THE FOREIGN AGENTS REGISTRATION ACT COMES TO LIGHT AMIDST PROBE INTO RUSSIAN ELECTION MEDDLING: AN EFFORT TO CRACK DOWN ON FOREIGN LOBBYISTS OR A SIGN OF CORRUPTION?

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INTRODUCTION[1]

The Foreign Agents Registration Act ("FARA" or "the Act") has drawn attention in news reports recently in light of the investigations into Russian interference in the 2016 presidential election, which have consumed the media and have been a cloud over the White House since the beginning of 2017 ("Russia Scandal").[2] FARA was enacted in 1938 as a means to protect American citizens from foreign propaganda in response to the fear of foreign interference in United States' affairs, specifically, the fear that the Americans worked for the Nazi German government to establish an underground propaganda outlet.[3] While the law originally focused on propagandists, the 1966 amendments to FARA shifted its focus to identifying the sources of political propaganda and protecting the integrity of the United States government's decision-making process.[4] FARA requires an agent who represents the interests of a foreign principal to register with the Department of Justice ("DOJ") and disclose the activities that such agent engages in on behalf of any foreign principal, as well as any compensation that such agent receives in connection with its work for any foreign principal.[5] However, lobbyists have been evading FARA's registration requirements for decades due to the DOJ's lax enforcement and loopholes in the Act's provisions, as the law has acquired a reputation around Washington, D.C. for being a "toothless" statute or "a complete joke."[6]

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2 *See* Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 611–18 (2016); *see also infra* Parts II.B–II.C (describing the events that sparked an investigation into Russia's interference in the 2016 election, discussing the FARA violations that are being prosecuted in connection with the investigations and highlighting potential FARA violations that have been ignored).

3 *See* AUDIT DIV., OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT OF THE NATIONAL SECURITY DIVISION'S ENFORCEMENT AND ADMINISTRATION OF THE FOREIGN REGISTRATION ACT 1 (2016) [hereinafter OIG REPORT], https://oig.justice.gov/reports/2016/a1624.pdf.

4 *See infra* Parts I.A–I.C (discussing FARA's legislative history and statutory text).

5 22 U.S.C. §§ 611–18.

6 *See* Ken Silverstein, *I've Covered Foreign Lobbying for 20 Years and I'm Amazed Manafort Got Busted*, POLITICO (Oct. 30, 2017), https://www.politico.com/magazine/story/2017/10/30/paul-manafort-indictment-foreign-

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Although the Department of Justice prosecuted only seven criminal FARA cases from 1966 to 2017, Special Counsel Robert Mueller III, who was appointed by the DOJ to investigate Russia's interference in the election and potential collusion between associates of the Trump campaign and the Russian government, has indicted multiple former Trump campaign associates for FARA violations as a result of his findings during the investigation.[7] The indictments may or may not prove that the Trump campaign colluded with Russia's government to interfere in the election, but the allegations pertaining to the Russia Scandal have raised questions about whether the special counsel's use of FARA as his weapon of choice is a sign that the DOJ has enhanced its enforcement efforts. However, a memorandum prepared by the House Permanent Select Committee on Intelligence ("HPSCI"), which is investigating the DOJ's and Federal Bureau of Investigation's ("FBI") use of the Foreign Intelligence Surveillance Act ("FISA") during the 2016 presidential election cycle ("Nunes Memo"), alleges that the DOJ and FBI relied upon unverified information contained in the Trump-Russia dossier to obtain a FISA warrant and three FISA renewals from the Foreign Intelligence Surveillance Court ("FISC") to surveil Carter Page, a former Trump campaign associate.[8] The Nunes Memo raises concerns that the FBI failed to disclose to the FISC that the dossier was compiled by a former British spy, who was paid over $160,000 by the Democratic National Committee ("DNC") and the Hillary Clinton campaign via the law firm Perkins Coie and an opposition research firm Fusion GPS, which has been accused of acting as an unregistered foreign agent on behalf of Russia.[9] Moreover, the DOJ has been notified that several other

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lobbying-russia-probe-215764 (stating that Paul Manafort, "like dozens of other influence peddlers, has been operating in plain sight for years. . . . So, it's not unreasonable to conclude that the only reason that Manafort got busted was because a special counsel was appointed after the firing of FBI Director James Comey to look into the Trump campaign's possible collusion with Russia. Manafort has been under investigation since 2014, but if the DOJ's track record is any indicator, it's quite likely that had he not been Trump's campaign manager, Manafort would be kicking back and enjoying his allegedly laundered cash at this very moment"); *see also* Miles Parks, *A 'Toothless' Old Law Could Have New Fangs, Thanks to Robert Mueller*, NPR (Nov. 17, 2017, 5:00 AM) (internal quotations omitted), https://www.npr.org/2017/11/17/563737981/a-toothless-old-law-could-have-new-fangs-thanks-to-robert-mueller ("The law intended to shine a light on foreign entities and foreign governments working to influence policy in Washington, D.C., has been called everything from 'toothless' to 'a complete joke.' But Justice Department special counsel Robert Mueller isn't laughing—and neither may potential violators if he decides to make it his new weapon of choice."). *See also infra* Part II.A (discussing the DOJ's administration and enforcement of FARA); *infra* Parts II.B–II.C (describing the loopholes and shortcomings created by FARA's broad definitions and exemptions).

[7] *See* OIG REPORT, *supra* note 3, at 8 (noting that the DOJ has brought only seven criminal FARA cases since 1966); notes 55–56 and accompanying text (detailing the seven criminal prosecutions for FARA violations that have been brought since 1966 and discussing the appointment of Robert Mueller III as Special Counsel to oversee the Russia Scandal investigations); *infra* Part II.C (examining the indictments of Paul Manafort, Rick Gates and Michael Flynn, former associates of Trump's presidential campaign).

[8] *See* Memorandum for Majority Members of the House Permanent Select Comm. on Intel., *Subject: Foreign Intelligence Surveillance Act Abuses at the Department of Justice and the Federal Bureau of Investigation* (Jan. 18, 2018) [Nunes Memo], https://www.documentcloud.org/documents/4365346-Nunes-memo-on-FBI-surveillance.html#document/p6. *See infra* Parts II.B–II.C (describing the Trump-Russia dossier and its connection to the Russia Scandal, the FBI's arrangement to pay the author of the dossier to confirm the dossier's content and its reliance upon such dossier to obtain a warrant to surveil one of Trump's campaign associates).

[9] *See* Nunes Memo, *supra* note 8, at 4 ("The 'dossier' compiled by Christopher Steele (Steele dossier) on behalf of the Democratic National Committee (DNC) and the Hillary Clinton campaign formed an essential part of the Carter Page FISA application. Steele was a longtime FBI source who was paid over $160,000 by the DNC and Clinton campaign, via the law firm Perkins Coie and research firm Fusion GPS, to obtain derogatory information on Donald Trump's ties to Russia."); *see also* Letter from Charles E. Grasley, Chairman, Senate Judiciary Committee, to Deputy

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unregistered agents who were involved in the events that led to the Russia Scandal are in violation of FARA, but the DOJ has not prosecuted such unregistered agents.[10] FARA furthers the DOJ's national security efforts by promoting the detection and forcing disclosure of foreign efforts to influence the United States' policies and public opinion, but it has not effectively served its purpose.[11] This Article proposes amendments to FARA that are designed to impose more severe punishment against individuals—particularly lobbyists, attorneys, politicians and government officials—who seek to influence United States domestic and foreign policy.[12]

I. BACKGROUND OF THE FOREIGN AGENTS REGISTRATION ACT

The Framers of the Constitution considered political corruption one of the primary threats to the new United States, and at the Constitutional Convention, "there was near unanimous agreement that corruption was to be avoided, that its presence in the political system produced a degenerative effect."[13] At the Convention, the delegates' deliberations over bribery, unwarranted influence, dependency, cabals and patronage infiltrating the political scene indicated that they associated corruption with politics; indeed, much of their debate about the process for electing the president hinged on their fear of corruption.[14] The delegates feared that the new government would be susceptible to corruption among its officials and throughout the election process, and they were particularly concerned with corruption by foreign influences.[15] To address these fears, the Framers

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Attorney General, Dep't of Justice, at 1 (Mar. 31, 2017), https://www.grassley.senate.gov/sites/default/files/judiciary/upload/2017-03-31%20CEG%20to%20DOJ%20%28Anti-Magnitsky%20FARA%20violations%29%20with%20attachments.pdf (alleging that Fusion GPS was acting as an unregistered agent of Russian interests while simultaneously overseeing the creation of the dossier).

10 *See infra* Parts II.B–II.C (discussing other potential FARA violations surrounding the Russia Scandal for which the DOJ has not pursued criminal FARA cases).

11 *See* OIG REPORT, *supra* note 3, at 33.

12 *See infra* Part III.B (proposing amendments to FARA under the "Foreign and Political Interference Prevention Act").

13 Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 348 (2009) [hereinafter Teachout, *Anti-Corruption*] (quoting James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. POL. 174, 181 (1994)). During the early stages of the Constitutional Convention, George Mason asserted that "if we do not provide against corruption, our government will soon be at an end." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 392 (Max Farrand ed., 1911). "[James Madison's] notes record that 15 delegates used the term 'corruption' no less than 54 times. Eighty percent of these references were uttered by seven of the most important delegates, including Madison, Morris, Mason, and Wilson." Savage, *supra*, at 177.

14 Savage, *supra* note 13, at 181 (indicating that the delegates' discussions about their concerns with "dependency, cabals, patronage, unwarranted influence, and bribery" reflected that their "understanding of corruption was explicitly political in content"); *see id.* at 177 ("Much of the debate over the election of the president . . . was influenced by the fear of corruption.").

15 *See id.* at 180 (analyzing the delegates' discussions at the Convention about the existence of corruption amidst all branches of the federal government); *see also* Teachout, *Anti-Corruption*, *supra* note 13, at 348 (footnote omitted) ("The delegates were looking at how legislators might use the public American channels for foreign or private ends. Because of the Senate's special power in foreign affairs, it was especially important to protect against Senators who might be agents of another country."). "The Constitutions' [sic] founders were intensely concerned about the prospect

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included various anti-corruption clauses in the Constitution and structured it in a manner designed to combat cabal, intrigue and corruption.[16]

Although the Framers created the Constitution with the goal of protecting new citizens of the Confederation from corruption, their prediction that corruption would eventually flounder America appears to have been accurate, as political and foreign corruption—which the Framers considered a key threat—continues to undermine the integrity of the American government and subvert the political process.[17] Congress has passed several laws and continues to enact legislation intended to combat corruption, and this Article focuses on one of these laws—the Foreign Agents Registration Act.[18]

A. An Overview of FARA's Legislative History

FARA was enacted in 1938 in response to the proliferation of propaganda disseminated in the United States prior to World War II by Nazi and Communist agents upon recommendations from the Special Committee on Un-American Activities of 1934, which was appointed to investigate anti-American activities in the United States.[19] The purpose of the Act was to require all persons

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of foreign involvement in American politics. At the time, foreign corruption was a major concern because the newly independent United States was a small and relatively poor country." Zephyr Teachout, *Extraterritorial Electioneering and the Globalization of American Elections*, 27 BERKELEY J. INT'L L. 162, 168 (2009) [hereinafter Teachout, *Extraterritorial Electioneering*]. *See generally id.* (explaining how the 2004 and 2008 elections were influenced by foreign individuals, entities and/or organizations via the internet, and proposing that the integrity of elections might not be able the withstand "extraterritorial electioneering"—which the author describes as the technical innovations that create avenues for foreign individuals, entities and/or organizations to influence elections on a global scale—through a globalized communication system).

[16] *See generally* Teachout, *Anti-Corruption*, *supra* note 13 (delineating and analyzing the anti-corruption provisions of the Constitution).

[17] *See id.* at 352–53 ("The Framers worked hard to create such a tool through a document that would protect new citizens of the Confederation from each others' [sic] most mercenary and covetous tendencies, and delay--if not forestall--the corruption that they believed would eventually founder America."); *id.* at 347 (noting that the Framers viewed political corruption as a key threat—if not the key threat—to the new United States); *see also* Arie J. Lipinski, Note, *Combating Government Corruption: Suing the Federal Government Via a Proposed Amendment to the Civil RICO Statute*, 46 VAL. U. L. REV. 169, 197–200 (2011) (discussing laws that were enacted by Congress for the purpose of curtailing government corruption). *See infra* Parts II.B–II.C (demonstrating that political and foreign corruption continues to compromise the United States' government and political system and describing how political officials and foreign influences played a key role in the Russia Scandal).

[18] Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 611–618, Pub. L. No. 77-532, 56 Stat. 248 (codified as amended at 22 U.S.C. §§ 611–618 (2016)); *see also infra* notes 19–20 and accompanying text (elaborating on the purpose for which the Act was created and noting that Congress has passed several laws designed to mitigate subversive activities in the United States).

[19] *See* H.R. Res. 198, 78 CONG. REC. 13, 13–14 (1934) ("[T]he Speaker of the House of Representatives . . . appoint[s] a special committee to be composed of seven members for the purpose of conducting an investigation of (1) the extent, character, and objects of Nazi propaganda activities in the United States; (2) the diffusion within the United States of subversive propaganda that is instigated from foreign countries and attacks the principle of the form of government as guaranteed by our Constitution . . . ."); *see also* OIG REPORT, *supra* note 3, at 2 ("FARA was enacted in 1938 in response to recommendations of a special congressional committee investigating anti-American activities in the United States.").

who were acting on behalf of foreign governments or foreign political groups to disseminate political propaganda in the United States to register with the State Department, anticipating that such registration requirement would publicize the nature of foreign propagandists' subversive activities so that the American people were aware of those individuals who were engaged by foreign agencies to spread anti-American doctrines and/or propaganda for purposes of influencing public opinion on political questions in the United States.[20] Congress feared that these individuals were representing foreign governments or political groups, which were supplied with funds by foreign agencies to influence the United States' internal and external policies.[21] Thus, Congress enacted FARA with the goal of counteracting the effects of foreign propaganda, and it sought to achieve that goal by requiring foreign agents to register with the Secretary of State, identify themselves and their employers, disclose their activities and file and label the source of the

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[20] *See* H.R. REP. NO. 75-1381, at 1–2 (1937) [hereinafter HOUSE REPORT) (describing the bill's purpose as requiring registration to publicize the subversive activities in which foreign propagandists engage with the goal of reducing the negative impact of foreign political propaganda in the United States); *see also* H.R. REP. NO. 81-2908, *as reprinted in* 1950 U.S.C.C.A.N. 3886, 3887 (noting that Congress has passed several laws designed specifically to curb subversive activities in the United States, which laws were directed at both Nazis and Communists). The House Judiciary Committee explained the purpose of FARA as follows:

> Incontrovertible evidence has been submitted to prove 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.
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> Evidence before the Special Committee on Un-American Activities, disclosed that many of the payments for this propaganda service was made in cash by the consul of a foreign nation, clearly giving an unmistakable inference that the work done was of such a nature as not to stand careful scrutiny.
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> As a result of such evidence, this bill was introduced, the purpose of which is to require all persons who are in the United States for political propaganda purposes—propaganda aimed toward establishing in the United States a foreign system of government, or group action of a nature foreign to our institutions of government, or for any other purpose of a political propaganda nature—to register with the State Department and to supply information about their political propaganda activities, their employers, and the terms of their contracts.
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> This required registration will publicize the nature of subversive or other similar activities of such foreign propagandists, so that the American people may know those who are engaged in this country by foreign agencies to spread doctrines alien to our democratic form of government, or propaganda for the purpose of influencing American public opinion on a political question.

