Statement for the Record
Jonathan Turley

J.B. and Maurice C. Shapiro Professor of Public Interest Law
The George Washington University Law School

"*Enhancing the Foreign Agents Registration Act of 1938*"

Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
United States House of Representatives

April 5, 2022

Chairman Cohen, Ranking Member Johnson, members of the Subcommittee, thank you for inviting me to testify today on the enhancement of the Foreign Agents Registration Act of 1938.[1] I have written about FARA for years from a constitutional perspective. I am honored to appear with my fellow witnesses today and I believe that we share many of the same concerns over such registration laws. Indeed, I am hopeful that, despite the many political divisions today, this is a subject upon which there can be civil discourse and bipartisan agreement.

I come to statutes like FARA from the perspective of someone with a robust view of free speech. My academic writings admittedly advance an approach to free speech that resists public or private speech controls, as well as forms of compelled speech and registration.[2] I also come to this discussion as a practicing criminal defense and constitutional law attorney, who has successfully challenged vague or unconstitutional legislation.[3] Finally, I have written on FARA and concerns over its expanding use in criminal prosecutions.[4]

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[1] 22 U.S.C. §§ 611-621 (2020).

[2] *See, e.g.,* Jonathan Turley, *Harm and Hegemony: The Decline of Free Speech in the United States*, 45 Harvard Journal of Law and Public Policy (2021); Jonathan Turley, *Anonymity, Obscurity, and Technology: Reconsidering Privacy in the Age of Biometrics*, 100 Boston University Law Review 2179 (2020); Jonathan Turley, *The Loadstone Rock: The Role of Harm In The Criminalization of Plural Unions*, 64 Emory L. J. 1905 (2015); *Registering Publicus: The Supreme Court and Right to Anonymity*, 2002 Supreme Court Review 57-83. Many of my columns on free speech are available on my Res Ipsa blog (www.jonathanturley.org).

[3] In addition to various cases challenging the application of federal laws on free speech grounds, I was lead counsel in litigation that struck down federal and state laws. On the federal level, I was the lead counsel in the Elizabeth Morgan case that led to the striking down of the Elizabeth Morgan Act. *Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003).

[4] *See, e.g*., Jonathan Turley, *National Enquirer Publisher Asked Justice Department if it Should Register as Foreign Agent*, Res Ipsa (www.jonathanturley.org), Feb. 12, 2019; Jonathan Turley, *Mueller's Deal: Tony Podesta Could Be The Greatest Beneficiary in the Gates Plea Bargain*, Res Ipsa (www.jonathanturley.org), Feb. 24, 2018; Jonathan Turley, *Mueller Stretches the Law in Calling Manafort's Own Lawyer as Witness*, The Hill, Nov. 3, 2017. Other columns can be found at www.jonathanturley.

We have seen a significant shift in the use of FARA in recent years as the basis for searches as well as criminal charges. For civil libertarians, the greatest concern is not the number of actual prosecutions, which remains relatively low. Rather, it is the potential use of the ambiguous elements of the Act to secure warrants and to seize material from attorneys, journalists, firms, and public interest groups that is so concerning. At the same time, we have seen foreign countries use their own FARA laws to crackdown upon public interest groups and journalists. I discuss a few areas where Congress should bring added clarity to FARA to focus on the core purpose of this law while avoiding areas raising significant constitutional and privilege concerns.

FARA began in the 1930s to combat the rise of Nazi sympathizers and propaganda. It was framed as a way to curtail "un-American" speech. In the hearing on the legislation, the purpose was based on

> "[i]ncontrovertible evidence . . . that there are many persons in the United States representing foreign governments or foreign political groups who are supplied by such foreign agencies with funds and other materials to foster un-American activities and to influence the external and internal policies of this country, thereby violating both the letter and the spirit of international law, as well as the democratic basis of our own American institutions of government."[5]

