

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

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## 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 third term as president. Western analysts described the law as an attempt to destroy Putin's opposition and stymie civil society, and after the law's passing, many NGOs were forced to close. The Russian government pushed back against the criticism, arguing that it had modeled the Foreign Agent Law after the American Foreign Agents Registration Act (FARA) passed in 1938. On their face, the laws seem similar, but their implementation has differed. Russia has actively enforced its Foreign Agent Law, whereas the United States—via the Department of Justice (“DOJ”)—had launched only a single criminal prosecution under its version of the Act from 1990 to 2010. However, since Russian interference in the 2016 U.S. presidential election, DOJ prosecutors have once again turned to FARA, bringing more cases between 2016 and 2019 than 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. While the Russian Foreign Agent Law contains significantly more substantive limitations on the functioning of “foreign agents” than FARA does, both laws are nonetheless broad and can sweep in legitimate civil society groups that should not be labeled “foreign agents.” DOJ discretion is the main barrier stopping America from replicating aspects of the negative Russian experience; this reliance on discretion fails to provide sufficient protection of the First Amendment rights at stake. This paper will propose that, given the recent resurgence in FARA's use, Congress should amend FARA to narrow its breadth and clarify its scope to avoid violation of civil liberties.*

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#### 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.<sup>1</sup> Despite the protest's large numbers, then-Prime Minister Putin saw the United States' hand behind them, claiming that "[Hillary Clinton] set the tone for some opposition activists, gave them a signal, they heard this signal and

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1. Ellen Barry, *Rally Defying Putin's Party Draws Tens of Thousands*, N.Y. Times (Dec. 10, 2011), <https://perma.cc/QNR6-SCA5>.

started active work.”<sup>2</sup> In response, Russia’s legislature soon passed the Foreign Agent Law (“RFAL”),<sup>3</sup> In addition to imposing audit requirements, RFAL labeled NGOs as foreign agents, a moniker in Russia synonymous with “spy.”<sup>4</sup>

However, Russia did not develop RFAL from a blank slate; rather, Duma members stated that they based their law on the United States’ Foreign Agents Registration Act (FARA), originally passed in 1938.<sup>5</sup> Indeed, the Acts bear similarities: both mandate that foreign agents register with law enforcement, subject them to audit requirements, and require them to mark all publications with a “foreign agent” stamp.<sup>6</sup> While no scholar has conducted an in-depth analysis of the laws’ similarities and differences, those who have compared them, at least superficially, have reached different conclusions on their resemblance.<sup>7</sup>

No matter the laws’ similarities on paper, in practice they have functioned differently. Russia has actively enforced its law, using it as a political tool to shut down domestically-operated NGOs with opposition views.<sup>8</sup> For example, Russia’s Ministry of Justice first targeted for registration “Golos,” one of Russia’s few independent election watchdogs, and one intimately connected to

2. Steve Gutterman & Gleb Bryanski, *Putin says U.S. stoked Russian protests*, REUTERS (Dec. 8, 2011), <https://perma.cc/9YYD-3AVX>.

3. Federal’nyi Zakon RF “O vnesenii izmenenii v otdel’nye zakonodatel’nye akty Rossiiskoi Federacii v chasti regulirovaniya deatel’nosti nekommercheskikh organizacii, vypolnjajushhih funkicii ‘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 7, 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. 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).

5. 22 U.S.C. §§ 611–621 (2020); Vade de Velde, *supra* note 4, 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 144. In turn, many countries copied Russia’s Act, specifically: “Azerbaijan, Kyrgyzstan, Kazakhstan, Tajikistan, Belarus, and Uzbekistan.” Vade de Velde, *supra* note 4, at 703.

6. 22 U.S.C. §§ 612, 614; NGO Law, *infra* note 28, arts 13.1(9), 24(1), 32.

7. *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 different due to FARA’s narrower “agency” requirement and scope, which, Orlova claims, predominantly applies to “lobbying, consulting, and advertising”); 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).

8. *See generally* COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, THIRD PARTY INTERVENTION BY THE COUNCIL OF EUROPE COMM’R FOR HUM. RTS. ¶¶ 19–23 (2017) (discussing enforcement practices).

the December 2011 protests.<sup>9</sup> As a result of the law, a “significant” number of NGOs have shut down.<sup>10</sup>

By contrast, until recently, the U.S. government had seemingly forgotten that FARA existed.<sup>11</sup> Between 1966 and 2015, the U.S. DOJ brought only seven prosecutions under FARA, two of which were dismissed by the courts.<sup>12</sup> Between 1974 and 2014, at least six separate Government Accountability Office (GAO) and NGO reports found serial under-enforcement of the statute.<sup>13</sup>

However, in 2016, the Russian government coordinated an intricate hacking and disinformation campaign that have influenced the U.S. presidential election.<sup>14</sup> 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.’”<sup>15</sup> The DOJ responded to these serious threats by leaning on FARA. Between 2016 and 2019, the DOJ brought more FARA prosecutions than in the fifty years prior.<sup>16</sup> As a result, many more lobbyists registered, and those who formerly considered FARA “a complete joke” started taking the law seriously for the first time in decades.<sup>17</sup>

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

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9. Dmitry Kolbasin, *Analiz pravoprimeritel'noy praktiki Federal'nogo zakona ot 20 iyulya 2012 goda № 121-FZ «O vnesenii izmeneniy v otdel'nyye zakonodatel'nyye akty Rossiyskoy Federatsii v chasti regulirovaniya deyatel'nosti nekommercheskikh organizatsiy, vypolnyayushchikh funktsii inostrannogo agenta»* [Analysis of the law enforcement practice of the Federal Law of July 20, 2012 No. 121-ФЗ “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 GRP., 5 (June 30, 2013) (Russ.); *Russia NGO law: Election watchdog Golos fined*, BBC (Apr. 25, 2013), <https://perma.cc/6PJT-FSSX> (“[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.’”).

10. COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, OPINION OF THE COMMISSIONER FOR HUMAN RIGHTS.; LEGISLATION AND PRACTICE IN THE RUSSIAN FEDERATION ON NON-COMMERCIAL ORGANISATIONS IN LIGHT OF COUNCIL OF EUR. STANDARDS: AN UPDATE ¶ 66 (July 9, 2015).

11. The DOJ previously referred to FARA as a “malum prohibitum [law], little known outside of the legal community.” See Zephyr Teachout, *How Mueller revived a law that protects us all against foreign money*, WASH. POST (Apr. 19, 2019), <https://perma.cc/S49J-BX2G>.

12. U.S. DEPT. OF JUST. OFF. 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://perma.cc/8XD6-PAG7> [hereinafter *OIG 2016 Audit*].

13. *Id.* at 27–28.

14. NAT’L INTEL. COUNCIL, ICA 2017-01D, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS ii (Jan. 6, 2017), <https://perma.cc/E28B-NU6T>.

15. *Id.*

16. Kai Bernier-Chen, *Lobbying Disclosure Exemption Allows for Continued Foreign Influence in U.S. Politics*, CTR. FOR AM. PROGRESS (Dec. 13, 2019), <https://perma.cc/52HG-Z3GB>.

17. 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 (2019) (“These cases have led to increased efforts by many former lobbyists to disclose their activities to avoid public scrutiny.”); see also Miles Parks, *A ‘Toothless’ Old Law Could Have New Fangs, Thanks To Robert Mueller*, NPR (Nov. 17, 2017), <https://perma.cc/5BPG-JPXH>.

develop.<sup>18</sup> Although the DOJ has tried to clarify its enforcement practices by publishing advisory opinions, confusion about FARA's application persists, both outside of and within the DOJ.<sup>19</sup> Compounding concerns about substantive vagueness, some have accused the DOJ of politicized targeting.<sup>20</sup>

Thus, we must ask: in the face of serious foreign threats, could the United States replicate aspects of Russia's oppressive enforcement of foreign agent laws? Could the United States use FARA as a weapon of politicized enforcement? If FARA does in fact resemble RFAL, is prosecutorial discretion the only factor stopping abuse of the statute?<sup>21</sup>

These questions implicate fundamental First Amendment rights.<sup>22</sup> In Russia, RFAL's implementation forced many civil society groups to shut down. In the United States, provisions for freedom of association have protected civil society groups, preserving their role as critical intermediaries between the government and U.S. citizens, permitting political debate and discourse.<sup>23</sup> FARA also applies to individuals and media organizations, and as it regulates the political speech of U.S. citizens, it could chill core First Amendment speech.<sup>24</sup> Thus, FARA's scope should concern all Americans.

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18. Statement by Claire Finkelstein, *Protecting Democracy: Modernizing the Foreign Agents Registration Act*, Ctr. for Ethics and the Rule of L. at U. Pa., & The Am. Enterprise Inst., at 35:50 (Apr. 17, 2019) <https://perma.cc/DK3H-45N4>.

19. See Lydia Dennett, *Justice Department Reveals (Some) of How It Interprets Foreign Influence Law*, PROGRAM ON GOV'T OVERSIGHT (June 15, 2018), <https://perma.cc/3NM6-7ZL8> (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").

20. 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).

21. See Statement by Claire Finkelstein, *supra* note 18, at 15:15.

22. See *infra* Section III(a)(iv) ("FARA's First Amendment Implications").

23. 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. *Cf. Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 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 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. 75-1381, at 2-3 (1937).

24. See *Meese v. Keene*, 481 U.S. 465, 492 (1987) (Blackmun, J., dissenting) (arguing that FARA disclosure requirements could have 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 cf. 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

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. Although others have remarked on the similarity of the two laws, none have demonstrated that similarities between them can function as a warning to the United States to revise FARA, and thereby protect the United States against practices that could undermine democracy.

The article asserts that RFAL 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, but 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 as 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 discusses 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.<sup>25</sup> *Bouvier* defines vagueness as: "[a]n uncertain meaning

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Amendment challenge on the grounds that the banned speech was "coordinated" and not "independent"). See *infra* note 283, for a discussion of how the Russian restrictions, if applied in the US, might not be upheld under *Holder*.

25. 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 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 as "[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.").



in a text or statement.”<sup>26</sup> Overbreadth is defined as: “[a] law that reaches conduct beyond that intended . . . [or one] that reaches constitutionally protected conduct.”<sup>27</sup> 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, 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.”<sup>28</sup> The Russian government originally passed RFAL in response to December 2011’s large-scale anti-government protests, with then-Prime Minister Vladimir Putin blaming foreign powers for the large turnout.<sup>29</sup> 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 NGOs and stymie legitimate voices of domestic opposition.<sup>30</sup>

#### 1. History of the Act

RFAL was formed as a byproduct of Russia’s tenuous political situation in early 2012. Serious irregularities marred the 2011 State Duma elections.<sup>31</sup> 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.<sup>32</sup> Then-Prime Minister Vladimir Putin blamed the United States for the protests, claiming that foreign grant recipients were following “the instructions of foreign governments” and interfering in the Russian political process.<sup>33</sup>

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

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

28. Federal’nyi Zakon RF o Nekomersheskih 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].

29. Gutterman & Bryanski, *supra* note 2.

30. Charles Digges, *Foreign Agent’ Law Has Put 33 Percent of Russia’s NGOs Out of Business*, BELLONA (Oct. 20, 2015), <https://perma.cc/MM6H-VWCL>.

