-statements-about-ukraine-work>.

¹⁶⁷ Attorney General William Barr, Remarks on China Policy at the Gerald R. Ford Presidential Museum (Jul. 17, 2020), <https://www.justice.gov/opa/speech/transcript-attorney-general-barr-s-remarks-china-policy-gerald-r-ford-presidential-museum>.

¹⁶⁸ Alexandra Ellerbeck & Avi Asher-Schapiro, *Everything to know about FARA, and why it shouldn't be used against the press*, COLUM. JOURNALISM REV. (Jun. 11, 2018), <https://www.cjr.org/analysis/fara-press.php>; *see also* Robinson, *supra* note 26, at 1124–30 (arguing that RT's forced registration raises "the specter of politicized enforcement").

¹⁶⁹ Marc Tracy & Lara Jakes, *U.S. Orders Al Jazeera Affiliate to Register as Foreign Agent*, N.Y. TIMES (Sept. 15, 2020), <https://www.nytimes.com/2020/09/15/business/media/aj-al-jazeera-fara.html>.

¹⁷⁰ Letter from Members of Congress to Attorney General Jeff Sessions, (Mar. 6, 2018), https://zeldin.house.gov/sites/zeldin.house.gov/files/3.6_zeldin_gottheimer_cruz_letter_pdf.pdf.

And the United Arab Emirates, a geopolitical foe of Qatar (Al-Jazeera's owner), paid D.C. law firm Akin Gump \$56 million since 2017 to lobby those same lawmakers regarding the "accuracy and transparency of Qatar government-owned media" and the "influence on US politics by Mideast regional media outlets and other groups."¹⁷⁰ Dan Friedman, *The Trump Administration Orders an Al Jazeera Affiliate to Register as a Foreign Agent*, MOTHER JONES (Sept. 15, 2020), <https://www.motherjones.com/politics/2020/09/trump-doj-al-jazeera-fara-uae-qatar/>.

Times, DOJ justified its order by noting: “Journalism designed to influence American perceptions of a domestic policy issue or a foreign nation’s activities or its leadership qualifies as ‘political activities’ under the statutory definition . . . even if it views itself as ‘balanced.’”¹⁷¹ DOJ provided no public explanation how a news station can intend to publish news that is both “balanced” and also targeted to achieve a favored political aim. Of course, this is not to say that one could not criticize Al Jazeera’s coverage.¹⁷² Rather, “[i]n invoking FARA, Congress is relying on a notoriously opaque unit within the Department of Justice to draw an impossible line between propaganda and journalism.”¹⁷³ Political sway and public outcry renders this line drawing problem even harder.

Congress has supported DOJ’s FARA reawakening. In 2018, the Chairman and a senior member of the House Natural Resources Committee urged the Natural Resource Defense Council (NRDC) to register as a “foreign agent” of China; these members were concerned that the NRDC was working in support of China’s interests.¹⁷⁴ Republicans did not stop there, and urged registration of other environmental groups such as: Earthjustice, the Center for Biological Diversity, and the World Resources Institute.¹⁷⁵ Earthjustice has since registered.¹⁷⁶ Furthermore, bipartisan bills have proposed expanding FARA’s scope and enforcement provisions — for example, repealing the LDA exemption, giving the DOJ civil investigative authority, explicitly requiring “foreign agents” to file all posts on social media with the DOJ, and creating a dedicated FARA Unit within DOJ.¹⁷⁷ At least one proposed amendment would also mandate greater transparency by requiring DOJ to release advisory opinions and create a comprehensive enforcement strategy.¹⁷⁸ As of this article’s writing, Congress has passed no new amendments.

As FARA emerges from its deep slumber, concern centers on FARA’s vague definition of “foreign agent” that, possibly, could result in an overly broad application of the statute. Previously, 2016’s FARA audit revealed that DOJ officials themselves voiced uncertainty concerning which

¹⁷¹ Tracy & Jakes, *supra* note 169.

¹⁷² See, e.g. Jonathan A. Greenblatt, *Al Jazeera propagates hatred. Is it also a Foreign Agent?*, THE HILL (Aug. 10, 2018), <https://thehill.com/blogs/congress-blog/politics/401145-al-jazeera-propagates-hatred-is-it-also-a-foreign-agent?rl=1>.

¹⁷³ Ellerbeck & Asher-Schapiro, *supra* note 168.

¹⁷⁴ Steven Mufson & Chris Mooney, *House Republicans attack environmental group over its climate work in China*, WASH. POST (Jun. 8, 2018), <https://www.washingtonpost.com/news/energy-environment/wp/2018/06/05/house-republicans-attack-environmental-group-for-its-climate-work-in-china/> (“The Committee is concerned about NRDC’s role in aiding China’s perception management efforts with respect to pollution control and its international standing on environmental issues in a way that may be detrimental to the United States.”).

¹⁷⁵ Letter from Members of Congress to Mr. Kieran Suckling, Executive Director, Center for Biological Diversity, (Jun. 20, 2018), https://republicans-naturalresources.house.gov/uploadedfiles/letter_to_center_bio_diversity_06.20.18.pdf; Letter from Members of Congress to Ms. Abigail Dillen, (Oct. 1, 2018), https://republicans-naturalresources.house.gov/uploadedfiles/2018-10-01_bishop_westerman_to_dillen_earthjustice_re_fara.pdf; Letter from Members of Congress to Mr. Andrew Steer, President and CEO, World Resources Institute, (Oct. 17, 2018), https://republicans-naturalresources.house.gov/uploadedfiles/bishop-westerman_to_steer_wri_re_fara_ii_10.17.2018.pdf.

¹⁷⁶ See Registration Statement (Sept. 20, 2019), <https://efile.fara.gov/docs/6725-Registration-Statement-20190920-1.pdf>.

¹⁷⁷ Updates on Congressional Action on FARA Reform, CAPLIN & DRYSDALE (Feb. 20, 2019), http://www.caplindrysdale.com/files/25392_updates_on_congressional_action_on_fara_reform.pdf.

¹⁷⁸ Foreign Agents Disclosure and Registration Enhancement Act of 2019, S. Res. 1762, 116th Cong. (2019).

parties FARA does and does not exempt from its scope.¹⁷⁹ From the DOJ officials' perspective, concerns around vagueness compromised their ability to enforce the Act.¹⁸⁰ To help clarify which parties the Act covers, DOJ recently released years of FARA advisory opinions.¹⁸¹ But releasing advisory opinions has not abated all vagueness concerns. The Program on Government Oversight concluded that "it's clear that each of these opinions relate to very specific instances and don't lend themselves to a great deal of extrapolation."¹⁸² While the opinions provide valuable information, "they do not shed light on all of the issues or potential grey areas" and in fact "serve to sign-post how desperately in need of clarity the law really is."¹⁸³ For instance, since the 2016 audit, formal DOJ regulations have not clarified the scope of FARA's agency requirement.¹⁸⁴ Mueller's prosecutions pushed the enforcement envelope,¹⁸⁵ and related investigations pose yet another area where FARA will force a court to make "very fine judgement calls about the degree of independence of a press organization [or other actor] relative to a government."¹⁸⁶ Indeed, while many approved of DOJ's forcing RT to register as a "foreign agent," other news organizations, like Al-Jazeera, pose a more difficult challenge.¹⁸⁷

In sum, one scholar writes: "FARA is so poorly written, and the stigma of being labeled a foreign agent so great, that just increasing enforcement without reforming the underlying law is likely to lead to confusion and abuse."¹⁸⁸ Another argues that vagueness breeds anxiety: "when you move from a regime of underenforcement to public scrutiny and pressure to engage in more enforcement, we have no idea what that enforcement is going to look like."¹⁸⁹ In the past, when the public has increased pressure on DOJ to enforce FARA, the department abused its authority.¹⁹⁰

¹⁷⁹ OIG 2016 Audit, *supra* note 17, at iii ("Another difficulty NSD cited relates to the breadth and scope of existing exemptions to the FARA registration requirement and determining whether activities performed by certain groups, such as think tanks, non-governmental organizations, university and college campus groups, foreign media entities, and grassroots organizations that may receive funding and direction from foreign governments fall within or outside those exemptions.").

¹⁸⁰ *Id.*, at 17.

¹⁸¹ Press Release, Office of Pub. Affairs, Dep't of Justice, Department Of Justice Posts Advisory Opinions On FARA.Gov Website (Jun. 8, 2018), <https://www.justice.gov/opa/pr/departments-justice-posts-advisory-opinions-faragov-website> ("To enhance compliance, we are making these advisory opinions available publicly and online for the first time. By posting these advisory opinions, the Department of Justice is making clearer how we interpret some of FARA's key provisions.").

¹⁸² Dennett, *supra* note 25.

¹⁸³ *Id.*

¹⁸⁴ CYNTHIA BROWN, CONG. RSCH. SERV., R45037, THE FOREIGN AGENTS REGISTRATION ACT (FARA): A LEGAL OVERVIEW 3 (2017) (citing 28 C.F.R. § 5.100).

¹⁸⁵ *See supra* notes 161–63 and accompanying text.

¹⁸⁶ Statement by Claire Finkelstein, *supra* note 24 (DIGITAL RECORDING: 10:20).

¹⁸⁷ *See, e.g.* Ellerbeck & Asher-Schapiro, *supra* note 168 (examining Al-Jazeera as a possible FARA overreach and noting that "[Al-Jazeera's] English-language branch has racked up reporting accolades, including eight Peabody Awards and a Polk Award."); Graham Ruddick, *Ofcom clears al-Jazeera of antisemitism in exposé of Israeli official*, THE GUARDIAN (Oct. 9, 2017), <https://www.theguardian.com/media/2017/oct/09/ofcom-clears-al-jazeera-antisemitism-expose-israeli-embassy-official>.

¹⁸⁸ Rutzen & Robinson, *supra* note 127.

¹⁸⁹ Statement by Claire Finkelstein, *supra* note 24 (DIGITAL RECORDING: 35:50).

¹⁹⁰ Statement by Nick Robinson, Video tape: Protecting Democracy: Modernizing the Foreign Agents Registration Act, held by the Ctr. for Ethics and the Rule of Law, U. Pa., and the Am. Enterprise Inst. (Apr. 17, 2019), <https://www.law.upenn.edu/institutes/ceerl/conferences/fara/schedule.php> (DIGITAL RECORDING 37:45).

