

## FOREIGN AGENTS: UPDATING FARA TO PROTECT AMERICAN DEMOCRACY

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### 1. INTRODUCTION

Lobbying is inherently a result of Mancur Olson's collective action problem. "Small, homogeneous groups with strong communities of interest tend to be more effective suppliers of political pressure and political support (votes, campaign contributions, and the like) than larger groups whose interests are more diffuse."<sup>1</sup> As a result, lobbying reform is not undertaken until the public as a whole creates a coalition large enough to overcome the coercion created by a much smaller group of lobbyists. As noted by Congress, lobbying on behalf of foreign entities can have serious implications for national policy beyond the effects created by domestic lobbyists whose ultimate goal arguably still pertains to the betterment of American society.<sup>2</sup>

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\* Editor-in-Chief of *University of Pennsylvania Journal of International Law*, vol. 31. I would like to thank my fellow board members and the *Journal* for all of its hard work this year. It absolutely is an experience I will take with me for the rest of my life. I would also like to thank my parents, Bassam and Virginia Atieh, for their love and support throughout my legal education. For without their help and advice, none of this would have been possible.

<sup>1</sup> William F. Shughart II, *Public Choice*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS (David R. Henderson ed., 2002), available at <http://www.econlib.org/library/Enc/PublicChoice.html>.

<sup>2</sup> See Foreign Agents Registration Act, 22 U.S.C. § 611 (2006), which states:

It is hereby declared to be the policy and purpose of this Act to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.

*Id.*; see also Robert Pear, *A Gray Law Illuminates Billy Carter's Foreign Deals*, N.Y. TIMES, July 20, 1980, at E3 (noting that Congress created greater restrictions on foreign lobbyists than on their domestic counterparts).

In response to this perceived threat, Congress has tended to keep the regulation of lobbyists representing foreign principals more stringent than that of their domestic counterparts. The Foreign Agent Registration Act ("FARA")<sup>3</sup> is Congress's premier tool of regulation for foreign lobbyists. As I will explain below, the regulation of foreign lobbyists under FARA has historically been much more stringent than regulations for domestic lobbyists under the former Federal Regulation of Lobbyist Act of 1946 ("FRLA") and the current Lobbyist Disclosure Act of 1995 ("LDA"), by requiring more thorough disclosures and enacting harsher penalties for failing to register.

As lobbying has grown in the latter half of the twentieth century, its abuses have followed suit. 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.<sup>4</sup> Since Congress is democratically elected, the public is the ultimate judge of the propriety of the lobbyists' proposed policy. However, while 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 had Congress responded and updated FARA along with the LDA. Instead, these loopholes in FARA have allowed foreign lobbyists to unduly influence U.S. foreign and domestic policy.

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<sup>3</sup> Foreign Agents Registration Act, 22 U.S.C. §§ 611–21 (2006).

<sup>4</sup> See *infra* Section 4.2. (describing how political scandals that arose from perceived lobbying scandals are often the product of the general public's rejection of the lobbyist proposed position); see also Kevin Bogardus, *White House Demands More Information from K Street on Lobbying Registrations*, THE HILL, Jan. 29, 2010, <http://thehill.com/homenews/administrator/78671-white-house-wants-more-information-from-k-street> (last visited Apr. 6, 2010) (stating that President Obama's proposals for lobbyist reform stated in the President's 2010 State of the Union Address were based on the perceived influence that lobbyists have on legislation).

This Comment will argue that in order to prevent further subrogation of the policy, it is necessary to update FARA by changing several of its provisions to allow the public more advance notice of lobbyist intent, before any actual lobbying activity has taken place. Such an update would alleviate many of the collective action problems from the lobbyists' rent-seeking behavior. This Comment will first define the collective action problem of lobbying and explain generally how small entities can gain immense power. Second, it will analyze FARA and the current lobbying law of the United States. Third, it will highlight the current loopholes of FARA, analyze their history, and explain how these loopholes allow lobbyists to avoid registration. Fourth, this Comment will analyze examples of registration failures under FARA, and the consequences for U.S. policy. Finally, this Comment will provide several proposals for updating FARA and discuss the feasibility and effectiveness of each.

## 2. THE COLLECTIVE ACTION PROBLEM OF LOBBYING

Public choice theory looks to analyze the context in which decisions are made by our government.<sup>5</sup> The theory begins with the premise that all actors—including voters, lobbyists, and legislators—will always act in their own rational self-interest.<sup>6</sup> Mancur Olson, who developed the theory of collective action, postulated that because such actors are acting in their own self-interest, it follows that when acting as a group, the same actors “will not voluntarily act to achieve their common or group interest” unless the group goal is exactly the same as their own self-interested goal.<sup>7</sup> The only way to tame this problem is to have a group that is sufficiently small such that the group's interests are in line with the individual's self-interest. In the realm of lobbying, this theory holds great weight. While the government is charged with benefiting the public as a whole, the individual member of Congress has his or her own self-interest in seeking funding and support for reelection. Therefore, the special interest lobby

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<sup>5</sup> See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 3–4 (Univ. of Mich. Press 2007) (1965) (describing the capabilities and limitations of collective choice theory).

<sup>6</sup> MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 1 (Harvard Univ. Press 1999) (1965).

<sup>7</sup> *Id.* at 2.

behaves rationally by seeking their own beneficial legislation, and the member of Congress is likewise behaving rationally by accepting such funding. The problem lies in the result. The cost to special interest groups who benefit is very small because the cost of the policy is ultimately born out on all of the taxpayers. However, the entirety of the gain is likewise theirs because the policy advocated only specifically favors them.<sup>8</sup> Similarly, since the cost is spread among the public at large, the cost to the individual taxpayer is actually quite small. Therefore, the expected gain of canceling the policy from the taxpayer's perspective is likewise small.<sup>9</sup> Since the cost of trying to affect policy can be quite high for the individual taxpayer relative to the expected gain, due to the costs of lobbying or campaigning against such policies, a rational taxpayer would likewise not have any incentive to try to stop such behavior. Olson's problem then re-occurs because in order for the total expected gains of the collective to outweigh the costs, the group of taxpayers must be significantly large.<sup>10</sup>

Unfortunately, the public faces significant hurdles in aggregating a group large enough. First, because all people are rational actors, many may see that the opportunity to free-ride exists. Individuals may choose not to spend their money and support the cause because they know that even a positive outcome will ultimately be shared with the taxpayers as a whole.<sup>11</sup> If enough people adopt this mentality, the group will not be able to sustain itself and, thus, not exist at all. Second, and more importantly, such a group suffers from an informational problem. The public as a whole lacks specific information regarding when policies that may affect them are adopted.<sup>12</sup> Without such information, the public will not be stirred into action at all because they are not even aware that they are being harmed.

