

**THE FOREIGN AGENTS REGISTRATION
ACT IN THE AGE OF THE RUSSIAN
FEDERATION: COMBATING
INTERFERENCE BY RUSSIAN MEDIA IN
THE UNITED STATES**

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INTRODUCTION

The media and the press provide essential avenues to inform the public, establish social unity and build trust between citizens and political figures. Western ideologies tend to regard these functions as essential to democracy, in part because they impose an obligation on news media to serve as political watchdogs, overseeing government action.¹ Since “wave[s] of political revolution” tend to follow technological advances that enable the spread of ideas, governments interested in preserving political dominance benefit from control over the information circulated to ensure the public views only information favorable to the state. Today, news and other media outlets, whether in print, over broadcast radio or television, or online, provide especially effective avenues for influencing public opinion.² Moreover,

1. Roy Peled, *Sunlight Where it's Needed: The Case for Freedom of Media Information*, 7 SW. J. INT'L MEDIA & ENTMT'L L. 65, 76 (2017) (“Freedom of Press itself is guaranteed in democracies because of the important role of the press as a monitoring mechanism, a watchdog to those in power.”);

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informational material intended for dissemination to the DOJ for review.⁷ While the Act does not authorize the DOJ to prohibit or deny dissemination of such material, the DOJ may demand that the agent place a “conspicuous statement” on the materials indicating the author’s ties to a foreign principal.⁸ In *Meese v. Keene*, the Supreme Court found that this disclosure requirement not only complied with the First Amendment but advanced free speech by demanding more information.⁹

Unfortunately, it remains unclear how to interpret the formed and the degree of “control” that is required before an agent is subject to FARA’s registration requirements.¹⁰

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can develop a fully informed opinion about the information conveyed by the agent.²¹

However, FARA consistently fails to accomplish its noble purpose, principally because the DOJ struggles to identify actors that qualify as agents as defined by the statute. Any person required to register as an agent is subject to the Act's reporting and disclosure requirements regarding informational materials.²² But, because the DOJ must establish that an agency relationship exists in order to trigger FARA's registration requirements, actors who obscure the agency relationship evade the registration requirement and may disseminate information without submitting the material for review from the DOJ and without a statement identifying the agent's foreign ties.²³ The difficulty the DOJ faces in identifying agents stems from the obscure definition of "control" under the Act, a problem consistently addressed by Congress.²⁴ As a result, the lack of specificity leaves the DOJ without a framework to identify actors qualifying as agents of a foreign principal. In addition, even if the DOJ identifies an agent that has failed to register, FARA offers few and ineffective means of compelling that agent to register under the Act.²⁵

A. FARA Overview: A Useful but Flawed Framework for Monitoring Political Influence by Foreign Actors with Interests in Shaping U.S. Policy

FARA requires individuals “doing political or advocacy work on behalf of foreign entities in the United States to register with the Department of

Government officials or agencies on behalf or in representation of the principal.³⁰ In its original form, FARA only required persons employed to disseminate political propaganda for foreign principals to register with the Federal Government.³¹ That is, whereas the original Act required an actor employed by a foreign principal to disseminate propaganda on its behalf register with the government, FARA's 1966 amendments altered the "agent of a foreign principal" definition to mean any person who acts at the "order, request . . . direction, or control" of a foreign principal.³²

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amendments were enacted, more closely resembling the registrations reported to Congress from 1942 to 1966.⁴²

The DOJ's inability to enforce the Act explains why there were only 428 active registrants on file with the DOJ in 2018;⁴³ compared to the 517 active registrants in 1965, 502 registrants in 1966, and 470 in 1967 – the period immediately before and after the pivotal 1966 amendments.⁴⁴ Strangely, the number of agents registered with the DOJ from 2000 to 2018 is nearly identical to those registered in the 1950s and 1960s despite enormous advances in communication technologies, business globalization, and media prevalence.⁴⁵ If the Act functioned properly, and in light of significant communication and information technologies, the number of activ

of control, the loopholes created in the 1966 amendments remain viable avenues for foreign governments to interfere in United States politics without DOJ oversight.