HOUSE REPORT, *supra*, at 1–2.

[21] *See* HOUSE REPORT, *supra* note 20, at 1–2 ("[P]ersons 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 politics 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."); *see also* Michael I. Spak, *America for Sale: When Well-Connected Former Federal Officials Peddle Their Influence to the Highest Bidder*, 78 KY. L. J. 237, 242–43 (1990) (citing H.R. Res. 198, 78 CONG. REC. 4934, 4949 (1934)) (contending that the primary target of FARA was Nazi and Communist propaganda, as the pro-Nazi and pro-Communist organizations were the two main disseminators of propaganda in the United States at the time).

propaganda.[22] Congress believed that if American citizens knew the identity of the foreign agents who were disseminating propaganda and the source thereof, the citizens could evaluate the credibility of the message that such propaganda intended to convey.[23]

To accomplish FARA's general purpose of protecting the United States' internal security, national defense and foreign relations, the Act and the regulations promulgated thereunder specify who must register, the type and form of information that must be disclosed and the requirements for filing supplemental registration statements.[24] In its original enactment, FARA required an "agent of a foreign principal" to register with, identify its foreign principals and disclose its activities to the United States government via the Secretary of State.[25] Congress defined other terms in the Act to assist with the application and enforcement of its requirements and to further its purpose of deterring the spread of foreign propaganda, and Congress has amended various sections of the Act several times since its enactment in 1938.[26] While FARA was originally aimed

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[22] Teachout, *Extraterritorial Electioneering*, *supra* note 15 (citing 51 AM. JUR. 2D *Lobbying* § 12, Westlaw (database updated Feb. 2018)); Spak, *supra* note 21, at 244 (citing HOUSE REPORT, *supra* note 20) ("FARA was designed to limit the effect of foreign propaganda by revealing both the identify of foreign agents and the source of the propaganda they were disseminating.").

[23] *See United States v. Augagen*, 39 F. Supp. 590, 591 (D.D.C. 1941) (analyzing the purpose of FARA, which the court refers to as the McCormack Act—as John McCormack, Democrat from Massachusetts, introduced the Act—and stating that Congress intended to "bring the activities of persons engaged in disseminating foreign political propaganda in this country out into the open and to make known to the Government and the American people the identity of any person who is engaged in such activities, the source of the propaganda and who is bearing the expense of its dissemination in the United States").

[24] *See* 22 U.S.C. § 612; 28 C.F.R. §§ 5.1–5.801 (specifying the filing requirements for FARA registration statements); *see also* Charles Lawson, Note, *Shining the 'Spotlight of Pitiless Publicity' on Foreign Lobbyists? Evaluating the Impact of the Lobbying Disclosure Act of 1995 on the Foreign Agents Registration Act*, 29 VAND. J. TRANSNAT'L L. 1151, 1157 (1996) (alteration in original) ("The ultimate purpose of FARA, as stated by Congress, was the 'protect[ion] of [the] internal security, national defense, and foreign relations of the United States.").

[25] Foreign Agents Registration Act of 1938, Pub. L. No. 75-583, 52 Stat. 631, 632. In its original enactment, FARA provided the following definition for "agent of a foreign principal":

> (d) The term "agent of a foreign principal" means any person who acts or engages or agrees to act as a public relations counsel, publicity agent, or as agent, servants, 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. Such term shall not include a duly accredited diplomatic or consular officer of a foreign government who is so recognized by the Department of State of the United States, nor a person, other than a public-relations counsel, or publicity agent, performing only private, non-political financial, mercantile, or other activities in furtherance of the bona fide trade or commerce of such foreign principal.

Id.

[26] *See id.* at 631–32 (defining "foreign principal" as "the government of a foreign country, a political party of a foreign country, a person domiciled abroad, or any foreign business, partnership, association, corporation, or political organization"); *id.* (providing the original definitions for the terms "person," "United States" and "Secretary"); *see also* Spak, *supra* note 21, at 244–49 (analyzing the amendments to FARA since its enactment in 1938). In 1942, Congress amended FARA for the first time to expand the definitions of the terms "foreign principal" and "foreign agent," as the 1942 amendments required agents of foreign principals (private or government) to:

at counteracting the negative repercussions of subversive foreign propaganda on the United States' internal and external policies, national security and foreign relations, its scope has been expanded to require agents of various foreign entities to register with the Attorney General regardless of whether their activities directly threaten the national security of the United States.[27]

In 1966, Congress shifted the focus of FARA from "the original target of foreign agent legislation—the subversive agent and propagandist of pre-World War II days"—to 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 staisfaction [sic] of his particular client."[28] The

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> (1) report each dissemination of political material in the interest of a foreign principal to the Internal Security Division of the Justice Department; (2) label the disseminated material as foreign political propaganda; and (3) file with the Department of Justice the names of persons and organizations to whom the material was disseminated.

Lawson, *supra* note 24, at 1161–62. The 1942 amendments were designed to close up certain loopholes to and improve the enforcement of FARA by amending the Act to expand the definition of "foreign principal" and exclude "any news or press service or association organized under the laws of the United States" from the definition of "agent of a foreign principal." Pub. L. No. 77-532, 56 Stat. 248, 249, § 1(b), (d) (codified as amended at 22 U.S.C. § 611 (1942)); *see id.* § 1(b) (expanding the definition of "foreign principal" to include "an individual affiliated or associated with, or supervised, directed, controlled, financed, or subsidized, in whole or in part, by and foreign principal"). Later that year, former President Franklin D. Roosevelt issued Executive Order No. 9176, thereby transferring the administrative duties to the Attorney General. *See* Exec. Order No. 9176, 7 Fed. Reg. 4127 (June 2, 1942). In 1961, Congress amended two sections of FARA to clarify the commercial exemption to the registration requirement and further expanded the definition of "foreign principal" to include domestic entities that were "supervised, directed, controlled, or financed, in whole or in substantial part, by any foreign government or foreign political party." Pub. L. No. 87-366, 75 Stat. 784 (1961); *see also id.* (exempting individuals from registration if their activities were "private and nonpolitical financial or mercantile activities").

[27] *See* Yuk K. Law, Note, *The Foreign Agents Registration Act: A New Standard for Determining Agency*, 6 FORDHAM INT'L L.J. 365, 365–66 (1982) (citing Act of July 4, 1966, Pub. L. No. 89-486, 80 Stat. 244 (1966) (codified as amended at 22 U.S.C. § 611 (1976))) (noting that FARA's scope has expanded since its enactment and now requires representatives of various foreign entities to register under FARA even though their activities do not pose a threat to national security).

[28] S. REP. NO. 89-143, at 4 (1965). The Committee on Foreign Relations elaborates in its section of comments to the Senate regarding S. 693, stating the following:

> Twenty-nine years ago a special committee of the House of Representatives, chaired by the present Speaker of the House of Representatives, John V. McCormack, filed a report on its investigation into Nazi and other subversive propaganda that circulated in the postdepression [sic] United States. The first, and primary, legislative recommendation of that committee was—
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> > That the Congress shall enact a statute requiring ill publicity, propaganda, or public relations agents or other agents who represent in this country any foreign government or a foreign political party or a foreign industrial organization to register with the Secretary of State of the United States, and to state name and location of such employer, the character of the service to be rendered, and the amount of compensation paid or to be paid therefor.
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> Three years later, in 193S. the Foreign Agents Registration Act (FARA), embodying the major recommendations of that committee, became law. For 27 years, this act, born of a congressional effort to prevent subversion as well as to control foreign political lobbying, has been the primary statute in its field.

1966 amendments, most of which have not been repealed by Congress, significantly transformed the purpose of FARA and attempted to tie up some of the loose ends through which attorneys, lobbyists and political officials in the United States circumvented FARA's registration requirements.[29] These amendments reflect the delegates' outlook on the significance of curtailing

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> The original target of foreign agent legislation-the subversive agent and propagandist of pre-World War II days-has been covered by subsequent legislation, notably the Smith Act. The place of the old foreign agent has been taken 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 staisfaction [sic] of his particular client.
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> Since the Second World War, and particularly since the end of the Korean war, U.S. oversea commitments—both political and economic—have grown markedly. In this same period, foreign governments along with foreign political and commercial interests became more active in attempting to influence the direction of our policies. The traditional target for such overtures was the Department of State. However, in the last decade an additional target has been established with the increasing direct congressional participation in specific foreign policy matters. Congress, for its part, has traditionally been more responsive to public pressures with the result that the mass media have also thereby gained new importance in the policy formation process.
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> Lobbying has always played a necessary part in our democratic form of representative government. In effect, it is the institutionalization of the people's constitutional right to petition their government. The practice of public relations in its current form represents a fairly new activity which in the main has the goal of assisting a client in his dealings with the mass media and the public at large. Individuals undertaking lobbying, public relations, or other related services vis-a-vis the Government—economic consulting. purchasing, fund raising, political reporting, general legal counseling—all are important in assisting or acting for the American citizen, corporation, or organization in dealing with his Government.

Id. at 3–4.

[29] *See* S. REP. NO. 89-143, at 1 (listing the major provisions contained in the bill S. 693 to amend FARA). The Committee on Foreign Relations recommended that the Senate pass S. 693 as amended, and in its report, the Committee provides a list of "major provisions," the first of which states that "[t]he new terms 'political activities' and 'political consultant' have been added and defined and definitions have been revised for the terms 'foreign principal' and 'agent of a foreign principal'—*all of which are aimed at better focusing the act on those individuals attempting to influence Government policies through political activities*." *Id.* (emphasis added); *see also id.* at 2 ("The commercial exemption has been broadened to exempt all private and nonpolitical activities with a bona fide commercial purpose and other activities not serving predominantly a foreign interest, even though they may be political in nature."); 111 CONG. REC. 1245 (1965) (statement of Sen. Fulbright) (providing background information about the preliminary staff investigation that influenced the conditions which prompted the bill to amend FARA and describing some of its major provisions, including the provision that "a foreign agent appearing for or in the interest of his foreign principal before a congressional committee be required to identify himself full as to his principals and file his latest registration statement as part of the committee hearing record"); *but see Foreign Agents Registration Act Amendments: Hearings on S. 693 and H.R. 290 Before Subcomm. No. 3 of the Comm. on the Judiciary, 89th Cong.* 12 (1965) [hereinafter *Hearings*] (statement of Arthur H. Dean, Member of the law firm of Sullivan & Cromwell, New York, N.Y.) (arguing that the bill's definition of "political activities" encompasses activities that are ordinarily considered professional, business or commercial, and therefore not "political"). S. 693 also added the "attorney exemption" after the *Rabinowitz v. Kennedy* decision, a case in which the United States Supreme Court granted certiorari after the Court of Appeals for the District of Columbia dismissed a declaratory judgment action brought by a group of attorneys—who represented the Republic of Cuba in unrelated litigation before the Supreme Court—seeking a declaration that attorneys were exempt from FARA's registration requirements. *Rabinowitz v. Kennedy*, 376 U.S. 605, 606–08 (1964); *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398. 399 (1964) (listing Victor Rabinowitz as the attorney of record representing Banco Nacional de Cuba—the representation that gave rise to the

corruption, and they are specifically aimed at combating political corruption, which the delegates considered a key threat.[30] As part of the 1966 amendments, Congress inserted subsections defining "political activities" and "political consultant," which state the following:

Rabinowitz litigation). The Supreme Court held that attorneys who represent a foreign government in legal matters in the United States, including litigation, are not exempt from FARA's registration requirements under the commercial exemption because the attorneys could not be engaged solely in "private and nonpolitical financial or mercantile" activities if they were litigating on behalf of a foreign government. *See Rabinowitz*, 376 U.S. at 609–10 (internal citations omitted) ("Although the work of a lawyer in litigating for a foreign government might be regarded as 'private and nonpolitical' activity, it cannot properly be characterized as only 'financial or mercantile' activity. It is clear from the statute and its history that 'financial or mercantile' activity was intended to describe conduct of the ordinary private commercial character usually associated with those terms. Furthermore, although the interest of a government in litigation might be labeled 'financial or mercantile,' it cannot be deemed only 'private and nonpolitical.' Since an attorney may not qualify for exemption '(i)f any one of these characteristics is lacking,' it would be impossible to conclude, under any construction of the statute, that petitioners are engaging 'only in private and nonpolitical financial or mercantile activities.'"). Thus, the group of attorneys representing Banco Nacional de Cuba in general matters, including litigation, did not qualify for the commercial exemption under section 613(d) of FARA, the provision that exempts from registration any person "engaging or agreeing to engage only in private and non-political, financial or mercantile activities in furtherance of the bona fide trade or commerce of such foreign principal . . . ." *Id.* at 608 (citing Pub. L. No. 87-366, 75 Stat. 784 (1961)); *see Rabinowitz*, 376 U.S. at 608 n.2 (quoting Pub. L. No. 77-532, 56 Stat. 254 (codified as amended at 22 U.S.C. §§ 611 (Supp. II 1941–42))) (acknowledging that section 613(d) "had previously been amended in 1942 to cover any person 'engaging or agreeing to engage only in private, nonpolitical, financial, mercantile, or other activities in furtherance of the bona fide trade or commerce of such foreign principal"); *supra* note 26 (noting that Congress amended FARA in 1961 to clarify the commercial exemption); *see also* S. REP. NO. 89-143, at 138 (statement of J. Walter Yeagley, Assistant Attorney Gen., U.S. Dep't of Justice) (refuting the testimony of Robert Dechert, the American Bar Association's representative, who proposed seven scenarios to the Subcommittee under which he believed that a lawyer representing a private foreign principal would not be entitled to the attorney exemption, and Mr. Yeagley confirmed that a lawyer would be exempt from registration in these scenarios because he would not be engaging in "political activities"); Lawson, *supra* note 24, at 1174–84 (evaluating the Lobbying Disclosure Act's ("LDA") impact on FARA, alleging that the broader scope of the LDA's disclosure requirements eliminates the exemption for lawyers who lobby on behalf of foreign companies or their subsidiaries, as lawyers could no longer circumvent FARA's registration requirements by characterizing their work as "legal representation"); *infra* notes 33–35 and accompanying text (discussing the impact of the LDA's amendments to FARA in both 1995 and 1998).