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<sup>8</sup> This behavior is often called rent-seeking. It refers to the practice of one entity trying to push the costs of the project on the whole while solely retaining the benefit. See Anne Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291, 291 (1974) (defining different types of rent seeking behavior).

<sup>9</sup> See *id.* (explaining the costs of rent-seeking behavior).

<sup>10</sup> See OLSON, *supra* note 6, at 3 (discussing the aggregation of costs).

<sup>11</sup> See DENNIS C. MUELLER, PUBLIC CHOICE III 473 (2003) (discussing the free-rider problem in the context of collective action).

<sup>12</sup> See DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE 57-63 (1994) (discussing rational choice theory and the informational gap of the voting public).

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Therefore, the evil of lobbying lies in the result. Congress has an electoral and, arguably a constitutional, duty to protect the entirety of their constituency. However, in order to remain in power, members of Congress require significant campaign contributions, often provided by lobbyists.<sup>13</sup> Lobbyists in return have the ear of the member of Congress and are able to make proposals more readily. Unfortunately, their constituencies: 1) often do not have any information on proposals being pushed by lobbyists, and 2) cannot individually or collectively mobilize to fight against the proposal because the expected gain of their individual mobilization is small and the cost of collectivizing is prohibitively large.<sup>14</sup>

### 3. LOBBYING LAW IN THE UNITED STATES: FARA AND THE LDA

All lobbying laws in the United States work in a similar manner. These laws seek to fix the abovementioned informational disadvantage that prevents the public from collectively acting. Their goal is not to restrict the speech of the lobbyist or the content of their lobbying; rather, their goal is to inform the public about who is influencing their representatives, and how such influence is obtained.<sup>15</sup> It is believed that through adequate registration of activities, the public will be informed of such excess influence and be able to respond by using its own methods of action—condemnation and voting.<sup>16</sup>

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<sup>13</sup> The effect of this money is now even more profound given the recent Supreme Court decision in *Citizen's United v. Fed. Election Comm'n*, No. 08-205, slip op. at 50 (U.S. Jan 21, 2010) (striking down campaign finance limits formerly imposed on political action committees and corporations).

<sup>14</sup> See *id.* at 34 (recognizing that there is no affirmative federal interest in equalizing “the relative ability of individuals and groups to influence the outcome of elections.”).

<sup>15</sup> See Lobbyist Disclosure Act of 1995, 2 U.S.C. § 1601(3) (2006) (“[T]he effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government.”).

<sup>16</sup> A recent example of this is the successful backlash against the sale of U.S. ports to a Dubai owned company. Public watchdog groups were able, through the LDA, to find the existence of lobbying and bring it to the public’s attention, ultimately ending the deal. See Elana Schor & Roxana Tiron, *Foreign-Agent Lobbyists Amid Uproars, Duck for Cover*, THE HILL, Mar. 29, 2006, <http://www.citizensforethics.org/node/22688> (last visited Apr. 6, 2010) (discussing how the Dubai Ports deal ultimately failed).

Similarly, it should be noted that lobbying laws are typically updated during a period of blatant scandals.<sup>17</sup> For example, the Republican Revolution of 1994, which saw the first change of power in the House of Representatives in over forty years, was based in part on public disgust over the perceived excess influence of lobbyists.<sup>18</sup> The public backlash returned in 2006, when the American public, after growing weary of the continued lobbying scandals that plagued a then Republican Congress, voted in a new Democratic majority that vowed to fundamentally change lobbying laws. After each of these scandals, domestic lobbying laws were updated almost immediately thereafter.<sup>19</sup> Furthermore, as shown below the regulation of lobbyists representing foreign entities is often revised when the public is similarly aroused.

During these periods of reform, the proposed reforms seek to give the public more information on who is lobbying the government so that the public would theoretically be able to prevent scandal by voicing disdain against policies they do not like before they are adopted. This is also meant to solve the information drought that plagues the public's attempts at collective action. Each of FARA's subsequent reforms occurred during one of these periods of condemnation.

### 3.1. *History of FARA*

FARA's original inception in 1938 was designed to halt the spread of Nazi propaganda immediately preceding U.S. entry into World War II.<sup>20</sup> However, the law was not designed to substantively censor or restrict foreign propaganda; rather, it was

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<sup>17</sup> During such scandals, the collective action problem is solved because the information is often readily available to the public due to media attention. Similarly, the media helps to align the public response to such scandals via elections. See GREEN & SHAPIRO, *supra* note 12, at 59-60 (noting that variables such as civic duty, closeness of election, and media attention on issues can often overcome the voter collective action problem).

<sup>18</sup> See Helen Dewar & Michael Weisskopf, *House Gives Final Approval to Lobbyist Disclosure Bill*, WASH. POST, Nov. 30, 1995, at A1 (describing how House Republicans fulfilled their electoral promise of lobbying reform).

<sup>19</sup> See *id.* at A14 (reporting that the LDA was a response to the perceived excesses of lobbyists prior to the Republican Revolution of 1994).