Of course, the vagueness criticized by scholars can also be a boon, as it affords DOJ discretion to tackle changing threats. Robert Mueller's prosecution of the actors who interfered in the 2016 presidential election, for instance, makes a strong argument against tailoring FARA too strictly.¹⁹¹

However, FARA's age, combined with the vastly different nature of today's foreign threats, creates another issue: the Law's purpose. The most recent official statements of FARA's purpose came in 1937: a law to spotlight U.S.-based parties financed by foreign governments, and in 1942: to protect the national defense.¹⁹² Congress in 1937 or 1942 could not have foreseen Russian interference in the 2016 election, or the growth of social media and multinational businesses. Thus, over 70 years later, confusion exists about FARA's aims. "[M]any see it primarily as a tool to provide transparency for lobbyists of foreign governments. Some continue to view it as a way to undermine propaganda or disinformation. And still others see FARA as a way to combat foreign interference in U.S. elections."¹⁹³

That said, there exists a "core" FARA aim. "FARA's purpose is to disclose sources of foreign political influence in the United States"¹⁹⁴ Indeed, DOJ advisory opinions do not always recommend registration when the potential "foreign agent" works on behalf of a private foreign party.¹⁹⁵ Conversely, DOJ *always* recommends registration when the agent works on behalf of a foreign government or its affiliate.¹⁹⁶ This makes sense, because covert actions of foreign governments or foreign government-affiliated entities may pose a direct threat to U.S. "national defense, internal security, and foreign relations."¹⁹⁷ To the extent that private parties unaffiliated with foreign governments pose a threat, the threat is usually more attenuated. Thus, while the Act's purpose could implicate private parties, its core aim is to expose the actions of foreign government and foreign government affiliates.

II. COMPARING THE RUSSIAN AND AMERICAN FOREIGN AGENT LAWS

For the reasons described in Part I(a), the United States Government should take steps to avoid replicating Russia's experience—stymying political opposition by closing domestically controlled civil society groups—with its own foreign agent law. One way to do that is by crafting sufficient safeguards to avoid the types of abuses seen in Russia. This section will compare three common aspects of the Russian and American foreign agent laws to help answer whether the current

For instance, a statutory abuse occurs when the DOJ interprets FARA in a way that is broader than the law's purpose, originally to disclose the secret activities of "foreign governments or foreign political groups," (H.R. Rep. No. 1381, 75th Cong., 1st Sess., 1–2 (1937)) or in a way that infringes First Amendment rights. *See Overbreadth*, *supra* note 33 (defining "overbreadth" as either contravening the statute's purpose or infringing upon protected rights).

¹⁹¹ *See supra*, notes 155–63 and accompanying notes (examining Mueller's FARA prosecutions).

¹⁹² H.R. Rep. No. 1381, 75th Cong., 1st Sess., 1–2 (1937). Preface of Act of April 29, 1942, ch. 263, 56 Stat. 248 (1942).

¹⁹³ Robinson, *supra* note 26, at 1078.

¹⁹⁴ Fattal, *supra* note 163.

¹⁹⁵ Dennett, *supra* note 25.

¹⁹⁶ *Id.*

¹⁹⁷ *See* Preface of Act of April 29, 1942, ch. 263, 56 Stat. 248 (1942).

American statute contains these safeguards. Part A compares the scope of the two laws by examining how each law defines “foreign agent.” Part B compares “foreign agent” registration requirements and other requirements while maintaining “foreign agent” status. And Part C compares the punishments for violators under each statute.

A. Scope

RFAL and FARA define “foreign agent” differently. The laws have three key elements: 1) the parties covered (possible exemptions for both), 2) the activities covered, and 3) the agency relationship between the domestic and foreign parties. Broadly speaking, RFAL defines foreign agent as any Russian NGO, media company, or individual involved in political activities who accepts money from abroad.¹⁹⁸ FARA defines foreign agent as any domestic party involved in certain public activities and controlled by a foreign entity.¹⁹⁹ Stylistically, RFAL’s scope is clear but overly broad.²⁰⁰ FARA, on the other hand, has a vague scope that could be interpreted and enforced too broadly.²⁰¹

1. Domestic Parties Covered

RFAL and FARA apply to different domestic parties, with RFAL’s definition of foreign agent not as vague as FARA’s. The Russian law applies to non-profit organizations, mass media, and individuals.²⁰² It clearly defines the exempt parties. Within the category of non-profit organizations, it exempts: non-profit political parties, religious organizations, state enterprises and NGOs created by them, and chambers of commerce.²⁰³ Persons exempt are employees of diplomatic missions and foreign-state representatives.²⁰⁴

¹⁹⁸ NGO Law, *supra* note 34, art. 2(6). After the 2020 amendments, parties who accept funding or property from an intermediary who accepts the funding from abroad, or who are themselves intermediaries, are also subject to registration. *Id.*

¹⁹⁹ Foreign Agents Registration Act, 22 U.S.C. § 611(c)(1) (2020).

²⁰⁰ Overly broad in the sense that it covers parties not implicated in the stated purpose of the law:

“to protect Russia from outside attempts to influence internal politics.” *Russian parliament adopts NGO 'foreign agents' bill*, *supra* note 41.

²⁰¹ Overly broad in the sense that it covers parties not implicated in the purpose of the law, to “shine a spotlight” on foreign influence (H.R. Rep. No. 1381, 75th Cong., 1st Sess., 1–2 (1937)) and that it could infringe upon First Amendment rights (*see infra* notes 316–49, and accompanying text (“FARA’s First Amendment Implications”)).

²⁰² NGO Law, *supra* note 34, art. 2(6) (NGOs); Mass Media Law, *supra* note 34, art. 6 (media companies and individuals).

²⁰³ 2012 Foreign Agent Law, *supra* note 3, art. 2(2) (political parties), art. 2(1) (religious organizations), art. 2(1) (state entities), art. 2(1) (chambers of commerce).

²⁰⁴ Federal’nyi Zakon RF o merakh vozdeystviya na lits, prichastnykh k narusheniyam osnovopolagayushchikh prav i svobod cheloveka, prav i svobod grazhdan Rossiyskoy Federatsii [Federal Law of the Russian Federation measures of influence on persons involved in violations of fundamental human rights and freedoms, rights and freedoms of citizens of the Russian Federation], SOBRANIE ZAKONODATEL’STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2012, No. 53, Item 7597, Red. Ot. Dec. 30, 2020 [As amended Dec. 30, 2020], Art. 2.1, ¶ 4 [hereinafter: Human Rights Law]. Note that foreign journalists accredited in Russia are formally exempt, but the Russian government also reserves the right to label foreign journalists as foreign agents if they

FARA, on the other hand, applies to all “persons” and defines “person” broadly as any “individual, partnership, association, corporation, organization, or any other combination of individuals.”²⁰⁵ Unlike its Russian counterpart, FARA not only exempts diplomats, diplomatic staff and foreign government officials, but also those participating in “private and nonpolitical activity” that furthers the “bona fide trade or commerce of [a] foreign principal,” those participating in “bona fide religious, academic, scholastic, or scientific [and fine arts] pursuit[s],” lobbyists registering under the LDA, parties involved in “other activities not serving predominantly a foreign interest,” bona fide domestic media, and any person qualified to practice law, representing an alleged foreign agent before a court or agency.²⁰⁶

The exempt categories’ vagueness sometimes results in confusion when determining FARA’s application. For instance, under DOJ’s interpretation, those engaged in “political activities” as defined by the act, are ineligible for the academic, scholastic, scientific, and fine arts exemption.²⁰⁷ But FARA’s definition of “political activities” is broad enough to cover many education or scientific institutions, like schools. As such, the exemption loses meaning, because under DOJ’s interpretation whether a party is involved in “political activities” remains the only relevant question. An example of a weird result: “a Catholic priest in the U.S. who, at the request of the Pope, calls for peace between all countries in their weekly sermon[; this actor] would seemingly be required to register as he would be attempting to influence U.S. public opinion on a policy issue at the request of a foreign principal.”²⁰⁸ In sum, tension between DOJ interpretation and FARA’s plain meaning makes the Law harder to follow.

It is also unclear how the education exemption above applies to NGOs. In an advisory opinion from 2012, DOJ stated that an organization working at the behest of a foreign government to convene educational panels discussing topics of interest to the foreign government (among other activities) must register as a “foreign agent.”²⁰⁹ With that in mind, many U.S.-based think-tanks accept money from foreign parties, including the Atlantic Council, the Council on Foreign Relations, and the Brookings Institution,²¹⁰ and host educational panels on a wide variety of global topics. Brookings, for instance, accepts significant money from the government of Qatar, and a former Qatari Prime Minister sits on the board of the Brookings Doha Center.²¹¹ Moreover, Brookings may act at the behest of the Qatari government. For example, Brookings academics in

perform foreign agent functions “incompatible with the professional activities of a journalist.” Art. 2.1(5). As such, this exemption appears to be a nullity.

²⁰⁵ 22 U.S.C. § 611(a) (2020).

²⁰⁶ § 613(a)–(c) (diplomats), § 613(e) (religious, academic, etc.), § 613(h) (LDA exemption), § 613(d)(2) (“other activities not serving predominantly a foreign interest”), § 611(d) (bona fide domestic media), § 611(g) (lawyers).

²⁰⁷ 28 C.F.R. § 5.304(d) (2020).

²⁰⁸ Robinson, *supra* note 26, at 1106. A full discussion of all of FARA’s vagueness is beyond the scope of this paper. Robinson’s paper provides thorough analysis of the issue.

²⁰⁹ Letter from Heather H. Hunt, Chief, Registration Unit, Counterespionage Section, Dep’t of Justice, to Addressee Deleted (Nov. 8, 2012), <https://www.justice.gov/nsd-fara/page/file/1070101/download>.

²¹⁰ See Dennett, *supra* note 25 (Atlantic Council and Brookings); Casey Michel, *Money Talks: Len Blavatnik And The Council On Foreign Relations*, BELLINGCAT (Oct. 10, 2019), <https://www.bellingcat.com/news/2019/10/10/money-talks-len-blavatnik-and-the-council-on-foreign-relations/> (Council on Foreign Relations).

²¹¹ See Dennett, *supra* note 25,

Qatar are not allowed to criticize the Qatari government.²¹² Brookings has not registered as a “foreign agent,” but strict reading of the 2012 advisory opinion could possibly include it because of its “political activity”: the public panels it convenes on topics in global politics. On the other hand, Brookings defines itself as a “public policy organization” that “conduct[s] in-depth research that leads to new ideas for solving problems facing society at the local, national and global level.”²¹³ Thus, its activities seem to fall under the religious, academic, scholastic, scientific, and fine arts exemption. This creates tension between DOJ guidance and FARA’s text that consequently renders ambiguous Brookings’ status, as well as that of many other think tanks.

Furthermore, the exemption concerning bona fide domestic media is narrower than it initially appears. For example, under FARA the Wall Street Journal (WSJ) might need to register as a foreign agent.²¹⁴ § 611(d) provides that media organizations at least 80% owned by U.S. citizens need not register *provided* they are “not owned, directed, supervised, controlled, subsidized, or financed, and none of [their] policies are determined by any foreign principal . . . or [their agent].”²¹⁵ But the WSJ is owned by NewsCorp, a company financed in part by foreigners with foreigners among its officers and directors.²¹⁶ Thus, “[i]f it was determined that [a] Wall Street Journal . . . journalist or editor acted at the request of a foreign principal,” it might need to register as a foreign agent.²¹⁷ Realistically, this exception to the exemption could sweep in many U.S.-based news organizations.