The purpose of the registration was expressly meant to create a stigma by tagging certain people and groups as not just foreign agents but also to label their views as un-American. The Act continues to impose a stigmatizing label for those who work with foreign interests. FARA declares that such individuals and firms must include a "conspicuous statement that the materials are distributed by the agent on behalf of the foreign principal" and leave it to the Attorney General on "what constitutes a conspicuous statement for the purposes of this subsection."[6] In addition to the stigma, FARA imposes reporting costs as well as the potential loss of federal funds.[7]

FARA had relatively limited use in World War II, though a couple dozen figures were prosecuted.[8] However, it soon entered a period of prosecutorial dormancy. Only eight individuals were prosecuted between 1966 and 2015.[9] Even in terms of civil enforcement, FARA was something of a sleeper statute with only seventeen cases during that period.[10] There has been an obvious uptick of investigations and prosecutions under FARA in high-profile cases. Those cases have refocused attention on the broad scope of the statute and how it can be used opportunistically or even politically by prosecutors.

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5 *Foreign Agents Registration Act of 1938: Hearing on H.R. 1591*, 75th Cong. 8021.

6 22 U.S.C. §614(b); *see also Viereck v. United States*, 318 U.S. 236, 241 (1943) (noting that FARA was intended "to identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda, and to require them to make public record of the nature of their employment.").

7 For example, under the Economic Aid Act, a firm, corporation, or individual registered under FARA may be ineligible to receive fund under the Paycheck Protection Program (PPP).

8 U.S. Dep't of Just., U.S. Attorneys' Manual: Crim. Manual § 2062 (2018).

9 *See generally* Off. of the Inspector Gen., U.S. Dep't of Just., Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act 2 (2016).

10 *Foreign Agents Registration Act Enforcement*, Criminal Resource Manual, U.S. Attorneys' Manual (2018).

I have long expressed discomfort over the free speech and associational dangers that arise from the use of ambiguous terms in FARA and other laws. The Act's key terms are defined in exceptionally broad terms in forcing the registration of "agents of a foreign principal."[11] While a "foreign principal" conjures up images of foreign governments or foreign agencies, it also covers foreign-based companies, nonprofits, and individuals, including Americans living in foreign countries. A "foreign agent" is defined as

> **"(1)** any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person—
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> > **(i)** engages within the United States in political activities for or in the interests of such foreign principal;
> > **(ii)** acts 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 solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or
> > **(iv)** within the United States represents the interests of such foreign principal before any agency or official of the Government of the United States; and
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> **(2)** any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal as defined in clause (1) of this subsection."[12]

Even with exemptions, that definition can cover a wide array of activities common to lawyers, academics, and others with global clients. Indeed, with the increasing globalization of law and business, FARA is now a continual concern for professionals in determining whether contracts or services cross any of these ill-defined lines. The four covered activities include not just the representation of a foreign principal with any government official or agency but also engaging in "political activities for or in the interests" and acting as public relations counsel, information-service employee, or political consultant. The political activities language highlights the fluid meaning in these critical terms. The government can allege a violation if someone is engaging in any activity that

> "the person engaging in believes will, or that the person intends to, in any way influence any agency or official of the Government of the United States or any section of the public within the United States with reference to formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party."[13]

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11 22 U.S.C. § 611.

12 Id. at §611 (c).

13 Id. at §611 (0).

It is hard to imagine any contact with a government official in Washington that would not meet such criteria.[14]

As noted, there are express exemptions for diplomats,[15] commercial activities,[16] lawyers,[17] academics,[18] and others. However, these exceptions are laced with terms that, again, largely leave compliance in the eye of the prosecutorial beholder. Take the exception for lawyers. It covers lawyers who are representing foreign interests "in the course of judicial proceedings [and related inquiries or investigations]."[19] Yet, lawyers are often enlisted to address matters that are not in court or squarely before an agency. They seek to avoid potential actions or try to put their clients in the best regulatory position. Moreover, as discussed below, the Justice Department has adopted a broad interpretation of this rule that requires law firms to register due to their representation unconnected to any judicial or administrative proceeding or claim, including advising an embassy.[20] The FARA regulations clarify that "attempts to influence or persuade" agency personnel or officials include any work that can be characterized as attempts to influence or persuade "with reference to formatting, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party."[21] That includes such acts as "sharing memorandum prepared by [US firm] with [foreign country]'s lobbyists and public relations firm regarding pending legislation in the House of Representatives," "drafting, at the request of the Embassy, potential responses to media inquiries to be delivered by the Embassy about litigation in which [U.S. firm] was counsel of record;" and "providing the Embassy with written arguments against passage of resolution in House of Representatives."[22]