<sup>20</sup> See Robert G. Waters, Note, *The Foreign Agents Registration Act: How Open Should the Market Place of Ideas Be?*, 53 MO. L. REV. 795, 798-99 (1988) (describing the creation of FARA by the House Un-American Activities Committee with the purpose of halting the "spread of propaganda and ideologies alien to our form of government").

designed to deter its use and adoption through mandatory disclosure requirements and fear of criminal punishment. The law thereby required “total public transparency over the operations of foreign agents in the US.”<sup>21</sup> While the use of FARA as an anti-propaganda tool continued after World War II to include communist propaganda;<sup>22</sup> FARA was subsequently amended in 1942 to “shield the U.S. Congress and the President from foreign-influenced grassroots lobbying shaping policy, legislation and lawmaking,”<sup>23</sup> predominantly due to the accession of the United States as a superpower.<sup>24</sup> Therefore, the 1942 amendments make clear that the purpose of FARA is to “protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure . . . [of] activities for or on behalf of foreign governments . . . .”<sup>25</sup> In order to step up enforcement, FARA was subsequently put under the jurisdiction of the Justice Department.<sup>26</sup>

However, in the 1960s, a slate of blatant enforcement failures led to significant public outcry against the excesses of lobbying

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<sup>21</sup> GRANT F. SMITH, *AMERICA’S DEFENSE LINE: THE JUSTICE DEPARTMENT’S BATTLE TO REGISTER THE ISRAELI LOBBY AS AGENTS OF A FOREIGN GOVERNMENT* 51 (Institute for Research 2008).

<sup>22</sup> Mark B. Baker, *Updating the Foreign Agents Registration Act to Meet the Current Economic Threat to National Security*, 25 *TEX. INT’L L.J.* 23, 25 (1990) (“After World War II, FARA served little use other than to track Communist propaganda through the warmer phases of the Cold War.”).

<sup>23</sup> SMITH, *supra* note 21.

<sup>24</sup> See Baker, *supra* note 22, at 2 (noting that most attempts to influence U.S. policy stem from desire to promote economic interests rather than subversive interests).

<sup>25</sup> 22 U.S.C. § 611 (2006).

<sup>26</sup> The statute states:

Upon the effective date of this Act [see Effective Date of 1942 Amendment note above], all powers, duties, and functions of the Secretary of State under the Act of June 8, 1938, 52 Stat. 631, as amended shall be transferred to and become vested in the Attorney General, together with all property, books, records, and unexpended balances of appropriations used by or available to the Secretary of State for carrying out the functions devolving on him under the above-cited Act.

*Id.* This allowed for both the monitoring and enforcement functions to be under the same room, effectively streamlining the process. See also SMITH, *supra* note 21, at 54 (noting that increased prison terms for violations accompanied the transfer).

which prompted Congress to question FARA's efficacy.<sup>27</sup> One of the most serious problems with FARA was the lack of spirited enforcement by the Justice Department,<sup>28</sup> who feared the potentially explosive nature of foreign lobbying investigations.<sup>29</sup> Therefore, in 1963 the Senate Foreign Relations Committee led by Chairman J.W. Fulbright held hearings to investigate FARA's shortcomings<sup>30</sup> and recommend revisions for the Act.<sup>31</sup> The committee proposed a slew of new amendments to FARA to close several of the loopholes that allowed non-registry.<sup>32</sup> The panel also proposed increased penalties for non-compliance, as well as an increase in the operating budget for enforcement.<sup>33</sup> However, while these amendments did much to increase the class of people

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<sup>27</sup> For example, in 1961, a public relations firm who wrote speeches for members of Congress on behalf of West Germany "[i]n order to influence public opinion" also "directly petitioned President Kennedy . . . urg[ing] him . . . to declare publicly that the U.S. appreciated the loyalty of [the West German Chancellor] to the Western cause" to help prevent the possibility of the Chancellor losing his upcoming election. RUSSELL WARREN HOWE & SARAH HAYS TROTT, *THE POWER PEDDLERS: A REVEALING ACCOUNT OF FOREIGN LOBBYING IN WASHINGTON* 22 (1977).

<sup>28</sup> Between 1951 and 1960, the United Jewish Appeal resisted FARA registration due to lax enforcement, and was able to allocate over \$2 million per year to politicians who supported their pro-Israeli policies. See SMITH, *supra* note 21, at 119 (discussing the continued lack of FARA enforcement against pro-Israeli lobbies that preceded the 1966 Amendments).

<sup>29</sup> One of the few prosecutions in 1958 against an FBI agent illegally acting as a foreign agent for the Dominican Republic was eventually overturned on appeal due to lack of proof. *Frank v. United States*, 262 F.2d 695 (D.C. Cir. 1958). This "case would surface again as a warning to all observers of just how politically explosive FARA enforcement could be," due to fact that many lobbyists are former Congressmen, or in this case agents of the U.S. government. SMITH, *supra* note 21, at 60.

<sup>30</sup> GRANT F. SMITH, *FOREIGN AGENTS: THE AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE FROM THE 1963 FULBRIGHT HEARINGS TO THE 2005 ESPIONAGE SCANDAL* 21-29 (2007) (describing and providing transcripts to the Fulbright Hearings).

<sup>31</sup> *Activities of Nondiplomatic Representatives of Foreign Principals in the United States Before S. Comm. On Foreign Relations*, 88th Cong. (1963) [hereinafter *Fulbright Hearings*] (describing the ultimate goals of the hearings); see also HOWE & TROTT, *supra* note 27, at 17-20 (describing the committee's investigation into the failings of FARA).

<sup>32</sup> See S. REP. No. 89-143, at 4 (1965) (describing the redefinition of "agent" to include "the lawyer-lobbyist and public relations counsel whose object [was] not to subvert or overthrow the U.S. Government, but to influence its policies [for a] particular client").

<sup>33</sup> See Harry Kennedy, Jr., *What You Should Know...About the Foreign Agents Registration Act*, 11 PUB. REL. Q. 17, 18-19 (1966) (discussing the 1966 amendments to FARA and the implications it could have on lobbyists).