In 1965, Chairman James Fulbright investigated FARA's enforcement and submitted several recommended amendments to improve enforcement, in part because he was concerned with FARA's inability to cover "more than one intermediate link in the chain [in which the] relationship between principal and his intermediary is itself indirect."⁴⁹ To curtail evasion by these intermediate links,⁵⁰ Fulbright suggested a direction and control standard in which an agent of the subsidiary, as well as any agents employed to carry out the functions subsidized, would be deemed an agent of a foreign principal.⁵¹ Though Congress increased the class of people required to register,⁵² the

49. To curtail the use of subsidies as a means of avoiding the Act's requirements, Senator Fulbright suggested that:

[P]roposed [1966] amendment would also make a number of changes in the definition of the term 'agent of a foreign principal' as it relates to the problem of indirect control exerted by foreign principals over their agents. It would cover the possibility of more than one intermediate link in the chain, providing for cases where the relationship between the foreign principal and his intermediary is itself indirect. In situations where subsidies are used as a means of control over an agent, the proposed amendment would provide that a major portion of the funds of a given undertaking would have to be traceable to the foreign principal in order for the agent of the recipient to be required to register, unless he is exempt.

JAMES W. FULBRIGHT, FOREIGN AGENTS REGISTRATION ACT AMENDMENTS, S. REP. No. 89-143, at 6-7 (1965).

50. *Id.* at 7 ("The proposed amendment would make it clear that mere receipt of a bona fide raceab b

1966 amendments failed to account for the intermediary link loophole the Chairman identified.⁵³

Again in 1988, as a direct response to the Toshiba scandal of 1987, which again brought attention to FARA's inadequacies, Senator John Heinz proposed several amendments.⁵⁴ Toshiba Corporation, a subsidiary of Toshiba Machine Co., began selling submarine propellers to the Soviet Union, even though these submarine propellers were included on the Coordinating Committee for Multilateral Security Control's international list of prohibited exports.⁵⁵ When the sales became public in 1987, Congress banned all imports from Toshiba from anywhere between two to five years.⁵⁶

its enforcement.⁶²

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why this proposed definition would not similarly apply to FARA's agency

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Globalization of media operations through outlets like RT and Sputnik similarly allows the Russian Federation to implement its influence on public opinion on a global scale through the same tools that allowed the Russian Federation to successfully control public opinion domestically.⁸⁵ According to a 2017 U.S. National Intelligence Council report, Russian efforts to

individuals but not the press: writers and editors were granted “de facto immunity” from criminal liability because prosecutors generally refused to initiate proceedings against the Soviet press.⁹³ The 1961 Civil Code, however, facilitated around 400 lawsuits per year, seventy-five percent of which were brought against newspapers.⁹⁴

Changes to defamation law following the fall of the Soviet Union, however, led to a massive increase in defamation litigation, particularly against members of the news community.⁹⁵ Importantly, the Russian



party leader would “immediately be followed by a lawsuit.”⁹⁹ True to his word, Zhirinovskii initiated nearly 100 defamation lawsuits by July of the same year.¹⁰⁰ The Council of Europe determined in 2005 that the current defamation legislation has since had a profound impact on the press: Compared to the 400 actions per year under the Soviet defamation law, under the Russian Federation law, 8,000-10,000 libel suits are brought each year against journalists alone.¹⁰¹ Considering the increase of successful litigation against media defendants following the Russian Federation’s rise to power, editors and journalists justifiably worried that publishing criticisms of party leaders would lead to defamation suits.¹⁰²

The European Court of Human Rights (ECtHR) has found nearly forty freedom of expression violations under Article 10 of the European Convention on Human Rights¹⁰³ by Russian authorities since 1959. *Grinberg v. Russia*, the first Russian defamation case considered by the ECtHR, concerned an article, published by Isaak Grinberg in the newspaper *Guberniya*, that criticized Governor V.A. Shamanov.¹⁰⁴ Shamanov brought a civil defamation action against Grinberg, *Guberniya*’s editorial office, and the newspaper’s founder, claiming the statements were untrue and damaging to his honor and reputation. After the Russian District and Regional Court agreed, finding Grinberg and the newspaper’s founder liable for civil damages, Grinberg’s and the newspaper’s founder filed a claim with the ECtHR.¹⁰⁵ The ECtHR determined the Russian authorities violated Article 10 of the Convention, stating:

99. Krug, *supra* note 90, at 849-50.

100. *Id.* at 860-61 n.59.

101. EUR. PARL. ASS., *Honouring of Obligations and Commitments by the Russian Federation*, Doc. No. 10568, ¶ 389 (2005), <http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10910&lang=en>.