The exemption for journalism has also been criticized as ill-defined. In 2017, the government required RT TV America and Sputnik to register as foreign agents.[23] The move raised great concerns over free press protections. It is true that these media outlets are funded by the Russian government. However, many such media organizations from BBC to NPR receive considerable public funding. Authoritarian countries have recognized FARA laws as a perfect vehicle for chilling speech and punishing dissents or journalists. A good example can be found in Russia where journalistic organization and Non-Government Organizations (NGOs) are labeled as foreign agents.[24] The Russian law was modeled on FARA and used to crackdown on dissent.

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14 Even an exception for news gathering organizations only applies for those media outlets deemed to be operating "by virtue of any bona fide news or journalistic activities" and meet certain ownership criteria. Id. at §611 (d).

15 22 U.S.C. § 613(a).

16 22 U.S.C. § 613(d)(1).

17 22 U.S.C. § 613(g).

18 22 U.S.C. § 613(e).

19 22 U.S.C. § 613(g).

20 Letter from Brandon L. Van Grack, Chief, FARA Registration Unit, U.S. Dep't of Just., (Apr. 21, 2020), https://www.justice.gov/nsd-fara/page/file/1287671/download

21 28 C.F.R. § 5.306(a).

22 *Id.*

23 Megan R. Wilson, *Russian News Outlet Sputnik Registers with DOJ as Foreign Agent*, The Hill, Nov. 17, 2017.

24 *See generally* Samuel Rebo, *FARA in Focus: What About Russia's Foreign Agent Tell Us About America's*, 12 J. Nat'l Security L. & Pol'y 277 (2022); Nick Robinson, *"Foreign Agents" in an Interconnected World: FARA and the Weaponization of Transparency*, 69 Duke L.J. 1075 (2020).

The use of FARA laws by countries like Russia have been roundly condemned. However, all these laws, including the law in this country, are capable of such abuse. Indeed, FARA was used against the civil rights leader W.E.B. Du Bois in 1951.[25] Despite its extremely limited use, the Justice Department used FARA to target Du Bois for disseminating anti-war literature on behalf of a French not-for-profit organization. Du Bois was 83 at the time. Notably, Du Bois was the chairman of the Peace Information Center (PIC), an antiwar and nuclear nonproliferation organization. PIC circulated the Stockholm Appeal, a petition conceived by Nobel laureate and chemist Frédéric Joliot-Curie. Joliot-Curie was also a communist but his petition was signed by such figures as Marc Chagall, Thomas Mann, and Pablo Picasso.[26] It was also signed by 2.5 million American citizens. It is also worth noting that PIC was headquartered in New York, but the Justice Department declared it to be a foreign agent without any foundation.

It was clear that the government primarily wanted to tag DuBois as a communist and add the stigma of being a foreign agent. Even after he prevailed, "the trial and the publicity around it ruined his career. He was left scrabbling to earn enough money just to buy groceries."[27] The government continued the persecution of Du Bois by taking away his passport.