2. Activities Covered

Both RFAL and FARA utilize broad and vague standards for the type of activity in which foreign agents engage. Put differently, if a covered party engages in any of the below-defined activities and has the required foreign nexus (see iii, below), that party must register under RFAL or FARA.

Under RFAL, an NGO, media company, or individual must register as a “foreign agent” if they participate in “political activities.”²¹⁸ In 2016, the government enacted an expansive definition of political activity:

[C]arr[ying] out activities in the field of state building, protecting the foundations of the constitutional system of the Russian Federation, the federal structure of the Russian Federation, protecting the sovereignty and ensuring the territorial integrity of the Russian Federation, ensuring the rule of law, law and order, state

²¹² *Id.*

²¹³ *About Us*, BROOKINGS (accessed Mar. 31, 2021), <https://www.brookings.edu/about-us/>.

²¹⁴ Robinson, *supra* note 26, at 1111.

²¹⁵ Foreign Agents Registration Act, 22 U.S.C. § 611(d) (2020).

²¹⁶ Robinson, *supra* note 26, at 1111.

²¹⁷ *Id.*

²¹⁸ NGO Law, *supra* note 34, art. 2(6).

and public security, defense of the country, foreign policy, socio-economic and national development of the Russian Federation, development of the political system, activities of state bodies, local governments, the legislative regulation of the rights and freedoms of man and citizen . . . the formation of state bodies, [and] local bodies²¹⁹

This broad definition fails to define internal terms like “rule or law or “development of the political system.” To provide context, RFAL includes possible ways in which a “foreign agent” might participate in the above-described activities. For instance, participating in and conducting rallies, lobbying, or conducting polling all constitute political activity.²²⁰ Not included as political acts are: “science, culture, art, healthcare, [disease] prevention and public health, social services, social support and the protection of citizens, protection of motherhood and childhood, social support for the disabled, promotion of a healthy lifestyle, physical [education] and sports, protection of flora and fauna, and charity.”²²¹

“Political activity” covers a huge swath of pursuits. In fact, it includes “almost all forms of public action undertaken by NGOs.”²²² The Council of Europe’s Conference of INGOs (international NGOs) reported that the Foreign Agent Law defines “political activity” so broadly that it gives unfettered discretion to the government against whom to enforce the law, and therefore chills any NGO activism.²²³ For example, the Ministry of Justice recently registered the NGO “Doctors’ Alliance” as a “foreign agent.”²²⁴ Doctors’ Alliance is a lobbying organization dedicated to advancing the interests of Russian doctors, and in the past few years has organized demonstrations to advocate for higher salaries and better working conditions for Russian doctors.²²⁵ However, after the government arrested the organization’s leader during an anti-government (pro-Aleksey Navalny) protest, the Ministry of Justice went further, and registered the entire organization as a foreign agent, claiming the organization received foreign funding and was

²¹⁹ *Id.* Repeated without change in the 2020 amendments. See 2020 Foreign Agent Law, *supra* note 74, art. 5.

²²⁰ NGO Law, *supra* note 34, art. 2(6).

²²¹ *Id.*

²²² Orlova, *supra* note 11, at 395.

²²³ DRAGAN GLUBOVICH, EXPERT COUNCIL ON NGO LAW, CONFERENCE OF INGOs OF THE COUNCIL OF EUR., OING Conf/Exp (2013), CONCLUSIONS ON THE LAW ON AMENDMENTS TO CERTAIN LEGISLATIVE ACTS OF THE RUSSIAN FEDERATION ON THE REGULATION OF ACTIVITIES ON NGOS FULFILLING THE FUNCTIONS OF A FOREIGN AGENT 1, ¶ 114. Note that the report analyzed the previous (not the current) definition of political activity. “Political activity” was previously defined as “participating . . . in organization and political action with the goal of changing government policy or influencing societal opinion.” 2012 Foreign Agent Law, *supra* note 3, art. 2(2). While the previous definition was vague and broad, the current definition is similarly broad, and therefore the Conference on INGOs would likely come to the same conclusion today. See *Politika—iskusstva vsyo vozmozhno* [Politics—the art of everything possible], KOMMERS. (Jan. 23, 2016), <https://www.kommersant.ru/doc/2899796> (“The head of the Duma committee on public associations and religious organizations, Yaroslav Nilov (LDPR), told Kommersant that the new version of the term ‘political activity’ is wider than that used [previously] . . . [but also] more specific.”).

²²⁴ Denis Eliseev, *Innostrannimi Agentami Mogut Prznat Vsekh* [Anyone can be called a foreign agent], YOUTUBE (Mar. 3, 2021), <https://www.youtube.com/watch?v=a11UCVJV6XA>.

²²⁵ *Id.*

involved in “political activities.”²²⁶ Put differently, the Ministry of Justice interpreted “political activity” to cover activity that could reasonably also fall under the “public health” exemption. After the 2019 amendment subjected individuals to RFAL requirements, “just about any Russian citizen with a Facebook page could be considered a foreign agent—all they need is to be in receipt of money or ‘property/possessions’ outside Russia.”²²⁷

While FARA defines covered activity differently, its vague language gives rise to similar overbreadth concerns. Under FARA, covered activities include:

(i) engag[ing] within the United States in political activities for or in the interests of such foreign principal; (ii) act[ing] 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; (iii) within the United States solicit[ing], collect[ing], disburs[ing], or dispens[ing] contributions, loans, money, or other things of value for or in the interest of such foreign principal; or (iv) within the United States represent[ing] the interests of such foreign principal before any agency or official of the Government of the United States²²⁸

The provisions addressing political activity and “things of value” are especially problematic. “Political activity” 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 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.”²²⁹ This broad definition covers not just lobbying the government but also general advocacy to sway public opinion.²³⁰ The D.C. Circuit concluded that FARA’s definition of foreign agent “include[s] almost anyone who undertakes any public-related or financial activity on behalf of a foreign principal.”²³¹

Subsection iii, covering those who handle “things of value” for a foreign principle, might also sweep broadly. For example, “Collecting . . . money . . . in the interest of such foreign principal” on its face could include those collecting money to send remittances to family members abroad. In practice, DOJ has sometimes read into the Act a requirement that handling “things of value” must

²²⁶ *Id.*

²²⁷ Ivan Davydov, *Why does Russia need a new “foreign agent” law?*, OPEN DEM. (Dec. 4, 2019), <https://www.opendemocracy.net/en/odr/why-does-russia-need-a-new-foreign-agent-law/>.

²²⁸ 22 U.S.C. § 611 (c)(1) (2020).

²²⁹ § 611(o).

²³⁰ Robinson, *supra* note 26, at 1098.

²³¹ 831 F.2d 1071, 1074 (D.C. Cir. 1987).

have political aims to require registration, but the text does not seem to require that reading.²³² Because of the law's broad and vague language, parties must rely on DOJ discretion to determine which activities FARA does and does not cover.

3. Foreign Nexus Required

In addition to identifying certain parties and activities covered, RFAL and FARA require different degrees of control of the domestic by the foreign party to apply the foreign agent label. While some analysts have argued this is a key difference between the two laws,²³³ FARA's vagueness could implicate a broader swath of persons than appears at first blush. Thus, in this respect the laws may not be so different.

Under RFAL, any monetary or property contribution from a foreign party to an NGO, media company, or individual (involved in previously defined "political activity") mandates that party's registration,²³⁴ no matter the nexus between the funding and "political activity."²³⁵

In 2014, the Russian Constitutional Court approvingly cited this standard as "block[ing] the arbitrary interpretation and application" of the Foreign Agent Law.²³⁶ In response, the dissent argued that the very fact the government labels NGOs "foreign agents" when they are not actually controlled by a foreign party indicates the definition's innate arbitrariness.²³⁷ However, whether or not the definition is arbitrary answers a different question than whether or not the law may be arbitrarily interpreted. Regarding the low possibility of arbitrary *interpretation*, the Court's majority was then correct.

However, RFAL's most recent amendments add that any NGO accepting foreign monetary or property contributions via a Russian *intermediary*, or that is themselves the intermediary, must also register as a foreign agent.²³⁸ This amendment does not apply to individuals or other parties. Although largely untested, it certainly expands the number of NGOs covered by RFAL. Its effect could turn on how broadly the government interprets the term "intermediary," currently defined as: "a citizen of the Russian Federation or a Russian legal entity that transfers funds and (or) other

²³² Robinson, *supra* note 26, at 1098 n.112. *See also, e.g.* Letter from Brandon L. Van Grack, Chief, FARA Unit, Counterespionage Section, Dep't of Justice, to Addressee Deleted (May 29, 2020), <https://www.justice.gov/nsd-fara/page/file/1287636/download> ("Your letter asks whether your client is acting as an agent of a foreign principal 'given that her work would be for [US nonprofit], a U.S.-based 501(c)(3), despite her Agreement with the Embassy of [foreign country].' The Embassy of [foreign country] is a foreign principal under the definition set out at 22 U.S.C. § 611(b)(1) and, pursuant to the Agreement, your client is acting at its direction and control. However, we do not believe your client is obligated to register under FARA at this time so long as her activities remain focused on developing a project plan for a gala dinner and related activities, because she would not be engaging in activities enumerated in 22 U.S.C. § 611(c)(1).").

²³³ Orlova, *supra* note 11, at 410.

²³⁴ 2012 Foreign Agent Law, *supra* note 3, art. 2(2) (NGOs); 2019 Foreign Agent Law, *supra* note 69, art. 1(1)(b) (individuals).

²³⁵ *See* Davydov, *supra* note 227.

²³⁶ Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 8 aprelya 2014 g. [Ruling of the Russian Federation Constitutional Court of Apr. 8, 2014], ROSSIISKAIA GAZETA [Ros. Gaz.], ¶ 3.3 (Apr. 18, 2014).

²³⁷ *Id.*, ¶ 3.2.

²³⁸ *See* 2020 Foreign Agent Law, *supra* note 73, art. 4.

property from a foreign source or a person authorized by him to a Russian non-profit organization participating in political activities carried out on the territory of the Russian Federation.”²³⁹ Thus, it increases the risk of the Law’s arbitrary interpretation. Its passage could also forecast other amendments that further broaden RFAL’s scope.

By contrast, FARA sets a higher standard for foreign nexus. FARA requires the domestic party to act “at the order, request, or under the direction or control, of a foreign principal”²⁴⁰ Unlike RFAL, accepting money from a foreign party on its own is not sufficient to mandate registration—FARA requires some sort of deeper relationship.