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who must register, they also simultaneously created many loopholes, including exemptions for attorneys, domestic subsidiaries of foreign corporations, and activities “not serving [a] predominately . . . foreign interest.”<sup>34</sup> Since FARA has not undergone a major overhaul since these amendments, all of the major loopholes that exist from this version are essentially still in effect today.<sup>35</sup>

Given these shortcomings, it did not appear as if it would take long until the public would again demand amendment of FARA. This outcry seemed to have occurred in the late 1970s after a scathing report by the Government Accountability Office (“GAO”) sparked outrage in Congress over the Department of Justice’s (“DOJ”) administration of agent registration.<sup>36</sup> Congress once again, through the Senate Foreign Relations Committee, studied several of these failures,<sup>37</sup> recommended changes to the Act, and called for increased DOJ enforcement.<sup>38</sup> Unfortunately, despite the apparent importance of lobbying reform,<sup>39</sup> Congress failed to pass any substantive reform. Since this failure to reform, GAO has subsequently released several reports, most recently in 2008, citing

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<sup>34</sup> U.S. GEN. ACCOUNTING OFFICE, EFFECTIVENESS OF THE FOREIGN AGENTS REGISTRATION ACT OF 1938, AS AMENDED, AND ITS ADMINISTRATION BY THE DEPARTMENT OF JUSTICE 6 (1974) [hereinafter GAO 1974].

<sup>35</sup> See Michael I. Spak, *America for Sale: When Well-Connected Former Federal Officials Peddle Their Influence to the Highest Foreign Bidder*, 78 KY. L.J. 237, 248–49 (1990) (noting that FARA’s last substantive revision came in 1966).

<sup>36</sup> GAO 1974, *supra* note 34.

<sup>37</sup> Several of the new failures included the lobbying by Greek-Americans to enact an arms embargo against Turkey without first registering, and the influence of lobbyist in speeches delivered abroad by Congressmen abroad in the early 1970s. See, e.g., HOWE & TROTT, *supra* note 27, at 21–22 (discussing the influence of lobbyists in a speech delivered by Senator Strom Thurmond in South Africa). These examples again demonstrate how U.S. policy can be altered by the efforts of lobbyists without public knowledge.

<sup>38</sup> S. COMM. ON FOREIGN RELATIONS, 95TH CONG., THE FOREIGN AGENTS REGISTRATION ACT 30 (Comm. Print 1977) [hereinafter CRS 1977] (discussing the DOJ’s role in enforcing FARA).

<sup>39</sup> HOWE & TROTT, *supra* note 27, at 26 (citing the belief of New York Congressman, Lester Wolff, that warranted the creation of a specialized federal commission to guarantee the strong enforcement of FARA provisions).

the very same reasons and premises for FARA reform.<sup>40</sup> Similarly Congress has studied the issue multiple times and has determined that action needed to be taken, but has likewise failed to act.<sup>41</sup>

The last public outcry that triggered any reform was the early 1990s backlash against the perceived influence of Japanese companies on U.S. trade policy.<sup>42</sup> While there were significant calls to reform FARA itself,<sup>43</sup> domestic lobbying laws were reformed instead with the introduction of the LDA. Even though the LDA represents a significant step forward in terms of domestic lobbying registration,<sup>44</sup> it also represents two steps back for foreign lobbyist registration. It allows foreign business agents to register under the LDA instead of FARA, despite the potential effect on U.S. policy.<sup>45</sup> <sup>46</sup> As I will note below, since the LDA requires less disclosure than

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<sup>40</sup> See GAO 1974, *supra* note 34, at 31 (noting the failure of the 1966 amendments to FARA); U.S. GEN. ACCOUNTING OFFICE, GOV'T ACCOUNTABILITY OFFICE, FOREIGN AGENT REGISTRATION: JUSTICE NEEDS TO IMPROVE PROGRAM ADMINISTRATION 4 (1980) [hereinafter GAO 1980] (describing the urgent need to make reforms to FARA); U.S. GEN. ACCOUNTING OFFICE, GOV'T ACCOUNTABILITY OFFICE, *Foreign Agent Registration and Former High-Level Officials Representing Foreign Interests: Before the S. Comm. On Commerce, Science, and Transportation*, 101<sup>st</sup> Cong. 4 (1990) [hereinafter GAO 1990] (reaffirming the 1980 recommendations and proposing further recommendations to improve the registration of foreign agents); U.S. GEN. ACCOUNTING OFFICE, GOV'T ACCOUNTABILITY OFFICE, POST-GOVERNMENT EMPLOYMENT RESTRICTIONS AND FOREIGN AGENT REGISTRATION: ADDITIONAL ACTION NEEDED TO ENHANCE IMPLEMENTATION OF REQUIREMENTS 2-4 (2008) [hereinafter GAO 2008] (stating that GAO has asked for substantive changes in the enforcement of FARA since 1974). Each report represents efforts by the GAO to increase enforcement of FARA by the DOJ.

<sup>41</sup> See CRS 1977, *supra* note 38, at 112 (recommending several changes to FARA to increase enforcement).

<sup>42</sup> See PAT CHOATE, *AGENTS OF INFLUENCE* 203 (1990) (discussing how Japanese lobbyists were able to affect U.S. policy through large donations to fund presidential libraries).

<sup>43</sup> See Philip J. Perry, *Recently Proposed Reforms to the Foreign Agents Registration Act*, 23 CORNELL INT'L L.J. 133, 145-46 (1990) (discussing Senator John Heinz's proposed reforms of FARA in the wake of Toshiba's failure to timely register their \$3 million lobbying effort to affect trade policy).

<sup>44</sup> See Charles Lawson, *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, 1174 (1996) (describing the LDA as a "legislative victory" that recognized and fixed the shortcomings of the former domestic lobbying disclosure statutes).

<sup>45</sup> See 22 U.S.C. § 613(h) (2006) (exempting agents registered under the LDA).

<sup>46</sup> The LDA did make one good substantive change to FARA. Prior to 1995, attorneys were exempt from FARA registration no matter the type of representation they offered. The LDA closed this loophole by only exempting attorneys who were actively representing the foreign principal in court. See *id.*

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FARA, this fact, combined with the material impact foreign lobbyists may have on U.S. policy, illuminates the need to close this loophole.