31. Case of Davydov and Others v. Russia, App. No. 75947/11, ¶ 336 (May 30, 2017), <https://perma.cc/2WPX-3SRR> (finding that Russian officials did not properly investigate reports of serious election irregularities).

32. Barry, *supra* note 1.

33. Gutterman & Bryanski, *supra* note 2; *Russia: Stop Harassing Election Monitors, Release Demonstrators*, HUMAN RIGHTS WATCH (Dec. 5, 2011), <https://perma.cc/4D8K-AMX3>.

Heeding Putin's warning, Russian legislators swiftly passed RFAL "to protect Russia from outside attempts to influence internal politics."<sup>34</sup> Russian officials justified the law's passage by comparing it to FARA, noting that "[n]ot 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."<sup>35</sup>

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, with no minimum.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

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.<sup>40</sup> 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."<sup>41</sup> Others may have chaffed at the label of "foreign"—implying that

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34. *Russian parliament adopts NGO 'foreign agents' bill*, BBC (July 13, 2012), <https://perma.cc/APA4-U42H>.

35. Vade de Velde, *supra* note 4, at 701; Rafael Saakov, *The State Duma approved the law on NGO's and "foreign agents."*, BBC (July 6, 2012), <https://perma.cc/5XJC-UWZH>.

36. 2012 Foreign Agent Law, *supra* note 3; *see also* Orlova, *supra* note 7, at 393–94.

37. 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.")

38. 2012 Foreign Agent Law, *supra* note 3, art. 2(4)–(5).

39. 2012 Foreign Agent Law, *supra* note 3, art. 3(2).

40. Orlova, *supra* note 7, at 394; *Russia's prosecutor general lashes out at NGOs*, THE OKLAHOMAN (July 9, 2013), <https://perma.cc/398T-FWHG> (Stating that Russia's head prosecutor believed that some 215 NGOs fell within the law's scope but remained unregistered).

41. *See Russia: Harsh Toll of 'Foreign Agents' Law*, HUM. RTS. WATCH (June 25, 2013), <https://perma.cc/N64W-BYWQ> (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://perma.cc/3NSA-YAV9> ("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), <https://perma.cc/G35H-UZQ5> (publishing a picture of the human rights NGO "Memorial" spray-painted with the words "Foreign Agent (Loves) USA" near its entrance).



they did not work on behalf of the Russian people.<sup>42</sup> Others may have been concerned with the onerous audit requirements the bill imposed.<sup>43</sup> Russian prosecutors demurred, unsure of how to respond, and the law lay dormant for about a year.<sup>44</sup>

Then, during 2013's yearly review of the federal security service ("FSB"), President Putin warned that foreign enemies were aiming to use "various instruments of pressure [against Russia], including mechanisms of so-called 'soft-power.'"<sup>45</sup> 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.<sup>46</sup> 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."<sup>47</sup> Some of the organizations targeted included the election watchdog "Golos," the anti-discrimination organization "Memorial," and the police-reform organization "Public Verdict Foundation."<sup>48</sup> As a result of their new foreign agent status, these, as well as other NGOs, suffered serious harassment.<sup>49</sup>

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.<sup>50</sup> First, a June 2014 amendment gave the Ministry of

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42. Callahan, *supra* note 7, at 1244.

43. See Kolbasin, *supra* note 9, at 10 (noting that registered "foreign agents" are faced with complex reporting rules).

44. See Callahan, *supra* note 7, at 1244.

45. See Callahan, *supra* note 7, at 1244.

46. *Russia: Harsh Toll of 'Foreign Agents' Law*, *supra* note 41 ("Four months into the campaign, at least 62 groups have received warnings or orders to register as 'foreign agents.'").

47. *Russia: Harsh Toll of 'Foreign Agents' Law*, *supra* note 41. See *infra* note 81, for a full list of the first organizations targeted.

48. *Russia: Harsh Toll of 'Foreign Agents' Law*, *supra* note 41.

49. *Russia: Harsh Toll of 'Foreign Agents' Law*, *supra* note 41 ("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.").

50. 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 Izmenenij v Otdel'nye Zakonodatel'nye Akty Rossiskoi Federatsii po Voprosu Finansovoi Otchetnosti Politicheskikh Partii, Izbiratel'nikh Obyedinenij, 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

Justice the ability to register NGOs as foreign agents without their consent.<sup>51</sup> Comparatively, in 2012, NGOs were foreign agents only if they registered themselves.<sup>52</sup> Next, a November 2014 amendment further limited how “foreign agents” could operate by banning foreign agent NGOs from participating in Russian electoral and referendum campaigns, and specifically banning them from contracting with or giving donations to political parties.<sup>53</sup> Overall, this legislation directly or indirectly forced many NGOs to close: by 2015, Russia had 33% fewer NGOs than prior to the passage of the 2012 Foreign Agent Law.<sup>54</sup>

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.<sup>55</sup> 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.<sup>56</sup> NGOs soon took advantage of the amendment, and by 2017, the Ministry of Justice was unregistering more organizations than registering them.<sup>57</sup> Soon thereafter, the government again amended RFAL multiple times to broaden its scope. Following the U.S. DOJ forcing Russian media company “RT” to register as a foreign agent, in 2017, the Russian government broadened RFAL’s scope to cover media companies.<sup>58</sup> Deputy Speaker of the Duma Peter Tolstoy stated that these changes “mirror” those in the United States and that the Russian government will only apply them to U.S.

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Local Gov’ts], SOBRANIE ZAKONODATEL’STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2014, No. 48, Item 6636 [hereinafter November 2014 Foreign Agent Law].

51. June 2014 Foreign Agent Law, *supra* note 50.

52. *Russia’s Foreign Agent Law: Violating human rights and attacking civil society*, NORWEGIAN HELSINKI COMM., 3 (Aug. 21, 2014), <https://perma.cc/4TV9-LVD6> (“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.”).

53. November 2014 Foreign Agent Law, *supra* note 50.

54. Digges, *supra* note 30.

55. Federal’nyi Zakon RF “O vnesenii izmenenii v stati 27 i 38 Federalnovo zakona ‘Ob obshestvenikh obedeneniyakh’ i statioo 32 Federalnovo zakona ‘O nekommersheshkikh 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’STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 10, Item 1413.

56. *See* Skibo, *supra* note 41.

57. *See* Skibo, *supra* note 41.

58. 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’STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2017, No. 48, Item 7051, art. 2 [hereinafter 2017 Foreign Agent Law]; *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 (Russ.) (Nov. 10, 2017), <https://perma.cc/EH5X-AU3M>.

media in Russia.<sup>59</sup> The law, however, did not distinguish nationalities, and thus could apply to any media organization operating in Russia that accepts foreign funding.<sup>60</sup>

In 2019, the government again broadened RFAL's scope. This time, acting in response to the U.S. DOJ's prosecution of Maria Butina, individuals, as well as mass media, were added to the list of parties subject to RFAL.<sup>61</sup> The amendment provides that any individual or media company that accepts foreign funding and publishes information on mass media must register as a foreign agent.<sup>62</sup> Russian lawmakers again claimed that the amendments brought Russia's law in line with FARA.<sup>63</sup>

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.<sup>64</sup> 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.<sup>65</sup> Previously, the law had included only those parties which accepted money or property directly from foreign principals. The amendment's effects

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59. *Duma Organichit Rabotu Amerikanskikh SMI na Onvet na Prichesleniya RT k inoagentam*, *supra* note 58.

60. 2017 Foreign Agent Law, *supra* note 58, art. 2.

61. Federal'nii 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 ROSSIYSKOI 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://perma.cc/Y7X4-KSQ5>.

62. 2019 Foreign Agent Law, *supra* note 61.

63. Troianovski, *supra* note 61.

64. See *Russia Eyes Expansion to 'Foreign Agent' Law*, THE MOSCOW TIMES (Dec. 2, 2020), <https://perma.cc/5TR9-RC69>; Andreas Rinke & Alexander Marrow, *Germany says it will investigate Navalny poisoning case, if he agrees*, REUTERS (Sept. 15, 2020), <https://perma.cc/S6GH-J53Q>; 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://perma.cc/94XE-TYN8>. 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://perma.cc/T2YX-G9AL>.

65. 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 [Fed. Law of the Russian Fed'n on amendments to certain legislative acts of the Russian Fed'n in terms of establishing additional measures to counter threats to national security], ROSSIISKAIA GAZETA [ROS. GAZ.] (11 Jan. 2021) [hereinafter 2020 Foreign Agent Law].

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.”<sup>66</sup>

In summary, RFAL currently 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.<sup>67</sup> It bans foreign agents from participating in “electoral or referendum campaigns,” from contracting with or donating to a political party, or from joining state or local government bodies.<sup>68</sup> Finally, it requires registered parties to include a “foreign agent” mark on all published material, and it punishes those who fail to register or fail to follow the rules once registered with fines, jail time, or forced labor.<sup>69</sup>

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

Enforcement of RFAL 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 criticisms 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: “[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].”<sup>70</sup>

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66. See, e.g., *Russia: New Effort to Stifle Independent Groups*, HUM. RTS. WATCH (Nov. 12, 2020), <https://perma.cc/KP4G-YF5M>; *What you need to know about Russia’s updated ‘foreign agent’ laws*, MEDUZA (Dec. 28, 2020), <https://perma.cc/M6TR-Y458> (“[T]his new legislation puts almost everyone at risk of being labeled a foreign agent.”).

67. NGO Law, *supra* note 28, arts. 32(1), (3).

68. Federal’nyi Zakon RF o Politicheskikh Partiyakh [Federal Law of the Russian Federation on Political Parties], SOBRANIE ZAKONODATEL’STVA ROSSIYSKOI 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]; 2020 Foreign Agent Law, *supra* note 65, art. 5(8).

69. NGO Law, *supra* note 28, art. 24(1); Mass Media Law, *supra* note 28, art. 27; UGOLOVNIY KODEKS ROSSIYSKOI FEDERATSII [UK RF] [CRIMINAL CODE] arts. 239, 330.1 (Russ.).

