

Bridging the Gap: Calibrating FARA Enforcement With Civil Penalties

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The Foreign Agents Registration Act (FARA)—a formerly obscure federal law designed to help the government monitor foreign influence in the United States—is obscure no longer. In 2023, cases abound: a charge lodged against a sitting U.S. senator for conspiring to help Egypt maintain its halal food export monopoly; increased scrutiny regarding foreign contributions to non-profit and cultural institutions; and a Grammy award-winning musician who lobbied on behalf of the Chinese government.

There also have been a fair number of criminal enforcement failures in this area. This is due to the Hobson's choice embedded in the statute: the extreme sanction of criminal enforcement or no real enforcement at all, without a meaningful civil middle ground. This lack of calibrated enforcement options has led to a series of grim FARA tales.

Historically, the U.S. Department of Justice (DOJ) has been subdued in its enforcement of FARA (once calling it “little known outside of the legal/lobbying community”). In recent years, however, FARA prosecutions have surged, driven not only by a rising concern over foreign involvement in the machinery of U.S. government, but also by the DOJ's deliberate reorientation toward the statute.

In 2019, John C. Demers, who led the Department's National Security Division, announced a shift from treating FARA merely as an “administrative obligation” to one that is “increasingly an enforcement priority.” Subsequently, the DOJ's FARA Unit appointed a criminal prosecutor to lead enforcement, underscoring the move from dormancy to active enforcement. The result? In 2018 alone, the DOJ



Courtesy photos

Preet Bharara, left, and Joe Zabel, right, of WilmerHale.

charged more than 20 individuals and entities with FARA violations—more than double the number charged in the prior 50 years combined.

But even as criminal FARA enforcement has increased exponentially, there is little meaningful civil enforcement of the law. From 1991 to 2019, the DOJ sought civil injunctive relief only once. The text of the statute may explain why. FARA's civil enforcement regime is extremely limited. It does not provide any avenue to impose civil penalties for deficient or delinquent filings; instead, it allows only for the government to seek to correct filings or else seek to enjoin any further unregistered activities. Moreover, it is unclear if the DOJ is even able to require foreign agents to retroactively register once they are no longer acting as an agent—an issue currently being litigated before the D.C. Circuit. All of this offers little to incentivize diligent compliance in the first instance.

The absence of a real civil enforcement option when FARA violations are less severe, we argue, unduly distorts decision-making in favor of criminal enforcement. Sometimes unjustly so.

Background

First, some more history is in order. In the 1930s, Nazism was quickly expanding beyond Germany, infecting not just neighboring nations but also countries an ocean way, including the United States. Nazis embedded foreign agents in America to exert influence over not only foreign policy, but also American culture and politics. In 1938, Congress passed FARA as a direct response to, and tool to fight against, the rising tide of Nazism and its influence in the United States in the lead-up to World War II. Intended to shine a “spotlight of pitiless publicity” in order to deter “pernicious propaganda,” the statute compelled individuals and organizations representing foreign interests to register as “agents of a foreign principal” with the DOJ and submit regular public filings.

Despite its important-sounding mandate, the statute lay dormant for decades before Special Counsel Robert Mueller awakened it in 2017 by indicting Paul Manafort for, among other things, acting on behalf of Ukraine without registering as a foreign agent.

A wave of prosecutions has followed—and so has failure. Notably, Greg Craig, a former White House counsel got his FARA charges dismissed in 2019. And Tom Barrack, a real estate investor accused of acting as a foreign agent for the United Arab Emirates and charged under 18 U.S.C. §951 (a sister statute often viewed as an extension of FARA) was acquitted in 2022.

Some of these failures may be due to the statute itself. FARA is a difficult statute to enforce, comply with and parse. It is riddled with ambiguity.

The DOJ has itself recognized as much. In a 2016 audit, the Department voiced uncertainty about certain aspects of the statute, including how “broadly worded exemptions make criminal or civil enforcement difficult.” In that same audit, the DOJ’s Inspector General (IG) found that many FARA registrants made errors in their registrations, filed initial registrations late, and missed deadlines to submit supplemental reports. For example, the IG determined that nearly half of the informational materials submitted by 77 registered agents sampled failed to include the required disclosure statement, and that many registrants were late “in submitting required documentation” or “unresponsive to FARA Unit requests to update their information.”

Nevertheless, criminal enforcement cases were few and far between, and civil enforcement was negligible.

That such a mess of a statute calls almost exclusively for criminal punishment, without a civil enforcement fallback, seems contrary to justice.

The Gap and Its Consequences

There is so little civil enforcement of FARA because the statute does not provide an avenue to impose meaningful civil penalties for deficient or delinquent filings, which is the heartland of violations. The main civil authority under FARA is a do-over, rather than a punitive or penalty power.