102. *Id.*

103. Article 10 of the Convention reads:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 10 [hereinafter ECHR]. The European Court of Human Rights found that the Russian Federation violated Article 10 in thirty-nine cases – surpassed only by Turkey with an astonishing 281 Article 10 violations. VIOLATIONS BY ARTICLE AND STATE 1959-2017, EUR. CT. HUM. RTS., https://www.echr.coe.int/Documents/Stats_violation_1959_2017_ENG.pdf. For noteworthy cases on Russia’s Article 10 violations, see generally *Press Country Profile: Russia*, EUR. CT. HUM. RTS., https://echr.coe.int/Documents/CP_Russia_ENG.pdf (last updated Mar. 2019).

104. Grinberg had charged that the Governor had “[n]o shame and no scruples!” Grinberg v. Russia, App. No. 23472/03, 43 Eur. H.R. Rep. 995, 997 (2006).

105. *Id.* at 998, ¶¶ 13-14.

The Court considers the contested comment was a quintessential example of a value judgment that represented the applicant's subjective appraisal of the moral dimension of Mr. Shamanov's behaviour. The finding of the applicant's liability for the pretended damage to Mr. Shamanov's reputation was solely based on his failure to show that Mr. Shamanov had indeed lacked 'shame and scruples.' This burden of proof was obviously impossible to satisfy.¹⁰⁶

Concern that defamation litigation stifle governmental criticism remains

B. Extra Legal Bases: State Corporate Ownership and Indirect Corporate Control

In addition to creating greater risk of civil and criminal liability for defamation in print and online, privatization of prominent media organizations by the Government helped further chip away at the once independent media and press.¹¹² According to Freedom House, “The [Russian] government controls, directly or through state-owned companies and friendly business magnates, all of the national television networks and many radio and print outlets, as well as most of the media advertising market.”¹¹³ For example, the Russian Federation owns a seventy-five percent stake in Channel 1, a thirteen percent share in Channel 2-Rossiya, Russia’s two most popular stations, and just under twenty percent of NTV, with the remaining majority shareholders maintaining close ties to the government.¹¹⁴

To rein in independent news agencies, the Russian Federation gained control over independent media outlets through corporate takeovers of privately owned media organizations.¹¹⁵ One especially illuminating example of the Russian government’s power to take control of private news outlets is the case of formerly independent NTV.¹¹⁶ NTV was once a fierce critic of the government, exposing falsehoods and corruption during the

112. IVAN ZASURSKII, *MEDIA & POWER IN POST-SOVIET RUSSIA* 16-17, 25 (2016) (emphasizing the “enormous power” Russian press held through the firm one

financed around 100 other regional publications.¹²⁶ As of 2015, *Ekho Moskvyy* (“Echo of Moscow”), Russia’s only radio station embracing wide and sometimes heated political discussions, was financially dependent on Gazprom.¹²⁷ A 2012 study determined that in the majority of cases, media entities were acquired by or consolidated with private media co

will most likely continue to utilize its highly effective means of media control to influence public opinion internationally.

Under FARA, the Act's failure to take into account the effect that

its policies and operations.”¹⁴⁸ As FARA is currently organized, its broad conception of the agency relationship misses important indicators of direction and control. Adopting a bright-line standard of direction and control along with allowing the DOJ to consider contextual control indications would significantly enhance the DOJ’s chances of detecting these obscure agency channels.

Agents like RT and Sputnik highlight the Act’s deficiencies that foreign principals may exploit to evade DOJ oversight. Of course, while RT and Sputnik offer especially illuminated answers to FARA’s difficulties, these are merely examples of how foreign principals avoid FARA detection and infiltrate and influence public opinion in the U.S. RT and Sputnik successfully operated without FARA’s obligations for an extended period of time, but they are by no means the only agents doing so. In general, however, the Office of the Inspector General determined in 2016 that FARA compliance rates were unacceptable overall, and that modificati

A. Minimizing the Agency Relationship: The Effect of Russia's Control Over its Domestic Media

Russian-based media outlets like RT and Sputnik successfully avoided FARA's registration and disclosure requirements because the organizations' funding is filtered through the obscure organizational structure.¹⁵¹

Similarly, in Sputnik's case, RIA Global, the company that "produces content" for Sputnik, protested its FARA registration, maintaining it still holds "independent editorial control[.]"¹⁶⁶ RIA Global's "customer of record" is MIA Rossiya Segodnya, formerly RIA Novosti, as the name might suggest.¹⁶⁷ The Sputnik-Russian Federation relationship might be summarized as follows: Russian Federation owns RIA-MIA, which owns RIA Global, which owns Sputnik.