[30] *Compare* S. REP. NO. 89-143, at 4–5 ("The prime hope for protecting U.S. interests in the field of non-diplomatic activities rests with strong executive enforcement of all provisions of the Foreign Agents Registration Act. However, disclosure by the agent to the Department of Justice is not enough. The 'pitiless spotlight of publicity' which Congressman Emanuel Celler so aptly referred to as the purpose of this legislation a quarter of a century ago remains its purpose today. The public is an important participant in this process and the responsibility of the mass media in disclosing foreign activities through agents therefore cannot be overlooked. . . . Testimony showed that numerous agents have exaggerated or misrepresented facts to their principals—and in almost every case the effect was to distort U.S. policy or the attitudes of agencies or individual officials within the United States. . . . But there is a responsibility to be met here, one of particular concern to the legislative branch for the hearings disclosed that in a number of cases it was a Member of Congress or the machinery of the Congress that was being misrepresented to foreign principals."), *with supra* notes 13–17 and accompanying text (discussing the delegates' fear that the new government would be susceptible to corruption among its officials and throughout the election process and their particular concern with corruption by foreign influences). The Committee on Foreign Relations proceeded to reprehend the media for their role in exacerbating the corruption:

> A second problem that needs other than legislative attention concerns the public's right to know the source of material presented to it by organs of the mass media when such material originates with or is promoted by foreign agents. The first amendment guarantees freedom of the press, but who except the press itself can guarantee that the right to seek the truth and publish it-as contemplated by this amendment-is to be shared with the public at large? The committee's hearings documented

> (o) The term "political activities" means the dissemination of political propaganda and any other activity which the person engaging therein believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, persuade, or in any other 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;
>
> (p) The term "political consultant" means any person who engages in informing or advising any other person with reference to the domestic or foreign policies of the United States or the political or public interest, policies, or relations of a foreign country or of a foreign political party . . . ."[31]

The main purpose of the 1966 amendments to FARA was to protect the United States' interests by requiring complete public disclosure by individuals acting for or in the interests of foreign principals "where their activities are political in nature or border on the political," as such public disclosures will allow the United States government and its citizens to be more informed as to the identities and activities of these individuals, and therefore "be better able to appraise them and the purposes for which they act."[32]

In response to criticisms that FARA's regulatory scheme contained loopholes that had been exploited by lobbyists, Congress passed the Lobbying Disclosure Act of 1995 ("LDA"), which

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> numerous cases of what one editor later characterized as "corruptions" of the mass media. The responsibility to police such corruption rests with media executives, but the Congress and the public should actively urge step to be taken to meet that important responsibility.

S. REP. NO. 89-143, at 5.

[31] Act of July 4, 1966, Pub. L. 89-486, 80 Stat. 244, 244–45; *see* 110 CONG. REC. 16036 (1964) (remarks of Sen. Fulbright) (explaining that the distinction between the "concept of political activity and the concept of political activity pursued for the benefit of a foreign principal" needs to be clarified). Congress inserted these amendments for purposes of redefining "agent of a foreign principal," and it also included a subsection that later became known as the "commercial exemption," but this subsection was repealed as part of the 1995 amendments. *See* Pub. L. 89-486, 80 Stat. 244, 245 (1966) (stating that for purposes of the definition of "agent of a foreign principal," "activities in furtherance of the bona fide commercial, industrial or financial interests of a domestic person engaged in substantial commercial, industrial or financial operations in the United States shall not be deemed to serve predominantly a foreign interest because such activities also benefit the interests of a foreign person engaged in bona fide trade or commerce which is owned or controlled by, or which owns or controls, such domestic person: Provided, That (i) such foreign person is not, and such activities are not directly or indirectly supervised, directed, controlled, financed or subsidized in whole or in substantial part by, a government of a foreign country or a foreign political party, (ii) the identity of such foreign person is disclosed to the agency or official of the United States with whom such activities are conducted, and (iii) whenever such foreign person owns or controls such domestic person, such activities are substantially in furtherance of the bona fide commercial, industrial or financial interests of such domestic person"); *see also* Lobbying Disclosure Act of 1995, Pub. L. 104-65, 109 Stat. 691 (striking the commercial exemption); William P. Fuller, S.J., *Congressional Lobbying Disclosure Laws: Much Needed Reforms on the Horizon*, 17 SETON HALL LEGIS. J. 419, 434 (1993) (examining the non-political activities or commercial exemption).

[32] S. REP. NO. 89-143, at 1.

was the next significant legislative reform affecting FARA.[33] The LDA requires lobbyists to register with the Secretary of the Senate and the Clerk of the House of Representatives within forty-five days of entering into a lobbying contract or becoming employed to enter into a lobbying contract.[34] The amount of FARA registrations decreased significantly after the enactment of the LDA and its 1998 amendments, as agents who registered under the LDA are exempt from FARA's registration requirements, so agents who fall within the purview of both Acts choose to register under the LDA because of its less onerous filing and disclosure requirements.[35]

B. FARA's Registration Requirements and Definitions

FARA requires any person who becomes an agent of a foreign principal to file a registration statement with the Attorney General, in duplicate and under oath, within ten days of becoming an agent, unless such person is exempt from registration under FARA's provisions.[36] The Act states that that the term "foreign principal" includes:

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[33] *See* Lobbying Disclosure Act of 1995, Pub. L. 104-65, 109 Stat. 691 (codified as amended at 2 U.S.C. §§ 1601–14 (2007)) (amending the definition of "political activities" by substituting "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" for "the dissemination of political propaganda and any other activity which the person engaging therein believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, persuade, or in any other way influence any agency or official of the Government" and striking subsection (q) of 22 U.S.C.§ 611)); *see* Pub. L. 104-65, 109 Stat. 691 (stating that existing lobbying disclosure statutes had been ineffective due to weak administration and enforcement provisions and unclear statutory language); *see also* Lawson, *supra* note 24, at 1153 (asserting that lobbyists had been exploiting FARA's loopholes for decades). See Spak, *supra* note 21, at 242–49 and Lawson, *supra* note 24, at 1155–66, for further analysis of FARA's legislative history.

[34] *See* 2 U.S.C. § 1601 (2016) ("No later than 45 days after a lobbyist first makes a lobbying contact or is employed or retained to make a lobbying contact, whichever is earlier, or on the first business day after such 45th day if the 45th day is not a business day, such lobbyist (or, as provided under paragraph (2), the organization employing such lobbyist), shall register with the Secretary of the Senate and the Clerk of the House of Representatives.").

[35] *See* 22 U.S.C. § 613(h) ("Any agent of a person described in section 611(b)(2) of this title or an entity described in section 611(b)(3) of this title if the agent has engaged in lobbying activities and has registered under the Lobbying Disclosure Act of 1995 [2 U.S.C.A. § 1601 et seq.] in connection with the agent's representation of such person or entity."); OIG REPORT, *supra* note 3, at i (noting that the Office of the Inspector General found that FARA registrations peaked in the 1980s, but they began declining significantly in the mid-1990s, which the DOJ's National Security Division—who is responsible for FARA's administration and enforcement—attributes to the imposition of registration fees in 1993 and the LDA's enactment in 1995); *see also* William V. Luneburg, T*he Evolution of Federal Lobbying Regulation: Where We Are Now and Where We Should Be Going*, 41 MCGEORGE L. REV. 85, 104 (2009) (footnotes omitted) ("FARA registration is a substantial undertaking in light of the detailed information that must be disclosed and updated every six months with regard to the agent, the principal, and the political and other activities undertaken on the principal's behalf. However, persons representing foreign principals other than foreign governments and foreign political parties can opt to register under the LDA instead of the FARA even where they do not meet LDA thresholds for required registration. By doing so, they escape the detailed disclosure regime of the FARA."). *See infra* note 41 (stating that foreign lobbyist regulation under FARA has historically been more demanding than domestic lobbying regulations under the LDA, as FARA requires more thorough disclosures and imposes harsher penalties for violations of the Act's registration requirements).

[36] *See* 22 U.S.C. §§ 611–14 (providing the provisions of FARA that govern the filing requirements for registration statements, establish who is required to file such statements and define the key terms and phrases included in the Act). FARA contains the following pertinent provisions governing the filing requirements for registration statements:

> (1) a government of a foreign country and a foreign political party;
> (2) a person outside of the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and
> (3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.[37]

This broad definition of "foreign principal" includes almost all foreign political organizations, as well as a variety of international companies that conduct business within the United States.[38] However, the definition of "foreign principal" does not bring domestic organizations within the purview of the Act's provisions, as they are not required to register even if such organizations are controlled, financed, supervised or directed by a foreign government or political party.[39]

> 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 and supplements thereto as required by subsections (a) and (b) of this section or unless he is exempt from registration under the provisions of this subchapter. Except as hereinafter provided, every person who becomes an agent of a foreign principal shall, within ten days thereafter, file with the Attorney General, in duplicate, a registration statement, under oath on a form prescribed by the Attorney General. The obligation of an agent of a foreign principal to file a registration statement shall, after the tenth day of his becoming such agent, continue from day to day, and termination of such status shall not relieve such agent from his obligation to file a registration statement for the period during which he was an agent of a foreign principal.

Id. § 612(a); *see id.* § 612(b)–(c) (delineating the filing requirements for supplements to registration statements and mandating that registration statements and supplemental statements thereto be executed under oath). The registration statements, including supplemental statements thereto, must be executed under oath by an individual, if he is the registrant; and if the registrant is a business entity or other business organization, then by a majority of the officers, members or board of directors thereof, or any persons functioning in these capacities. *Id.* § 612(c). Section 612 of the Act also authorizes the Attorney General to exempt, through regulation, any officer, partner, employee or director listed in a registration statement filed by a foreign agent "where . . . the Attorney General . . . determines that such registration, or the furnishing of such information . . . is not necessary to carry out the purposes of this subchapter." *Id.* § 612(f).

[37] *Id.* § 611(b).

[38] *See* Fuller, S.J., *supra* note 31, at 429–30 (alteration in original) (quoting 28 C.F.R. § 5.100) (stating that "[t]his expansive definition of 'foreign principal' covers nearly all foreign political organizations as well as a wide range of international companies conducting business within the United States," and the Department of Justice has further expanded it by promulgating a regulation that defines the term to include "a person any of whose activities are directed or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal as that term is defined in section 1(b) of the Act").

[39] *See* 22 U.S.C. § 611(b); *see also* S. REP. NO. 87-1061, at 2 (1961) ("Because of the definition of the term 'foreign principal' as presently used in the act, agents of a domestic organization need not register even though their organizations are financed, controlled, supervised, or directed by a foreign government or political party. Section 1 of H.R. 470 defines 'foreign principal' so as to bring domestic organizations within the purview of the registration requirements of the act, irrespective of whether they are 'subsidized,' if a foreign government or a foreign political party supervises, directs, controls, or finan ces [sic] them in such a manner as to exercise substantial control over their policies and activities."). *See* Liz Kennedy & Alex Tausanovitch, *Secret and Foreign Spending in U.S. Elections:*

FARA defines an "agent of a foreign principal" as follows:

> (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--
> (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
> (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.[40]

Among other requirements, the registration statement must include a comprehensive description of the nature of the registrant's business, the name and address of each foreign principal for whom the registrant is acting, the character of the business or other activities for each foreign principal and the extent to which each foreign principal is controlled, directed, owned or financed by any foreign government, foreign political party or other foreign principal.[41] Any agent of a

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Why America Needs the DISCLOSE Act, CENTER FOR AM. PROGRESS (July 12, 2017, 9:01 AM), https://www.americanprogress.org/issues/democracy/reports/2017/07/17/435886/secret-foreign-spending-u-s-elections-america-needs-disclose-act/ (noting that "[i]n 2016, 840 LLCs donated a combined total of roughly $21 million to groups backing presidential candidates, almost double the amount spent by 109 LLCs in the 2012 race"); *see also infra* Part III.B (proposing an amendment to the commercial exemption designed to prevent foreign principals seeking to support a political organization from avoiding FARA's registration requirements by funneling money through domestic subsidiaries).

[40] *Id.* § 611(c). The term "political activities" is broadly defined as:

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

Id. § 611(o); *see generally id.* § 611 (providing all other definitions under the Act).

[41] *Id.* § 612(a)(1)–(11); *see id.* (listing FARA's content requirements, including the specific information and details that an "agent of a foreign principal" must disclose to the Attorney General). The information contained in a FARA registration statement is regarded as "material," and the provision in FARA that governs the content of registration statements imposes burdensome disclosure requirements. *Id.*; *see* Jahad Atieh, Comment, *Foreign Agents: Updating FARA to Protect American Democracy*, 31 U. PA. J. INT'L L. 1051, 1052 (2010) (noting that foreign lobbyist regulation

foreign principal who is required to file a registration statement with the Attorney General under FARA must also file and label any "informational materials" that such agent intends to disseminate among two or more persons within forty-eight hours of the transmittal thereof.[42] The filing fee for an initial registration statement is $305.00, and the fee is the same for supplemental statements, which must be filed every six months after the initial registration statement.[43] FARA does not impose penalties for late registration even though the registration documents are routinely submitted late.[44]

C. Exemptions

Diplomats and officials of foreign governments, as well as their staff members, are exempt from FARA's registration requirements.[45] The Act provides exemptions for certain activities as well, including private and non-political activities; religious, scholastic or scientific pursuits; and defense of a foreign government vital to the United States' defense.[46] FARA also contains exemptions for attorneys who represent foreign principals, so long as they do not try to influence the United States' policies at the behest of their clients, and agents who have engaged in lobbying activities and registered under the LDA; indeed, Congress has debated these exemptions since their enactment.[47] Prior to the enactment of the LDA in 1995, which amended some of FARA's

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under FARA has historically been more demanding than domestic lobbying regulations under the LDA, as FARA requires more thorough disclosures and imposes harsher penalties for violations of the Act's registration requirements); *id.* ("Abuses by lobbyists often result in a 'political scandal' that creates a public outcry to reform lobbying law. Lobbyists are often the targets of such scandals because, by way of their constant interaction with legislators, they often possess a keen ability to rightly or wrongly influence politicians. Congress responds by reforming lobbyist regulations when the public believes that lobbyists have had an undue influence on legislation or policy. . . . . [W]hile Congress has responded to the recent outcry against domestic lobbyists by enacting domestic lobbyist reform--as evidenced by its enactment of the LDA and its subsequent 2007 revision--it has done little to alleviate many of the loopholes that exist in FARA. Moreover, it is these loopholes that have led to many of the recent foreign lobbying scandals in Congress. Many of these scandals could have been prevented . . . .Instead, these loopholes in FARA have allowed foreign lobbyists to unduly influence U.S. foreign and domestic policy.").