Despite the increased regulation of domestic lobbying by the LDA, Congress has not substantively changed FARA since its 1966 revisions.<sup>47</sup> While Congress typically amends both domestic and foreign lobbyist registration during the same reform periods,<sup>48</sup> they have not reformed FARA after the introduction of the LDA in 1995 and its amendment in 2007 after the Abramoff scandal. Likewise, several recent scandals discussed below make it clear that FARA is in need of significant updating. If the above pattern holds, it would be safe to assume that real reform of FARA will occur in the near future as scandals usually precede reform.

### 3.2. Structure and Applicability of FARA

FARA is designed to work in a manner similar to that of other lobby disclosure laws.<sup>49</sup> Its main structure allows the regulation of lobbying not through the regulation of substance, but through public disclosure of activities.<sup>50</sup> It is believed that through this public disclosure, a well-informed public will be in the best position to decide whether the policy that the agents are attempting to influence their representative into adopting is appropriate.<sup>51</sup> This would negate the second prong of the collective action problems facing the public by putting them on

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<sup>47</sup> See Lawson, *supra* note 44, at 1162 (describing the 1966 amendment of FARA as the most significant revisions since the bills inception).

<sup>48</sup> For example, shortly after the FARA amendments of 1942, Congress enacted the FRLA in 1946 to register domestic lobbyists. Similarly, in 1966 domestic lobbying laws were strengthened to match the bolstering of FARA. See Federal Regulation of Lobbying Act, 2 U.S.C. § 261 (repealed 1993).

<sup>49</sup> See Lawson, *supra* note 44, at 1179–81 (discussing the LDA's impact on the structure of FARA).

<sup>50</sup> See *id.* at 1156–57 (stating that FARA was designed not to limit the information disseminated, but to allow for public disclosure of its source).

<sup>51</sup> See *id.* (noting that FARA enabled “U.S. citizens [to] make an informed decision[] as to the accuracy of the information”). However, agents who claim an exception under FARA do not need to notify the DOJ that they are not filing due to an exception. See GAO 2008, *supra* note 40, at 2 (stating that it is the duty of the DOJ to find all FARA violators).

notice. However, in order for this system to work effectively, proper disclosure is imperative.<sup>52</sup>

FARA is essentially self-policed, such that it requires the lobbyists themselves to take the initiative to learn which types of activities necessitate disclosures and when disclosures must be filed.<sup>53</sup> Furthermore, the DOJ is intended to act as a gatekeeper in this process, investigating, and prosecuting potential violators.<sup>54</sup> FARA's operative section requires that "[n]o person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement . . . or unless he is exempt from registration . . ."<sup>55</sup> Therefore, one must know when they are an "agent," who qualifies as a "foreign principal," and what is required in a filing.

The term "agent" refers to any person or organization, who acts in any "capacity at the order, request, or under direction or control, of a foreign principal . . ."<sup>56</sup> Under the 1966 revisions, this includes any person who engages in political activities, acts as public relations counsel, solicits money for the principal, dispenses contributions, and represents the principal before any agency or official of the government.<sup>57</sup> Therefore, this definition, as interpreted by the DOJ, is meant to include all types of lobbying activities that try to influence policy.<sup>58</sup>

FARA's distinguishing factor is that the lobbying activity must be made on behalf of a foreign principal.<sup>59</sup> Foreign principal encompasses any foreign government or political party, any person residing outside the United States, or any organization organized

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<sup>52</sup> The act itself requires the ability for public examination of records. 22 U.S.C. § 616(a). Similarly, since 2004 the DOJ has put the database online allowing for public searches. United States Department of Justice, Foreign Agent Registration Search, <http://www.usdoj.gov/criminal/fara/links/search.html> (last visited Jan. 14, 2008).

<sup>53</sup> Perry, *supra* note 43, at 142.

<sup>54</sup> *Id.* at 143.

<sup>55</sup> 22 U.S.C. § 612(a) (2006).

<sup>56</sup> *Id.* § 611(a), (c).

<sup>57</sup> *Id.* § 611(c).

<sup>58</sup> See GAO 2008, *supra* note 40, at 7 (discussing the definition of an agent of a foreign principle under FARA).

<sup>59</sup> 22 U.S.C. § 612(a). Otherwise, the lobbyist would likewise have to file under the LDA. See 2 U.S.C. § 1601 (1995) (noting the need for public disclosure of lobbying activities).

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under the laws of a foreign country.<sup>60</sup> While this term seems very broad, as we will see below, several exceptions and loopholes have undercut its apparent breadth.

Once an agent has determined that they are required to register under FARA, they are subject to very stringent reporting requirements. In addition to requiring a statement of how much money is spent on behalf of the principal for lobbying activities, FARA also requires that all expenditures be itemized, separating lobbying costs from campaign contributions to politicians.<sup>61</sup> Moreover, FARA also requires that a copy of any written agreement be filed with the DOJ as well.<sup>62</sup> This filing must also include a description of how the agreement was reached as well as a detailed summary of the obligations of both parties.<sup>63</sup> These requirements were enacted to provide an accurate account of what influence or type of influence the agent is seeking, and how the agent went about obtaining that influence, by requiring documentation of every step that necessitated any agreement.<sup>64</sup> While the breadth of these requirements can serve as a powerful tool for the public, once again for the Act to work properly, not only is mere disclosure necessary, but accurate disclosure is also

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<sup>60</sup> 22 U.S.C. § 612(b) (2006); *see also* GAO 2008, *supra* note 40, at 7–8 (discussing the interpretation of foreign principal).

<sup>61</sup> *See* 22 U.S.C. § 612(a)(5) (2006) (discussing how the registration statement must include “[t]he nature and amount of contributions, income, money, or thing of value, if any, that the registrant has received . . . and the form and time of each such payment and from whom received”).

