January 16, 2018

The Honorable Bob Goodlatte
Chairman
Judiciary Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Jerry Nadler
Ranking Member
Judiciary Committee
U.S. House of Representatives
Washington, DC 20515

Re: H.R. 4170, the Disclosing Foreign Influence Act

The National Association of Criminal Defense lawyers (NACDL) wishes to raise concerns about H.R. 4170, the Disclosing Foreign Influence Act, which is set to be considered by the House Judiciary Committee on January 17, 2018. This bill would undermine core constitutional principles by granting federal authorities the power to compel the production of documents and force the testimony of the targets of criminal investigations, without any prior showing of probable cause or court approval. This evades fundamental limits on investigatory power and subverts the notion that no person should be compelled to be a witness against himself.

Section 3 of the bill would empower federal investigators to utilize "civil investigative" tools while conducting criminal investigations into alleged violations of the existing Foreign Agents Registration Act (FARA) of 1938. FARA is both a civil and a criminal statute, and violations are punishable by up to five years in federal prison.[1] Under Section 3 of this bill, "prior to the institution of a civil or criminal proceeding" related to FARA violations, federal authorities would be empowered to "issue in writing … a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to answer in writing written interrogatories with respect to such documentary material or information, to give oral testimony concerning such documentary material or information, or to furnish any combination of such material, answers, or testimony." There is no requirement that investigators have probable cause that a target has violated the law prior to issuing these demands, and instead investigators need only assert that they have any "reason to believe" that the target "may have any information relevant to an investigation." Any person seeking to refuse to answer these requests or submit the demanded information must object with a court and seek intervention, or face the possibility of being held in contempt.

First, this procedure undermines core Fourth Amendment privacy protections. While the Fourth Amendment allows federal investigators to issue investigative subpoenas, such a subpoena must still be "reasonable" and must not be "far too sweeping in its terms to be regarded as reasonable

[1] 22 U.S.C. § 618(a).

under the Fourth Amendment."[2] But even those bare limits may not be met here. The bill allows broad investigatory tools that demand documents, written answers, and even sworn testimony, without obvious limitation. No doubt some requests will exceed the legal limitations. But the government may issue the demands first, without court approval, based on the barest assertion that the request is "relevant to an investigation," and it is up to the target to seek intervention. Law enforcement should not be granted nearly unlimited power to search the papers and effects of anyone it wishes, without first making some showing of particularized suspicion to a court for approval.

Second, the use of compelled testimony and the requirement that targets produce written responses to interrogatories, intrude onto the Fifth Amendment's privilege against self-incrimination. As the Supreme Court has long recognized, "[O]urs is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth."[3] Yet, this bill threatens to subvert that tradition. Indeed, this bill would require "the production" of "answers to written interrogatories" and "testimony" in criminal investigations. Even if this is a constitutionally permissible statute, it infringes upon fundamental notions of fairness and respect for our system.

Along these lines it is also critical to note that, even with warnings that a target may refuse to answer questions on the advice of counsel, the bill creates an unfairly coercive investigatory environment. While a target of a criminal inquiry may not suffer an adverse inference of guilt based on his decision to maintain silence, a target of a civil inquiry may be subject to adverse consequences for his silence.[4] The bill envisions joint civil and criminal investigations, and therefore requires a target to confront a Hobson's choice of presumed civil liability or properly invoking core constitutional protections. Considering also that a target must resist investigative demands on pains of contempt, this bill creates an unacceptable burden on the right to silence.

For these reasons, NACDL urges you to not support this expansion of unchecked law-enforcement authority.

Respectfully,

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The National Association of Criminal Defense Lawyers (NACDL)

[2] United States v. Calandra, 414 U.S. 338, 346 (1974).
[3] Rogers v. Richmond, 365 U.S. 534, 541 (1961).
[4] Baxter v. Palmigiano, 425 U.S. 308, 318-19 (1976)