On a larger scale, Gazprom, the major gas mogul whose majority shareholder is the Russian Federation, has registered as an agent of the Russian government since 2002, conducting enormously profitable "media

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B. Minimizing the Agency Relationship Through Obscure Ownership of Media Outlets

Aside from the legal efforts to disassociate the Russian government from RT and Sputnik, decades-long threats of defamation liability and structural influence of corporate ownership allow the Russian government to control these entities from within, a method of control that FARA does not acknowledge. Decades of defamation liability, in addition to control the State maintains due to corporate takeover and ownership, allows the Government to dictate editorial policies independent of any official government action. According to the Foreign Relations Committee 2018 report, “Former staff report that RT’s editorial line comes from the top down, and managers choose what will be covered and how.”¹⁷¹ Margarita Simonyan, RT’s Editor-in-Chief, believes that “since RT receives [a] budget from the state, it must comply with the tasks given by the state.”¹⁷² Further, media outlets likewise tend to hire personnel whose beliefs already align with State policies, furthering diminishing any need for direct censorship.¹⁷³

As a result of defamation intimidation and state-owned corporate ownership, state-friendly executives set RT’s employment and editorial policies to enable the Government to promote its interests without raising official censorship concerns. According to the DOJ, Kremlin closely supervises RT’s coverage and recruits employees who convey the Russian Federation’s messages because previously-held ideological beliefs align with the State.¹⁷⁴ In striking similarity to Shevchenko of *Channel 1*, RT’s editor-in-chief, Simonyan explains that, because RT receives funding from the Russian Government, “it must complete tasks given by the state.”¹⁷⁵

Important to recount is that defamation suits are common, particularly against journalists.¹⁷⁶ However, since employees of RT already subscribe to Kremlin ideals, the State does not need to impose censorship or resort to lawsuits. Thus, by allowing journalists to freely express their preexisting pro-state viewpoints, the Government can promote its interests while complying with constitutionally mandated free press.

171. PUTIN’S ASYMMETRIC ASSAULT ON DEMOCRACY, *supra* note 145, at 42; see Postnikova, *supra* note 30, at 8 (“Liz Wahl, the RT anchor who resigned on air in 2014 in protest of RT’s coverage of Ukraine, described how detailed directives on editorial coverage and selection of commentators came from RT’s Russian managers.”) (citing Liz Wahl, *Discrediting the West: An Insider’s View on Russia’s RT*, STOPFAKE.ORG (Mar. 8, 2016, 10:21 PM), <https://www.stopfake.org/en/discrediting-the-west-an-insider-s-view-on-russia-s-rt/>).

172. NAT’L INTELLIGENCE COUNCIL, *supra* note 12, at 9.

173. Schimpfossel & Yablokov, *supra* note 114, at 308.

174. NAT’L INTELLIGENCE COUNCIL, *supra* note 12, at 9.

175. *Id.*; see Schimpfossel & Yablokov, *supra* note 114.

176. See *supra* section III(A).

C. Identifying the Agency Relationshi

material intended to influence U.S. foreign policy.¹⁸¹ The Court noted that the films were not held exempt from FARA's disclosure requirements even though one won an "Oscar" for best foreign documentary in 1983.¹⁸²

RT's editor-in-chief, Margarita Simonyan, condemned the DOJ for compelling the registration, claiming the move was an attack on free speech.¹⁸³

under the labeling provisions.¹⁸⁹ Thus, “political propaganda” is no longer the standard by which agent-disseminated material is assessed by the DOJ, whether the term’s connotation is pejorative or not.

Although RT and Sputnik disclose that Russian sources provide some funding, neither RT’s nor Sputnik’s characterization conveys the significance of the financial and social nature of the relationship, such as the decades-long threat of defamation liability that journalists and press establishments have faced, and continue to risk for criticizing the administration.¹⁹⁰

CONCLUSION

Through instilling fear of defamation suits, corporate takeover and control, and control over the Internet, the current administration manages what the citizens see and thereby controls public opinion. These same tactics