<sup>62</sup> *Id.* § 612(a)(4), which states:

Copies of each written agreement and the terms and conditions of each oral agreement, including all modifications of such agreements, or, where no contract exists, a full statement of all the circumstances, by reason of which the registrant is an agent of a foreign principal; a comprehensive statement of the nature and method of performance of each such contract, and of the existing and proposed activity or activities engaged in or to be engaged in by the registrant as agent of a foreign principal for each such foreign principal, including a detailed statement of any such activity which is a political activity.

*Id.*

<sup>63</sup> *Id.* § 612(a)(4)–(9) (mandating detailed explanations accompanying each filing).

<sup>64</sup> *See* GAO 1980, *supra* note 40, at 3 (discussing the purposes of GAO’s disclosure requirements in the context of the Justice Department’s failure to uphold the spirit of the act through enforcement).

required, so that the public is aware of exactly how the government is being influenced.<sup>65</sup>

In a similar vein, the penalties of FARA non-compliance are stringent.<sup>66</sup> Under the Act, violations of FARA, which are criminal, include total failure to file a registration statement, filing an untrue or fraudulent statement, and filing a deficient registration statement.<sup>67</sup> Penalties range from removal of aliens or injunctive relief, to five years imprisonment and a \$5,000-\$10,000 fine.<sup>68</sup> However, FARA does not allow for the imposition of civil penalties,<sup>69</sup> nor does it allow for a private right of action.<sup>70</sup>

FARA contains exceptions to filing only in limited circumstances. For example, employees of foreign states (including diplomats, officials, and their staff) are exempt from filing.<sup>71</sup> Similarly, religious personnel, attorneys (only to the extent they are engaged in active legal representation before a court of law), and private humanitarian activities are also exempt.<sup>72</sup> In addition, agents who are allowed to register under the LDA are also exempt from FARA.<sup>73</sup>

### 3.3. *The LDA and its Comparison to FARA*

The Lobbyist Disclosure Act of 1995 was a major overhaul of domestic lobbying disclosure. The LDA's functionality is similar to that of FARA where its primary purpose is to ensure adequate disclosure of lobbying activity because "the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as

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<sup>65</sup> See SMITH, *supra* note 21, at 202-03 (stating that inaccurate FARA disclosures and lack of prosecution against them can "create a serious drag on society and has a corrosive effect on public law abidance").

<sup>66</sup> See Lawson, *supra* note 44, at 1157-58 (noting the criminal penalties for failure to comply with FARA).

<sup>67</sup> 22 U.S.C. § 618(a) (2006).

<sup>68</sup> *Id.*

<sup>69</sup> See Lawson, *supra* note 44, at 1173-74 (arguing that giving the DOJ power to impose civil liability would improve the enforceability of FARA).

<sup>70</sup> See Comm. for a Free Namibia v. Sw. Africa People's Org., 554 F. Supp. 722, 723 (D.D.C. 1982) (holding that the plaintiff who sought to compel FARA registration against a group lobbying to alter U.S. policy for Namibia lacked standing for a private cause of action under FARA).

<sup>71</sup> 22 U.S.C. § 613(a)-(c) (2006).

<sup>72</sup> See *id.* § 613(d)-(g) (listing the exemptions under FARA).

<sup>73</sup> *Id.* § 613(h).

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proponents of the public weal.”<sup>74</sup> Substantively, however, FARA differs significantly from the LDA. First, the LDA explicitly defines lobbyists, lobbying activities, and lobbying contacts in an attempt to clarify those who fall under the Act.<sup>75</sup> Second, and perhaps more importantly, adequate disclosure under the LDA is much less stringent than under FARA.<sup>76</sup> Under the LDA, a lobbyist only has to file a semi-annual report that contains his name, firm, a short description of the “general issue area” on behalf of which they are lobbying, and a “good faith estimate of the total amount of” income received and expenses on behalf of the client.<sup>77</sup> FARA, on the other hand, requires regular updates of activities to the DOJ, detailed lists of activities, an itemized account of expenditures, and copies of all oral or written agreements.<sup>78</sup> Third, violations of the LDA for failure to file or for fraudulent filings are only punishable by civil penalties of up to \$50,000 as opposed to FARA’s criminal penalties.<sup>79</sup> Finally, these differences are only heightened by the fact that the LDA exempts certain foreign lobbyists, mainly commercial entities, from filing FARA reports.<sup>80</sup> This was done despite the fact that the commercial interests represented are still mainly those of a foreign entity.<sup>81</sup>

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<sup>74</sup> United States v. Harriss, 347 U.S. 612, 625 (1954).

<sup>75</sup> FARA instead relies on an overly broad definition of the agency to include any contact on behalf of an agent. See 2 U.S.C. § 1602(7)–(8) (1995) (defining lobbying activities and lobbying contact); see also *The History of the Lobbying Disclosure Act*, LOBBYINGINFO.ORG, July 26, 2005, <http://www.lobbyinginfo.org/laws/page.cfm?pageid=15> (discussing the LDA’s clarification of definitions for “lobbyist” and “lobbying activities”).

<sup>76</sup> See 2 U.S.C. §1602(7)–(8) (1995) (defining “lobbyist activities” and “lobbying contact”).

<sup>77</sup> See *id.* § 1604(b) (describing the contents of an LDA report).

<sup>78</sup> 22 U.S.C. § 612(a) (2006).

<sup>79</sup> 2 U.S.C. § 1606 (1995).

<sup>80</sup> Registration for lobbyists lobbying for foreign commercial entities was removed from the purview of FARA and into that of the less stringent LDA. See Craig Holman, *Origins, Evolution and Structure of the Lobbying Disclosure Act*, PUB. CITIZEN, May 11, 2006, at 11, available at <http://www.cleanupwashington.org/documents/LDAorigins.pdf> (elaborating on the substantive changes to FARA by the LDA).

<sup>81</sup> As we will see through the Dubai Ports deal, many of the assumptions of the LDA’s framers turned out to be wrong, and many “commercial” entities wishing to substantively affect U.S. policy have used the LDA exemption from FARA as a way around the full disclosure required by FARA, especially when the policy advocated is unpopular. See *infra* Section 4.2.2.2.