70. Kolbasin, *supra* note 9, at 5.

Golos was not alone. Every one of the initial NGOs forced to register were those whose advocacy not only clashed with the government line but also promoted more “western” views.<sup>71</sup> More recently, the Council of Europe reported:

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%).<sup>72</sup>

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.”<sup>73</sup> To be sure, in 2017, less than 1% of all foreign funding received by Russian NGOs was received by those labeled foreign agents.<sup>74</sup> 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, finding no “political activity” but ultimately registering the NGO as a foreign agent anyway.<sup>75</sup> 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.<sup>76</sup> Rather, its inclusion was preemptive, in the context of “state supervision.”<sup>77</sup> Similarly, it launched a case against

71. See Callahan, *supra* note 7, at 1245 (including Human Rights Watch, Amnesty International, and Transparency International); *Russia’s Foreign Agent Law: Violating human rights and attacking civil society*, *supra* note 52, at 3 (stating that 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 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 9, at 9 (concluding that the Ministry of Justice intended to target these human rights groups for political reasons).

72. COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, *supra* note 8, ¶ 21.

73. Troianovski, *supra* note 61.

74. Elena Mukhametshina, *Chislo novikh inostrannikh agentov za god sznizilos pochni v dve* [The number of new foreign agents fell by almost half], *VEDOMOSTI* (Russ.) (May 1, 2017), <https://perma.cc/S9PN-4RQW>.

75. COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, *supra* note 10, ¶ 37.

76. COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, *supra* note 10, ¶ 37.

77. COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, *supra* note 10, ¶ 37 (explaining that state supervision may be “the monitoring of the organisation’s web-site by the Ministry on its own initiative”).

the environmental club “Ulukitkan,” without evidence of “political activity.”<sup>78</sup> 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.<sup>79</sup> Finally, the Ministry of Justice has brought claims against groups, like the anti-discrimination NGO “Memorial” (different than the aforementioned “Memorial” that investigates Stalinist repression) that did not receive any foreign funding whatsoever.<sup>80</sup>

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.<sup>81</sup> The law’s criminal penalties “play an important role in self-censorship.”<sup>82</sup> 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.”<sup>83</sup> They also face the possibility of additional unscheduled audits at the government’s discretion.<sup>84</sup> 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, participating in electoral or referendum campaigns, and, as of December 2020, being appointed to state or local government bodies.<sup>85</sup> Finally, the label “foreign agent” carries with it intense stigma. Organizations branded as foreign agents often lose valuable private and public partners with whom they previously worked, and many are subject to severe harassment.<sup>86</sup>

78. *Russia: Harsh Toll of ‘Foreign Agents’ Law*, *supra* note 41.

79. *Russia: Harsh Toll of ‘Foreign Agents’ Law*, *supra* note 41.

80. *See Russia: Harsh Toll of ‘Foreign Agents’ Law*, *supra* note 41.

81. *Russia: Harsh Toll of ‘Foreign Agents’ Law*, *supra* note 41, ¶¶ 65–67.

82. *Russia: Harsh Toll of ‘Foreign Agents’ Law*, *supra* note 41, ¶ 48.

83. *Russia’s Foreign Agent Law: Violating human rights and attacking civil society*, *supra* note 52 at 1.

84. NGO Law, *supra* note 28, art. 32(4.2) (explaining that the Russian government can in certain situations perform unscheduled audits of NGOs).

85. Political Party Law, *supra* note 68, arts. 30(3)(n) (explaining that “foreign agents” cannot donate to political parties), 31(4.1)(e) (explaining that “foreign agents” cannot contract with political parties); Federal’nyi Zakon RF “Ob osnovnykh garantiyakh izbiratel’nykh prav i prava na uchastiye v referendumе grazhdan Rossiyskoy Federatsii” [Federal Law of the Russian Federation “On basic guarantees of voting and rights and rights for participation in referendums of citizens of the Russian Federation”] SOBRANIE ZAKONODATEL’STVA 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) (Russ.) [hereinafter Election Law]; 2020 Foreign Agent Law, *supra* note 65, art. 5(8).

86. COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, *supra* note 8, ¶¶ 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.”); *Russia: Harsh Toll of ‘Foreign Agents’ Law*, *supra* note 41 (“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



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 long seen the Russian courts as a subservient branch of government.<sup>87</sup> Here too, the judiciary has sanctioned a system that chills civil society and stymies the free expression of opinions.<sup>88</sup>

In 2014, the Russian Constitutional Court reviewed and upheld RFAL.<sup>89</sup> The majority stated that the law did not infringe upon the fundamental right to association, in part because it aimed to increase transparency rather than interfere in the activities of organizations designated as foreign agents.<sup>90</sup> 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.”<sup>91</sup>

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.”<sup>92</sup>

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), 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.<sup>93</sup> Thus, it would likely uphold the law against a similar challenge.

Movement for Human Rights, a leading human rights group, and physically removed activists from the premises, injuring several of them.”).

87. *Russian Federation*, INT’L COMM. OF JURISTS, 16 (June 2014), <https://perma.cc/N4MX-Y4PR> (“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://perma.cc/CBN2-LFY5> (“The judiciary lacks independence from the executive branch, and career advancement is effectively tied to compliance with Kremlin preferences.”).

88. See COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, *supra* note 8, ¶ 38.

89. 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 (Russ.).

90. *Id.* ¶¶ 3.2–3.4; Orlova, *supra* note 7, at 399–401.

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

92. Orlova, *supra* note 7, at 404 (“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.”).

93. *V Gosdumu vnesli popravki ob ugovnoy otvetstvennosti inoagentov* [Amendments were made to the State Duma on the criminal liability of foreign agents] RIA NOVOSTI (Russ.) (Nov. 12, 2020), <https://perma.cc/BMV7-SJBA> (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

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 developed a negative judicial practice regarding NGOs suspected of being foreign agents."<sup>94</sup> Similarly, the Norwegian Helsinki Committee 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.<sup>95</sup> Put differently, courts do not challenge the Ministry of Justice's sometimes expansive legal arguments.<sup>96</sup> 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 and, if anything, it has become worse.<sup>97</sup>

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."<sup>98</sup>

### B. *The 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.<sup>99</sup> Congress passed FARA in 1938 to "shine a spotlight of pitiless publicity" on Nazi propaganda in the United States.<sup>100</sup> 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 dis

legislation in this area, Andrei Klimov, head of the Federation Council commission for the protection of state sovereignty, told RIA Novosti on Friday.").

94. Kolbasin, *supra* note 9, at 9–10.

95. *Russia's Foreign Agent Law: Violating human rights and attacking civil society*, *supra* note 52, 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.").

96. 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://perma.cc/5LAN-PSQM>. See also Kolbasin, *supra* note 9, 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).

97. COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, *supra* note 8, ¶ 20. The Commissioner's report continues to describe the types of organizations whose activity courts have deemed "political." Some strain credibility. For instance, "[l]ocal 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.'" ¶ 22.

98. COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, *supra* note 8, ¶ 38.

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

100. H.R. REP. NO. 75-1381, at 1–2 (1937).

use.<sup>101</sup> However, Russian interference in the 2016 presidential election prompted a reawakening of DOJ enforcement and congressional interest in the law.<sup>102</sup> Today, legislators and prosecutors consider FARA a key tool in combatting covert foreign influence in the United States.

### 1. History of the Act

The U.S. Congress enacted FARA in 1938.<sup>103</sup> The now-defunct Special Committee on Un-American Activities proposed FARA to monitor and expose the propaganda of Axis powers with the view that a forced transparency regime would deter that propaganda.<sup>104</sup> 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.<sup>105</sup> The law 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.”<sup>106</sup>

In 1942, Congress transferred enforcement of FARA from the Department of State to the Department of Justice.<sup>107</sup> 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.”<sup>108</sup>

During the period immediately following World War II, FARA’s enforcement focus switched from Nazis to communists and communist sympathizers.<sup>109</sup> DOJ reported twelve FARA prosecutions between the end of World War II and 1963, including three involving the Soviet Union and five involving Cuba.<sup>110</sup> FARA also provided the legal basis for some politically tinged prosecutions: in 1951, the DOJ charged W.E.B. DuBois, founder of the National Association for the

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101. Atieh, *infra* note 104 at 1057; *see also* OIG 2016 Audit, *supra* note 12, at 2–9.

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

103. CONG. RSCH. SERV., IF10499, FOREIGN AGENTS REGISTRATION ACT: AN OVERVIEW 1 (2019), <https://perma.cc/RU5V-A3BM>.

104. A committee “charged with identifying Communist threats to the United States.” *House Un-American Activities Committee*, TRUMAN LIBRARY (last visited Feb. 8, 2021), <https://perma.cc/EJ5G-XU3N>; Act of June 8, 1938, ch. 327, Pub. L. No. 75-583, 52 Stat. 631.; Jihad Atieh, *Foreign Agents: Updating FARA to Protect American Democracy*, 31 U. PA. J. INT’L L. 1051, 1056–57 (2010); Vade de Velde, *supra* note 4, at 700; CONG. RSCH. SERV., IF10499, *supra* note 103, at 1 (“[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.”).

105. Act of June 8, 1938, ch. 327, Pub. L. No. 75-583, 52 Stat. 631.

106. *Id.*

107. Atieh, *supra* note 104, at 1057.

108. Act of Apr. 29, 1942, ch. 263, Pub. L. No. 77-532, 56 Stat. 248.

109. Atieh, *supra* note 104, at 1057.

110. Fattal, *supra* note 17, at 912. The others were “one Rumania, two the Dominican Republic, and one the Committee of World Congress of the Defenders of Peace.” *Att’y Gen. of U.S. v. Irish People, Inc.*, 684 F.2d 928, 945 (D.C. Cir. 1982).

Advancement of Colored People (“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.<sup>111</sup> A judge acquitted him as a matter of law because there was no agency between DuBois and the Soviet Union.<sup>112</sup> Nevertheless, the negative press generated by his prosecution “ruined his career.”<sup>113</sup> In addition to founding the NAACP, DuBois had been the first African American to receive a Harvard doctorate and was an anti-war advocate.<sup>114</sup> After his trial, which the NAACP called “one of the most ludicrous actions ever taken by the American government,” DuBois stopped “many of his anti-nuclear policies, and he was thereafter sidelined in U.S. politics.”<sup>115</sup>

In 1966, Congress passed multiple amendments to FARA to account for the United States’ new economic hegemony and the subsequent growth of the lobbying industry. As the United States 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.<sup>116</sup> As a Senate report explained: “[t]he 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.”<sup>117</sup> 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.”<sup>118</sup> The amendments redefined “political activity,” increased FARA’s enforcement budget, added penalties for non-compliance, and broadened registration exemptions to “ensure legitimate commercial activities were not burdened.”<sup>119</sup> At the same time, the amendments “narrowed the reach of FARA so that the government has to prove that a foreign agent is acting at the order,

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111. Doug Rutzen & Nick Robinson, *The Unintended “Foreign Agents,”* JUST SECURITY (Mar. 16, 2018), <https://perma.cc/6URL-AASV>.