FARA definitions are so general that any moderately creative prosecutor could sufficiently allege a possible violation for a wide array of advocates, lawyers, and others with international clients. That is all that is required to secure a search warrant to gain access to potentially privileged or sensitive information. Since a covered person has only 10 days to register after such a contact,[28] it is easy to trip the wire as an unregistered agent under the law. Moreover, the Justice Department exercises broad discretion in determining whether a violation is intentional or unintentional – the difference between a potential five-year prison sentence and a simply retroactive registration.[29] It has used that discretion to shift from its long-treatment of FARA as an administrative procedure to great criminal enforcement.[30]

A 2019 letter from the Justice Department shows how broad both the discretion and the interpretation of FARA has become.[31] A church asked if it had to register as a foreign agent because foreign members had requested the printing of banners for a public march. A foreign foundation and its members were considered "foreign principals" and the church an agent engaged in political activities covered by the Act. Likewise, public interest organizations have been required to register as foreign agents, including the National Wildlife Federation (NWF).[32] The NWF merely accepted a grant from the Norwegian government to fight the destruction of the rainforest in countries like Brazil. It noted that "in its interactions with U.S. government officials, [U.S. organization] has nothing to do with formulating, adopting, or changing the

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25 Andrew Lanham, *When W.E.B. DuBois Was UnAmerican*, Boston Review, Jan. 13, 2017.

26 *Id.*

27 *Id.*

28 22 U.S.C. § 612(a).

29 Jacob R. Straus, Cong. Rsch. Serv., *Foreign Agents Registration Act: An Overview* 2 (2019).

30 Straus, *supra,* at 2.

31 Advisory Opinion Pursuant to 28 C.F.R. § 5.2, Counterintelligence and Expert Control Section, National Security Division, Justice Department, Nov. 19, 2019, available at https://www.justice.gov/nsd-fara/page/file/1232921/download.

32 Advisory Opinion Pursuant to 28 C.F.R. § 5.2, Counterintelligence and Expert Control Section, National Security Division, Justice Department, March 13, 2020, available at https://www.justice.gov/nsd-fara/page/file/1287616/download.

domestic or foreign policies of the United States."[33] However, the Justice Department still declared that these are covered "political activities" because organizing against the destruction of rainforests in other countries could still "influence … the public within the United States "with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party."[34]

There has never been an examination of what FARA registration has accomplished beyond tagging individuals, companies, or firms as foreign agents. Even more specific objections like combatting "disinformation" by forcing the registration of foreign media has done little in reducing such distribution. Rather, it has allowed countries like Russian and China to tell its citizens that the compelled registration of media and NGOs is consistent with what is done by the United States.

My recommendation is for this Committee to focus on four primary areas for reform.

Clarifying the Purpose of FARA. Any enhancement of FARA should begin with a clear understanding of what FARA is meant to achieve. I am not speaking of the functional act of registering foreign agents, but rather, why such registration is needed. That question can inform the necessary scope of FARA as well as the necessity of criminal prosecutions to enforce it.

Given the costs to core rights and the use of registration laws by authoritarian countries, Congress should clearly define what we are trying to achieve in FARA in its current or any amended form. We are hopefully beyond our past desire to register people with "un-American" viewpoints or associations. Moreover, if the law is meant to curtail free speech (even in the guise of "disinformation"), it would invite challenge as facially unconstitutional or unconstitutional "as-applied." In articulating a new purpose, Congress should avoid unnecessary or superfluous overlap with other laws. FARA is not needed to combat espionage or fraud given the ample statutory protections against those crimes. It is not needed for the regulation of elections given our extensive election laws and regulations. It is not needed to monitor foreign contributions or funding in higher education.[35] Finally, any court or agency is free to (and often does) ask for counsel or advocates to identify their clients. In court and congressional proceedings, for example, client identity is commonly sought for participants. Indeed, the recent indictment of Michael Sussmann shows that 18 U.S.C. 1001 is sufficient to deter those who would hide their clients.[36] Finally, the Lobbying Disclosure Act (LDA) not only forces disclosures on clients and interests but can be the basis of an exemption under FARA.