There are several reasons FARA's regulations are more strenuous than the LDA's. First, harkening back to FARA's anti-propaganda roots, congressional policy has tended to monitor those who are doing the bidding of another government. Moreover, due to its international scale, there is a greater perceived harm of foreign entities lobbying Congress to do their bidding as opposed to domestic lobbyists' more personal and more domestic ambitions.<sup>82</sup> Second, unlike domestic lobbyists, whose interests are vaguely perceived to be connected to the country as a whole, there exists an inherent fear of the secret perversion of our officials by foreign governments whose interests are not in line with those of the American people.<sup>83</sup> Using Olson's analysis, all actors act rationally for their own self-interest; foreign agents' self-interest is with their government, while the interests of domestic agents are likewise domestic.<sup>84</sup> Foreign agents represent foreign principals whose interest lie in their own self-preservation; hence, their desire is to affect American policy for their own betterment, regardless of its effect on the American people.<sup>85</sup> On the other hand, domestic lobbyists are seen as also being concerned with America's preservation along with their own. This, therefore, requires less stringent disclosure of their activities.<sup>86</sup>

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<sup>82</sup> See Baker, *supra* note 22, at 32 ("Lobbying for foreign interests potentially threatens the ability of the United States to detect and respond to breached trade agreements, trade barriers, and trade deficits between nations.").

<sup>83</sup> William v. Luneburg, *The Evolution of Federal Lobbying Regulation: Where We Are Now and Where We Should Be Going*, 41 MCGEORGE L. REV. 85, 126 (2009) ("Given the exception from required FARA registration for lobbying by foreign commercial entities, the focus of that regime today is largely on lobbying by foreign governments and foreign political parties. That implicates national security and foreign policy interests that justify DOJ's continued retention of FARA administration."); see also Baker, *supra* note 22, at 33 (discussing the idea that any activity that threatens the economic health of the nation also threatens its national security).

<sup>84</sup> See OLSON, *supra* note 6, at 1-2 (arguing that while individuals are motivated to act in their own self-interest, they do not incorporate the outcome of group-based activities into the analysis of where this interest lies).

<sup>85</sup> Baker, *supra* note 22, at 32 ("Increased foreign investment in United States property leads foreign owners to protect their interests by increasing their involvement in domestic policies.").

<sup>86</sup> *Id.* at 36 ("United States citizens are being denied the ability to make informed decisions on trade legislation issues because the ultimate source of information is often hidden. Agents of foreign principals can and do represent themselves as disinterested spokespersons from domestic constituencies because of the...exemptions of FARA.").

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#### 4. FARA'S SHORTCOMINGS AND THEIR POTENTIAL EFFECT ON POLICY

##### 4.1. Loopholes and Failures of FARA

Since its last substantive reform in 1966, many, including Congress itself, have pointed out FARA's failures and shortcomings in lobbyist registration.<sup>87</sup> Despite the outcry from several members of Congress, action has yet to be taken to revise foreign lobbyist registration.<sup>88</sup>

##### 4.1.1. DOJ Failures

Perhaps the Act's greatest setback is the lack of spirited enforcement from the Justice Department. As noted, the Justice Department is charged with ensuring timely, adequate, and correct disclosure, and prosecuting non-disclosures.<sup>89</sup> However, as the 1963 Senate investigation shows, lack of enforcement dates almost from the point the DOJ first took control of FARA registration in 1942.<sup>90</sup> Furthermore, as GAO has pointed out, little action has been taken since.<sup>91</sup> To put it simply—the DOJ's enforcement of FARA has been abysmal—"[a]ccording to [the Department of] Justice, it

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<sup>87</sup> See GAO 1974, *supra* note 34, at 1 (stating that the 1966 amendments to FARA did not have their intended effect); GAO 1980, *supra* note 40, at 1 (citing lack of DOJ enforcement as the largest barrier to effective disclosure); GAO 2008, *supra* note 40, at 15 (discussing changes that need to be made to increase FARA's efficacy); HOWE & TROTT, *supra* note 27, at 13 (noting the size and growth of the foreign lobbying industry, especially ethnic lobbies); SMITH, *supra* note 21, at 186 (describing the effects of the DOJ's minimalist approach to FARA enforcement); CHOATE, *supra* note 42, at 202 (noting that FARA has many loopholes).

<sup>88</sup> See *Hearing on S.R. 2279 Before the S. Subcomm. on Oversight of Gov't Mgmt, Comm. on Gov't Affairs*, 102d Cong. 1-3 (1992) [hereinafter *LDA Hearing*] (statement of Sen. Levin) (noting that FARA has heretofore failed in disclosing foreign agents); HOWE & TROTT, *supra* note 27, at 26 ("A New York Democratic Congressman, Lester Wolff, . . . is investigating the policy making influence of multinational corporation lobbies and other pressure groups."); SMITH, *supra* note 30, at 41 (quoting Senator Fulbright) (stating that FARA disclosures are not adequately prosecuted); Perry, *supra* note 43, at 150-52 (discussing Senator Heinz's proposed amendments to fix FARA's enforcement failures).

<sup>89</sup> See *supra* text accompanying notes 58-63 (discussing the disclosure process and requirements).

<sup>90</sup> See *Fulbright Hearings*, *supra* note 31, at 1705-09 (discussing the failure of the justice department to prosecute the American Zionist Council's admittedly misleading filings from 1950-1960).