112. Robinson, *supra* note 20, at 1120–21.

113. Andrew Lanham, *When W.E.B. DuBois Was Un-American*, BOSTON REV. (Jan. 13, 2017), <https://perma.cc/HKM8-9LB2>.

114. *NAACP History: W.E.B. DuBois*, NAACP (last visited Apr. 17, 2020), <https://perma.cc/4WV5-KQTK>.

115. *The Life of W.E.B. DuBois*, CORP. INTERNSHIP LEADERSHIP INST., (last visited Sep. 17, 2021), <https://perma.cc/MR6G-7HE8>; Nick Robinson, *The Foreign Agents Registration Act is Broken*, FOREIGN POLICY (July 22, 2019), <https://perma.cc/U4AY-AEB6>.

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

117. S. REP. NO. 89-143, at 4 (1965).

118. Law, *supra* note 116, at 368.

119. Roland A. Paul, *Foreign Agents Registration Act: The New Amendments*, 22 THE BUSINESS LAWYER 601, 604–06 (1967); Atieh, *supra* note 104, at 1058; CONG. RSCH. SERV., IF10499, *supra* note 103, at 1. At least one analyst described these amendments as the creation of “loopholes.” Atieh, *supra* note 104, at 1058–59. Congress also passed a FARA-related statute that bans “foreign agents” from becoming certain public officials. 18 U.S.C. § 219; see also *FARA Related Statutes*, U.S. DEP’T OF JUST., <https://perma.cc/ZU78-9SE8> (accessed Nov. 8, 2021).

request, or under the direction and control of a foreign principal.”<sup>120</sup> These amendments form the core of FARA today.<sup>121</sup>

Due to this recalibration, FARA prosecutions dropped precipitously. From 1966 to 2015, the DOJ prosecuted only seven FARA cases; “[a]ccording to FARA Unit staff, the 1966 amendments reduced the incidence of criminal FARA prosecutions while increasing civil and administration resolution of FARA violations.”<sup>122</sup> The amendments increased the burden of proof for FARA prosecutions and provided the DOJ with a new civil injunctive remedy for possible violations, thus possibly explaining the drop in prosecutions.<sup>123</sup> But these penalties, including civil ones, were rarely imposed. From 1991 to 2019, DOJ’s FARA Unit—a section within the National Security Division (“NSD”) responsible for FARA administration and enforcement—had used civil injunctive relief only once and sought civil fines only twice, both times without success.<sup>124</sup>

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”; if a lobbyist registered under the LDA, he or she did not need to register under FARA.<sup>125</sup> After the LDA exception to FARA took effect, new FARA registrations declined about 30%.<sup>126</sup> Second, Congress replaced the more pejorative term “political propaganda” (as contained in the original law) with the more neutral term “informational materials.”<sup>127</sup> 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.”<sup>128</sup>

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

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120. OIG 2016 Audit, *supra* note 12, at 2.

121. OIG 2016 Audit, *supra* note 12, at 2.

122. Katie Benner, *Justice Dept. to Step Up Enforcement of Foreign Influence Laws*, N.Y. TIMES (Mar. 6, 2019), <https://perma.cc/69CT-AM8E>. 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://perma.cc/R967-UFE6>. Previously, “[i]t was used in the World War II era to successfully prosecute some 23 criminal cases.” *Foreign Agents Registration Act Enforcement*, DEP’T OF JUSTICE ARCHIVE (last visited Feb. 9, 2021), <https://perma.cc/S37R-QFKF>. OIG 2016 Audit, *supra* note 12, at 2; *see also* Fattal, *supra* note 17, at 912 (FARA prosecutions “largely ceased, likely owing to the Act’s shifted focus onto lobbying”).

123. *See Foreign Agents Registration Act Enforcement*, *supra* note 122.

124. For more information on the FARA Unit, see OIG 2016 Audit, *supra* note 12, at 3–4 (“NSD’s Administration and Enforcement of FARA”); Press Release, Department of Justice, Court Finds RM Broadcasting Must Register as a Foreign Agent (May 13, 2019), <https://perma.cc/6NGN-PVPP>; OIG 2016 Audit, *supra* note 12, 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 104, at 1067–69.

125. OIG 2016 Audit, *supra* note 12, at 2.

126. OIG 2016 Audit, *supra* note 12, at 5 (showing that after DOJ filing fees in 1993, new registrations also declined 40%).

127. OIG 2016 Audit, *supra* note 12, at 2.

128. OIG 2016 Audit, *supra* note 12, at 2–3.

request and engages in political or other associated activities.<sup>129</sup> Registered parties must renew their registration every six months, 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.<sup>130</sup> Violations of the Act may result in a fine, jail time, or even deportation, if a foreign citizen.<sup>131</sup>

## 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.<sup>132</sup> Then-Deputy Attorney General Rod Rosenstein appointed a special counsel, Robert Mueller, to fully investigate the matter.<sup>133</sup> 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.<sup>134</sup> Mueller's seven indictments were equivalent to the total number of FARA charges from 1966 to 2017.<sup>135</sup> The DOJ previously referred to FARA as a law that was "little known outside of the legal community," but these cases forced lobbyists to sit up and take notice.<sup>136</sup>

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, marking the first ever application of FARA to social media.<sup>137</sup> 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."<sup>138</sup> 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

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129. 22 U.S.C. § 611 (2020).

130. §§ 612, 614.

131. § 618.

132. NAT'L INTEL. COUNCIL, ICA 2017-01D, *supra* note 14, at ii.

133. Press Release, U.S. Dep't of Just., Appointment of Special Counsel (May 17, 2017), <https://perma.cc/Y8F4-VXZ2>. 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.

134. Teachout, *supra* note 11.

135. Teachout, *supra* note 11. Since the 2016 Inspector General's report, DOJ has initiated more FARA prosecutions than it did the fifty years prior. Bernier-Chen, *supra* note 16.

136. Teachout, *supra* note 11 (quoting journalist Ken Silverstein as saying that if FARA were properly enforced, "roughly half of Washington would be under arrest"). See Fattal, *supra* note 17, at 915 ("These cases have led to increased efforts by many former lobbyists to disclose their activities to avoid public scrutiny.")

137. Fattal, *supra* note 17, at 903–05.

138. Fattal, *supra* note 17, at 903–05 (emphasis added).



FARA with the Justice Department.”<sup>139</sup> This argument is likewise unprecedented. Indeed, the breadth of Mueller’s indictments implies that FARA’s previous failure to warn of Russian interference stemmed from, if anything, its underenforcement, rather than some possible statutory limitation.

Following Mueller’s investigation, the DOJ has reemphasized FARA, albeit outside of the election-interference context. In 2017, the DOJ ordered Russian-state media outlets RT 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.<sup>140</sup> In March 2019, Assistant Attorney General for DOJ’s National Security Division John Demers announced that the 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.”<sup>141</sup> 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.<sup>142</sup> In July 2020, during a speech on China, Attorney General William Barr hinted at an even greater role for FARA, stating that “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.”<sup>143</sup>

Since the DOJ’s FARA reemphasis, some have questioned how the DOJ determines who to target for registration; “the 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.”<sup>144</sup> Indeed, in September 2020, DOJ ordered AJ+, an Al Jazeera subsidiary, to register as a foreign

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139. Joshua R. Fattal, *The Justice Department’s New, Unprecedented Use of the Foreign Agents Registration Act*, LAWFARE BLOG (Dec. 18, 2019), <https://perma.cc/EEW2-5HSD>.

140. 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://perma.cc/N325-X6JL>.

141. Benner, *supra* note 122.

142. Press Release, U.S. Dep’t of Just., Prominent Global Law Firm Agrees to Register as an Agent of a Foreign Principal (Jan. 17, 2019), <https://perma.cc/9QQQ-QTU5>. 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://perma.cc/GFT9-G9SJ>.

143. Att’y Gen. William Barr, Remarks on China Policy at the Gerald R. Ford Presidential Museum (July 17, 2020), <https://perma.cc/6P7B-TQNN>.

144. Alexandra Ellerbeck & Avi Asher-Schapiro, *Everything to know about FARA, and why it shouldn’t be used against the press*, COLUM. JOURNALISM REV. (June 11, 2018), <https://perma.cc/L8QA-6NT7>; see also Robinson, *supra* note 20, at 1124–30 (arguing that RT’s forced registration raises “the specter of politicized enforcement”).

agent.<sup>145</sup> AJ+’s registration might raise eyebrows, insofar as it took place only after members of Congress pressured the DOJ to investigate Al Jazeera.<sup>146</sup> In a letter obtained by the New York Times, the DOJ justified its order by noting that “[j]ournalism 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.’”<sup>147</sup> The DOJ provided no public explanation as to 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,<sup>148</sup> but 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.”<sup>149</sup> Political sway and public outcry renders this line-drawing problem even more difficult.

Congress has supported the 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 because they were concerned that the NRDC was working in support of China’s interests.<sup>150</sup> Republicans did not stop there, and ultimately urged registration of other environmental groups such as Earthjustice (which has since registered), the Center for Biological Diversity, and the World Resources Institute.<sup>151</sup> 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

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145. Marc Tracy & Lara Jakes, *U.S. Orders Al Jazeera Affiliate to Register as Foreign Agent*, N.Y. TIMES (Sept. 15, 2020), <https://perma.cc/G3LV-26KV>.

146. Letter from Members of Congress to Att’y Gen. Jeff Sessions (Mar. 6, 2018), <https://perma.cc/R4RC-RXHP>.

The United Arab Emirates, a geopolitical foe of Qatar (Al-Jazeera’s owner), has 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.” Dan Friedman, *The Trump Administration Orders an Al Jazeera Affiliate to Register as a Foreign Agent*, MOTHER JONES (Sept. 15, 2020), <https://perma.cc/QQ98-GD4C>.

147. Tracy & Jakes, *supra* note 145.

148. See, e.g., Jonathan A. Greenblatt, *Al Jazeera propagates hatred. Is it also a Foreign Agent?*, THE HILL (Aug. 10, 2018), <https://perma.cc/YV25-W82Q>.

149. Ellerbeck & Asher-Schapiro, *supra* note 144.

150. Steven Mufson & Chris Mooney, *House Republicans attack environmental group over its climate work in China*, WASH. POST (June 8, 2018), <https://perma.cc/MZ6P-45VJ> (“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.”).