[42] *See* 22 U.S.C. § 614 (stating FARA's requirements for filing and labeling political propaganda); *see also* OIG REPORT, *supra* note 3 (noting that the term "propaganda" was replaced with the term "informational materials" in 1995, but the Act does not define the term "informational materials").

[43] *See* 28 C.F.R. § 5.5 (2017) (providing a complete list of FARA's registration fees); OIG REPORT, *supra* note 3, at 1 (discussing fees for document filings under FARA). Registrants must include an exhibit A for each foreign principal, and the registration fee for each exhibit A is also $305.00. 28 C.F.R. § 5.5.

[44] *See* OIG REPORT, *supra* note 3, at 13 (describing the tests conducted on the FARA Unit's monitoring of new and existing registration statements and noting that the Office of the Inspector General found that registration documents were routinely submitted late, while some registrants had ceased filing the required documents).

[45] 22 U.S.C. § 613(a)–(c).

[46] *Id.* § 613(d)–(f).

[47] *See id.* § 613(g)–(h) (providing the attorney exemption and the exemption for agents of foreign principals who register under the LDA). FARA's attorney exemption states the following:

> Any person qualified to practice law, insofar as he engages or agrees to engage in the legal representation of a disclosed foreign principal before any court of law or any agency of the

provisions, attorneys were exempt from FARA registration in both formal and informal proceedings, but Congress provided few guidelines for determining what constitutes an "informal proceeding."[48] The LDA was designed to close one of FARA's loopholes, limiting the scope of its attorney exemption to allow only attorneys who represent foreign principals "before any court of law or any agency of the Government of the United States" to be exempt from FARA's

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> Government of the United States: *Provided*, That [sic] for the purposes of this subsection legal representation does not include attempts to influence or persuade agency personnel or officials other than in the course of judicial proceedings, criminal or civil law enforcement inquiries, investigations, or proceedings, or agency proceedings required by statute or regulation to be conducted on the record.

Id. § 613(g). The Act also exempts agents of foreign principals, as defined in FARA's "Definitions" provision, "if the agent has engaged in lobbying activities and has registered under the Lobbying Disclosure Act of 1995 [2 U.S.C. 1601 et seq.] in connection with the agent's representation of such person or entity." *Id.* § 613(h). *See Hearings*, *supra* note 29 (statement of Arthur H. Dean, Member of the law firm of Sullivan & Cromwell, New York, N.Y.) (arguing that the provisions of S. 693—the bill which contained provisions that were incorporated into the 1966 amendments to FARA—still present troublesome ambiguities that "continue to cause concern and have evoked considerable critical comment by businessmen, lawyers, and other professional men"). During the hearings before the House Judiciary Committee that took place prior to the enactment of the 1966 amendments to FARA, Congress considered testimony from partners at law firms, individuals representing the American Bar Association and the Assistant Attorney General regarding their objections to bill S. 693 to amend FARA. *See Hearings*, *supra* note 29, at 12 (statement of Arthur H. Dean, Member of the law firm of Sullivan & Cromwell, New York, N.Y.) (contending that the bill's provisions will require not only individuals or firms who have placed themselves in a sensitive position by engaging in political activities, public relations or other services on behalf of a foreign principal to register under FARA, but also those "persons who are engaged in day-to-day, nonsensitive activities which businessmen and their advisers normally conduct"); *id.* at 32–47 (statement of James Joseph Frawley, Special Counsel for the Government of the Province of Alberta, Canada) (noting that the term "political" effectively brings tourist literature within the purview of FARA's registration and labeling requirements and that labeling is unacceptable because it disassociates the DOJ from such literature); *id.* at 56 (statement of John F. Sonnett, Partner in the Law Firm of Cahill, Gordon, Reindel & Ohl) ("Even the private giving of advice—on matters clearly affecting business interests—by corporate executives to their international affiliates, or by lawyers, public relations, or other usual corporate advisers, may be covered by the broad definition of 'political consultant.'"); *see also* S. REP. NO. 89-143, at 3–4 (asserting that the focus of FARA has shifted to the lawyer-lobbyist and public relations counsel whose goal is to influence the United States government's policies in favor of their clients); *supra* notes 27–29, 39 and accompanying text (debating the application of the attorney exemption and discussing how the broader scope of the LDA's disclosure requirements eliminates the exemption for lawyers who lobby on behalf of foreign companies or their subsidiaries, as lawyers could no longer circumvent FARA's registration requirements by characterizing their work as "legal representation"). The debate over whether attorneys representing foreign principals should be required to register under FARA has also been deliberated in the context of the commercial exemption and the definition of an "agent of a foreign principal." *See Rabinowitz*, 376 U.S. at 606–08 (holding that attorneys who represented a foreign government in legal matters, including litigation, were not exempt from FARA's registration requirements under the section that is currently referred to as the commercial exemption); S. REP. NO. 89-143, at 13 (stating that the addition of the commercial exemption and the attempt to clarify the scope of the definition of an "agent of a foreign principal" should resolve any doubts—as to whether attorneys who represent foreign governments in legal matters are exempt from FARA's registration requirements—that may have been caused by the Supreme Court's decision in *Rabinowitz*).

[48] *See* 22 U.S.C. § 613(g) (1976) (providing the original language included in FARA's attorney exemption, which exempted from registration "[a]ny person qualified to practice law . . . engaged[d] in the legal representation of a disclosed foreign principal before any court of law or any agency of the Government of the United States" in a formal or informal proceeding); Phyllis K. Fong, Note, *Lawyers, Privileged Communications, and the Foreign Agents Registration Act of 1938*, 11 VAND. J. TRANSNAT'L L. 753, 758 (1978) (noting that Congress left few guidelines on the activities that would be considered "informal proceedings" under FARA's attorney exemption).

registration requirements.[49] However, the number of agents representing foreign principals in the foreign agent registration pool has declined since the enactment of the LDA, and the FARA Unit's staff, which is responsible for administering and monitoring the foreign agent registration pool, "believe[s] that the passage of the [LDA] in 1995 contributed to [this] steep decline in FARA registrations."[50] As a result of the passage of the LDA, an agent representing foreign commercial interests can register as a lobbyist under the LDA, as opposed to a foreign agent under FARA; thus, FARA is mostly limited to agents who represent the interests of foreign government and political parties.[51] The attorney and LDA exemptions and the broad definitions included in the Act's provisions have created loopholes that allow attorneys, lobbyists and individuals engaged in political activities to circumvent FARA's registration and disclosure requirements.[52] Nonetheless, amending FARA's definitions and exemptions provisions in an attempt to cure the deficiencies that have been exploited by attorneys, lobbyists and politicians—who effectively act as unregistered agents of foreign principals—will not remedy the DOJ's lax enforcement of the law.[53]

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[49] 22 U.S.C. § 613(g); *see*. Pub. L. 104-65, 109 Stat. 691, § 9(2) (substituting "judicial proceedings, criminal or civil law enforcement inquiries, investigations, or proceedings, or agency proceedings required by statute or regulation to be conducted on the record" for "established agency proceedings, whether formal or informal"); Atieh, *supra* note 41, at 1060–61 n.46 ("Prior to 1995, attorneys were exempt from FARA registration no matter the type of representation they offered.").

[50] OIG REPORT, *supra* note 3, at 17.

[51] *See id.* at 17–18.

[52] *See supra* note 39 and accompanying text (noting that the definition of "foreign principal" does not bring domestic organizations within the purview of the Act's provisions, as they are not required to register even if such organizations are controlled, financed, supervised or directed by a foreign government or political party); *supra* notes 32–33 and accompanying text (discussing the shortcomings of FARA's definitions for "political activities" and "political consultant" and acknowledging that Congress passed the LDA in an attempt to close a loophole in FARA's 1966 amendments that was being exploited by lobbyists); *see also* Atieh, *supra* note 41, at 1065–71 (presenting the "Loopholes and Failures of FARA," and specifically explaining that domestic subsidiaries of foreign corporations do not fall within the purview of FARA because they are not organized under the laws of a foreign country, regardless of whether they advocate their foreign parent's policies); *id.* at 1070–71 (footnotes omitted) (highlighting that political action committees ("PACs"), whose contributions are not subject to FARA's registration requirements, "often act as 'agents' by lobbying for a foreign entity's political cause, thereby triggering FARA's registration requirement as an agent of a foreign principal. Certain PAC's [sic] argue that because they are created by Americans they should be exempt from FARA for the same reason as domestic companies, because they are not 'organized under the laws of another country.' However, unlike domestic subsidiaries where it is arguable that they 'are not seeking to subvert policy,' PACs representing purely foreign interests, such as foreign governments, are in fact seeking to affect foreign policy for the foreign principal. It should not matter the form that one takes to influence policy, but the substance of the attempted influence"). *See generally* Lawson, *supra* note 24, at 1163–64 (explaining additional shortcomings and deficiencies of FARA).

[53] *See infra* Part II.A (discussing the Department of Justice's lax enforcement of FARA and detailing how the DOJ and FBI allegedly withheld information about a Trump-Russia dossier in a FISA application that they submitted to the FISC, through which they requested and obtained approval to electronically surveil Carter Page ("Page"), a former Trump campaign associate, by arguing that the FBI had reason to believe that Page was acting as a Russian agent); *see also* Tom Hamburger & Alice Crites, *Former Trump Adviser Admits to 2013 Communication with Russian Spy*, WASH POST. (Apr. 4, 2017), https://www.washingtonpost.com/politics/former-trump-adviser-admits-to-2015-communication-with-russian-spy/2017/04/04/a09d7384-193b-11e7-9887-1a5314b56a08_story.html?utm_term=.90891b649257 (stating that Page confirmed his role in the DOJ's 2015 "spy case," in which "he assisted U.S. prosecutors in their case against Evgeny Buryakov, an undercover Kremlin agent then posing as a bank executive in New York. Buryakov was convicted of espionage and released from federal prison

II. The DOJ's Lax Enforcement of FARA Opens the Door for Russia to Interfere with 2016 Presidential Election

The DOJ has been criticized for its failure to adequately enforce FARA for decades, and this criticism has been reinforced in light of the potential FARA implications at issue in the Russia Scandal.[54] From 1966 to 2015, the Department of Justice brought only seven criminal FARA cases.[55] However, the Special Counsel for the DOJ, who was appointed to oversee the investigation into any coordination between individuals associated with President Trump's campaign and the Russian government, Special Counsel Robert S. Mueller III has filed indictments against multiple former associates of President Trump's campaign for potential FARA violations in 2017.[56] As a result of these indictments, FARA has drawn widespread attention in media news

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[in late May 2017], a few months short of completing a 30-month sentence. Buryakov agreed to be immediately deported to Russia"). Page is allegedly identified as "Male 1" in the DOJ's complaint against three Russian spies, Defendants Evgeny Buryakov, a/k/a "Zhenya," Igor Sporyshev and Victor Podobnyy ("spies"), which complaint includes charges against the spies for conspiring to act as an unregistered agent of a foreign government and acting as an unregistered agent of a foreign government, in violation of FARA. *See id.* (stating that BuzzFeed reported that Page was identified as "Male 1" in the DOJ's complaint against the spies); *see also* Sealed Complaint at 1–2, U.S. v. Buryakov (S.D.N.Y. Jan. 23, 2015), *available at* https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/26/buryakov-complaint.pdf (bringing charges against the spies for FARA violations and describing Page's alleged role as "Male 1").

[54] *See Oversight of the Foreign Agents Registration Act and Attempts to Influence U.S. Elections: Lessons Learned from Current and Prior Administrations: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2017) (prepared statement of Chuck Grassley, Chairman, S. Judiciary Committee), https://www.judiciary.senate.gov/imo/media/doc/07-26-17%20Grassley%20Statement.pdf ("Unfortunately, it appears that the Justice Department and FBI have been seriously lax in enforcing FARA for a long time. In 12 years, the Department has only sent 178 letters to people it believes should register as a foreign agent. Only 178 letters in 12 years. That's only 15 letters a year. The Justice Department thinks I send more oversight letters than that in a week. Only nine people in the entire Justice Department work full time to enforce this law and monitor potential unregistered foreign agents in the U.S. It's no surprise that only 400 foreign agents are currently registered."); Fuller, S.J., *supra* note 20, at 436 (stating that FARA has been the subject of heightened criticism primarily due to its ineffectiveness and sporadic enforcement); Miles Parks, *A 'Toothless' Old Law Could Have New Fangs, Thanks to Robert Mueller*, NPR (Nov. 17, 2017, 5:00 AM), https://www.npr.org/2017/11/17/563737981/a-toothless-old-law-could-have-new-fangs-thanks-to-robert-mueller ("The perception out there in the regulated community is that [it is] a toothless statute . . . . Critics . . . have long questioned how committed the Justice Department actually is to enforcing the law.")

[55] *See* OIG Report, *supra* note 3, at 8 (noting that the Department of Justice reported to the Office of the Inspector General that it had brought only seven criminal FARA cases since 1966—one led to a conviction at trial for conspiracy to violate FARA; two of the cases were dismissed, two pleaded guilty and two pleaded guilty to non-FARA charges).

[56] *See* Office of the Att'y Gen., U.S. Dep't of Justice, Appointment of Special Counsel to Investigate Russian Interference with 2016 Presidential Election and Related Matters, Att'y Gen. Order No. 3915-2017 (May 17, 2017), https://www.justice.gov/opa/press-release/file/967231/download (appointing Robert S. Mueller, III to serve as Special Counsel for the Department of Justice "to conduct the investigation confirmed by then-FBI Director James B. Comey in testimony before the House Permanent Select Committee on Intelligence on March 20, 2017, including: (i) any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump; and (ii) any matters that arose or may arise directly from the investigation"); *see also infra* Part II.C (describing the details of the indictments brought against former members of President Trump's campaign). On March 20, 2017, former FBI Director Comey confirmed that the FBI "is investigating the Russian government's efforts to interfere in the 2016 presidential election . . . . [and] that the probe includes investigating the nature of any links between individuals associated with the Trump campaign and the Russian government and whether there was any

reports, and the DOJ has been subject to heightened scrutiny in addition to the criticism it has endured in the past for its lack of a comprehensive FARA enforcement strategy.[57]

A. *Administration and Enforcement of FARA*

In September 2016, the Office of the Inspector General ("OIG") released a report containing its observations, conclusions and recommendations after conducting an audit in response to the United States House of Representatives Committee on Appropriations' demand that the OIG review the DOJ's enforcement of FARA.[58] According to statistics in this report, the number of criminal FARA cases that Special Prosecutor Mueller pursued in connection with the Russia Scandal investigations during late 2017 deviates significantly from the expected trend of criminal FARA cases pursued by the DOJ over the previous fifty years.[59] Perhaps these indictments are a sign that the DOJ is intensifying its efforts to enforce FARA, but the House Permanent Select Committee on Intelligence ("HPSCI") has expressed its "concerns with the legitimacy and legality of certain DOJ and FBI interactions with the [FISC], and . . . represent a troubling breakdown of legal processes established to protect the American people from abuses related to the FISA process.[60]

The National Security Division's ("NSD") Counterintelligence and Export Control Section ("CES"), and its FARA Registration Unit are responsible for the administration and enforcement

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coordination between the campaign and Russia's efforts." AJ Vicens, *Here's a Guide to Every Trump-Russia Investigation*, MOTHER JONES (Jun. 7, 2017, 6:38 PM), http://www.motherjones.com/politics/2017/06/trump-russia-investigation-guide-comey-mueller/.