Nevertheless, FARA adopts a broad and vague conception of nexus, and multiple interpretations of it exist. Under DOJ FARA guidelines, a foreign party exercises control over the domestic actor if it has “the power, directly or indirectly, to determine the policies or the activities of a person, whether through the ownership of voting rights, by contract, or otherwise.”²⁴¹ The Third Circuit adopted a standard from the Restatement of Agency: “the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.”²⁴² The Second Circuit rejected the Third Circuit’s approach. It wrote: the “concern is not whether the agent can impose liability upon his principal [as in the Restatement] . . . but whether the relationship warrants registration by the agent to carry out the informative purposes of the Act.”²⁴³ When examining fringe cases, courts should look at the “surrounding circumstances” to determine if control as contemplated by FARA exists.²⁴⁴ In particular, such “surrounding circumstances” include “whether those requested to act were identified with specificity by the principal,” and also whether the foreign principle requested the action, specifically.²⁴⁵ Thus, at least three conceptions of FARA’s agency requirement exist.

Some conceptions are clearer than others. Compared to the Third Circuit, the Second Circuit sets a hazier standard for agency. Under the Second Circuit’s standard, because the enquiry is entirely contextual, “a person may not receive adequate notice of his duty to comply with FARA’s requirements.”²⁴⁶ Applied today, the Second Circuit’s test could lead to ridiculous outcomes: a relative living abroad could request “an American transport a birthday gift back to their sibling in the United States” and if the American complied, he or she would “seemingly need to register under FARA.”²⁴⁷ The American “would be engaged in covered activity—i.e., disbursing something of value for a foreign principal—and following through on a ‘particular course of conduct’ requested by the foreign principal.”²⁴⁸ While no other circuits have ruled on the question,

²³⁹ 2020 Foreign Agent Law, *supra* note 73, art. 4.

²⁴⁰ 22 U.S.C. § 611(c)(1) (2020).

²⁴¹ 28 C.F.R. § 5.100(b) (2018).

²⁴² *United States v. German-American Vocational League*, 153 F.2d 860, 864 (3d Cir. 1946).

²⁴³ *Attorney Gen. of United States v. Irish Northern Aid Committee*, 668 F.2d 159, 161 (2d Cir. 1982).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *See* Law, *supra* note 133, at 380.

²⁴⁷ *Robinson*, *supra* note 26, at 1101.

²⁴⁸ *Id.*

other district courts have adopted the Second Circuit's standard,²⁴⁹ which may "enlarge FARA's coverage"²⁵⁰

Even under the Third Circuit's clearer standard, FARA's broad text could sweep in unwitting parties. While a domestic party cannot become a foreign agent simply by accepting money from a foreign source (unlike in RFAL), a domestic party can become a *foreign principal* by doing so if the domestic party is "subsidized in whole or in major part" by a foreign party.²⁵¹ Returning to the Wall Street Journal (WSJ) example from Part II(a), since no court has defined what constitutes "a major part,"²⁵² an activist DOJ could designate the WSJ a foreign principal, and therefore order a WSJ reporter to register as a foreign agent.²⁵³ After all, the WSJ's holding company is partly owned by foreigners.

To be sure, this "foreign principal" loophole has echoes of RFAL's intermediary rule. If the WSJ were a Russian media company, one of its reporters could also be registered as a foreign agent under RFAL. The reporter would accept funds (their salary) from the WSJ, and the WSJ, accepting money from a foreign investor, could be considered an intermediary.

B. Registration and maintenance requirements

Both RFAL and FARA impose requirements on "foreign agents" when registering and, also, when maintaining their "foreign agent" status. Some of the requirements, as well as the "foreign agent" label itself, stigmatize registered parties. Compared to FARA's registration and maintenance requirements, the RFAL imposes more substantive limitations on the activates that "foreign agents" are able to undertake.

1. Requirements upon registration

RFAL imposes requirements that are similar to those in FARA. Parties who qualify as "foreign agents" are required to register as such, and provide extensive documentation of any personnel and financial cash flow.²⁵⁴ In contrast to FARA, under RFAL the Russian government has the ability

²⁴⁹ See *RM Broad., LLC v. U.S. Dep't of Justice*, 379 F. Supp. 3d 1256, 1262 (S.D. Fla. May 7, 2019) ("[T]he Court notes that a common-law agency relationship is unnecessary to satisfy FARA's definition of 'agent of a foreign principal.'" (citing Attorney Gen. of United States v. Irish Northern Aid Committee, 668 F.2d 159, 161 (2d Cir. 1982))). *C.f.* *United States v. Rafiekian*, 2019 WL 4647254, at *11 n.24 (E.D. Va. Sept. 24, 2019) (citing the Second Circuit's standard approvingly); Brian D. Smith & Robert Kelner, *Florida FARA Case Leaves Troubling Precedent*, INSIDEPOLITICALLAW.COM (Jun. 9, 2019), <https://www.insidepoliticallaw.com/2019/06/05/florida-fara-case-leaves-troubling-precedent/>.

²⁵⁰ Law, *supra* note 133, at 377.

²⁵¹ 22 U.S.C. § 611(c) (2020).

²⁵² Robinson, *supra* note 26, at 1102.

²⁵³ See *id.*, at 1102–03 ("Subsidized in Whole or in Major Part").

²⁵⁴ See *NGO Law*, *supra* note 34, art. 13.1(10) (registration mandate); *id.*, art. 32(3) (Parties must "submit to the authorized body documents containing a report on their activities, on the personnel of governing bodies and employees, documents on the purposes of spending money and using other property, including that received from foreign sources, and non-profit organizations performing the functions of a foreign agent, also an auditor's report.

to forcibly register “foreign agents.”²⁵⁵ In practice, forced registration by the Ministry of Justice may have even become the norm.²⁵⁶

Under FARA, “foreign agents” must self-report; the DOJ has no legal mechanism to force registration outside of the judicial system.²⁵⁷ The registration itself is detailed.²⁵⁸ The registrant must provide a copy of every contract (including oral agreement) concluded between itself and the foreign principal, disclose the nature and amount of any funding or thing of value given by the foreign principal to the registrant, and disclose any spending for the foreign principal within the past sixty days.²⁵⁹ To keep the information current, the registrant must re-file every six months.²⁶⁰

2. Maintenance requirements

RFAL imposes more burdensome maintenance requirements than does FARA. Once registered under RFAL, every six months “foreign agents” must submit detailed reports on their activities and the composition of their leadership.²⁶¹ They must submit financial reports on spending and income, quarterly, and conduct a full audit, annually.²⁶² Additionally, the Ministry of Justice has permission in certain situations to conduct unscheduled audits of the “foreign agents.”²⁶³

Like its American counterpart, RFAL mandates that any material published by the “foreign agent” contain a mark indicating the “foreign agent” status of its source.²⁶⁴ RFAL imposes further restrictions. It bans “foreign agents” from donating to, or concluding any contract with, political parties.²⁶⁵ It also bans “foreign agents” from participating generally in any election or referendum campaign.²⁶⁶ Finally, the most recent 2020 Amendments ban “foreign agents” from appointment

Concurrently, the documents submitted . . . must contain information on the purpose of spending money and using other property received from foreign sources, and on their actual spending and use.”)

²⁵⁵ NGO Law, *supra* note 34, art. 32(7); *see also* *Russia’s Foreign Agent Law: Violating human rights and attacking civil society*, *supra* note 60, at 3 (listing NGOs forcibly registered by the Ministry of Justice).

²⁵⁶ Alexander Mosesov, “*Innostranni Agenti*” v *Rossii i SShA—v chom Skhodsva i Razlichie* [“Foreign Agents” in Russia and the U.S.—What are the Similarities and Differences], *reprinted in* MINJUST.RU, MINISTRY OF JUS. OF THE RUSSIAN FED’N, <https://minjust.ru/ru/smi-o-nas/inostrannye-agenty-v-rossii-i-ssha-v-chem-shodstva-i-razlichiya> (Russ.) (noting erroneously that the Russian law gives the Ministry of Justice the *sole* ability to register “foreign agents.”).

²⁵⁷ Fattal, *supra* note 22, at 938 (“Regarding registration, DOJ does not have jurisdiction to compel a foreign entity to submit its paperwork under FARA.”); *see also* Foreign Agents Registration Act, 22 U.S.C. § 612(a) (2020) (“No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement”); § 618(f) (providing the District Court subject matter jurisdiction to issue injunctions under FARA).

²⁵⁸ Among other requirements, a registrant “foreign agent” must provide: “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. § 612(a)(3).

²⁵⁹ § 612(a)(1–11).

²⁶⁰ § 612(b).

²⁶¹ NGO Law, *supra* note 34, art. 32(3).

²⁶² *Id.*

²⁶³ *Id.*, art. 32(5)–(6).

²⁶⁴ *Id.*, art. 24(1).

²⁶⁵ Political Party Law, *supra* note 76, art. 30(3)(n) (donations), art. 31(4.1)(e) (contracts).

²⁶⁶ Election Law, *supra* note 97, art. 3(6).

to state or local government bodies, and requires media companies, when reporting on foreign agents, to notify the public that the party mentioned is a “foreign agent.”²⁶⁷

FARA requires registrants re-file every six months.²⁶⁸ Besides registration and re-filing, registrants must include an “identification statement” labeling themselves as “foreign agents” on virtually any public mailing or published material.²⁶⁹ They must file a copy with the Attorney General of such material within 48 hours of its publication.²⁷⁰ Furthermore, FARA precludes registrants from concluding contingency fee agreements with their foreign principals.²⁷¹

Indeed, both Laws share public-facing requirements that can breed stigma about the role of “foreign agents.” Under both laws, “foreign agents” include a mark on published material indicating their “foreign agent” status—this label may itself stigmatize branded parties.²⁷² The “foreign agent” brand in Russia carries with it an intense stigma,²⁷³ on its own, that stigma has ostracized multiple NGOs and may have caused many to shut down.²⁷⁴ In the U.S., the stigma is great enough that when Congress crafted FARA in 1938, it hoped *the “foreign agent” label itself would stymie foreign propaganda.*²⁷⁵ Thus, both governments crafted the term “foreign agent” to brand parties considered threats: the Russians targeted western-friendly NGOs while the Americans targeted Nazi and communist sympathizers.²⁷⁶ These findings substantiate the opinion of some experts that the laws “resemble[]” one another.²⁷⁷

On the other hand, RFAL’s registration and maintenance requirements are harsher. First, Russia’s Ministry of Justice has the ability to forcibly register parties as “foreign agents;” the U.S.

²⁶⁷ 2020 Foreign Agent Law, *supra* note 3, art. 1 & 5(8).

²⁶⁸ 22 U.S.C. § 612(b).