151. Letter from Members of Congress to Mr. Kierán Suckling, Exec. Dir., Center for Biological Diversity (June 20, 2018), <https://perma.cc/M5YQ-BWS4>; Letter from Members of Congress to Ms. Abigail Dillen (Oct. 1, 2018), <https://perma.cc/2ZQB-MWS8>; Letter from Members of Congress to Mr. Andrew Steer, President and CEO, World Resources Institute (Oct. 17, 2018), <https://perma.cc/V247-9L64>; see Registration Statement (Sept. 20, 2019), <https://perma.cc/2T95-7NK5>.

the DOJ.<sup>152</sup> At least one proposed amendment would also mandate greater transparency by requiring the DOJ to release advisory opinions and create a comprehensive enforcement strategy.<sup>153</sup> As of this article's writing, Congress has not passed any new amendments.

As FARA emerges from its deep slumber, concerns center on FARA's vague definition of "foreign agent," which could result in an overly broad application of the statute. The 2016 FARA audit revealed that DOJ officials themselves voiced uncertainty concerning which parties FARA does and does not exempt from its scope.<sup>154</sup> From the DOJ officials' perspective, concerns around vagueness compromised their ability to enforce the Act.<sup>155</sup> To help clarify which parties the Act covers, the DOJ recently released years of FARA advisory opinions.<sup>156</sup> However, 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."<sup>157</sup> 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."<sup>158</sup> For instance, since the 2016 audit, formal DOJ regulations have not clarified the scope of FARA's agency requirement.<sup>159</sup> Mueller's prosecutions pushed the enforcement envelope, and related investigations pose more instances 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."<sup>160</sup> Indeed, while many approved of DOJ forcing RT to register as a foreign agent, other news organizations, like Al-Jazeera, pose a more difficult challenge.<sup>161</sup>

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152. Updates on Congressional Action on FARA Reform, CAPLIN & DRYSDALE (Feb. 20, 2019), <https://perma.cc/2J42-URNR>.

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

154. OIG 2016 Audit, *supra* note 12, 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.").

155. OIG 2016 Audit, *supra* note 12, at 17.

156. Press Release, U.S. Dep't of Just., Department Of Justice Posts Advisory Opinions On FARA.Gov Website (June 8, 2018), <https://perma.cc/A3PX-S654> ("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.").

157. Dennett, *supra* note 19.

158. Dennett, *supra* note 19.

159. CYNTHIA BROWN, CONG. RSCH. SERV., R45037, THE FOREIGN AGENTS REGISTRATION ACT (FARA): A LEGAL OVERVIEW 3 (2017) (citing 28 C.F.R. § 5.100). However, for the first time in about 15 years, DOJ may adopt new FARA regulations. *See* Clarification and Modernization of Foreign Agents Registration Act (FARA) Implementing Regulations, 86 Fed. Reg. 70,787 (proposed Dec. 13, 2021) (to be codified at 28 C.F.R. pt. 5).

160. *See supra* notes 161–63 and accompanying text; Statement by Claire Finkelstein, *supra* note 18, at 10:20.

161. *See, e.g.,* Ellerbeck & Asher-Schapiro, *supra* note 144 (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-*

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.”<sup>162</sup> 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.”<sup>163</sup> In the past, when the public has increased pressure on the DOJ to enforce FARA, the department has abused its authority.<sup>164</sup> Of course, the vagueness criticized by scholars can also be a boon, as it affords the 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.<sup>165</sup>

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).<sup>166</sup> Congress in 1937 or 1942 could not have foreseen Russian interference in the 2016 election, or the growth of social media and multinational businesses. As a result, over 70 years later, confusion exists about FARA’s aims: “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.”<sup>167</sup>

That said, there exists a core FARA aim: “FARA’s purpose is to disclose sources of foreign political influence in the United States.”<sup>168</sup> Indeed, DOJ advisory opinions do not always recommend registration when the potential foreign agent works on behalf of a private foreign party.<sup>169</sup> Conversely, DOJ *always* recommends registration when the agent works on behalf of a foreign government or its affiliate.<sup>170</sup> 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.”<sup>171</sup> To the extent that private parties unaffiliated with foreign governments pose a threat, the threat is usually more

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Jazeera of antisemitism in exposé of Israeli official, *THE GUARDIAN* (Oct. 9, 2017), <https://perma.cc/L54P-LEK8>.

162. Rutzen & Robinson, *supra* note 111.

163. Statement by Claire Finkelstein, *supra* note 18, at 35:50.

164. Statement by Nick Robinson, 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), at 37:45, <https://perma.cc/JQY7-KCW6>.

165. See *supra* notes 155–63 and accompanying notes (examining Mueller’s FARA prosecutions).

166. H.R. REP. NO. 75-1381, at 1–2 (1937); Preface of Act of April 29, 1942, ch. 263, 56 Stat. 248 (1942).

167. Robinson, *supra* note 20, at 1078.

168. Fattal, *supra* note 139.

169. Dennett, *supra* note 19.

170. Dennett, *supra* note 19.

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

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 U.S. 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 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 (and 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.<sup>172</sup> FARA defines “foreign agent” as any domestic party involved in certain public activities and controlled by a foreign entity.<sup>173</sup> Stylistically, RFAL's scope is clear, but overly broad.<sup>174</sup> FARA, on the other hand, has a vague scope that could be interpreted and enforced too broadly.<sup>175</sup>

#### 1. Domestic Parties Covered

RFAL and FARA's respective definitions of “foreign agent” apply to different domestic parties. RFAL applies to non-profit organizations, mass media, and individuals, and clearly defines exempt parties.<sup>176</sup> Within the category of non-profit organizations, it exempts non-profit political parties, religious organizations, state

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172. NGO Law, *supra* note 28, 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. NGO Law, *supra* note 28, art. 2(6).

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

174. 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 34.

175. 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. 75-1381, at 1–2 (1937). Additionally, it could infringe upon First Amendment rights. *See infra* notes 316–49 and accompanying text (“FARA's First Amendment Implications”).

176. NGO Law, *supra* note 28, art. 2(6) (NGOs); Mass Media Law, *supra* note 28, art. 6 (media companies and individuals).

enterprises and NGOs created by them, and chambers of commerce.<sup>177</sup> Persons exempt are employees of diplomatic missions and foreign-state representatives.<sup>178</sup>

FARA, on the other hand, is much vaguer: it applies to all “persons” and broadly defines “person” as any “individual, partnership, association, corporation, organization, or any other combination of individuals.”<sup>179</sup> 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.<sup>180</sup>

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.<sup>181</sup> However, FARA’s definition of “political activities” is broad enough to cover many educational or scientific institutions, such as schools. As such, the exemption loses meaning, because under the DOJ’s interpretation, whether a party is involved in “political activities” remains the only relevant question. An example of a strange 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 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.”<sup>182</sup> 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 a 2012 advisory opinion, the DOJ stated that an organization working at the behest

177. 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).

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

179. 22 U.S.C. § 611(a) (2020).

180. §§ 613(a)–(c) (diplomats), (e) (religious, academic, etc.), (h) (LDA exemption), (d)(2) (“other activities not serving predominantly a foreign interest”); §§ 611(d) (bona fide domestic media), (g) (lawyers).

181. 28 C.F.R. § 5.304(d) (2020).

182. Robinson, *supra* note 20, 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.



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.<sup>183</sup> 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, 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.<sup>184</sup> Moreover, Brookings may act at the behest of the Qatari government (namely, Brookings academics in Qatar are not allowed to criticize the Qatari government).<sup>185</sup> Brookings has not registered as a foreign agent, but a 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.”<sup>186</sup> 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.<sup>187</sup> § 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].”<sup>188</sup> But the WSJ is owned by NewsCorp, a company financed in part by foreigners with foreigners among its officers and directors.<sup>189</sup> 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.<sup>190</sup> Realistically, this exception to the exemption could sweep in many U.S.-based news organizations.

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183. Letter from Heather H. Hunt, Chief, Registration Unit, Counterespionage Section, U.S. Dep’t of Justice, to Redacted Addressee (Nov. 8, 2012), <https://perma.cc/296N-L7CY>.

184. See Dennett, *supra* note 19 (Atlantic Council and Brookings); Casey Michel, *Money Talks: Len Blavatnik And The Council On Foreign Relations*, BELLINGCAT (Oct. 10, 2019), <https://perma.cc/DZN2-WLKA> (Council on Foreign Relations).

185. See Dennett, *supra* note 19.

186. *About Us*, BROOKINGS (last visited Mar. 31, 2021), <https://perma.cc/TS8F-KATV>.

187. Robinson, *supra* note 20, at 1111.

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

189. Robinson, *supra* note 20, at 1111.

190. Robinson, *supra* note 20, at 1111.

## 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.”<sup>191</sup> 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 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 bodies . . .<sup>192</sup>

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 polling all constitute political activity.<sup>193</sup> 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.”<sup>194</sup>

“Political activity” covers a huge swath of pursuits. In fact, it includes “almost all forms of public action undertaken by NGOs.”<sup>195</sup> The Council of Europe’s Conference of International Non-Governmental Organisations (INGOs) reported that RFAL 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.<sup>196</sup> For example, the Ministry of Justice recently registered the

191. NGO Law, *supra* note 28, art. 2(6).

192. NGO Law, *supra* note 28, art. 2(6). Repeated without change in the 2020 amendments. See 2020 Foreign Agent Law, *supra* note 65, art. 5.

193. NGO Law, *supra* note 28, art. 2(6).

194. NGO Law, *supra* note 28, art. 2(6).

195. Orlova, *supra* note 7, at 395.

196. COUNCIL OF EUROPE EXPERT COUNCIL ON NGO LAW, *Opinion on the Law Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organisations Performing the Function of Foreign Agents* ¶ 114 (Aug. 2013). 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,

NGO “Doctors’ Alliance” as a foreign agent.<sup>197</sup> 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.<sup>198</sup> 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 involved in political activities.<sup>199</sup> Put differently, the Ministry of Justice interpreted “political activity” to cover activity that could also reasonably 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.”<sup>200</sup>

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 States . . . .<sup>201</sup>

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

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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 Taisiya Bekbulatova & Sofya Samokhina, *Politika—iskusstva vsyo vozmozhnovo* [Politics is the art of everything possible], KOMMERS. (Moscow), Jan. 23, 2016, <https://perma.cc/E3J7-D7JP> (“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.”).

197. Denis Eliseev, *Innostrannimi Agentami Mogut Prznat Vsekh* [Anyone can be called a foreign agent], YOUTUBE (Mar. 3, 2021), <https://perma.cc/LLH8-KM9D>.

198. *Id.*

199. *Id.*

200. Ivan Davydov, *Why does Russia need a new “foreign agent” law?*, OPEN DEMOCRACY (Dec. 4, 2019), <https://perma.cc/8GWJ-GYXR>.