57 *See* OIG REPORT, *supra* note 3, at 8 (stating that the Office of the Inspector General believes that officials of the Department of Justice's National Security Division disagree with field level agents and prosecutors about the National Security Division's reluctance to approve FARA charges due to the Department of Justice's lack of a comprehensive enforcement strategy); *see also infra* Part II.A (describing the enforcement methods and process for prosecuting FARA violations).

58 *See* OIG Report, *supra* note 3, at i.

59 *See id.* (specifying the results of the seven criminal FARA cases pursued by the Department of Justice from the years 1966 to 2015); *see also infra* Part II.C (discussing the indictments of Paul Manafort, Rick Gates and Michael Flynn).

60 Nunes Memo, *supra* note 8, at 3. *Compare* Adriana Cohen, *A Tale of DOJ Corruption*, REAL CLEAR POLITICS (Dec. 15, 2017), https://www.realclearpolitics.com/articles/2017/12/15/a_tale_of_doj_corruption_135790.html (asserting that the DOJ has become a "politicized agency" that has become a "weaponized arm of the Democratic National Committee," and American citizens are "witnessing corruption at the highest echelons of the FBI and DOJ, where high-ranking officials have become transparently politicized, causing corrosive distrust in [the United States'] justice system"), *with* Matthew Kahn, *The Party's Over for Washington's Foreign Lobbyists*, FOREIGN POLICY (Nov. 3, 2017, 11:24 AM), http://foreignpolicy.com/2017/11/03/the-partys-over-for-washingtons-foreign-lobbyists/ ("Washington lobbyists—many of whom regularly represent the interests of foreign governments, companies, or individuals—are crying foul over the apparently selective indictment of Manafort and Gates for their violation. As one writer noted: Manafort is hardly the only Washington lobbyist who appears to have flouted the FARA rules. Evading registration is child's play for Washington pros.").

of FARA.[61] The FBI counterintelligence agents investigate FARA cases and the United States Attorney's Offices ("USAO") prosecute them after obtaining NSD approval.[62] FARA's enforcement provision provides the following:

> **(a) Violations; false statements and willful omissions**
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> Any person who—
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> (1) willfully violates any provision of this subchapter or any regulation thereunder, or
>
> (2) in any registration statement or supplement thereto or in any other document filed with or furnished to the Attorney General under the provisions of this subchapter willfully makes a false statement of a material fact or willfully omits any material fact required to be stated therein or willfully omits a material fact or a copy of a material document necessary to make the statements therein and the copies of documents furnished therewith not misleading, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both, except that in the case of a violation of subsection (b), (e), or (f) of section 614 of this title or of subsection (g) or (h) of this section the punishment shall be a fine of not more than $5,000 or imprisonment for not more than six months, or both.[63]

The Act also provides an injunctive remedy that allows the Attorney General to submit an application for an order enjoining "any person who is engaged in or about to engage in any acts which constitute or will constitute" a violation of FARA or any regulations issued thereunder "from continuing to act as an agent of such foreign principal, or for an order requiring compliance with any appropriate provision of the [Act] or regulation thereunder."[64] Any failure to file a

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[61] *See* OIG REPORT, *supra* note 3, at 3. *See id.* (providing details about the FARA Unit and NSD staff members who comprise each unit, describing the deficiencies in staff and noting that the FARA Unit has received fourteen requests for advisory opinions since 2013, but it has failed to make any advisory opinions publicly available after receiving requests).

[62] *Id.*

[63] 22 U.S.C. § 618(a).

[64] *Id.*§ 618(f). Although the FARA Unit sought authority to impose civil fines for registration delinquencies in previous years, FARA Unit staff members indicated that they would be hesitant to seek civil fines because it would be counterproductive, as seeking civil fines for late filings could deter disclosure by registrants who are otherwise in compliance with FARA's registration requirements and would add administrative costs to the FARA Unit's work. *See* OIG REPORT, *supra* note 3, at 12. FARA's enforcement provision also permits the Attorney General to notify a registrant in writing that his registration statement is not in compliance with FARA's registration requirements, and any such person is prohibited from acting as an agent of a foreign principal any time ten or more days after receiving such notification prior to filing an amended registration statement in compliance with FARA. *Id.*§ 618(g); *but cf.* OIG REPORT, *supra* note 3, at 9–10 (noting that, after FBI personnel expressed their beliefs that "CES generally appeared to lack confidence in FARA because it was too seldom used or too difficult to prosecute," NSD officials deflected this contention and claimed that the NSD has "a clear preference toward pursuing registration for alleged FARA violators rather than seeking prosecution, in keeping with its voluntary compliance approach").

registration statement or supplements thereto is considered a continuing violation for as long as such failure occurs, but there are no penalties for untimely filings.[65] The FARA Unit's enforcement efforts focus on encouraging voluntary compliance, as opposed to pursuing criminal or civil charges.[66] One of the primary reasons for this is that the high burden of proving "both willfulness on the part of the accused to avoid registration or to make a false statement or omission in their feelings, and that the agent was directed and controlled by a foreign principal" presents difficulties for prosecutors attempting to establish that a criminal FARA violation has occurred.[67]

The FARA Unit staff members believe that the rule requiring agents of foreign principals to submit a hard copy of all informational materials to the Unit within forty-eight hours of dissemination is outdated due to advances in information technology, as agents frequently send informational materials on behalf of their foreign principals via social media and other internet sources.[68] After the FARA Unit is able to locate a foreign agent who might be required to register under FARA but either knowingly or unknowingly fails to register, it has difficulty obtaining the information necessary to determine whether such agent is required to register; however, the DOJ does not have civil investigative demand authority despite previous legislative proposals seeking such authority, as well as a recommendation by the United States Government Accountability Office.[69] NSD has difficulty determining whether activities that university and college campus groups, foreign media entities, non-governmental organizations, grassroots organizations that may receive funding from foreign governments and think tanks fall within the scope of existing

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[65] *Id.* § 618(e).

[66] *See* OIG REPORT, *supra* note 3, at 10; *but see id.* (noting that the FBI and USAO staff members informed the OIG that they were actively pursuing criminal charges and believe FARA criminal cases are an "effective tool carrying sufficient penalties to deter foreign principals from exerting undisclosed influence, or to compel the development of cooperating sources," but the NSD officials disagreed with the FBI staff members' assessment). The OIG attributed this disagreement between FBI and USAO staff members and the FARA Unit and NSD officials to the DOJ's lack of a comprehensive enforcement strategy. *Id.*; *see* note 57 and accompanying text (indicating that the DOJ has been subject to heightened scrutiny as a result of the indictments in connection with the Russia Scandal investigation in addition to the criticism it has endured in the past for its lack of a comprehensive FARA enforcement strategy). *See also* OIG REPORT, *supra* note 3, at 10–12 (elaborating on the deficiencies in the process for pursuing criminal charges for FARA violations, indicating that the high burden of proving willful conduct makes it difficult for prosecutors to obtain convictions and providing the OIG's recommendations for improvement).

[67] *Id.* at 11.

[68] 22 U.S.C. § 614; OIG REPORT, *supra* note 3, at 19; *see supra* note 32 (reiterating the forty-eight-hour rule); *see also* OIG REPORT, *supra* note 3, at 19 (explaining the obstacles that hinder the FARA Unit's ability to enforce the forty-eight-hour rule); *see also id.* (noting that the FARA Unit recommends amending the Act "to allow registrants to compile informational materials and submit them semi-annually with each supplemental statement. . . . [T]he FARA Unit believes that the labeling requirement needs to be updated to address the internet and social media as means of conveying informational materials").

[69] *See* OIG REPORT, *supra* note 3, at 18; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-855, POST-GOVERNMENT EMPLOYMENT RESTRICTIONS AND FOREIGN AGENT REGISTRATION (July 30, 2008), https://www.gao.gov/new.items/d08855.pdf ("Congress may wish to consider (1) granting the Department of Justice civil investigative demand authority to inspect the records of persons Justice believes should be registered as agents of foreign principals . . . .").

exemptions to the FARA registration requirements.[70] According to the FARA Unit, these types of organizations are inclined to claim that they are not required to register because they are either not serving a foreign interest or are acting independently of foreign control.[71]

B. DOJ Ignores Potential FARA Violations Committed by Russian Lawyer-Lobbyist and Opposition Research Firm

In January 2017, the Senate Select Committee on Intelligence announced that it would conduct an investigation into Russian interference in the 2016 presidential election.[72] Around that time, a dossier emerged that reportedly outlined compromising information about then-President-elect Trump, including allegations that the Russian government sought to split the Western alliance by supporting Trump and gathering compromising information—"kompromat"—on him in an attempt to blackmail him ("Dossier").[73] The Dossier consists of a collection of seventeen memoranda written by Christopher Steele, a former British intelligence officer ("Steele"), between

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[70] OIG REPORT, *supra* note 3, at 18–19; *see infra* Part III.B (proposing amendments to the exemptions for "private and nonpolitical activities" and "religious, scholastic, or scientific pursuits" with the intent of preventing foreign principals from funneling money through domestic subsidiaries, especially non-commercial organizations).

[71] *Id.* at 19.

[72] *See* Press Release, U.S. Senate Select Committee on Intelligence, Joint Statement on Committee Inquiry into Russian Intelligence Activities (Jan. 13, 2017), https://www.intelligence.senate.gov/press/joint-statement-committee-inquiry-russian-intelligence-activities; Press Releases, U.S. House Permanent Select Committee on Intelligence, Joint Statement on Progress of Bipartisan HPSCI Inquiry into Russian Active Measures (Jan. 25, 2017), https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=758 (detailing the scope of the Senate Select Committee on Intelligence's investigation into Russian activities during the election). A declassified report prepared by the Director of National Intelligence "that described a multifaceted effort led by Russian President Vladimir Putin to interfere with the election by releasing damaging information about Clinton to help Trump" sparked the Senate Select Committee on Intelligence's Russia Scandal investigation. CNN Library, 2016 Presidential Election Investigation Fast Facts, CNN (Dec. 2, 2017), http://www.cnn.com/2017/10/12/us/2016-presidential-election-investigation-fast-facts/index.html; *see* OFFICE OF DIR. OF NAT'L INTELLIGENCE, NAT'L INTELLIGENCE COUNCIL, ICA 2017-01D, BACKGROUND TO "ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS": THE ANALYTIC PROCESS AND CYBER INCIDENT ATTRIBUTION 12 (2017). The Office of the Director of National Intelligence reported that one of the events that led to the Intelligence Community's assessment that Russian President Vladimir Putin ordered an influence campaign aspiring to help Trump win the election was the Russian intelligences services' hacking of Democrat officials and political figures' personal email accounts and subsequently using WikiLeaks to release such emails. *See id.* at 2–3. On February 2, 2017, the Senate Judiciary Subcommittee on Crime and Terrorism announced that it would conduct a probe into Russian efforts to influence elections in the United States and abroad. *See* CNN Library, *supra*. On May 17, 2017, Deputy Attorney General Rod Rosenstein appointed Mueller as Special Counsel to lead the DOJ's investigation into Russian interference in the election. *See* Office of the Att'y Gen., U.S. Dep't of Justice, Appointment of Special Counsel to Investigate Russian Interference with 2016 Presidential Election and Related Matters, Att'y Gen. Order No. 3915-2017 (May 17, 2017), https://www.justice.gov/opa/press-release/file/967231/download.

[73] *See* Glenn Kessler, *The 'Dossier' and the Uranium Deal: A Guide to the Latest Allegations*, WASH. POST (Oct. 29, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/10/29/the-dossier-and-the-uranium-deal-a-guide-to-the-latest-allegations/?utm_term=.6a5d3e4be122; *see also id.* ("The [D]ossier has also been cited by FBI Director James Comey in some of his briefings to members of Congress in recent weeks, as one of the sources of information the bureau has used to bolster its investigation, according to US officials briefed on the probe. This includes approval from the secret court that oversees the Foreign Intelligence Surveillance Act (FISA) to monitor the communications of Carter Page . . . .").

June 20, 2016, and December 13, 2016.[74] Steele had been a "longtime FBI source" who received over $160,000 from the Democratic National Committee ("DNC") and the Clinton campaign via the law firm Perkins Coie and Fusion GPS, an opposition research firm, to "obtain derogatory information on Donald Trump's ties to Russia."[75] According to the Nunes Memo, the Dossier was an integral part of a FISA application submitted by the DOJ and FBI to electronically surveil Carter Paige, but neither the initial October 21, 2016 FISA application nor any of the three renewal applications disclosed that the DNC and/or the Clinton campaign funded Steele's efforts to gather compromising information to compile the memoranda that comprise the Dossier "or that the FBI had separately authorized payment to Steele for the same information."[76] The FBI suspended and terminated Steele as a source for what it considers to be the most serious of violations—an unauthorized disclosure of his arrangement with the FBI via a *Mother Jones* article, dated October 31, 2016.[77] Steele should have been terminated for previously failing to disclose contacts with

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[74] *See id.*

[75] Nunes Memo, *supra* note 8, at 2.