²⁶⁹ *Id.*

²⁷⁰ § 614(a).

²⁷¹ § 618(h).

²⁷² *See* § 614(b); NGO Law, *supra* note 34, art. 24(1).

²⁷³ *See* Vade de Velde, *supra* note 5, at 701; Robinson, *supra* note 26, at 1086 (“[F]oreign agent’ is closely associated with ‘spy’ in Russian.”).

²⁷⁴ *See* *Ot Redaktsii: Kak gosydarstvo boretsa s unostranami agentami* [Editor’s Note: How the government fights with foreign agents], VEDOMOSTI (Dec. 10, 2014), <https://www.vedomosti.ru/opinion/articles/2014/12/11/suverennye-prava> (Russ.) (“The status of an NPO [NGO] agent is perceived as a stigma by officials and loyal benefactors. NPOs are discriminated against: in November, the Duma adopted without public discussion amendments to the law ‘On Basic Guarantees of Electoral Rights,’ which prohibited agents of any form from participating in elections. After the agents were entered into the registry, Golos ceased its activities; The Kostroma Center for Supporting Public Initiatives, the Center for Social Policy and Gender Studies (Saratov), the Institute for the Development of Freedom of Information Foundation, and the NPO Lawyers for Constitutional Rights and Freedoms are in the process of liquidation; litigation has essentially stopped the Saratov NPO Partnership for Development from working.”).

²⁷⁵ Ellerbeck & Asher-Schapiro, *supra* note 168.

²⁷⁶ *See* Orlova, *supra* note 11, at 403 (quoting *Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii* of 8 aprelya 2014 g. [Ruling of the Russian Federation Constitutional Court of Apr. 8, 2014], ROSSIISKAIA GAZETA [Ros. Gaz.], ¶ 5 (Apr. 18, 2014) (Yaroslavtsev, dissenting)) (Yaroslavtsev wrote that the term “foreign agent” as used in the statute carries with it a negative connotation “designed to elicit a negative public reaction to those qualifying NGOs.”); Robinson, *supra* note 26, at 1095 (“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.”).

²⁷⁷ *See* John C. Hamlett, *The Constitutionality of Russia’s “Undesirable” NGO Law*, 21 UCLA J. INT’L L. & FOR. AFF. 246, 254 n.35 (2017) (finding that the Russian law “resembles a 1938 US statute named the Foreign Agents Registration Act . . .”).

Department of Justice lacks this power.²⁷⁸ Second, the Russian law's audit requirements are more burdensome. In the course of a year a "foreign agent" in the U.S. must register twice.²⁷⁹ Within a year, a Russian "foreign agent" must submit two activity reports, four financial reports, and one annual audit—all of that, assuming the government did not perform an additional unscheduled audit, as allowed. Finally, the Russian law denies "foreign agents" the ability to donate to or conclude contracts with political parties.²⁸⁰ It also bans their participation in electoral or referendum campaigns,²⁸¹ and the most recent 2020 amendments ban persons labeled "foreign agents" from appointment to state or local governments bodies.²⁸² These restrictions effectively deny "foreign agents" the ability to conduct "political activity," which, ironically, was the very reason they had to register as "foreign agents" in the first place. If applied in the United States, courts would likely find these restrictions facially unconstitutional.²⁸³

In sum, while the laws' registration and maintenance requirements are similar, the Russian law reaches beyond the American to further burden parties designated as "foreign agents."

C. PUNISHMENTS

RFAL and FARA contain similar sanctions for "foreign agent" registration violations, but RFAL adopts a partial strict liability regime. For NGOs, RFAL punishes "malicious" violations of the Act with criminal sanctions: a fine of 300,000 rubles (about \$4,000), the equivalent of one's salary (of uncertain term), or a specified amount paid regularly up to two years.²⁸⁴ Other penalties available are mandatory community service up to 480 hours, correctional labor, or a prison term

²⁷⁸ On the whole, this probably leaves Russian "foreign agents" worse off. Prior to Russian amendments that gave the Ministry of Justice this ability, the Russian Constitutional Court found that the Ministry shouldered the burden of proof if it sought forcible registration of NGOs as "foreign agents" in court. *Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 8 aprelya 2014 g.* [Ruling of the Russian Federation Constitutional Court of Apr. 8, 2014], ROSSIISKAIA GAZETA [Ros. Gaz.] ¶3.2 (Apr. 18, 2014). In fact, this was a rationale for upholding the law. Orlova, *supra* note 11, at 401. But ever since the Ministry of Justice can forcibly register "foreign agents," unwilling registrants must petition the court for removal; this places the burden on *them* to disprove the government. *See Russia's Foreign Agent Law: Violating human rights and attacking civil society*, *supra* note 60, at 3.

²⁷⁹ 22 U.S.C. § 612(b).

²⁸⁰ Political Party Law, *supra* note 76, art. 30(3)(n) ("foreign agents" cannot donate to political parties), art. 31(4.1)(e) ("foreign agents" cannot contract with political parties).

²⁸¹ Election Law, *supra* note 97, art. 3(6).

²⁸² 2020 Foreign Agent Law, *supra* note 73, art. 5(8). The government may also deny "foreign agents" access to "state secrets." *Id.*, art. 2.

²⁸³ Denying an American citizen the ability to participate in the political process likely abridges his or her core First Amendment rights; the U.S. Supreme Court has struck down such restrictions in multiple areas. *See Citizens United v. FEC*, 558 U.S. 310, 318 (2010) (campaign finance), *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (incitement). *But see Holder v. Humanitarian Law Project*, 561 U.S. 1, 31–32 (2010) (upholding a law banning assistance to foreign terrorist organizations from a First Amendment challenge on the grounds that the banned speech was "coordinated" and not "independent."). That said, the restrictions upheld in *Holder* are materially different than the Russian restrictions, in that the Russian restrictions ban the political conduct of "foreign agents" without considering if the "foreign agent" concludes the political conduct on the foreign funder's behalf. In *Holder*, the Court upheld only a narrow set of restrictions on US citizens' speech: speech coordinated with terrorist organizations. *Id.* at 36–37. Finally, that foreign parties have limited First Amendment rights is probably not pertinent to this question; FARA regulates *American citizens'* speech. *See supra* note 29.

²⁸⁴ UGOLOVNIY KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] art. 330.1 (Russ.).

up to two years.²⁸⁵ Mass media companies or individuals can face lesser administrative sanctions (10,000 rubles for individuals, 500,000 for legal entities),²⁸⁶ or criminal sanctions with similar penalties as NGOs.²⁸⁷ Though ambiguous, some have argued that mass media companies and individuals can face criminal penalties only after a first RFAL violation.²⁸⁸ That interpretation would make sense, as law removes the *mens rea* requirement of “maliciousness” (required for NGO criminal convictions).²⁸⁹ In effect, this creates a partial strict liability regime for media representatives and individuals.

Under FARA, any willful violation of the Act, including any willfully misleading, false, or omitted statement concerning a material fact, can be punished by criminal sanctions: a fine up to \$250,000 and/or five years' imprisonment.²⁹⁰ If the government charges an alien with a violation, he or she is subject to removal from the country.²⁹¹

While the exact terms and fines differ between the countries, the punishments are substantially alike. At minimum, violators face steep fines. At most, violators face criminal sanctions including imprisonment for up to five years.

They differ, however, in that RFAL adopts a strict liability regime for individuals and mass media companies, whereas FARA penalizes only “willful” violations. This difference is notable, in that RFAL allows the Russian Ministry of Justice to impose criminal liability on a larger group of people than does FARA (to the DOJ).

Overall, Russia's Ministry of Justice has more discretion than does DOJ to assess foreign agent liability for mass media companies and individuals, but similar discretion when it comes to NGOs. The punishments and fines available under each law are similar.

D. SUMMARY OF THE LAWS' SIMILARITIES AND DIFFERENCES

Analysis of each Law's scope, registration and maintenance requirements, and punishments provides a multifaceted picture of the Laws' similarities and differences.

²⁸⁵ *Id.*

²⁸⁶ КОДЕКС ОБ АДМИНИСТРАТИВНИХ ПРОВОНАРУШЕНИЯХ [Administrative Code] art. 19.34.1 (Russ.).

²⁸⁷ Note that individuals can face prison terms up to 5 years. UK RF, art. 330.1. This also applies to any person who, acting in the interests of a foreign state or organization, purposefully collects information on Russia's “military-technical activities,” and fails to register as a foreign agent. *Id.*

²⁸⁸ *Inostrannikh Agentov Stale Bolshe* [There are now more foreign agents], AKTUALNII KOMENTARIJ (Mar. 1, 2021), <https://actualcomment.ru/inostrannykh-agentov-stanet-bolshe-2103011454.html> (Russ.) (“Persons who violated the procedure for the activities of a media-foreign agent and who were previously brought to administrative responsibility may be subject to criminal sanctions up to imprisonment for up to two years.”); Eliseev, *supra* note 224 (noting that a second violation can result in imprisonment, and making an exception for those who collect military-technical information—they can face criminal penalties at the first violation).

²⁸⁹ UK RF, art. 330.1.

²⁹⁰ 22 U.S.C. § 618(a); *Frequently Asked Questions*, DEP'T OF JUSTICE (accessed Apr. 1, 2021).

²⁹¹ § 618(c).

1. Similarities

On a high level, the Acts share a similar structure.²⁹² Both Acts require “foreign agents” to register, and then subject them to maintenance requirements, like financial audits. They share stigmatizing requirements, like using the label “foreign agent,” and forcing registered parties to bear the “foreign agent” moniker in public.²⁹³

Each Law includes a broad definition of “foreign agent.” RFAL identifies the required foreign nexus as whenever a party accepts any funding from a foreign principal, including an intermediary of that principal, however small or informal this funding may be. This broad definition of “foreign nexus” could ensnare private individuals who post about politics on their Facebook pages, or accept gifts from relatives living abroad.²⁹⁴ FARA, by contrast, defines “nexus” more narrowly. FARA requires the foreign principal to have a degree of control over the possible “foreign agent.” However, FARA does not specify what constitutes the required degree of control. Under a broad reading of FARA, DOJ could force that same individual posting about politics online or accepting gifts from foreign relatives to register as a “foreign agent” in the United States.²⁹⁵ Therefore, FARA’s vagueness minimizes some of what, on first glance, look like differences between the two laws.

Finally, both Laws share similar sanctions. Violators face criminal liability in each country. Willful violations (in Russia: “malicious”) subject violators to comparable fines, and possibly jailtime in both countries.

2. Differences

Conversely, the laws have many differences. RFAL uses a bright-line rule to define the required “foreign agent” nexus—any funding from abroad—while the American Law requires the foreign principal to exert a degree of control over the “foreign agent.” Thus, sweeping broadly can happen in two ways, by giving explicit instructions, as does RFAL, or by leaving much open to interpretation, as does FARA. In this way, the American law is vague where the Russian law is not.