The 1942 amendments continued the purpose of FARA to combat un-American speech or speech deemed propaganda.[37] It expanded the scope and required both greater identification and disclosures from covered parties. The 1966 amendments represented a shift from the original design of speech regulation to a new purpose of transparency in the lobbying of the government.[38] As the D.C. Circuit stated:

> "Over the years, FARA's focus has gradually shifted from Congress' original concern about the political propagandist or subversive seeking to overthrow the Government to the now familiar situation of lobbyists, lawyers, and public relations consultants pursuing

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33 *Id.*

34 *Id.*

35 Higher Education Act, 20 U.S.C. § 1011f.

36 Indictment, *United States v. Sussmann*, Sept. 9, 2021, available at https://www.justice.gov/sco/press-release/file/1433511/download.

37 6 P.L. 77-532, 56 Stat. 248 (1942).

38 *See, e.g.,* U.S. Congress, Senate Committee on Foreign Relations, *Nondiplomatic Activities of Representatives of Foreign Governments*, 87th Cong., 2nd sess., July 1962.

> the less radical goal of 'influencing [Government] policies to the staisfaction [sic] of [their] particular client.' But as its focus has changed, the core notion of FARA has remained the same, namely that government officials and the public generally should be able to identify those who act on behalf of a foreign principal."[39]

This resulted however in a further expansion of the scope of the law.

The rationale shift in 1966 continued with the enactment of the LDA.[40] Replacing the Regulation of Lobbying Act of 1946, the LDA legislation included FARA amendments, including key exemptions. It allowed lobbyists for foreign corporations, associations, and partnerships to register under LDA rather than FARA. That avoided the stigmatizing label of being a foreign agent.[41] It also included the legal exemptions discussed below.

The greatest mistake would be a return to the anti-free speech origins of FARA under the guise of combating "disinformation." Not only does FARA not materially impact the dissemination of information, the use of the law as a cudgel for those espousing foreign political agendas will raise even greater constitutional concerns. The "enhancement" of FARA as a vehicle for speech controls and sanctions would come at a time when free speech is under unprecedented attacks here and abroad.[42]

The law continues to sweep broadly and continues to impact free speech values. Indeed, many want it to sweep even more broadly. If the purpose is to identify foreign clients seeking legislative or regulatory changes, FARA could achieve that goal without the ever-expanding range of covered parties. Registration can still be required under LDA without the stigma (or the criminal enforcement) of registration under FARA as foreign agents. Likewise, for those who are arguing for the expansion of FARA, they should consider whether the same added transparency would not be achieved through the LDA without the stigma imposed under FARA. It could also legislatively correct and narrow the interpretations issued by the Justice Department. It could also strengthen exemptions for public interest, journalistic, and advocacy groups.

Clarifying the Line Between Criminal and Civil Enforcement. One area that should be a priority for congressional review is the increasingly unintelligible line between civil and criminal enforcement. FARA has been used to trigger criminal investigatory powers, including searches targeting lawyers. More importantly, some figures have been allowed to retroactively register (which has been the norm) while others have been subject to indictments.[43] After ramping up prosecutions in the last decade, the Justice Department has created precedent for the criminalization of what were previously treated as administrative violations. From Paul Manafort to the current investigation of Hunter Biden, there remain questions as to whether Justice Department will operate under a single, coherent, and predictable standard. The Justice Department cannot simply repeat the mantra of prosecutorial discretion. This is an area that demands a bright line not only so covered parties can be confident on their legal obligations, but also so the public is assured that prosecutions are driven by legal, not political, considerations.

There have been calls for the enhancement of civil powers for the Justice Department to investigate potential FARA violations. That includes giving the Department civil investigative

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39 *United States v. McGoff*, 831 F.2d 1071, 1073-74 (D.C. Cir. 1987) (citing S. Rep. No. 143, 89th Cong., 1st Sess. 4 (1965)).

40 P.L. 104-65, 109 Stat. 691 (1995).

41 U.S. Congress, House, Committee on the Judiciary, *Lobbying Disclosure Act of 1995*, H.R. 2564, 104th Cong., 1st Sess., H. Rep. 104-339, November 14, 1995.

42 *See generally* Turley, *Harm and Hegemony*, *supra*.