201. 22 U.S.C. § 611(c)(1) (2020).

foreign political party.”<sup>202</sup> This broad definition covers not just lobbying the government but also general advocacy to sway public opinion.<sup>203</sup> 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.”<sup>204</sup>

Subsection iii, covering those who handle “things of value” for a foreign principal, might also sweep broadly. For example, “[c]ollecting . . . 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, the DOJ has sometimes read into FARA a requirement that handling “things of value” must have political aims to require registration, but the text does not seem to require that reading.<sup>205</sup> Because of the law’s broad and vague language, parties must rely on the DOJ’s 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 party by the foreign party to apply the foreign agent label. While some analysts have argued this is a key difference between the two laws, 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.<sup>206</sup>

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, no matter the nexus between the funding and political activity.<sup>207</sup>

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202. § 611(o).

203. Robinson, *supra* note 20, at 1098.

204. *U.S. v. McGoff*, 831 F.2d 1071, 1074 (D.C. Cir. 1987).

205. Robinson, *supra* note 20, at 1098 n.112. *See also, e.g.*, Letter from Brandon L. Van Grack, Chief, FARA Unit, Nat’l Sec. Div., U.S. Dep’t of Just., to Redacted Addressee (May 29, 2020), <https://perma.cc/C5ZX-7VC3> (“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).”).

206. Orlova, *supra* note 7, at 410.

207. 2012 Foreign Agent Law, *supra* note 3, art. 2(2) (governing NGOs); 2019 Foreign Agent Law, *supra* note 61, art. 1(1)(b) (governing individuals). *See* Davydov, *supra* note 200.

In 2014, the Russian Constitutional Court approvingly cited this standard as “block[ing] the arbitrary interpretation and application” of RFAL.<sup>208</sup> 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.<sup>209</sup> 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.<sup>210</sup> 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 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.”<sup>211</sup> 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.”<sup>212</sup> 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 the DOJ’s 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.”<sup>213</sup> 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.”<sup>214</sup> The Second Circuit rejected the Third Circuit’s approach, writing that the

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208. 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).

209. *Id.* ¶ 3.2.

210. See 2020 Foreign Agent Law, *supra* note 65, art. 4.

211. 2020 Foreign Agent Law, *supra* note 65, art. 4.

212. 22 U.S.C. § 611(c)(1) (2020).

213. 28 C.F.R. § 5.100(b) (2018).

214. *United States v. Ger.-Am. Vocational League*, 153 F.2d 860, 864 (3d Cir. 1946). It is unclear to what extent the Third Circuit’s standard is still valid given its adoption before the 1966 amendments. However, at least one court recently cited its standard approvingly. See *United States v. Rafiekian*, 2019

“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.”<sup>215</sup> When examining fringe cases, courts should look at the “surrounding circumstances” to determine if control as contemplated by FARA exists.<sup>216</sup> In particular, such “surrounding circumstances” include “whether those requested to act were identified with specificity by the principal,” and also whether the foreign principal specifically requested the action.<sup>217</sup> 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 inquiry is entirely contextual, “a person may not receive adequate notice of his duty to comply with FARA’s requirements.”<sup>218</sup> Applied today, the Second Circuit’s test could lead to unintended 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.”<sup>219</sup> 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.”<sup>220</sup> While no other circuits have ruled on the question, other district courts have adopted the Second Circuit’s standard, which may “enlarge FARA’s coverage.”<sup>221</sup>

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 under 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.<sup>222</sup> Returning to the WSJ example from Part II(a), since no court has defined what constitutes “a major part,” an activist DOJ could designate the WSJ a foreign principal, and thereby

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WL 4647254, at \*10 (E.D. Va. Sept. 24, 2019), rev’d in part, vacated in part, 991 F.3d 529 (4th Cir. 2021) (“As the Third Circuit recognized with respect to a similar definition of an agent, the statute defines the term ‘substantially as in the Restatement of Agency.’”).

215. Att’y Gen. of U.S. v. Irish N. Aid Comm., 668 F.2d 159, 161 (2d Cir. 1982).

216. *Id.*

217. *Id.*

218. Law, *supra* note 116, at 380.

219. Robinson, *supra* note 20, at 1101.

220. Robinson, *supra* note 20, at 1101.

221. Law, *supra* note 116, at 377. See *RM Broad., LLC v. U.S. Dep’t of Just.*, 379 F. Supp. 3d 1256, 1262 (S.D. Fla. 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 Att’y Gen. of U.S. v. Irish N. Aid Comm., 668 F.2d 159, 161 (2d Cir. 1982)). *Cf.* *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*, INSIDE POLITICAL LAW (June 9, 2019), <https://perma.cc/S3KS-838Y>.

222. 22 U.S.C. § 611(c) (2020).



order a WSJ reporter to register as a foreign agent.<sup>223</sup> 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 additionally 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, RFAL imposes more substantive limitations on the activities that foreign agents are able to undertake.

#### 1. Requirements Upon Registration

RFAL imposes requirements that are similar to those under FARA: parties who qualify as foreign agents are required to register as such and provide extensive documentation of any personnel and financial cash flow.<sup>224</sup> In contrast to FARA, under RFAL, the Russian government has the ability to forcibly register “foreign agents.”<sup>225</sup> In practice, forced registration by the Ministry of Justice may have even become the norm.<sup>226</sup>

Under FARA, foreign agents must self-report; the DOJ has no legal mechanism to force registration outside of the judicial system.<sup>227</sup> The registration itself is detailed: the registrant must provide a copy of every contract, including oral

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223. Robinson, *supra* note 20, at 1102–03 (“Subsidized in Whole or in Major Part”).

224. See NGO Law, *supra* note 28, arts. 13.1(10) (mandating registration data from non-commercial organizations exercising the functions of a foreign agent), 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. 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.”).

225. NGO Law, *supra* note 28, art. 32(7); see also *Russia's Foreign Agent Law: Violating human rights and attacking civil society*, *supra* note 52, at 3 (listing NGOs forcibly registered by the Ministry of Justice).

226. 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 JUSTICE OF THE RUSSIAN FED'N, <https://perma.cc/NL5Y-PKR8> (Russ.) (noting erroneously that the Russian law gives the Ministry of Justice the *sole* ability to register “foreign agents.”).

227. Fattal, *supra* note 17, at 938 (“Regarding registration, DOJ does not have jurisdiction to compel a foreign entity to submit its paperwork under FARA.”); see also 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).

agreements, 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.<sup>228</sup> To keep the information current, the registrant must re-file every six months.<sup>229</sup>

## 2. Maintenance Requirements

RFAL imposes more burdensome maintenance requirements than FARA does. Once registered under RFAL, foreign agents must submit detailed reports every six months on their activities and the composition of their leadership.<sup>230</sup> They must submit financial reports on spending and income quarterly and conduct a full audit annually.<sup>231</sup> Additionally, the Ministry of Justice has permission in certain situations to conduct unscheduled audits of the “foreign agents.”<sup>232</sup>

Like its American counterpart, RFAL mandates all material published by the foreign agent bear a mark indicating the foreign agent status of its source.<sup>233</sup> The most recent 2020 Amendments ban foreign agents from appointment to state or local government bodies.<sup>234</sup> However, RFAL imposes further restrictions, banning foreign agents from donating to, or concluding any contract with, political parties, and goes as far as prohibiting them from participating generally in any election or referendum campaign.<sup>235</sup> Finally, RFAL requires media companies, when reporting on foreign agents, to notify the public that the party mentioned is a foreign agent.<sup>236</sup>

FARA requires registrants to re-file every six months.<sup>237</sup> Besides registration and re-filing, registrants must include an “identification statement” labeling themselves as foreign agents on virtually any public mailing or published material.<sup>238</sup> They must file a copy with the Attorney General of such material within 48 hours of its publication.<sup>239</sup> FARA precludes registrants from concluding contingency fee agreements with their foreign principals.<sup>240</sup> Finally, similar to RFAL, a

228. § 612(a)(1-11) (stating that 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).

229. § 612(b).

230. NGO Law, *supra* note 28, art. 32(3).

231. NGO Law, *supra* note 28, art. 32(3).

232. NGO Law, *supra* note 28, art. 32(5)–(6).

233. NGO Law, *supra* note 28, art. 24(1).

234. Human Rights Law, *supra* note 178, art. 2(1).

235. Political Party Law, *supra* note 68, arts. 30(3)(n) (mandating that a political party is not allowed to receive donations from legal entities registered for less than one year prior to the date of the donation), 31(4.1)(e) (contracts); Election Law, *supra* note 85, art. 3(6).

236. Mass Media Law, *supra* note 28, art. 4.

237. 22 U.S.C. § 612(b).

238. § 614(b).

239. § 614(a).

240. § 618(h).

FARA-related statute bans “foreign agents” from serving as certain public officials.<sup>241</sup>

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, a label which may itself stigmatize branded parties.<sup>242</sup> The foreign agent brand in Russia carries with it an intense stigma; on its own, that stigma has ostracized multiple NGOs and may have caused many to shut down.<sup>243</sup> In the United States, the stigma is great enough that when Congress crafted FARA in 1938, it hoped the “foreign agent” label itself would stymie foreign propaganda.<sup>244</sup> 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.<sup>245</sup> These findings substantiate the opinion of some experts that the laws “resemble[]” one another.<sup>246</sup>

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. DOJ lacks this power.<sup>247</sup> Second, RFAL’s audit

241. 18 U.S.C. § 219; *see also FARA Related Statutes*, U.S. DEP’T OF JUST., <https://perma.cc/ZU78-9SE8> (accessed Nov. 8, 2021).

242. *See* § 614(b); NGO Law, *supra* note 28, art. 24(1).

243. *See* Vade de Velde, *supra* note 4, at 701; Robinson, *supra* note 20, at 1086 (“[F]oreign agent’ is closely associated with ‘spy’ in Russian.”); *Ot Redaktsii: Kak gosydarstvo boretsa s unostranami agentami* [How the government fights with foreign agents], VEDOMOSTI (Moscow), Dec. 10, 2014, <https://perma.cc/Y8RU-G9F5> (“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.”).

244. Ellerbeck & Asher-Schapiro, *supra* note 144.

245. *See* Orlova, *supra* note 7, 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) (explaining 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 20, 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.”).