The registration and maintenance requirements are also different. The Russian Ministry of Justice can forcibly register parties as “foreign agents,” while the U.S. Department of Justice cannot. When assuming “foreign agent” status, registered parties in Russia must complete many more audits and financial reviews than registered parties in the U.S. Finally, RFAL imposes substantive limitations on the activities of “foreign agents.” Specifically, “foreign agents” may not

²⁹² Perhaps this is to be expected, given that the Russian government explicitly based its law on FARA. *See* Saakov, *supra* note 43.

²⁹³ *See supra* notes 272–77 and accompanying text.

²⁹⁴ *See* Davydov, *supra* note 227.

²⁹⁵ If the individual’s relative sent the person a link from a political talk show, the individual could be seen as acting at the foreign relative’s “request.” *See* Robinson, *supra* note 26, at 1101 (identifying how the “request” language could include individuals that seemingly should not be included).

conclude contracts with or donate to political parties. They also may not participate generally in any election or referendum campaign. After December 2020, foreign agents may not be appointed to state or local government office.²⁹⁶ FARA subjects U.S. actors to none of these restrictions.²⁹⁷

Finally, RFAL likely subjects more parties to criminal sanction than does FARA. FARA requires violations to be “willful” before DOJ can impose criminal sanctions. RFAL, however, distinguishes based on the type of party. NGOs face criminal sanction only for “malicious” violation of the Law. But individuals and mass media companies have no such barrier; after a first violation, they can face criminal sanction even for accidental violations.

III. ANALYSIS: FARA’S STRENGTHS AND WEAKNESSES

Comparison of the two laws in Part II has revealed both similarities and dissimilarities. With these findings in mind, Part III(a) concludes that Congress should amend FARA to help avoid the Russian experience of stymying dissent, especially given FARA’s First Amendment implications. Part III(b) recommends possible changes to FARA to implement III(a)’s conclusions.

A. *Takeaway: Russia’s law exposes FARA’s risks*

This comparative legal analysis brings into sharper focus how the U.S. government could amend FARA from a civil liberties perspective.²⁹⁸ Because of the civil rights abuses Russia has perpetrated under its Act (as the Council of Europe concluded, “silenc[ing], marginaliz[ing] and punish[ing]” the “legitimate activity” of civil society groups),²⁹⁹ few American lawmakers would want similarities to exist between the U.S. and Russian laws, yet in overbreadth and stigmatization, uncomfortable similarities remain.

1. FARA protects civil liberties better RFAL

First, it bears noting the major differences between the Russian and U.S. Laws. From a civil liberties perspective, almost all the differences paint FARA in a better light. FARA allows for

²⁹⁶ 2020 Foreign Agent Law, *supra* note 73, art. 5(8).

²⁹⁷ *But see* Statement by Claire Finkelstein, *supra* note 24 (DIGITAL RECORDING: 6:30) (noting that RT lost its Congressional press pass after becoming a “foreign agent”). This, however, is not a restraint FARA imposes. Statement by John Demers, Video tape: Protecting Democracy: Modernizing the Foreign Agents Registration Act, held by the Ctr. for Ethics and the Rule of Law, U. Pa., and the Am. Enterprise Inst. (Apr. 17, 2019), <https://www.law.upenn.edu/institutes/cerl/conferences/fara/schedule.php> (DIGITAL RECORDING 7:50).

²⁹⁸ This paper focuses specifically on the civil liberties perspective. In general, an analysis of how FARA could be made more effective from the national security perspective is beyond the scope of the paper unless such arguments implicate civil liberties concerns. See, for example, *supra* notes 161–63 and accompanying text (noting that FARA’s text made Mueller’s “unprecedented” indictments possible), *supra* note 283 (arguing that harsher provisions in the Russian Foreign Agent Law, if applied in the US, might be found unconstitutional), and *infra* notes 350–52 and accompanying text (rebutting national security-based counterarguments). For a deeper discussion of how FARA may be improved from the national security perspective, outside of the comparison with the Russian law, see Fattal, *supra* note 22, *passim*, and Atieh, *supra* note 119, *passim*.

²⁹⁹ COMM’R FOR HUM. RIGHTS, COUNCIL OF EUR., CommDH(2017)22, *supra* note 12, ¶ 38.

nuance in the “foreign agent”/principal nexus, its “foreign agent” maintenance requirements subsume less of a registered party’s resources, and it imposes no substantive limitations on registered party functions. These differences show that FARA is not RFAL. Russian legislators’ claims that their law “mirrors” FARA are, at best, misinformed.

Furthermore, the laws are stylistically very different. The Russian law employs a bright-line rule to define the required foreign nexus: the acceptance of any foreign funding.³⁰⁰ The American law uses a vague standard: acting at the “at the order, request, or under the direction or control, of a foreign principal.”³⁰¹

2. Yet, both Laws are overbroad

Both statutes are overbroad. By defining a “foreign agent” as any party engaged in political activities that accepts *any* foreign funding, RFAL is overinclusive, given its purpose to root out secret foreign influence rather than to destroy opposition views.³⁰² In Russia, RFAL has ensnared many NGOs and media organizations that do not seem to carry out the wishes of a foreign power.³⁰³ FARA’s standard, defining agency as acting “at the order, request, or under the direction or control, of a foreign principal,”³⁰⁴ can be interpreted narrowly or broadly—perhaps as broadly as the Russian statute.³⁰⁵ Indeed, FARA defines “foreign principal” as *any* foreign party.³⁰⁶ It therefore might sweep broader than its original and core purpose of disclosing the secret activities of “foreign governments or foreign political groups.”³⁰⁷ As journalist Ken Silverstein noted, if FARA were properly enforced, “roughly half of Washington would be under arrest.”³⁰⁸

At the current moment, DOJ has begun seriously implementing FARA for the first time since World War II, and anxious parties ask if political pressure will widen the scope of DOJ enforcement.³⁰⁹ Barring arrest of half the capital, perhaps the more likely risk is politically-tinged enforcement. Indeed, FARA has been abused before, both in the 1940s when DOJ prosecuted civil rights icon W.E.B. DuBois, and possibly recently, when the Republican-controlled House Natural

³⁰⁰ See NGO Law, *supra* note 34, art. 2(6).

³⁰¹ Foreign Agents Registration Act, 22 U.S.C. § 611(c)(1) (2020).

³⁰² See *Russian parliament adopts NGO 'foreign agents' bill*, *supra* note 41.

³⁰³ See COMM’R FOR HUM. RIGHTS, COUNCIL OF EUR., CommDH(2015)17, *supra* note 15, ¶ 33 (detailing, for example, court cases in Russia where the Ministry of Justice and the courts applied the law retroactively); COMM’R FOR HUM. RIGHTS, COUNCIL OF EUR., CommDH(2017)22, *supra* note 12, ¶ 22 (“Local prosecutorial authorities have even qualified a project for preventing HIV transmission – that included distribution of syringes and condoms (NCO Sotsium, in the city of Engels in the Saratov region) - as ‘political activity.’”).

³⁰⁴ § 611(c)(1).

³⁰⁵ See *supra*, note 283 (detailing how Russian NGOs might be treated in the US); Robinson, *supra* note 26, *passim* (arguing that FARA is dangerously vague).

³⁰⁶ § 611(b).

³⁰⁷ *Attorney Gen. of United States v. Irish People, Inc.*, 684 F.2d 928, 939 (1982) (quoting H.R. Rep. No. 1381, 75th Cong., 1st Sess., 1–2 (1937)). See also *supra*, notes 192–97 and accompanying text.

³⁰⁸ Teachout, *supra* note 16.

³⁰⁹ The DOJ invokes FARA with increasing frequency. See, e.g. Attorney General William Barr, Remarks on China Policy at the Gerald R. Ford Presidential Museum, *supra* note 159 (“America’s corporate leaders might not think of themselves as lobbyists [for China]. . . . But you should be alert to how you might be used, and how your efforts on behalf of a foreign company or government could implicate the Foreign Agents Registration Act.”).

Resources Committee investigated multiple environmental advocacy groups as foreign agents. Other instances, like DOJ's recent inclusion of an Al-Jazeera subsidiary as a "foreign agent," show the fine line between "foreign agent" and "media company." At the very least, these episodes exhibit how "just increasing enforcement without reforming the underlying law is likely to lead to confusion and abuse."³¹⁰

3. Both Laws stigmatize "foreign agents"

Both Laws also stigmatize labeled parties. Both Laws use the term "foreign agent" and mandate that registered parties include a "foreign agent" mark on all published materials. In Russia, this stigma has practical effects—organizations branded "foreign agents" have found neither government agencies nor private foundations will work with them—in turn they have a much harder time doing their jobs, and some have shutdown.³¹¹ The effect in the U.S. is also not insignificant. When Congress crafted FARA in 1938, it hoped *the "foreign agent" label itself would stymie foreign propaganda.*³¹² And today, when a media company is labeled a "foreign agent," Congress revokes its press pass.³¹³ Shunning certain news organizations can create a stigma, that combined with FARA's previously-mentioned vagueness, has resulted in "A sort of panic [] among reporters working for foreign-funded outlets."³¹⁴ Because FARA does not draw clear lines between organizations like the BBC and those like RT, "the question will always be: why are you ramping up enforcement [t]here, but not here?"³¹⁵

4. FARA's First Amendment Implications

Certain FARA provisions arguably infringe upon political speech and association, the "core" of the U.S. Constitution.³¹⁶ However, this paper does not contend that FARA violates the First

³¹⁰ Rutzen & Robinson, *supra* note 127.

³¹¹ COMM'R FOR HUM. RIGHTS, COUNCIL OF EUR., CommDH(2017)22, *supra* note 12, ¶¶ 33–34 ("Russian national human rights institutions have stated that the "foreign agent" label amounts to a major blow to the reputation of civil society organisations.").

³¹² Ellerbeck & Asher-Schapiro, *supra* note 168.

³¹³ Hadas Gold, *Congressional press office yanks RT's credentials*, CNN (Nov. 30, 2017), <https://money.cnn.com/2017/11/29/media/rt-capitol-credentials-revoked/index.html> (citing *Accreditation Criteria, HOUSE RADIO TELEVISION CORRESPONDENTS' GALLERY* (Accessed Mar. 28, 2020), <https://radiotv.house.gov/membership/accreditation-criteria>).

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *See* Robinson, *supra* note 26, at 1130–35 (FARA's Potential Constitutional Defects"); Susan B. Anthony List v. Driehaus, 573 U.S. 149, 167 (2014) (referring to core speech as "political"); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary."); NAACP v. Alabama, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has [recognized] by remarking upon the close nexus between the freedoms of speech and assembly." (alteration in original)).