[76] *Id.*; *see also id.* (noting that the Page FISA application extensively cited a *Yahoo News* article written by Michael Isikoff, dated September 23, 2016, which focuses on Page's trip to Moscow in July 2016, but that the article does not corroborate the Dossier because the article "is derived from information leaked by Steele himself to *Yahoo News* . . . [as] Steele has admitted in British court filings that he met with *Yahoo News*—and several other outlets—in September 2016 at the direction of Fusion GPS. Perkins Coie was aware of Steele's initial media contacts because they hosted at least one meeting in Washington D.C. in 2016 with Steele and Fusion GPS where this matter was disclosed"); Michael Isikoff, *U.S. Intel Officials Probe Ties Between Trump Adviser and Kremlin*, YAHOO! (Sept. 23, 2016), https://www.yahoo.com/news/u-s-intel-officials-probe-ties-between-trump-adviser-and-kremlin-175046002.html; *see also* Def.s' Resp. to Claimant's Req. for Further Information Pursuant to CPR Part 18, *Gubarev v. Orbis Business Intelligence Ltd.*, Claim No. HQ17D00413, at 7 (In the High Court of Justice Queen's Bench Division May 18, 2017) (providing Christopher Steele's response to a request for information in a lawsuit filed by claimants, Aleksej Gubarev and Webzilla B.V., among others, in the High Court of Justice, Queen's Bench Division, which response states that "the words complained of were published by BuzzFeed as part of an article which stressed that the contents of the [D]osier (which included the December memorandum) were '*unverified*', '*unconfirmed*' and contained '*unverified, and potentially unverifiable allegations*.' The article added that, '*BuzzFeed News reporters in the US and Europe have been investigating the alleged facts in the [D]osier but have not verified or falsified them.*' The article reported that the President-elect's attorney, Michael Cohen, had said that allegations in the [D]osier '*were absolutely false*'. In these circumstances, readers of the words complained of were therefore aware that (i) the contents of the December memorandum did not represent (and did not purport to represent) verified facts, but were raw intelligence which had identified a range of allegations that warranted investigation given their potential national security implications; (ii) persons mentioned in the December memorandum were unlikely to have been approached for comment, and therefore many of those persons were likely to deny the allegations contained in the raw intelligence; and (iii) while the December memorandum was prepared in good faith, its content must be critically viewed in light of the purpose for and circumstances in which the information was collected").

[77] Nunes Memo, *supra* note 8, at 2; *see* David Corn, *A Veteran Spy Has Given the FBI Information Alleging a Russian Operation to Cultivate Donald Trump*, MOTHER JONES (Oct. 31, 2016, 11:52 PM), https://www.motherjones.com/politics/2016/10/veteran-spy-gave-fbi-info-alleging-russian-operation-cultivate-donald-trump/ ("At the end of August, [Senate Minority Leader Harry] Reid had written to Comey and demanded an investigation of the 'connections between the Russian government and Donald Trump's presidential campaign,' and in that letter he indirectly referred to Carter Page, an American businessman cited by Trump as one of his foreign policy advisers, who had financial ties to Russia and had recently visited Moscow. Last month, *Yahoo News* reported that US intelligence officials were probing the links between Page and senior Russian officials. (Page has called accusations against him "garbage.") [sic] On Monday, NBC News reported that the FBI has mounted a preliminary inquiry into the foreign business ties of Paul Manafort, Trump's former campaign chief. But Reid's recent note hinted at more than the Page or Manafort affairs. And a former senior intelligence officer for a Western country who

Yahoo News and other media outlets in September 2016—before the Page FISA application was submitted to the FISC on October 21, 2016—but Steele concealed and lied about those contacts to the FBI.[78]

On January 10, 2017, Aleksej Gubarev ("Gubarev") filed a lawsuit against BuzzFeed, Inc. ("BuzzFeed") in the Circuit Court of Brown County, Florida, seeking to recover damages for BuzzFeed's alleged defamatory publication of an article containing the unverified Dossier, which Gubarev claims falsely accused Gubarev of conspiring to undermine American Democracy and

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specialized in Russian counterintelligence tells *Mother Jones* that in recent months he provided the bureau with memos, based on his recent interactions with Russian sources, contending the Russian government has for years tried to co-opt and assist Trump—and that the FBI requested more information from him.").

78 Nunes Memo, *supra* note 8, at 2–3. Earlier that day, *Slate Magazine* posted an article alleging that Trump has "nefarious ties" with a Russian bank, Alfa, and the Clinton campaign used the article as ammunition against Trump one week prior to the 2016 election. Franklin Foer, *Was a Trump Server Communicating with Russia?*, SLATE (Oct. 31, 2016, 5:36 PM), http://www.slate.com/articles/news_and_politics/cover_story/2016/10/was_a_server_registered_to_the_trump_organization_communicating_with_russia.html) (alleging that Trump has secret communications with Russian bank Alfa, citing a group of scientists claiming to have proof of server pings between a Trump hotel server and Alfa's server); *see* Peter Hasson, *Fusion GPS Tied to Story Used by Clinton Campaign to Attack Trump Week Before the Election*, DAILY CALLER (Dec. 11, 2017, 9:11 PM) (citing.Foer, *supra*), http://dailycaller.com/2017/12/11/fusion-gps-tied-to-story-used-by-clinton-campaign-to-attack-trump-week-before-the-election/ ("The Clinton campaign immediately used Foer's hit piece, which was reportedly produced by their own opposition research firm, to accuse Trump of being too close with Russia. 'This secret hotline may be the key to unlocking Trump's ties to Russia,' Clinton campaign press secretary Jake Sullivan said at the time, calling it 'the most direct link yet between Donald Trump and Moscow.' The campaign sent out a tweet from Hillary Clinton's Twitter account attacking Trump for the story. The tweet went viral, getting more than 28,000 likes or retweets."). The story was created by Fusion GPS and failed to pass follow-up media scrutiny. *See* Hasson, *supra*; *see also* Philip Bump, *That Secret Trump-Russia Email Server Link Is Likely Neither Secret Nor a Trump-Russia Link*, WASH POST. (Nov. 1, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/11/01/that-secret-trump-russia-email-server-link-is-likely-neither-secret-nor-a-trump-russia-link/?utm_term=.d973a35465ab (discrediting the allegations contained in Franklin Foer's *Slate* article); Rowan Scarborough, *Fusion GPS Tried to Tie Trump to Clinton's Pedophile Pal Epstein As Part of Smear Campaign*, WASH. TIMES (Dec. 10, 2017), https://www.washingtontimes.com/news/2017/dec/10/glenn-simpsons-fusion-gps-ran-donald-trump-smear-c/?utm_source=RSS_Feed&utm_medium=RSS (internal quotations omitted) ("Fusion GPS, the opposition research firm whose Democrat-financed Russia dossier fueled an FBI investigation into Donald Trump, pitched other stories about the Republican presidential candidate to Washington reporters, including an attempt to tie him to a convicted pedophile who was once buddies with former President Bill Clinton. . . . For years, Fusion GPS has been an influential hidden hand in Washington, with entree into the city's most powerful news bureaus. Behind the scenes, the private intelligence firm run by former *Wall Street Journal* reporters was particularly active last year working to defeat Mr. Trump. Fusion leader Mr. Simpson, who railed against sleazy opposition research as a reporter, harbored a strong desire to bring down the builder of hotels with, well, opposition research. Fusion representatives met with *New York Times* reporters during the Democratic National Convention in July 2016. Ironically, it appears *The Times* was the first to out Fusion on Jan. 11 as the source of the scandalous dossier that *Buzzfeed* posted the previous day. *Buzzfeed* did the posting without identifying Fusion or dossier writer Christopher Steele, a former British spy. The *New York Times*, I know they work with Fusion, said Mr. Silverstein, an investigative reporter who skewers the left and right. Fusion works with a lot of big media organizations. That would give them influence in Washington."). *See* Memorandum from Charles E. Grassley, Chairman, U.S. Senate Comm. on the Judiciary, and Lindsey O. Graham, Chairman, Subcomm. on Crime and Terrorism, U.S. Senate Comm. on the Judiciary, to Rod J. Rosenstein, Deputy Attorney Gen., U.S. Dep't of Justice, and Christopher A. Wray, Dir., Fed. Bureau of Investigation (Jan. 4, 2018) [Grassley Memo], https://www.judiciary.senate.gov/imo/media/doc/2018-02-06%20CEG%20LG%20to%20DOJ%20FBI%20(Unclassified%20Steele%20Referral).pdf (elaborating on Steele's relationships with Fusion GPS, the FBI and media outlets, as well as his activities related to the Dossier).

the 2016 election, in addition to conspiring to commit crimes against the Democratic Leadership.[79] The Washington Free Beacon, a conservative website and Republic donor, initially hired Fusion GPS to conduct anti-Trump research, but it discontinued the arrangement after Trump was elected as the Republican nominee.[80] Thereafter, Hillary Clinton's campaign and the DNC retained the Perkins Coie law firm, and the Clinton campaign and the DNC began funding Steele's research for the Dossier via Perkins Coie and Fusion GPS.[81] Steele approached the FBI with the Dossier and eventually "reached an agreement with the FBI a few weeks before the election for the bureau to pay him to continue his work."[82] Before and after the FBI terminated its arrangement with Steele due to his "demonstrate[ing] that [he] had become a less than reliable source" after his unauthorized disclosure of his relationship with the FBI to media outlets, Steele maintained contact with a senior DOJ official, then-Associate Deputy Attorney General Bruce Ohr ("Ohr"), whose wife was employed by Fusion GPS to assist with the opposition research on Trump.[83] Ohr provided the FBI with all of his wife's opposition research.[84]

The FBI presented the Dossier as evidence to support its initial October 21, 2016 Page FISA application to obtain approval to electronically surveil Page, but the DOJ and FBI's initial FISA application did not disclose that that the FBI had authorized payment to Steele for the information or that Steele was working for and paid by the Clinton campaign and the DNC.[85] Moreover, the

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79 Complaint, *Gubarev v. Orbis Business Intelligence Ltd.*, Claim No. HQ17D00413, Filing No. 52031663, at 1–2 (Feb. 3, 2017) (In the High Court of Justice Queen's Bench Division May 18, 2017).

80 *See* Kenneth P. Vogel & Maggie Haberman, *Conservative Website First Funded Anti-Trump Research by Firm That Later Produced Dossier*, N.Y. TIMES (Oct. 27, 2017), https://www.nytimes.com/2017/10/27/us/politics/trump-dossier-paul-singer.html ("The Washington Free Beacon, a conservative website funded by a major Republican donor, first hired the research firm that months later produced for Democrats the salacious dossier describing ties between Donald J. Trump and the Russian government . . . .); *see also* Editorial Board, *Democrats, Russians and the FBI*, WALL ST. J. (Oct. 25, 2017, 6:49 PM), https://www.wsj.com/articles/democrats-russians-and-the-fbi-1508971759 ("The Washington Post revealed Tuesday that the Hillary Clinton campaign and Democratic National Committee jointly paid for that infamous "dossier" full of Russian disinformation against Donald Trump. They filtered the payments through a U.S. law firm (Perkins Coie), which hired the opposition-research hit men at Fusion GPS. Fusion in turn tapped a former British spook, Christopher Steele, to compile the allegations, which are based largely on anonymous, Kremlin-connected sources.").

81 *See supra* note 75 (explaining that the Clinton campaign and the DNC paid Steele more than $160,000 via the law firm Perkins Coie and Fusion GPS for Steele to gather the information contained in the Dossier).

82 Tom Hamburger and Rosalind S. Helderman, *FBI Once Planned to Pay Former British Spy Who Authored Controversial Trump Dossier*, WASH POST. (Feb. 28, 2017), https://www.washingtonpost.com/politics/fbi-once-planned-to-pay-former-british-spy-who-authored-controversial-trump-dossier/2017/02/28/896ab470-facc-11e6-9845-576c69081518_story.html?utm_term=.4d8f27ef1e8e.

83 Nunes Memo, *supra* note 8, at 3.

84 *Id.*

85 *Id.* at 2–3; *see supra* note 76 and accompanying text (stating that the Dossier was an integral part of the initial Page FISA application, but the application failed to disclose that the DNC and Clinton campaign funded Steele's work and that the FBI had authorized payment to Steele for the same work). *See* Nunes Memo, *supra* note 8, at 3 (noting that Assistant Director Bill Priestap, head of the FBI's counterintelligence division, stated that "corroboration of the [Dossier] was in its 'infancy' at the time of the initial Page FISA application"). However, in early January 2017, James Comey, then-FBI Director, briefed then-President-elect Trump on the Dossier although he testified before the

FBI did not disclose the information about the Ohrs' relationship with Steele and/or Fusion GPS to the FISC.[86] In December 2017, FBI Deputy Director Andrew McCabe ("McCabe") supposedly testified before the HPSCI "that no surveillance warrant would have been sought from the FISC without the [D]osier information."[87] On January 29, 2018, McCabe announced that he was stepping down from his position at the FBI.[88]

On July 15, 2016, Hermitage Capital Management, through CEO William Browder, sent a formal complaint to the FARA Unit, which alleges that several individuals were involved in an ongoing lobbying campaign to repeal the Magnitsky Act on behalf of the Human Rights Accountability Global Initiative Foundation, in violation of FARA and the LDA.[89] Among the individuals alleged to have committed FARA violations are Glenn Simpson ("Simpson"), a former *Wall Street Journal* correspondent who co-founded Fusion GPS, and Natalia Veselnitskaya ("Veselnitskaya"), a Russian lawyer who represented Prevezon Holdings Limited ("Prevezon"), a Russian-owned Cyprus company.[90] One of the highly discussed topics in the Russia Scandal is a

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Senate Intelligence Committee in June 2017 that the information contained in the Dossier was "salacious and unverified." Nunes Memo, *supra* note 8, at 3. To obtain approval of a FISA application, the FISC must enter an ex parte order approving the electronic surveillance after finding that:

> (1) the application has been made by a Federal officer and approved by the Attorney General; (2) on the basis of the facts submitted by the applicant there is probable cause to believe that—
> (A) the target of the electronic surveillance is a foreign power or an agent of a foreign power . . . .

50 U.S.C.A. § 1805. *See* First Amendments Reauthorization Act of 2017, Pub. L. No. 115-118, 132 Stat. 3 (2018) (proving the legislation enacted to amend FISA for purposes of "improve[ing] foreign intelligence collection and the safeguards, accountability, and oversight of acquisitions of foreign intelligence, to extend title VII of such Act, and for other purposes"); *see also supra* note 56 (discussing Page's role in the DOJ's 2015 FBI "spy case" to assist U.S. prosecutors in pursuing criminal charges against three Russian spies, who allegedly had tried to recruit Americans, including Page, for conspiracy to commit and the commission of FARA violations, among other charges).

[86] Nunes Memo, *supra* note 8, at 3.

[87] *Id.* Also, Senator Mark Warner, the Democrat on the Senate Intelligence Committee leading its Russia Scandal investigation, "had extensive contact last year with a lobbyist for a Russian oligarch" who allegedly offered Warner access to the Dossier. Ed Henry, *Democratic Sen. Mark Warner Texted with Russian Oligarch Lobbyist in Effort to Contact Dossier Author Christopher Steele*, FOX NEWS (Feb. 8, 2018), http://www.foxnews.com/politics/2018/02/08/democratic-sen-mark-warner-texted-with-russian-oligarch-lobbyist-in-effort-to-contact-dossier-author-christopher-steele.html. *See id.* (providing a link to the text messages exchanged between Mark Warner, Democrat-Virginia, Senate Intelligence Committee and Adam Waldman, a U.S. lobbyist) (see file:///C:/Users/alipinski/Downloads/371101285-TEXTS-Mark-Warner-texted-with-Russian-oligarch-lobbyist-in-effort-to-contact-Christopher-Steele.pdf to access the text messages directly).