43 *See* Jonathan Turley, *Mueller's Deal: Tony Podesta Could Be The Greatest Beneficiary in the Gates Plea Bargain*, Res Ipsa (www.jonathanturley.org), Feb. 24, 2018.

demand (CID) authority to allow for administrative demands or subpoenas. If Congress wants to expand such civil authority and investigative powers, it should consider narrowing the criminal penalties. To the extent that FARA is a transparency or information forcing law, that can be achieved through administrative measures without the expanded use of the criminal process.

Clarifying Key Terms. As discussed above, FARA has suffered from a type of statutory mission creep as the Justice Department took ambiguous terms and used that ambiguity to steadily expand the scope of the Act. Congress can bring greater clarity and purpose to the Act by narrowing the threshold terms. For example, "foreign principal" can be narrowed to focus on foreign governments, foreign political parties, and surrogates that are largely funded by either foreign government or parties.[44] That would still leave groups and individuals who are closely associated with foreign interests. However, as noted above, other statutes also apply to such transactions and associations to address specific risks. This includes, but is not limited to, the disclosure provisions of Lobbying Disclosure Act.[45] Notably, the exemption for LDA registration, does not include representatives "where a foreign government or foreign political party is the principal beneficiary."[46] Moreover, by narrowing this term, some of the most problematic (and potentially unconstitutional) applications of the Act can be avoided.

The identification of a "foreign agent" is left fluid with the inclusion of undefined terms. For example, an organization can be designated a foreign agent simply because it acted on a "request" from a foreign principal. Thus, a church or public interest group may be deemed a foreign agent if they act on the request of the Ukrainian government in the opposition to the Russian invasion. Moreover, those groups which received any grants or monies from foreign sources are left unsure when such money closes the line of receiving funds "in major part" from a foreign source. The statute and regulations do not define how that line is drawn. Is it a measure of the amount or the percentage of the budget of the organization? There is a significant level of uncertainty when an organization risks the stigma of being labeled a foreign agent.

The language on the exemptions for political activities could also be clarified to require a direct nexus to the interests of the foreign principal. Specifically, the type of interpretation subjected the NWF to registration should be eliminated. A good place to start is with the 2019 opinion where the Department rejected an exemption for a firm working with an international religious organization on a conference to "bring together the world's religious leaders to agree on measures to overcome important social challenges." It was still considered a covered activity because a foreign government's ministry funded the firm's work and the conference and the underlying social issues "could also be in the public interests of a foreign government."[47]

Clarifying the Legal Exemption. Recent controversies have focused on the use of FARA to investigate, search, or to charge attorneys ranging from Paul Manafort to Rudy Giuliani[48] to

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44 Congress previously considered such a narrowing of this term in 1993. *See* S. Rep. No. 103-37 (1993).

45 2 U.S.C. § 1601.

46 28 C.F.R. § 5.307.

47 Advisory Opinion Pursuant to 28 C.F.R. § 5.2, Counterintelligence and Expert Control Section, National Security Division, Justice Department, Nov. 12, 2019, available at https://www.justice.gov/nsd-fara/page/file/1234516/download.

48 Erica Orden, *How Federal Prosecutors are Pursuing Rudy Giuliani*, CNN, May 22, 2021.

Victoria Toensing[49] to Hunter Biden.[50] We still do not have all the facts on many of these investigations, but they raise the long-standing questions of where the line is drawn in terms of the exemption. That confusion is evident in the statutory language and conflicting agency interpretations given to legal representational questions.

Recently, the Justice Department withdrew an advisory opinion from December 2019. The earlier interpretation imposes a narrow scope on the legal exemption that declared that attorneys would still have to register if they planned to "provide factual responses to media inquiries about the litigation, issue press releases containing facts regarding the litigation, and engage in press conferences regarding [the case]." The opinion ignores that lawyers often field media inquiries and have a duty to ethically represent their clients inside and outside of courtroom or committee rooms. To its credit, the Justice Department rescinded the order and clarified that responding to media inquiries does not trigger the need for registration.[51] However, the resulting statement preserved the maddening ambiguity of the exemption itself:

> "The legal exemption is triggered once a person, qualified to practice law, engages or agrees to engage in the legal representation of a disclosed foreign principal before any court or agency of the Government of the United States. The exemption is not triggered by an agreement to provide legal representation to further political activities, as defined by FARA, to influence or persuade agency personnel or officials, other than in the course of either judicial proceedings; criminal or civil law enforcement inquiries, investigations, or proceedings; or other agency proceedings required by law to be conducted on the record. The scope of the exemption, once triggered, may include an attorney's activities outside those proceedings so long as those activities do not go beyond the bounds of normal legal representation of a client within the scope of that matter."[52]

Consider that language if you are trying to comply with federal law. You are not required to register "so long as those activities do not go beyond the bounds of normal legal representation of a client within the scope of that matter." The Justice Department reserves to itself to determine what is within "the bounds of normal legal representation." Moreover, it is not clear what will be defined as "within the scope of that matter." A "matter" often involves both immediate actions as well as potential actions involving a client.

In fairness to the Justice Department, the line between legal advocacy and lobbying is often murky. Both the Manafort and Biden controversies show how attorneys will often be used for efforts that seem more political than legal, including tasks that can legitimately be described as outside the "normal scope" of legal representation. Yet, the firms often perform atypical functions in response to collateral questions in maintaining client relationships. There is an obvious need to register as a lobbyist when you are seeking benefits or changes from agencies or

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[49] Oliver O'Connell, *FBI Searches Home of Giuliani-Connected Laywerin Relation to Ukraine Dealings*, The Independent, Apr. 28, 2021.

[50] Jerry Dunleavy, *DOJ Investigating Hunter Biden for Lobbying Violations*, Washington Examiner, March 16, 2022.

[51] Advisory Opinion Pursuant to 28 C.F.R. § 5.2, Counterintelligence and Expert Control Section, National Security Division, Justice Department, Jan. 5, 2020, available at https://www.justice.gov/nsd-fara/page/file/1351401/download.

[52] *Id*. at 1-2.

officials. The question is why a lawyer or firm should be compelled to file as a foreign agent when offering advice or assistance to a client.

Even the scope of the allowable media work by lawyers as an unregistered party is cloaked in ambiguity. The Justice Department states:

> "While responding to media inquiries about litigation typically fall within the scope of the exemption, the proposed activities entail more proactive media engagement that are more akin to a public relations campaign aimed at promoting the litigation and the political objectives of the [US organization]. Such activities, within the context of the litigation, appear beyond the bounds of normal legal representation."[53]

Again, what constitutes "proactive media engagement" is largely left to the discretion of the Department. Good attorneys will often anticipate controversies and seek to defuse them on behalf of their clients. That includes trying to emphasize positive elements of a client's position or work. Given the free speech and free press concerns over such rules, there should be greater clarity and accommodation for media interactions for counsel representing foreign clients.

The common concern among the witnesses today is a promising sign that it is possible to reach a new and bipartisan approach to FARA. This can be accurately described as the third incarnation of FARA. It has gone from an anti-free speech statute to a transparency in lobbying statute. Frankly, my greatest concern is that Congress could revert to the original anti-free speech purpose of the Act under the guise of combatting "disinformation." Instead, Congress should recognize the array of other statutes enacted since 1938 that force transparency in foreign lobbying and financing in areas ranging from election to education. Given that new context, it is possible to narrow FARA to achieve a more defined and static purpose. That includes shifting back toward an administrative rather than criminal emphasis on enforcement. There is no political agenda behind such reforms. Both parties have had associated figures targeted under the Act. The question is now what we are still trying to achieve under FARA and how we can better to achieve those goals without undermining the constitutional values that define us as a nation.

Thank you for the opportunity to speak with you today. I am happy to answer any questions that you might have at this time.

Jonathan Turley
Shapiro Professor of Public Interest Law
George Washington University Law School
Washington, D.C. 20052
jturley@law.gwu.edu
(202) 994-7001

[53] *Id.*