Amendment. Rather, it notes that FARA regulates political speech, and given its vagueness problems, it could have a “chilling effect” on political speech, and thus implicate First Amendment concerns.³¹⁷ Congress should consider amending the Act for that reason.

First, this “chilling effect” is not hypothetical. RFAL and FARA share overbreadth, serious punishments, and stigmatization *combined*. Thus, parties who are *not* “foreign agents” might nevertheless alter their activity to avoid investigation. In Russia, media companies and NGOs, seeking to avoid registration but unsure if they fall within the law’s scope, self-censor or even shut down.³¹⁸ And in the U.S., “a person may not receive adequate notice of his duty to comply with FARA's requirements.”³¹⁹ Thus, aggressive U.S. enforcement of FARA also risks a “chilling effect.”

Second, these effects matter in the United States, perhaps more than in Russia, because of the protections afforded by the First Amendment. The “core” of the First Amendment is its protection of political speech and association.³²⁰ As the Supreme Court wrote: “[W]here a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.”³²¹ Consequently, a law need not directly infringe upon the First Amendment to implicate its concerns. “Abut[ment]” suffices.

Third, FARA “abuts” our freedom of speech and association. One might show abutment by demonstrating the likelihood that a court will apply a higher level of scrutiny. Modern courts subject laws to strict scrutiny if the laws enact content-based speech restrictions.³²² A content-based restriction is one that “target[s] speech based on its communicative content.”³²³ In *Reed v. Gilbert*,³²⁴ the Supreme Court found a town’s “sign code[] provisions” which regulated political signs differently than apolitical signs, violated the First Amendment.³²⁵ Similarly, FARA regulates the political speech of American citizens differently than it regulates their non-political speech.³²⁶

³¹⁷ See *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). *C.f.* *New York Times Co. v. Sullivan*, 376 U.S. 254, 300–01 (1964) (striking down a libel statute as unconstitutional because of its impermissible “chilling effect” on speech).

³¹⁸ See COMM’R FOR HUM. RIGHTS, COUNCIL OF EUR., CommDH(2015)17, *supra* note 15, ¶¶ 65–67 (in Russia, many organizations have self-censored, or even shut down).

³¹⁹ See *Law*, *supra* note 133, at 380 (criticizing the Second Circuit’s approach).

³²⁰ See *supra* note 316.

³²¹ *Grayned*, 408 U.S. at 108–09.

³²² See *Barr v. American Association of Political Consultants*, 140 S. Ct. 2335, 2346 (2020) (“Content-based laws are subject to strict scrutiny.”) (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015)); *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (quoting *Reed*, 576 U.S. at 155).

³²³ *NIFLA*, 138 S. Ct. at 2371.

³²⁴ 576 U.S. 155 (2015).

³²⁵ *Reed*, 576 U.S. at 155; see also *Barr*, 140 S. Ct. at 2346 (“For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed.” (internal quotations omitted)).

³²⁶ See *Meese v. Keene*, 481 U.S. 465, 470 (1987) (“When the agent of a foreign principal disseminates any political propaganda, § 611(j) in the United States mails or in the channels of interstate commerce, he or she must also provide the Attorney General with a copy of the material and with a report describing the extent of the dissemination.”) (internal quotations omitted).

Under the *Reed* standard, a court would likely subject FARA's regulations to strict scrutiny, making the Act "presumptively invalid."³²⁷

Some justices have implied that viewpoint discrimination, not content discrimination, is required to apply strict scrutiny in the First Amendment context. Viewpoint discrimination is a higher bar than content discrimination, and means discriminating on the basis of a particular opinion. In *NIFLA v. Becerra*,³²⁸ four justices argued that California's law requiring pregnancy centers to notify their clients "that California provides free or low-cost services, including abortions" likely constituted viewpoint-based discrimination.³²⁹ After all, the majority concluded that the notices attempted "to dissuade women from choosing" anti-abortion centers.³³⁰ More recently in *Barr v. American Association of Political Consultants*,³³¹ five justices agreed that content-based discrimination subjects a law to strict scrutiny.³³² However, four justices wrote that content discrimination is sometimes *too low a bar*. They argued: "The idea that broad language in any one case (even *Reed*) has categorically determined how content discrimination should be applied in every single context is both wrong and reflects an oversimplification and over-reading of our precedent."³³³

While viewpoint discrimination constitutes a higher bar than content discrimination, one could argue that FARA, via its regulation of parties solely under *foreign* control, viewpoint discriminates by encouraging Americans to distrust "foreign agents'" speech.³³⁴ As a former DOJ Assistant Attorney General once stated: "It is fair to say that the original act reflected a perceived close connection between political propaganda and subversion. It is this original focus . . . and therefore the pejorative connotations of the phrases 'foreign agent' and 'political propaganda' which has caused such misunderstanding over the years."³³⁵ Congress replaced the term "political propaganda" in 1995,³³⁶ but retained the term "foreign agent" and the "pejorative connotations" that come with it. These connotations weigh down "foreign agents'" speech. Consequently, one could argue that the Act discriminates against particular viewpoints.

Unlike the statute limiting foreign campaign contributions found constitutional in *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. Aug. 8, 2011) (*affirmed by* 565 U.S. 1104 (2012) (per curiam)), FARA applies to American citizens, not just foreign citizens.

³²⁷ *R.A.V. v. City of St. Paul*, 505 U.S. 382 (1992) (referring to "content-based regulations").

³²⁸ 138 S. Ct. 2361 (2018).

³²⁹ *NIFLA*, 138 S. Ct. at 2378 (Kennedy, J., concurring).

³³⁰ *Id.* at 2371 (Thomas, J.).

³³¹ 140 S. Ct. 2335 (2020).

³³² *Id.*, at 2346.

³³³ *Id.* at 2361 (Breyer, J., concurring).

³³⁴ *C.f.* *R.A.V. v. City of St. Paul*, 505 U.S. 382, 383–84 (ruling that certain "areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) -- not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.").

³³⁵ Oversight Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 98th Cong., 1st Sess., 3 (1983) (testimony of D. Lowell Jensen, Assistant Attorney General, Criminal Division, Department of Justice) quoted in *Meese v. Keene*, 481 U.S. 465, 488 (1987) (Blackmun, J., dissenting).

³³⁶ OIG 2016 Audit, *supra* note 17, at 2.

On the other hand, in 1987 the Supreme Court considered and rejected a similar First Amendment challenge to FARA.³³⁷ In *Meese v. Keene*,³³⁸ the Court found that FARA's use of the term "political propaganda" to describe foreign agents' speech was "neutral," and carried "no pejorative connotation."³³⁹ Thus, its use did not violate the Constitution.³⁴⁰ Since *Meese*, Congress removed the term "political propaganda" and replaced it with "informational materials."³⁴¹

However, the *Meese* Court analyzed only whether the term "political propaganda" violated the Constitution, and First Amendment doctrine has significantly evolved since 1987. Thus, new avenues have opened for those wishing to challenge the Law's constitutionality. For instance, FARA's disclosure requirements fall squarely within the Court's doctrine of "compelled speech," a doctrine that has developed within just the last few decades.³⁴² Furthermore, the Court only recently began subjecting content-based restrictions to strict scrutiny.³⁴³ A law limiting the content of newspapers and *only* newspapers, or corporations and *only* corporations, likely gets strict scrutiny.³⁴⁴ Similarly, FARA regulates categories of *speakers*, not categories of *speech*. Overall, since *Meese*, the "Supreme Court's First Amendment jurisprudence has become more robust" and "the Court today would be skeptical of [FARA's] constitutionality."³⁴⁵

Of course, while courts often reject laws after applying strict scrutiny, national security-related laws sometimes survive heightened review.³⁴⁶ Since FARA regulates foreign relations and possible "subversion," a court could similarly uphold FARA as part of national security deference to the political branches.

But even if a court upheld FARA over a First Amendment challenge, that does not mean Congress should avoid its duty to safeguard First Amendment rights.³⁴⁷ FARA's "vagueness may in itself deter constitutionally protected and socially desirable conduct."³⁴⁸ Judicial considerations of national security deference do not apply to the legislature. And because freedom of speech

³³⁷ *Meese*, 481 U.S. at 467–69.

³³⁸ 481 U.S. 465 (1987).

³³⁹ *Id.* at 485.

³⁴⁰ *Id.*

³⁴¹ OIG 2016 Audit, *supra* note 17, at 2–3.

³⁴² See Vikram David Amar & Alan Brownstein, *Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 20 U. Ill. L. Rev. 1, 3 (2020) ("The idea that the First Amendment protects us from being compelled to speak, while not new, is being invoked more frequently, more widely, and more aggressively than ever before.").

³⁴³ See generally Dan V. Kozlowski & Derigan Silver, *Measuring Reed's Reach: Content Discrimination in the U.S. Circuit Courts of Appeals After Reed v. Town of Gilbert*, 24 COMM. L. & POL'Y 191 (2019) (describing *Reed's* possibly radical effect as cabined by the lower courts).

³⁴⁴ See *Reed v. Gilbert*, 576 U.S. 155, 170 (2015).

³⁴⁵ Robinson, *supra* note 26, at 1132.

³⁴⁶ See, e.g. *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (upholding a law that banned US citizens from providing assistance to foreign terrorist organizations from a First Amendment challenge on the grounds that the banned speech was "coordinated" and not "independent."); *Rumsfeld v. FAIR*, 547 U.S. 47 (2006) (upholding a law that required schools receiving government subsidies to admit military recruiters on the grounds that allowing military recruiters would not be seen as the schools' speech).

³⁴⁷ *C.f. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646–71 (1947) (Frankfurter, J., dissenting) (arguing that a key role of Congress is to protect civil liberties).

³⁴⁸ *United States v. National Dairy Products Corp.*, 372 U.S. 29, 36 (1963) (citing *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940) & *NAACP v. Button*, 371 U.S. 415 (1961)).

arguably constitutes the reason for the United States' very existence,³⁴⁹ freedom of speech is an area where all branches of government should tread carefully. FARA implicates these concerns.

5. Rebutting Counterarguments

Responding to the argument that Congress should amend FARA, some might argue that FARA's scope is permissibly broad. After all, the actual regulations on "foreign agents" are not as burdensome as those in the Russian Act. Put differently, we can stand the risk of overinclusion because FARA is primarily a disclosure statute and does not regulate substantive activity.

This argument fails to appreciate the significant burdens the statute imposes, *similar* to those in RFAL. For example, both the U.S. and Russian Act mandate that registered parties include a "foreign agent" stamp on any publication.³⁵⁰ This stamp carries a stigma and could chill the speech of the "foreign agent." American "foreign agents" must additionally file each public message or publication with the Attorney General.³⁵¹ Furthermore, both statutes can be interpreted in an overly broad manner to include parties not truly under the control of foreign principals. Overbreadth, combined with the statutes' notable burdens and punishments, provides little peace of mind to innocent parties. Because of the First Amendment rights implicated, the argument that these burdens are acceptable must fail.