[88] *See* Mary Kay Mallonee, et al., *FBI Deputy Director Andrew McCabe Steps down Abruptly*, CNN (Jan. 30, 2018, 1:44 AM), https://www.cnn.com/2018/01/29/politics/andrew-mccabe-fbi/index.html.

[89] *See* Complaint Regarding the Violation of US Lobbying Laws by the Human Rights Accountability Global Initiative Foundation and Others by Hermitage Capital Management, FARA Unit, at 1 (July 15, 2016) [hereinafter Complaint], https://www.grassley.senate.gov/sites/default/files/judiciary/upload/Russia%2C%2003-31-17%2C%20Magnitsky%20Act%20-%202016-%2007-15%20HCM%20Complaint%20to%20FARA%20%28003%29_Redacted.pdf.

[90] *See id.* at 3–4 ("Through the creation of a new NGO which appears to be disguising its lobbying activities, the lobbying of Congress, and the screening of a film intended to spread misinformation about the history of Sergei

controversial meeting between Veselnitskaya and Donald Trump, Jr. ("Trump, Jr."), Jared Kushner ("Kushner") and Paul Manafort ("Manafort"), which occurred in June 2016.[91] British publicist Rob Goldstone ("Goldstone") arranged the meeting by sending emails to Donald Trump, Jr., in which Goldstone claims he "puffed up" the wording to secure the meeting, offering "official" Russian documents that he claimed would "incriminate" Hillary Clinton and "be very useful to [his] father."[92] Although Veselnitskaya had been permitted to enter the United States on three previous occasions for her role in the Prevezon case, United States Attorney Preet Bharara of Manhattan "specifically refused Veselnitskaya's request that the Justice Department authorize her trip via a mechanism known as immigration parole, which allows the attorney general to temporarily suspend immigration requirements on a case-by-case basis."[93] Veselnitskaya lobbied to repeal the Magnitsky Act on behalf of the Russian government and "played a key role" in the Russian government's attempt to rewrite the history of Sergei Magnitsky without registering under FARA or the Lobbying Disclosure Act.[94]

On March 31, 2017, Charles E. Grassley, Chairman of the Senate Judiciary Committee ("Senator Grassley"), sent a letter to the DOJ following up on Hermitage Capital's formal FARA complaint, asserting that "[t]he issue is of particular concern to the Committee given that when Fusion GPS reportedly was acting as an unregistered agent of Russian interests, it appears to have been simultaneously overseeing the creation of the unsubstantiated [D]ossier of allegations of a

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Magnitsky, the individuals and lobbyists identified below are in breach of various statutory lobbying requirements under FARA and the LDA 1995. 1. Creation of the Human Rights Accountability Global Initiative Foundation ("HRAGIF") . . . . C. The following people were involved in HRAGIF's lobbying activities, and are listed as in-house lobbyists on HRAGIF's LDA filings: . . . Natalia Veselnitskaya, the Russian lawyer for Prevezon."); *id.* at 1 (asserting that Glenn Simpson of SNS Global and Fusion GPS was hired to lobby on behalf of HRAGIF in violation of FARA and the LDA).

[91] *See* Jonathan Easley, Katie Bo Williams and Morgan Chalfant, *Clinton, Trump and the Russia Dossier: What You Need to Know*, THE HILL (Oct. 28, 2017, 12:31 PM), http://thehill.com/homenews/campaign/357581-clinton-trump-and-the-russia-dossier-what-you-need-to-know.

[92] Chris Baynes, *British Publicist Who Arranged Donald Trump Jr's Meeting with Russian Lawyer Breaks Silence on Collusion claims*, INDEPENDENT (Nov. 19, 2017, 3:56 PM), http://www.independent.co.uk/news/world/americas/us-politics/british-publicist-arranged-donald-trump-jr-meeting-russian-lawyer-breaks-silence-rob-goldstone-a8063371.html.

[93] Alison Frankel, *How Did Russian Lawyer Veselnitskaya Get into U.S. for Trump Tower Meeting?*, REUTERS (Nov. 6, 2017, 4:15 PM), https://www.reuters.com/article/legal-us-otc-veselnitskaya/how-did-russian-lawyer-veselnitskaya-get-into-u-s-for-trump-tower-meeting-idUSKBN1D62Q2.

[94] *See* Complaint, *supra* note 78, at 4. *See generally* Testimony of William Browder on FARA Violations Connected to the Anti-Magnitsky Campaign by Russian Government Interests, Before the Judiciary Committee, U.S. Senate, at 1, 6 (July 26, 2017) (informing the Senate Judiciary Committee of his knowledge regarding the death of Sergei Magnitsky and stating that Veselnitskaya headed the lobbying campaign to repeal the Magnitsky Act on behalf of the Russian state in coordination with a large of American lobbyists); *see also* Chris York, *Here's the Explosive Russia Testimony You Missed Whilst Distracted by 'The Mooch'*, HUFF. POST (last updated Aug. 4, 2017), http://www.huffingtonpost.co.uk/entry/bill-browders-senate-judiciary-committee-hearing_uk_597ee55ce4b02a4ebb7675a6 (providing the full transcript of William Browder's July 26, 2017 testimony before the Senate Judiciary Committee, which includes his testimony that "What you need to understand about the Russians is there is no ideology at all. Vladimir Putin is in the business of trying to create chaos everywhere").

conspiracy between the Trump campaign and the Russians."[95] Despite the formal FARA complaint and follow-up by the Senate Judiciary Committee, the DOJ has not pursued criminal FARA cases against Fusion GPS or Veselnitskaya. Although the DOJ has not pursued criminal cases against any of the individuals who have been accused of violating FARA for their connections to the Dossier, Special Counsel Mueller has indicted multiple former Trump campaign associates for alleged FARA violations as a result of his findings during the investigation.[96] Mueller's indictments against former members of Trump's campaign could be construed as an attempt by the DOJ to enhance its enforcement strategy by pursing criminal cases against unregistered agents of foreign principals who violate FARA's provisions.[97]

C. Mueller Files Indictments Against Associates of President Trump's Campaign

On October 27, 2017, a federal grand jury returned an indictment against Paul Manafort ("Manafort"), Trump's former campaign chairman, and Rick Gates ("Gates"), former Trump campaign official, with twelve counts, including a charge for "knowingly and willfully, without registering with the Attorney General as required by law, act[ing] as agents of a foreign principal, to wit, the Government of Ukraine, the Party of Regions, and Yanukovych."[98] On April 6, 2017, Senator Grassley reported to the DOJ that Manafort, Gates, the Podesta Group and Mercury LLC failed to register under FARA for their work on behalf of the Ukrainian government.[99] Manafort and Gates allegedly acted as unregistered agents of the Government of Ukraine, the Party of Regions, a Ukrainian political party and the Opposition Bloc, and they generated millions of dollars in income as a result of their work for Ukrainian principals.[100] They purportedly laundered more than $75 million through offshore accounts to hide Ukrainian payments from United States

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[95] Letter from Charles E. Grassley, Chairman, S. Judiciary Comm., to Deputy Attorney Gen., Dep't of Justice, at 1 (Mar. 31, 2017) [hereinafter Grassley Letter 1], https://www.grassley.senate.gov/sites/default/files/judiciary/upload/2017-03-31%20CEG%20to%20DOJ%20%28Anti-Magnitsky%20FARA%20violations%29%20with%20attachments.pdf.

[96] *See infra* Part II.C (discussing the indictments of Paul Manafort, Rick Gates and Michael Flynn, former Trump campaign and transition team members).

[97] *See* Grassley Letter 1, *supra* note 95, at 2–5; *see also supra* note 29 and accompanying text (explaining that Congress transformed the purpose of FARA to tie up some of the loose ends through which attorneys, lobbyists and political officials in the United States circumvented FARA's registration requirements); *but see supra* Part I.B–I.C (discussing how the attorney and LDA exemptions and the broad definitions included in the Act's provisions have created loopholes that allow attorneys, lobbyists and individuals engaged in political activities to circumvent FARA's registration and disclosure requirements); *infra* Part II.C (discussing the indictments filed against Paul Manafort, Rick Gates and Michael Flynn, associates of Trump's campaign and transition team).

[98] *United States v. Manafort*, Case No. 1:17-cr-00201 (D.D.C., Oct. 27, 2017) [hereinafter Manafort Indictment], https://www.politico.com/f/?id=0000015f-6d73-d751-af7f-7f735cc70000.

[99] *See* Letter from Charles E. Grassley, Chairman, S. Judiciary Comm., to Dana Boente, Acting Attorney General, U.S. Dep't of Justice (Apr. 6, 2017) [hereinafter Grassley Letter 2], https://www.judiciary.senate.gov/imo/media/doc/2017-04-06%20CEG%20to%20DOJ%20(Manafort%20Podesta%20FARA).pdf.

[100] Manafort Indictment, *supra* note 98, ¶ 1.

authorities.[101] While these indictments are considered the first charges to be brought in connection with the Russia Scandal, none of the charges for which Manafort and Gates were indicted related to any activity in their capacities as Trump campaign associates, as their alleged criminal activity was committed prior to their joining the Trump campaign.[102]

After Manafort and Gates were indicted, Grassley wrote a letter to Attorney General Jeff Sessions, which is dated November 15, 2017, concerning lobbying work completed by the Podesta Group on behalf of Uranium One, Inc. ("Uranium One"), a Canadian company owned by Rosatom, the Russian State Corporation for Nuclear Energy.[103] Specifically, Grassley stated:

> On April 6, 2017, I wrote to the Justice Department regarding reports that Paul Manafort, Rick Gates, the Podesta Group, and Mercury LLC failed to register under the Foreign Agents Registration Act (FARA) for work on behalf of the Ukrainian government. Since then, all have registered under FARA, and Mr. Manafort and Mr. Gates have been charged by Special Counsel Mueller for violating that statute. However, the Podesta Group and Mercury LLC have not been charged.[104]

The Podesta Group defended its decision not to register under FARA for its lobbying on behalf of Uranium One, claiming that it was exempt from FARA because it was engaged in political activities on behalf of a foreign corporation when it was not "serving predominately a foreign interest where the political activities are directly in furtherance of the bona fide commercial, industrial, or financial operations of the foreign corporation."[105] However, Tony Podesta, the founder of the Podesta Group and brother to John Podesta, Clinton's campaign chairman, resigned from the firm in response to Mueller's investigation.[106] While Mueller has not pursued a criminal FARA case against the Podesta Group and/or Tony Podesta, Mueller filed a one-count information against Michael T. Flynn, former National Security Advisor ("Flynn"), for making false

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[101] *See id.*, ¶ 6.

[102] *See generally id.* (charging Manafort and Gates for serving as political consultants, lobbyists and acting as unregistered agents for work performed on behalf of the Ukrainian, the Party of Regions, Yanukovych and the Opposition Bloc between at least 2006 and 2015).

[103] Letter from Charles E. Grassley, Chairman, S. Judiciary Comm., to Jeff Sessions, Attorney General, U.S. Dep't of Justice, at 1 (Nov. 15, 2017) [hereinafter Grassley Letter 3], https://www.judiciary.senate.gov/imo/media/doc/2017-11-15%20CEG%20to%20DOJ%20(Uranium%20One%20FARA).pdf.

[104] *Id.*

[105] 28 C.F.R. § 5.304(c) (2017); *see* Richard Pollock, *Tony Podesta Lobbied for Russia's 'Uranium One' and Did Not File As a Foreign Agent*, Daily Caller (Nov. 5, 2017, 7:57 PM), http://dailycaller.com/2017/11/05/tony-podesta-lobbied-for-russias-uranium-one-and-did-not-file-as-a-foreign-agent/ ("The Podesta Group defended its decision not to file under FARA regarding Uranium One, saying they were exempt from FARA under a Justice Department rule in 28 CFR 5.304 paragraph C."); *supra* Parts I.A–I.C (discussing FARA's definition of "political activities" and the commercial exemption).

[106] *See* Anna Giaritelli, *Tony Podesta Resigns from Lobbying Firm Amid Robert Mueller Investigation*, WASH. EXAMINER (Oct. 30, 2017, 1:14 PM), http://www.washingtonexaminer.com/tony-podesta-resigns-from-lobbying-firm-amid-robert-mueller-investigation/article/2638986.

statements.[107] Flynn had collected $530,000 for his lobbying work on behalf of a firm with connections to the Turkish government during the presidential campaign, as indicated by his retroactive FARA registration statement.[108]

Although the indictments against Manafort, Gates and Flynn do not appear to be related to their roles in the Russia Scandal, the alleged charges for FARA violations contained in the indictments appear to be warranted. However, the DOJ has yet to pursue criminal charges for FARA violations against Veselnitskaya and Fusion GPS for their involvement in the Russia Scandal after it had been notified of the alleged violations reinforces the criticism against the DOJ for its lack of a comprehensive enforcement strategy.[109] Moreover, the FBI's authorization of payments to Steele for his work in connection with the Dossier and presenting the Dossier as evidence before the FISA Court to obtain approval to electronically surveil Page—knowing that the information contained in the Dossier had not been verified—has generated concerns about the legitimacy and legality of the DOJ's and FBI's interactions with the FISC and perhaps their politically motivated abuse of authority.[110]

III. Proposed Amendments to FARA Designed to Curtail Foreign and Political Corruption

A. Legislation Proposed by Congress in Response to Russia Scandal

In response to the high profile cases of unregistered and/or untimely registered foreign agents revealed through the Russia Scandal investigations, Democrats and Republicans in Congress have introduced legislation to amend FARA.[111] The bills proposed by Senate and House Republicans

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107 *United States v. Flynn*, Case No. 1:17-cr-00232, at 1 (D.D.C., Nov. 30, 2017) [hereinafter Flynn Indictment], https://www.politico.com/f/?id=00000160-128a-dd6b-afeb-37afd8000000.

108 *See* Michael Flynn Registration Statement, FARA Unit, U.S. Dep't of Justice (March 7, 2017), https://www.fara.gov/docs/6406-Registration-Statement-20170307-1.pdf.

109 *See supra* Part II.B (demonstrating the DOJ's refusal to pursue FARA criminal cases against Veselnitskaya, Fusion GPS, Steele and other unregistered agents of foreign principals despite Hermitage Capital's forma FARA complaint and the Senate Judiciary Committee's follow-up letter); *see also supra* note 53 and accompanying text (asserting that amending FARA's provisions to require more stringent registration requirements or clarify its broad definitions and exemptions will not remedy the Department of Justice's lax enforcement of the law).

110 *See supra* notes 82–88 (explaining that the FBI authorized payment to Steele for his work in relation to the Dossier, that the DOJ and FBI relied upon the Dossier in the initial Page FISA application that they submitted to the FISC to obtain permission to electronically surveil Page and failed to disclose or reference the role of the Clinton campaign, DNC or any of their relationships with Steele); *see also* Nunes Memo, *supra* note 8, at 1 (describing the HPSCI's concerns with the DOJ's .and the FBI's interactions with the FISC).