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

247. 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* of 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 7, at 401. But ever since the Ministry of Justice gained the ability to forcibly register “foreign agents,” unwilling registrants must petition the court for removal; this places the burden on *them* to disprove the

requirements are more burdensome: in the course of a year, a foreign agent in the United States must register twice, whereas a Russian foreign agent must submit two activity reports, four financial reports, and one annual audit (assuming the government did not perform an additional unscheduled audit, as permitted).<sup>248</sup> RFAL denies “foreign agents” the ability to donate to or conclude contracts with political parties.<sup>249</sup> It also bans “foreign agents” participation in electoral or referendum campaigns.<sup>250</sup> 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 some of these restrictions facially unconstitutional.<sup>251</sup>

In sum, while the laws’ registration and maintenance requirements are similar, Russia’s law reaches beyond its American counterpart 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.<sup>252</sup> Other penalties available are mandatory community service up to 480 hours, correctional labor, or a prison term up to two years.<sup>253</sup> Mass media companies or individuals can face lesser administrative sanctions (10,000 rubles for individuals, 500,000 for legal

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government’s assertion of their foreign agent status. *See Russia’s Foreign Agent Law: Violating human rights and attacking civil society*, *supra* note 52, at 3.

248. 22 U.S.C. § 612(b).

249. Political Party Law, *supra* note 68, arts. 30(3)(n) (“foreign agents” cannot donate to political parties), 31(4.1)(e) (“foreign agents” cannot contract with political parties).

250. Election Law, *supra* note 85, art. 3(6).

251. 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, *passim* (2010) (holding that the government may not, under the First Amendment, suppress political speech on the basis of the speaker’s corporate identity); *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (holding that the Ohio Criminal Syndicalism Act, which failed to distinguish mere advocacy from incitement to imminent lawless action, violates the First and Fourteenth Amendments). *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.

252. UGOLOVNIY KODEKS ROSSIISKOI FEDERATSII [UK RF] [CRIMINAL CODE] art. 330.1 (Russ.). At least one NGO has been ordered to “liquidate” and shut down as a result of alleged violations. Sarah Rainsford, *Russian Court Orders Oldest Civil Rights Group Memorial to Shut*, BBC (Dec. 28, 2021), <https://perma.cc/5B93-UUKS>.

253. UGOLOVNIY KODEKS ROSSIISKOI FEDERATSII [UK RF] [CRIMINAL CODE] art. 330.1 (Russ.).

entities), or criminal sanctions with similar penalties as NGOs.<sup>254</sup> Though ambiguous, some have argued that mass media companies and individuals can face criminal penalties only after a first RFAL violation.<sup>255</sup> That interpretation would make sense, as law removes the *mens rea* requirement of “maliciousness” (required for NGO criminal convictions).<sup>256</sup> In effect, this creates a 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.<sup>257</sup> If the government charges an alien with a violation, he or she is subject to removal from the country.<sup>258</sup>

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, regardless of the actor. This difference is notable, in that RFAL allows the Russian Ministry of Justice to impose criminal liability on a much larger group of people.

Overall, Russia’s Ministry of Justice has more discretion than the DOJ does in assessing foreign agent liability for mass media companies and individuals, but they have equal 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.

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254. КОДЕКС ОБ АДМИНИСТРАТИВНИХ ПРОВОНАРУШЕНИЯХ [ADMINISTRATIVE CODE] art. 19.34.1 (Russ.); UK RF, art. 330.1. Note that individuals can face prison terms up to 5 years. 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.

255. *Inostrannikh Agentov Stale Bolshe* [There will be more foreign agents], AKTUALNI KOMENTARIJ (Kiev), Mar. 1, 2021, <https://perma.cc/8J2W-D6DW> (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 197 (noting that a second violation can result in imprisonment and making an exception for those who collect military-technical information, as those violators can face criminal penalties at the first violation).

256. UK RF, art. 330.1.

257. 22 U.S.C. § 618(a); *Frequently Asked Questions*, U.S. DEP’T OF JUST., <https://perma.cc/JZ2P-66FE> (last visited Apr. 1, 2021).

258. § 618(c).

### 1. Similarities

On a high level, the laws share a similar structure.<sup>259</sup> Both 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.<sup>260</sup>

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.<sup>261</sup> 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, the 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.<sup>262</sup> Therefore, FARA’s vagueness minimizes some of what, on first glance, seem like differences between the two laws.

Finally, both laws share similar sanctions. Violators face criminal liability in each country: willful or, in Russia, malicious violations subject violators to comparable fines, and possibly jail time 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 FARA 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. DOJ cannot. When assuming foreign agent status, registered parties in Russia must complete many more audits and financial reviews than registered parties in the United States. Finally, RFAL imposes more substantive limitations on the activities of foreign agents. Specifically, foreign agents may not conclude

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259. Perhaps this is to be expected, given that the Russian government explicitly based its law on FARA. *See Saakov, supra* note 35.

260. *See supra* notes 272–77 and accompanying text. Furthermore, both RFAL and a FARA-related statute ban “foreign agents” from certain public offices. *See supra* notes 265, 273.

261. *See Davydov, supra* note 200.

262. 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 20, at 1101 (identifying how the “request” language could include individuals that seemingly should not be included).



contracts with or donate to political parties. They also may not participate generally in any election or referendum campaign. FARA subjects U.S. actors to none of these restrictions.<sup>263</sup>

Finally, RFAL likely subjects more parties to criminal sanction than FARA does. FARA requires violations to be willful before the 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 reveals 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.<sup>264</sup> Because of the civil rights abuses Russia has perpetrated under its Act—namely, “silenc[ing], marginaliz[ing] and punish[ing]” the “legitimate activity” of civil society groups—few American lawmakers would want similarities to exist between the U.S. and Russian laws, yet through overbreadth and stigmatization, uncomfortable similarities remain.<sup>265</sup>

#### 1. FARA Protects Civil Liberties Better Than RFAL

First, it is worth 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 nuance in the foreign agent/principal nexus, its foreign agent maintenance requirements subsume less of a registered party's

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263. Notably, other U.S. laws and policies impose substantive restrictions on “foreign agents.” See, e.g. 18 U.S.C. § 219 (banning “foreign agents” from becoming certain public officials); Am. Enterprise Inst., *supra* note 18, at 06:30 (stating that RT lost its congressional press pass after becoming a “foreign agent,” ostensibly due to a rule of Congress).

264. 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 17, *passim*, and Atieh, *supra* note 104, *passim*.

265. COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, THIRD PARTY INTERVENTION BY THE COUNCIL OF EUROPE COMM'R FOR HUM. RTS., *supra* note 12, ¶ 38.

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 misinformed at best.

Furthermore, the laws are stylistically very different. RFAL employs a bright-line rule to define the required foreign nexus: the acceptance of *any* foreign funding.<sup>266</sup> The American law uses a vague standard: acting "at the order, request, or under the direction or control, of a foreign principal."<sup>267</sup>

## 2. Yet, Both Laws Are Overbroad

Both statutes are nonetheless 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.<sup>268</sup> In Russia, RFAL has ensnared many NGOs and media organizations that do not seem to carry out the wishes of a foreign power.<sup>269</sup> FARA's standard, defining agency as acting "at the order, request, or under the direction or control, of a foreign principal," can be interpreted narrowly or broadly—perhaps as broadly as the Russian statute.<sup>270</sup> Indeed, FARA defines "foreign principal" as *any* foreign party.<sup>271</sup> It therefore might sweep broader than its original and core purpose of disclosing the secret activities of "foreign governments or foreign political groups."<sup>272</sup> As journalist Ken Silverstein noted, if FARA were properly enforced, "roughly half of Washington would be under arrest."<sup>273</sup>

At the current moment, the DOJ has begun to seriously implement FARA for the first time since World War II, and anxious parties ask if political pressure will widen the scope of DOJ enforcement.<sup>274</sup> Barring arrest of half the Capitol, perhaps the more likely risk is politically-tinged enforcement. Indeed, FARA has been abused before, both in the 1940s when the DOJ prosecuted civil rights icon

266. See NGO Law, *supra* note 28.

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

268. See *Russian Parliament Adopts NGO 'Foreign Agents' Bill*, *supra* note 34.

269. See COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, OPINION OF THE COMMISSIONER FOR HUMAN RIGHTS.; LEGISLATION AND PRACTICE IN THE RUSSIAN FEDERATION ON NON-COMMERCIAL ORGANISATIONS IN LIGHT OF COUNCIL OF EUR. STANDARDS: AN UPDATE *supra* note 15, ¶ 33 (detailing, for example, court cases in Russia where the Ministry of Justice and the courts applied the law retroactively); COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, THIRD PARTY INTERVENTION BY THE COUNCIL OF EUROPE COMM'R FOR HUM. RTS., *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.'").

270. § 611(c)(1). See *supra* note 283 (detailing how Russian NGOs might be treated in the US); Robinson, *supra* note 20, *passim* (arguing that FARA is dangerously vague).

271. § 611(b).

272. *Att'y Gen. of United States v. Irish People, Inc.*, 684 F.2d 928, 939 (D.C. Cir. 1982) (quoting H. R. REP. NO. 75-1381, at 1–2 (1937)). See also *supra* notes 192–97 and accompanying text.

273. Teachout, *supra* note 11.

274. The DOJ invokes FARA with increasing frequency. See, e.g., *Att'y Gen. William Barr*, *supra* note 143.

W.E.B. DuBois, and possibly recently, when the Republican-controlled House Natural 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."<sup>275</sup>

### 3. Both Laws Stigmatize "Foreign Agents"

Both laws also stigmatize labeled parties: each uses the term "foreign agent" and mandates that registered parties include a "foreign agent" mark on all published materials. In Russia, this stigma has practical effects: organizations branded as foreign agents have found neither government agencies nor private foundations will work with them, and in turn they have a much harder time doing their jobs, forcing some to shut down.<sup>276</sup> The effect in the United States is also not insignificant. When Congress crafted FARA in 1938, it hoped the "foreign agent" label itself would stymie foreign propaganda; today, when a media company is labeled a "foreign agent," Congress revokes its press pass.<sup>277</sup> 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."<sup>278</sup> Because FARA does not draw clear lines between organizations like the British Broadcasting Channel ("BBC") and those like RT, "the question will always be: why are you ramping up enforcement [t]here, but not here?"<sup>279</sup>

### 4. FARA's First Amendment Implications

Certain FARA provisions arguably infringe upon political speech and association, which make up the core of the U.S. Constitution.<sup>280</sup> However, this paper

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275. Rutzen & Robinson, *supra* note 111.

276. COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, THIRD PARTY INTERVENTION BY THE COUNCIL OF EUROPE COMM'R FOR HUM. RTS., *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.").

277. Ellerbeck & Asher-Schapiro, *supra* note 144 ; Hadas Gold, *Congressional press office yanks RT's credentials*, CNN (Nov. 30, 2017), <https://perma.cc/E32Z-GQKV> (citing *Accreditation Criteria*, HOUSE RADIO TELEVISION CORRESPONDENTS' GALLERY, <https://perma.cc/A37Z-EN92> (last visited Mar. 28, 2020)).