Alternatively, one could argue that DOJ should have broad discretion to tackle changing threats, and FARA is a good solution, if not the best solution, to a changing world. After all, Congress crafted many statutes broadly to give the DOJ that discretion. After Russian social media actors attacked the United States in 2016, FARA's broad scope allowed Robert Mueller's "unprecedented" indictments.³⁵²

Even so, a hypothetical FARA amendment need not strip DOJ of all discretion, or even the discretion afforded Mueller. Instead, this article argues that its discretion should be cabined *only more than it currently is* to 1) more carefully tailor FARA's scope to its core purpose,³⁵³ and 2) sufficiently protect First Amendment rights. In this respect, RFAL provides an excellent foil of the risks associated with an overly broad statute. History shows that FARA enforcement may bend to political pressure, like its Russian counterpart. So as political pressure increases on DOJ to enforce FARA for the first time in over fifty years, the law contains few textual safeguards to limit which parties may be targeted. Unlike other laws, DOJ has issued few regulations to clarify what future enforcement will look like.³⁵⁴ Because the stakes of applying FARA too broadly are no less than

³⁴⁹ See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the *final end of the State* was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary.") (emphasis added).

³⁵⁰ Foreign Agents Registration Act, 22 U.S.C. § 614(b) (2020); NGO Law, *supra* note 34, art. 24(1).

³⁵¹ § 614(a).

³⁵² See generally Fattal, *supra* note 22, at 905 (analyzing FARA as applied to social media actors).

³⁵³ See *supra*, notes 192–97 and accompanying text (noting the consensus that, at its core, FARA is meant to cover covert activity by foreign governments and affiliates to influence the U.S. political system).

³⁵⁴ See CYNTHIA BROWN, *supra* note 184, at 3.

impinging upon a U.S. citizen's First Amendment rights, FARA's current state should concern everyone.

B. Recommendations

To separate the substance of FARA from that of RFAL, legislators should amend FARA to clarify its vague definition of "foreign agent." They should also amend FARA to mitigate the statute's stigmatizing effects.

First, legislators could consider replacing FARA's current definition of foreign control, acting "at the order, request, or under the direction or control, of a foreign principal,"³⁵⁵ with the definition of control from the Restatement of Agency (adopted by the Third Circuit): "the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."³⁵⁶ Most importantly, the Third Circuit's standard is clearer than the Second Circuit's, and thus gives better notice to parties on whether they must register.³⁵⁷ Furthermore, doing so would clarify the statute in an area where DOJ has issued little guidance.³⁵⁸ Indeed, this proposal falls in line with a previous Congressional proposal.³⁵⁹

Second, legislators could clarify FARA's exemptions. Exemptions needing clarification include those for "bona fide trade or commerce," and "bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts."³⁶⁰ Such an amendment would define the exempt categories and articulate that if an entity falls within the exempted categories then it need not register.³⁶¹ This is an area where DOJ prosecutors themselves have been confused about FARA's application,³⁶² and well-defined exemptions would help set FARA apart from its Russian counterpart.³⁶³

³⁵⁵ 22 U.S.C. § 611 (2020).

³⁵⁶ *United States v. German-American Vocational League*, 153 F.2d 860, 864 (3d Cir. 1946); *see also* Law, *supra* note 133, at 380–82 (advocating for adoption of the Restatement of Agency standard).

³⁵⁷ *See supra* section II(a)(ii).

³⁵⁸ *See* CYNTHIA BROWN, *supra* note 184, at 3 (citing 28 C.F.R. § 5.100).

³⁵⁹ *Foreign Agent Registration Bill Advances in House on Split Vote: Could Affect Nonprofit Cross-Border Programs*, CHARITY AND SEC. NETWORK (Feb. 7, 2018), https://charityandsecurity.org/news/fara_advances_house/ ("Rep. Jamie Raskin (D-MD) amendment to limit the definition of an 'agent of a foreign principal' in FARA to include only those who are 'under the direction or control, of a foreign principal or of a person directed or controlled' by one. . . . As Raskin explained in the hearing . . . the current definition is so broad that it defies common sense and is inconsistent with the common law definition of the agent/principal relationship.").

³⁶⁰ 22 U.S.C. § 613(d)–(e).

³⁶¹ Current DOJ regulations stipulate that a party is not "exempt" if it participates in "political activities." 28 C.F.R. § 5.304(d) (2020).

³⁶² OIG 2016 Audit, *supra* note 17, at 17 (finding that FARA agents believe that the vague exemptions make the law hard to enforce).

³⁶³ While the Russian law exempts from "political activities," "science, culture, art, healthcare, [disease] prevention and public health" and more, it does not define these exemptions. NGO Law, *supra* note 34, art. 2(6). Thus the Russian government has in the past targeted NGOs for registration that seemingly fall under these categories. *See, e.g. Russia: Harsh Toll of 'Foreign Agents' Law*, *supra* note 49 (the government once sent a warning to "a local group helping people who have cystic fibrosis . . .").

Third, legislators could consider redefining “foreign principal” to include only foreign governments, political parties, or those acting on their behalf. These are the parties of greatest concern, as these are the parties most likely to subvert the American political system.³⁶⁴ Furthermore, by allowing registration of foreign government and foreign political party affiliates, the amendment would not overly cabin DOJ’s ability to respond to covert threats. Indeed, it would result in FARA’s agency requirement partially mirroring the foreign agent espionage statute: 18 U.S.C. § 951.³⁶⁵ Given FARA’s First Amendment implications, this higher standard is nevertheless appropriate.

Together, implementing these amendments helps tailor FARA to its main goal: shining a “spotlight of pitiless publicity” on parties financed by “foreign governments or foreign political groups.”³⁶⁶ The above amendments would narrow the Act to implicate *only those agents* whose disclosure would further that purpose. FARA’s current language is broader and could sweep in more than just those secretly working on behalf of a foreign power or its affiliate; it could sweep in innocent NGOs, media companies, and even grandmas receiving money from relatives abroad.

To be sure, Congress could also append a statement clarifying FARA’s goals onto any new amendment. Understandably, some have voiced confusion about the Act’s current goals, given Congress most recently opined on FARA’s purpose in 1942.³⁶⁷ This clarification would aid not only DOJ enforcement, but also help those courts which accept the Second Circuit’s standard for agency—a standard that explicitly relies on the Act’s *purpose*.³⁶⁸

Finally, Congress could remove the Act’s stigmatizing language. Stigmatizing language can chill political speech, and Congress has taken similar measures to destigmatize FARA registration before. In 1995, it replaced the term “political propaganda” in the Act with “informational materials.”³⁶⁹ In 1991, a Congressperson introduced a bill “to remove the stigma of being labeled a foreign agent by changing the name of the law to the Foreign Interests Representation Act.”³⁷⁰

³⁶⁴ Dennett, *supra* note 25 (“One thing that is reiterated again and again in these [DOJ] opinions is that the registration requirement is triggered when the entity that most benefits from the work is a foreign government or political party.” (citing 28 C.F.R. § 5.307)); Robinson, *supra* note 26, at 1145.

³⁶⁵ See 18 U.S.C. § 951(d) (2020) (“For purposes of this section, the term ‘agent of a foreign government’ means an individual who agrees to operate within the United States subject to the direction or control of a foreign government or official . . .”). *C.f.* Matthew Kahn, *No, Mariia Butina Wasn’t Charged With Violating FARA*, LAWFARE (Jul. 27, 2018), <https://www.lawfareblog.com/no-mariia-butina-wasnt-charged-violating-fara> (explaining the difference between FARA and § 951 violations).

³⁶⁶ Attorney Gen. of United States v. Irish People, Inc., 684 F.2d 928, 939 (1982) (quoting H.R. Rep. No. 1381, 75th Cong., 1st Sess., 1–2 (1937)); see *supra*, pages 30–31 (noting the consensus that, at its core, FARA is meant to cover covert activity by foreign governments and affiliates to influence the U.S. political system).

³⁶⁷ Preface of Act of April 29, 1942, ch. 263, 56 Stat. 248 (1942) (current version at 22 U.S.C. § 611 *et seq.* (2020)); see Robinson, *supra* note 26, at 1078 (“Today, many see it primarily as a tool to provide transparency for lobbyists of foreign governments. Some continue to view it as a way to undermine propaganda or disinformation. And still others see FARA as a way to combat foreign interference in U.S. elections.”).

³⁶⁸ See Attorney Gen. of United States v. Irish Northern Aid Committee, 668 F.2d 159, 161 (2d Cir. 1982); OIG 2016 Audit, *supra* note 17, at iii (DOJ confusion).

³⁶⁹ OIG 2016 Audit, *supra* note 17, at 2.

³⁷⁰ *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).

Following that cue, Congress could reclassify “foreign agents” as “foreign interests.” Second, at a minimum Congress could ensure that the federal government does not condone ostracizing these parties. Congress could remove its rule that revokes the press passes of media companies registered as “foreign agents”—shunning them from conducting Congressional oversight. It should also ensure that other agencies do not discriminate against “foreign agents” in a similar fashion.

If Congress decides to clarify FARA’s scope, then amendments to destigmatize “foreign agents” become less important, but still remain necessary. Ostensibly, clarifying FARA’s scope would result in registering only agents of foreign powers—not individuals, NGOs, or media companies that have a tenuous relationship to foreign parties. Thus, the burdens shouldered by these new “foreign agents” become more appropriate given the purpose of the law. Still, the First Amendment risks of accidental overbreadth are significant. To account for this inevitable loose tailoring, Congress should pass amendments to limit stigmatization whether or not it also clarifies FARA’s scope.

CONCLUSION

The Russian Foreign Agent Law provides a useful foil to alert Congress to the areas of FARA most in need of amending. The Russian and U.S. foreign agent acts laws not the same, but they bear uncomfortable similarities. While the Russian Act adds burdensome restrictions on “foreign agents,” both acts adopt a broad definition of “foreign agent” and both acts stigmatize those “foreign agents.”

Given the seriousness of Russia’s 2016 election interference, the U.S. government has a weighty interest to detect and expose insidious foreign actors. As such, though designed in 1937, FARA still has an important role today.

However, as the Russian experience shows, an overly broad foreign agent law can be used as a political tool to silence legitimate dissent. FARA’s vagueness, combined with the fact that DOJ is enforcing the Law for the first time in over 60 years, has already resulted in confusion and fear of enforcement for limited political ends not consonant with the Law’s purpose.

Consequently, Congress should amend FARA, address issues highlighted by RFAL, and mitigate the risk of future statutory abuse. Given the important First Amendment concerns implicated, it should waste no time doing so.