That is, FARA provides injunctive relief: if the Attorney General determines that a registration statement “does not comply with the requirements of [the statute],” he shall “so notify the registrant in writing, specifying in what respects the statement is deficient,” after which, “[i]t shall be unlawful for any person to act as an agent of a foreign principal at any time ten days or more after receipt of such notification without filing an amended registration statement in full compliance with the requirements of [the statute].” In other words, the (toothless) civil penalty for noncompliance is compliance.

The DOJ can also seek to enjoin further unregistered activities in certain circumstance, but as a matter of practice, before the FARA unit seeks injunctive relief that will require registration or remedying delinquent filings, it “would have to have sought voluntary registration and received a direct refusal. According to the FARA Unit, they do not typically encounter such scenarios.” Clearly, there is little deterrent value if the only real civil penalty is to simply require after-the-fact refiling, and only after asking for compliance first.

All of this leaves the government with little recourse, except to seek criminal charges. But criminal liability under FARA requires a willful violation, a threshold that can be challenging to overcome given the complexity of the law itself and the culpability (or lack thereof) of registrants whose filings are unintentionally deficient or delinquent. Moreover, in a criminal case, the government would have to prove all these elements under the highest standard in law: beyond a reasonable doubt.

Granting the DOJ more meaningful civil enforcement authority in cases of false, deficient, or delinquent filings, where appropriate, would likely lessen the number of heavy-handed and overreaching criminal prosecutions in this area.

Some members of Congress have recognized this problem and have proposed legislation. Notably, the DOJ has been supportive. Writing in partial support of the Foreign Agents Disclosure and Registration Enhancement Act of 2021—a proposed measure to enact FARA reform—the DOJ acknowledged the yawning gap between a feckless civil remedy and the sledgehammer of criminal prosecution:

“Currently, the Department’s civil enforcement authority is limited to bringing an action in district court for an injunction to mandate compliance. That imposes a high cost on the Department and since the only consequence is an order to comply with the act, the remedy provides little incentive to comply before the issuance of a court order. Pursuing criminal charges for willful violations of FARA’s provisions *often will be inappropriate* or unavailable for the types of common compliance problems we face” (emphasis added).

The DOJ acknowledged this gap again just days ago. To its credit, the Department recognizes that without a reliable civil backup in many cases, prosecutors may be locked into an overly binary choice: either prosecute and treat the conduct overly harshly or leave the misconduct untouched and forego accountability and deterrence. Because currently the government cannot default to effective civil enforcement where criminal enforcement is not warranted, prosecutors may try to re-engineer a civil case where there is no clear criminal intent as a criminal one or else just leave certain instances of misconduct unaddressed. The risk is draconian treatment in certain instances and insufficient treatment in others, which makes for a poorly calibrated statutory framework.

We have seen this scenario play out in our practice, with the threat of criminal charges as a looming default for improper filings, even where a civil remedy (were there an effective one) is clearly more fitting. Without an appropriate civil remedy, over-criminalization is likely to persist.

Solution

While the first step is resolving some of FARA’s statutory ambiguities and other pressing areas of reform, the gap we have described can be effectively filled: give the civil enforcement provisions some teeth.

We would not necessarily recommend empowering the DOJ to seek fines until the statute has been reformed in other ways. Still, broader FARA reform should include consideration of a provision in the statute granting the DOJ

authority to seek a monetary penalty for inadequate registrations and/or a longer suspension period rather than one that lasts only until refiling, the scale of which can be calibrated to the misconduct. For example, a minor error in a registration may justify a nominal civil penalty or none at all, whereas a more deliberate or serious error would warrant a more substantial penalty. This more calibrated statutory scheme would offer the DOJ the flexibility to adapt its enforcement approach to the nature of the misconduct and increase its deterrent value.

As the Department itself (along with legislators from both sides of the aisle) have recognized, civil penalties can help “ensure agents do not simply consider the risk of non-compliance as a cost of doing business, but they are not so high as to approach the amounts set for criminal fines.”

A more robust civil provision would not only benefit the government’s policy and enforcement interests, but also defendants. There is clearly a set of circumstances in which an agent’s registration-related misconduct does not reflect criminal intent, but in which non-enforcement would also be inappropriate. In such cases, the DOJ may feel compelled to nevertheless pursue criminal charges, which, even if they don’t stick, can upend an individual’s life and reputation in ways that a civil penalty simply does not. Over-prosecution may be a heightened risk because of the prominence and political involvement of certain foreign agents, as well as the antipathy that may be directed toward their foreign state principal.

With a reliable and well-calibrated civil alternative, defendants are less likely to be caught in the Department’s criminal crosshairs, amid the crossfire of politics and foreign policy, and can thereby avoid overly harsh treatment while still being incentivized to ensure their registrations comply with the law.

Conclusion

FARA is messy and misapplied. It demands substantive legislative scrutiny and, ultimately, reform. The statute requires broader reform than we suggest here, but part of that reform should be filling this civil enforcement gap. Doing so allows the law to properly meet the conduct it is intended to govern, enhancing justice in the process.

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