278. Ellerbeck & Asher-Schapiro, *supra* note 144.

279. Ellerbeck & Asher-Schapiro, *supra* note 144.

280. See Robinson, *supra* note 20, 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).

does not contend that FARA violates the First Amendment. Rather, it notes that FARA regulates political speech, and given its vagueness problems, the Act could have a “chilling effect” on political speech, thus implicating First Amendment concerns.<sup>281</sup> 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.<sup>282</sup> In the United States, “a person may not receive adequate notice of his duty to comply with FARA’s requirements.”<sup>283</sup> 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.<sup>284</sup> As the Supreme Court wrote: “where 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.”<sup>285</sup> Consequently, a law need not directly infringe upon the First Amendment to implicate its concerns: abutment 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.<sup>286</sup> A content-based restriction is one that “target[s] speech based on its communicative content.”<sup>287</sup> In *Reed v. Gilbert*, the Supreme Court found a town’s “sign code[] provisions,” which regulated political signs differently than apolitical signs, violated the First Amendment.<sup>288</sup> Similarly,

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

282. See COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, OPINION OF THE COMMISSIONER FOR HUMAN RIGHTS.; LEGISLATION AND PRACTICE IN THE RUSSIAN FEDERATION ON NON-COMMERCIAL ORGANISATIONS IN LIGHT OF COUNCIL OF EUR. STANDARDS: AN UPDATE *supra* note 15, ¶¶ 65–67 (in Russia, many organizations have self-censored, or even shut down).

283. Law, *supra* note 116, at 380 (criticizing the Second Circuit’s approach).

284. See *supra* note 316.

285. *Grayned*, 408 U.S. at 108–09.

286. See *Barr v. Am. Ass’n of Pol. 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)); *Nat’l Institute of Fam. and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (quoting *Reed*, 576 U.S. at 155).

287. *Nat’l Institute of Fam. and Life Advocates*, 138 S. Ct. at 2371.

288. *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

FARA regulates the political speech of American citizens differently than it regulates their non-political speech.<sup>289</sup> Under the *Reed* standard, a court would likely subject FARA's regulations to strict scrutiny, making the Act "presumptively invalid."<sup>290</sup>

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, requiring discrimination on the basis of a particular opinion. In *NIFLA v. Becerra*, 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.<sup>291</sup> After all, the majority concluded that the notices attempted "to dissuade women from choosing" anti-abortion centers.<sup>292</sup> More recently in *Barr v. American Association of Political Consultants*, five justices agreed that content-based discrimination subjects a law to strict scrutiny.<sup>293</sup> However, three justices wrote that content discrimination is sometimes *too low a bar*, arguing that "[t]he 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."<sup>294</sup>

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 speech by foreign agents.<sup>295</sup> As a former DOJ Assistant Attorney General once stated: "[i]t 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

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if it imposed no limits on the political viewpoints that could be expressed." (internal quotations omitted)).

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

290. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (referring to "content-based regulations").

291. *Nat'l Institute of Fam. and Life Advocates*, 138 S. Ct. 2361, 2378 (Kennedy, J., concurring).

292. *Id.* at 2371 (Thomas, J.).

293. *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2346 (2020).

294. *Id.* at 2361 (Breyer, J., concurring). A fourth Justice, Justice Sotomayor, likely agrees: "I agree with much of the partial dissent's explanation that strict scrutiny should not apply to all content-based distinctions." *Id.* (Sotomayor, J., concurring).

295. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992) (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.").

propaganda' which has caused such misunderstanding over the years."<sup>296</sup> Congress replaced the term "political propaganda" in 1995, but retained the term "foreign agent" and the pejorative connotations that come with it.<sup>297</sup> These connotations weigh down foreign agents' speech. Consequently, one could argue that the Act discriminates against particular viewpoints.

On the other hand, in 1987, the Supreme Court considered and rejected a similar First Amendment challenge to FARA.<sup>298</sup> In *Meese v. Keene*, the Court found that FARA's use of the term "political propaganda" to describe foreign agents' speech was "neutral," and carried "no pejorative connotation."<sup>299</sup> Thus, its use did not violate the Constitution.<sup>300</sup> Since *Meese*, Congress removed the term "political propaganda" and replaced it with "informational materials."<sup>301</sup>

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.<sup>302</sup> Furthermore, the Court only recently began subjecting content-based restrictions to strict scrutiny.<sup>303</sup> A law limiting the content of newspapers and *only* newspapers, or corporations and *only* corporations, likely gets strict scrutiny.<sup>304</sup> 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."<sup>305</sup>

Of course, while courts often reject laws after applying strict scrutiny, national security-related laws sometimes survive heightened review.<sup>306</sup> Since FARA

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296. *Meese v. Keene*, 481 U.S. 465, 488 (1987) (Blackmun, J., dissenting) (quoting *Canadian Films and the Foreign Registration Act: Hearing Before the H. Subcomm. on Civil and Constitutional Rights*, 98th Cong. 3 (1983) (statement of D. Lowell Jensen, Assistant Attorney General, Criminal Division, Department of Justice)).

297. OIG 2016 Audit, *supra* note 12, at 2.

298. *Meese*, 481 U.S. at 467–69.

299. *Id.* at 484.

300. *Id.* at 485.

301. OIG 2016 Audit, *supra* note 12, at 2–3.

302. 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.").

303. 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).

304. See *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015).

305. Robinson, *supra* note 20, at 1132.

306. 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. F. for Acad. and Inst. Rts.*, 547 U.S. 47 (2006) (upholding a law that required schools receiving



regulates foreign relations and possible “subversion,” a court could similarly uphold FARA as part of national security deference to the political branches.

Even if a court would likely uphold FARA over a First Amendment challenge, that does not mean Congress should avoid its duty to safeguard First Amendment rights.<sup>307</sup> FARA’s “vagueness may in itself deter constitutionally protected and socially desirable conduct.”<sup>308</sup> Judicial considerations of national security deference do not apply to the legislature, and because freedom of speech arguably constitutes the reason for the United States’ very existence, freedom of speech is an area where all branches of government should tread carefully.<sup>309</sup>

### 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 under RFAL. 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, which are similar to those in RFAL. For example, both the U.S. and Russian laws mandate that registered parties include a “foreign agent” stamp on any publication.<sup>310</sup> 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.<sup>311</sup> 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 the DOJ should have broad discretion to tackle changing threats, and FARA is a good, if not the best, solution to a changing world. After all, Congress crafted many statutes broadly to give the DOJ that level of discretion. After Russian social media actors attacked the United States in 2016, FARA’s broad scope allowed Robert Mueller’s “unprecedented” indictments.<sup>312</sup>

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government subsidies to admit military recruiters on the grounds that allowing military recruiters would not been seen as the schools’ speech).

307. *Cf. 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).

308. *United States v. Nat’l 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 (1963)).

309. *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).

310. Foreign Agents Registration Act, 22 U.S.C. § 614(b) (2020); NGO Law, *supra* note 28, art. 24 (1).

311. § 614(a).

312. *See generally Fattal, supra* note 17, at 905 (analyzing FARA as applied to social media actors).

Even so, a hypothetical FARA amendment need not strip DOJ of all discretion, or even the discretion afforded to 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, and (2) sufficiently protect First Amendment rights. In this respect, RFAL provides an excellent foil of the risks associated with an overly broad statute.<sup>313</sup> History shows that FARA enforcement may bend to political pressure, like its Russian counterpart. So as political pressure increases on the 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, the DOJ has issued few regulations to clarify what future enforcement will look like.<sup>314</sup> Because the stakes of applying FARA too broadly are no less than 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," 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."<sup>315</sup> 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.<sup>316</sup> Furthermore, doing so would clarify the statute in an area where the DOJ has issued little guidance.<sup>317</sup> Indeed, this proposal falls in line with a previous congressional proposal.<sup>318</sup>

Second, legislators could clarify FARA's exemptions. Exemptions needing clarification include those for "bona fide trade or commerce" and "bona fide

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313. 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).

314. See BROWN, *supra* note 159, at 3.

315. Foreign Agents Registration Act, 22 U.S.C. § 611(c)(1) (2020); *United States v. Ger.-Am. Vocational League*, 153 F.2d 860, 864 (3d Cir. 1946); see also Law, *supra* note 116, at 380–82 (advocating for adoption of the Restatement of Agency standard).

316. See *supra* section II(a)(ii).

317. See BROWN, *supra* note 159, at 3 (citing 28 C.F.R. § 5.100).

318. *Foreign Agent Registration Bill Advances in House on Split Vote: Could Affect Nonprofit Cross-Border Programs*, CHARITY AND SEC. NETWORK (Feb. 7, 2018), <https://perma.cc/ZA7S-YW8S> ("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.").

religious, scholastic, academic, or scientific pursuits or of the fine arts.”<sup>319</sup> Such an amendment would define the exempt categories and articulate that if an entity falls within the exempted categories then it need not register.<sup>320</sup> This is an area where DOJ prosecutors themselves have been confused about FARA’s application, and well-defined exceptions would help set FARA apart from its Russian counterpart.<sup>321</sup>

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.<sup>322</sup> Furthermore, by allowing registration of foreign government and foreign political party affiliates, the amendment would not overly curb the 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.<sup>323</sup> 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.”<sup>324</sup> 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

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319. 22 U.S.C. § 613(d)–(e).

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

321. OIG 2016 Audit, *supra* note 12, at 17 (finding that FARA agents believe that the vague exemptions make the law hard to enforce). 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 28, 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 41 (the government once sent a warning to “a local group helping people who have cystic fibrosis”).

322. Dennett, *supra* note 19 (“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 (2020))); Robinson, *supra* note 20, at 1145.

323. *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 . . .”). *Cf.* Matthew Kahn, *No, Mariia Butina Wasn’t Charged With Violating FARA*, LAWFARE (July 27, 2018), <https://perma.cc/Y84F-3K5B> (explaining the difference between FARA and § 951 violations).

324. *Att’y Gen. of United States v. Irish People, Inc.*, 684 F.2d 928, 939 (1982) (quoting H.R. REP. NO. 75-1381, at 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).

the Act's current goals, given Congress most recently opined on FARA's purpose in 1942.<sup>325</sup> 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*.<sup>326</sup>

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."<sup>327</sup> In 1991, a member of Congress 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."<sup>328</sup> 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 nevertheless 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 laws are 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."

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325. Foreign Agents Registration Act of 1938, as amended, ch. 263, 56 Stat. 258 (1942) (codified as at 22 U.S.C. § 611 *et seq.* (2020)); see Robinson, *supra* note 20, 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.").

326. See *Att'y Gen. of United States v. Irish N. Aid Comm.*, 668 F.2d 159, 161 (2d Cir. 1982); OIG 2016 Audit, *supra* note 12, at iii (DOJ confusion).

327. OIG 2016 Audit, *supra* note 12, at 2.

328. *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).

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 the DOJ is enforcing the law for the first time in over sixty 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.

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