111 *See* H.R. 4504, 115th Cong. (1st Sess. 2017) (introducing legislation—sponsored by Representative Mike Quigley (Democrat – Illinois) and referred to the Committee on Oversight and Reform on November 30, 2017—to amend FARA, among other statutes, by improving registration information from agents of foreign principals, striking the exemption for lobbyists who register under the LDA and requiring lobbyists who file under the LDA to simultaneously file under FARA); S. 2039, 115th Cong. (1st Sess. 2017) (proposing a bill—introduced by Senator Grassley (Republican – Iowa), read twice and referred to the Committee on Foreign Relations—to amend FARA by promoting greater transparency in the registration for agents of foreign principals, provide the Attorney General with greater authority to investigate alleged violations of the Act and bring criminal and civil actions against persons who violate

would permit the DOJ to enforce registrations under FARA by demanding the production of documents and testimony to ensure compliance.[112] They would also eliminate a broad exemption from registration for those who register under the LDA—an exemption established in 1995 that was recommended for a formal assessment by the DOJ's Office of the Inspector General—and require the DOJ to develop a comprehensive enforcement strategy.[113] The bill introduced by Senate Democrats would allow the DOJ to impose civil fines for FARA violations, as the law currently imposes only criminal penalties.[114] While some of the proposed amendments to FARA presented in both pieces of legislation would promote more effective oversight and enforcement of the law and/or impose harsher penalties for certain violations, the proposed amendments will not prevent unregistered agents of foreign principals from escaping conviction for FARA violations due to the lack of sufficient evidence necessary to meet the high burden of proving willful conduct.[115] Moreover, the proposed amendments to FARA that impose harsher penalties for certain violations do not impose penalties severe enough to deter certain agents of foreign principals—such as the unregistered Russian agents involved in the Russia Scandal—who are motivated to influence the United States' policies and political processes, from refusing to register under FARA. The proposed amendments do not close the loopholes that allow individuals who work on behalf of a foreign principal to circumvent FARA registration requirements by retaining an American law firm to hire and pay for a lobbyist, public relations executive or even a spy's services, nor do they prevent foreign principals from influencing United States policies by funding political organizations through their domestic subsidiaries.[116]

B. Foreign and Political Interference Prevention Act – Proposed 2018 Amendments to FARA

A BILL

To amend the Foreign Agents Registration Act of 1938, as amended, to repeal certain exemptions and impose more severe penalties for violators.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Foreign and Political Interference Prevention Act.'

FARA); H.R. 4170, 115th Cong. (1st Sess. 2017) (introducing legislation proposed by six House Republicans, which is identical to S. 2039).

[112] *See* S. 2039; H.R. 4170.

[113] S. 2039; H.R. 4170.

[114] H.R. 4504.

[115] *See supra* notes 67–70 and accompanying text (explaining how the high burden of proving willful conduct hinders prosecutors' ability to convict unregistered agents of foreign principals for FARA violations).

[116] *See supra* Part II.B (describing how the Clinton campaign and the DNC paid for Fusion GPS, an unregistered foreign agent, to conduct opposition research by shielding their payments through the Perkins Coie law firm).

SECTION 2. AMENDING EXEMPTION FROM REGISTRATION UNDER FOREIGN AGENTS REGISTRATION ACT OF 1938 FOR PRIVATE AND NONPOLITICAL ACTIVITIES; SOLICITATION OF FUNDS.

(a) Private and nonpolitical activities; solicitation of funds. Section 3 of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 613) is amended—

(1) Subsection (d) to read as follows:

(d) Private and nonpolitical activities; solicitation of funds

Any person engaging or agreeing to engage only (1) in private and nonpolitical activities in furtherance of the bona fide trade or commerce of such foreign principal; or (2) in other activities not serving predominantly a foreign interest; or (3) in the soliciting or collecting of funds and contributions within the United States to be used only for medical aid and assistance, or for food and clothing to relieve human suffering, if such solicitation or collection of funds and contributions is in accordance with and subject to the provisions of subchapter II of chapter 9 of this title, and such rules and regulations as may be prescribed thereunder; *provided that any such person is not a: (1) domestic organization; (2) owned, operated, controlled and/or managed by a "foreign principal" as defined under Section 611(b) under this Act; and (3) soliciting, receiving and/or collecting funds, donations and/or contributions.*

STATEMENT

This proposed amendment to 22 U.S.C. § 613(d) is designed to close the loophole that allows domestic organizations or entities that are effectively agents of foreign principals from circumventing FARA's registration requirements by creating an exception to the commercial exemption that brings domestic organizations, which are owned, controlled or operated by a foreign principal and soliciting or receiving funds, within the purview of the definition of an "agent of a foreign principal."

SEC. 3. AMENDING EXEMPTION FROM REGISTRATION UNDER FOREIGN AGENTS REGISTRATION ACT OF 1938 FOR PERSONS QUALIFIED TO PRACTICE LAW.

(a) Persons qualified to practice law. Section 3 of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 613) is amended—

(1) Subsection (g) to read as follows:

(g) Persons qualified to practice law

Any person qualified to practice law, insofar as he engages or agrees to engage in the legal representation of a disclosed foreign principal before any court of law or any agency of the Government of the United States: Provided, That for the purposes of this subsection legal

representation does not include attempts to influence or persuade agency personnel or officials other than in the course of judicial proceedings, criminal or civil law enforcement inquiries, investigations, or proceedings, or agency proceedings required by statute or regulation to be conducted on the record.

Any person who qualifies for this exemption under 22 U.S.C. § 613(g) cannot invoke the attorney-client privilege as to any communications, which contain financial information and/or are related to any funds collected, received, paid, exchanged or distributed, between such exempt individual and any individual and/or entity that acts as an "agent" of a "foreign principal," or any "foreign principal," as these terms are defined under this Act.

Any person who qualifies for this exemption under 22 U.S.C. § 613(g) cannot invoke the attorney-client privilege as to any communications between any individual and/or entity that acts as an "agent" of a "foreign principal," or as to any communications between such exempt individual and any "foreign principal," as these terms are defined under this Act, unless such communications occur during the course of such exempt individual's representation of the "agent" of a "foreign principal" or "foreign principal" in connection with formal legal proceedings in the jurisdiction of the United States.

STATEMENT

The purpose of this proposed amendment to 22 U.S.C. § 613(g) is to prevent agents of foreign principals and foreign principals from retaining attorneys to serve as financial intermediaries, or in some other transactional or fiduciary capacity, for purposes of using the attorney-client privilege as a shield to conceal payments made and/or received by agents of foreign principals and/or foreign principals.

SEC. 4. REPEALING EXEMPTION FROM REGISTRATION UNDER FOREIGN AGENTS REGISTRATION ACT OF 1938 FOR PERSONS FILING DISCLOSURE REPORTS UNDER LOBBYING DISCLOSURE ACT OF 1995.

(a) Repeal of Exemption. Section 3 of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 613) is amended by striking subsection (h);

(b) Timing of Filing of Registration Statements. Section 2 of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 612) is amended—

(1) in subsection (a), in the matter preceding paragraph (1), in the fourth sentence, by striking "'The registration statement shall include' and inserting 'Except as provided in subsection (h), the registration statement shall include'; and

(2) by adding at the end the following:

'*(h) Filing of Statements by Persons Registered Under Lobbying Disclosure Act of 1995. In the case of an agent of a person described in section 1(b)(2) or an entity described in section 1(b)(3) who has registered under the Lobbying Disclosure Act of 1995 (2 U.S.C. § 1601 et seq.), after the*

agent files the first registration required under subsection (a) in connection with the agent's representation of such person or entity, the agent shall file all subsequent statements required under this section at the same time, and in the same frequency, as the reports filed with the Clerk of the House of Representatives or the Secretary of the Senate (as the case may be) under section 5 of the Lobbying Disclosure Act of 1995 (2 U.S.C.§ 1604) in connection with the agent's representation of such person or entity.'[117]

STATEMENT

The purpose of this proposed amendment to 22 U.S.C. § 613(h) is to repeal the exemption for lobbyists who register under the LDA to prevent lobbyists who register under the LDA from circumventing FARA's more stringent filing requirements.

SEC. 5. PROMOTING ENFORCEMENT OF REGISTRATION REQUIREMENTS FOR FOREIGN AGENTS BY IMPOSING MORE SEVERE PENALITIES.

(a) Enforcement and Penalties. Section 8 of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 618) is amended—

(1) Subsection "1." should be inserted after "**(a) Violations; false statements and willful omissions**" before "Any person who—" on the first line of 22 U.S.C. § 618(a)(1); former § 618(a)(1) should be converted to § 618(a)(1)(i); former § 618(a)(2) should be converted to § 618(a)(1(ii); and §§ 618(a)(2)–(3) should be inserted after § 618(a)(1)(ii) and as follows:

(a) Violations; false statements and willful omissions

(1) Any person who—

(i) willfully violates any provision of this chapter or any regulation thereunder, or

(ii) in any registration statement . . . .

(2) Any person who engages in or agrees to engage in "political activities" as defined under Section 613(d) of this Act, any person who is qualified to practice law and any person who is engaged or agrees to engage in lobbying activities in the United States and conspires, coordinates, participates in racketeering activity (as defined under 18 U.S.C. §§ 1961) and/or performs any act in conjunction or coordination with an unregistered agent of a foreign principal who is in violation of this Act, for purposes of interfering, influencing, impacting or affecting the United States' government affairs, policies, political processes, elections, appointments, whether directly or indirectly, shall be subject to deportation under 22 U.S.C. § 618(c).

(3) Any government or public official, anyone employed by any branch of the Government of the United States and/or anyone who represents himself as an agent of the Government of the United States, who conspires, coordinates, participates in racketeering activity (as defined under 18 U.S.C. §§ 1961) and/or performs any act in conjunction or coordination with an unregistered agent of a foreign principal or a foreign principal for purposes of interfering, influencing, impacting or affecting the United States' government affairs, policies, political processes, elections,

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[117] *See* H.R. 4170 (proposing an identical amendment).

appointments, whether directly or indirectly, shall be deemed to have committed treason against the United States and subject to punishment therefor in accordance with U.S. Const. art. III, § 3 and 18 U.S.C. § 2381.[118]

STATEMENT

This proposed amendment to 22 U.S.C. § 618(a) inserts a provision that imposes the penalty of deportation on politicians, attorneys, lobbyists government or anyone engaging in political activities in the United States who conspires with any agent of a foreign principal who fails to register in violation of FARA to influence or interfere with the United States' government affairs, policies or political processes. Additionally, this proposed amendment inserts a provision that subjects United States government and public officials to the penalty of treason for conspiring with any agent of a foreign principal who fails to register in violation of FARA to influence or interfere with the United States' government affairs, policies or political processes.

CONCLUSION

Individuals who engage in the type of foreign and politically corrupt activity that the delegates at the Constitution feared would flounder America and that Congress has sought to prevent, including the surreptitious activity displayed in the Russia Scandal, will continue to engage in such activity unless they fear the consequences therefor. The Foreign and Political Interference Prevention Act, as introduced in this Article as part of the 2018 amendments to FARA proposed by the author, might deter individuals from interfering with United States policies due to the potential of being subject to the punishment for treason. However, FARA will need a complete overhaul to effectively serve its purpose of deterring foreign influence in United States policies, affairs or elections in light of the rapid development of technology and the prevalence of social media advertisements. No law that merely requires registration is going to be effective unless it is strictly enforced, but the FARA Unit does not have the resources to ensure that agents of foreign principals are complying with FARA's provisions. Perhaps FARA could be reconstructed to acclimate an innovative registration or licensing system that is more conducive to market competition, but that likely will not happen in the foreseeable future.

The delegates accurately predicted that foreign and political corruption would flounder America in the future, and FARA has been a more effective avenue for corruption than it has a tool to curtail it. As demonstrated by the events surrounding the Russia Scandal, unregistered agents of a foreign principal are a threat to the United States' national security to the extent that they are violating FARA to avoid being detected—likely for their roles in connection with other unlawful activity in the United States as well—and engage in activity designed to interfere with

[118] *See* U.S. CONST. art. III, § 3 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."); 18 U.S.C. § 2381 (2016) ("Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States.").

the United States' government affairs, influence its policies and damage public trust. The Russia Scandal has dominated media new reports, cost taxpayers a significant amount of money by virtue of the expenses necessary to conduct the investigations, among other costs and expenses, distracted the United States' government officials from their duties to protect and serve the interests of its citizens that has caused political division among the citizens of the United States. American citizens have begun to question the integrity of the United States government, and United States government officials have become suspicious of some of the other government agencies' and officials' actions. and their officials.

Perhaps Russian President Vladimir Putin and other Russian Federation officials have conspired with numerous unregistered agents across the world for several years to influence countries' policies, interfere with their political processes and cause their citizens to question the integrity of their governments? Perhaps Vladimir Putin has been engaged in a "deep state" conspiracy that he successfully designed a scheme to disrupt public trust in the United States government that resulted in Donald Trump and Hillary Clinton being elected as the nominees for their respective parties, Donald Trump being elected as president and the appointment of a special counsel to investigate alleged Russian interference in the 2016 United States election and any collusion with Trump's campaign with the goal of provoking discussions about impeaching President Trump? In any event, Vladimir Putin has proven accurate William Browder's statement that "Vladimir Putin is in the business of trying to create chaos everywhere," as the Russia Scandal has been a "cloud" over the White House, revealed certain government officials' alleged abuse of power for political purposes and exposed the political and foreign corruption that flounders the United States.[119] If Congress enacted the Foreign and Political Interference Act and applied it retroactively to punish the individuals involved in the Russia Scandal, some government officials could be deemed to have committed treason and would be subject to the penalties therefor. The proposed 2018 amendments to FARA through the Foreign and Political Interference Prevent Act would be a step in the right direction, but in its current state, the Act is too flawed and the DOJ's enforcement is too delinquent to prevent foreign and political corruption from jeopardizing the integrity of the United States government and undermining its decision-making processes.

[119] *See supra* note 94 (noting that William Browder testified before the Senate Judiciary Committee on July 26, 2017, that "What you need to understand about the Russians is there is no ideology at all. Vladimir Putin is in the business of trying to create chaos everywhere"); *see also* Philip Rucker and Ashley Parker, *'Category 5 Hurricane': White House Under Siege by Trump Jr.'s Russia Revelations*, WASH. POST (July 12, 2017), https://www.washingtonpost.com/politics/category-5-hurricane-white-house-under-siege-by-trump-jrs-russia-revelations/2017/07/11/1e091478-664d-11e7-8eb5-cbccc2e7bfbf_story.html?utm_term=.1ae9558248da (contending that the White House "has been thrust into chaos" and that President Trump is enraged about the Russia "cloud" still hanging over his presidency).