<sup>91</sup> See GAO 2008, *supra* note 40, at 2 ("Our past work has found problems with the U.S. government's implementation of these laws.").

has prosecuted one violation of FARA since 1990.”<sup>92</sup> There are several causes for this problem. The first is that the Foreign Agent Registration Unit at the DOJ plainly does not have the resources to undergo any investigations of fraudulent filings, let alone non-compliance altogether.<sup>93</sup> Similarly, the unit only has eight staff members (six professional and two administrative), which is clearly not enough to even register and file the thousands of applications that they currently have.<sup>94</sup>

Another cause for lax enforcement is the lack of a clear legal mandate for the DOJ.<sup>95</sup> As previously noted, FARA is intended to be self-policing. Therefore, agents do not have to notify the DOJ when they are claiming an exemption. This effectively makes it harder for the DOJ to find violators because the unit is charged with not only prosecuting the violators, but also with actively monitoring all lobbying activities.<sup>96</sup> This, when coupled with the small staff due to lack of funding, creates a disastrous lack of legal enforcement.<sup>97</sup>

Finally, early political embarrassments from failed FARA enforcements have effectively stopped prosecutions since the 1980s. “Between 1944 and the 1963 [Senate] hearings, there were ten indictments and five convictions,”<sup>98</sup> however, by 1974 “FARA’s full potential criminal sanctions were accurately portrayed as ‘rarely pursued.’”<sup>99</sup> Much of the stigma against prosecutions came from a rash of failures by the DOJ to effectively prosecute FARA

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<sup>92</sup> *Id.* at 8.

<sup>93</sup> See *id.* at 14 (“[The DOJ] cited resource limitations as a barrier to monitoring compliance”); see also CRS 1977, *supra* note 38, at 28 (“lack of adequate staff and funds in the past have been cited as reasons for hampering fully effective enforcement of the Act.”).

<sup>94</sup> *Id.*; see also Kevin Bogardus, *Foreign Lobbyist Database Could Vanish*, CENTER FOR PUBLIC INTEGRITY, July 28, 2004, <http://www.publicintegrity.org/articles/entry/486/> (quoting DOJ officials as stating that due to lack of funding, FARA’s online database is “so fragile” that it “could result in a major loss of data”).

<sup>95</sup> GAO 2008, *supra* note 40, at 14 (referring to justice officials that note the lack of clear legal authority pose a barrier to increased compliance monitoring).

<sup>96</sup> *Id.*; see also Perry, *supra* note 43, at 142–43 (noting that the DOJ faces a difficult task in monitoring potential violators).

<sup>97</sup> See CRS 1977, *supra* note 38, at 105 (concluding that the DOJ’s inability to effectively monitor provides “no assurance that foreign agents are properly identifying themselves and disclosing the identities of their foreign principal”).

<sup>98</sup> HOWE & TROTT, *supra* note 27, at 17. In one of the most famous cases, Alex L. Guterma was sentenced to twenty-four months in prison for accepting \$750,000 “to disseminate . . . favorable propaganda” for the Dominican Republic. *Id.* at 17.

<sup>99</sup> *Id.* at 186.

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violations.<sup>100</sup> Due to a string of case dismissals, the DOJ effectively saw criminal enforcement of FARA as a waste of the unit's limited resources.<sup>101</sup> As with all criminal prosecutions, violators are only deterred if there is an adequate threat of prosecution.<sup>102</sup> "Enforcement malaise causes entities in many sectors, from business to nonprofits to individuals, to question whether they are suckers for paying their fair share, playing by the rules, or disclosing relevant information that being a citizen of the United States demands."<sup>103</sup>

#### 4.1.2. *Foreign Business Entities*

As discussed above, FARA exempts registration of foreign commercial entities with contacts in the United States that are able to register under the LDA.<sup>104</sup> While this was not the case prior to the LDA, its amendment of FARA placed foreign corporations out of FARA's jurisdiction.<sup>105</sup> The breadth of this exception cannot be understated. Due to the LDA's revision, even foreign state-owned companies are exempt from FARA, despite the fact that they clearly represent the bidding of the state itself, a principal that was intended to remain under the purview of FARA.<sup>106</sup> Furthermore, even without the LDA's revision, domestic subsidiaries of foreign corporations never fell under the purview of FARA because they are not "organized under the laws of another country," even if the

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<sup>100</sup> See *United States v. McGoff*, 831 F.2d 1071, 1071 (D.C. Cir. 1987) (dismissing a case against pro-South African apartheid lobbyists because the statute of frauds ran out); *United States v. Covington and Burling*, 411 F. Supp. 371, 377 (D.D.C. 1976) (dismissing a FARA case against the law firm Covington and Burling for lobbying on behalf of the Guinean government for attorney client privilege); SMITH, *supra* note 21, at 185-86 (discussing the dismissal of a 1976 case against Billy Carter, President Carter's brother, who lobbied on behalf of Libya).

<sup>101</sup> See SMITH, *supra* note 21, at 202-03 (discussing the steady decline of FARA enforcement from the failures of the 1970s to the present).

<sup>102</sup> This is clearly shown in the case of the American Israeli Public Affairs Committee ("AIPAC"), whom the DOJ has failed in registering since AIPAC's precursor in the 1950s. *Id.* at 204.

<sup>103</sup> *Id.* at 203.

<sup>104</sup> See 22 U.S.C. § 613(h) (2006) (defining agents who are exempt from FARA, but are still required to register under the LDA).

<sup>105</sup> See Lawson, *supra* note 44, at 1178 (discussing and approving of the reasons given by the LDA's framers for exempting commercial entities).

<sup>106</sup> See 2 U.S.C. § 1602(8)(B)(iv) (requiring that lobbying "on behalf of a government of a foreign country or a foreign political party" be disclosed under FARA).

policies they advocate are essentially those of its foreign parent.<sup>107</sup> The reasons for removal given by the drafters include: the idea that corporate entities are more likely to comply if the requirements are easier, the notion that corporate entities do not seek to affect policy as much as political entities, and the assumption that domestic subsidiaries of foreign corporations have mainly domestic interests.<sup>108</sup> To some, this exemption may seem harmless, because, as the lobbyists argue, “overseas companies are not seeking to subvert American government policy.”<sup>109</sup> However, as one commentator notes, “[i]ndeed, in this era of global competition, it is not realistic to expect foreign companies doing business with the United States to avoid attempting to influence U.S. policy in their favor.”<sup>110</sup> Furthermore, because of the decreased scrutiny of the LDA, far less information is given about the lobbying activities by foreign entities.<sup>111</sup>

#### 4.1.3. *Political Action Committee*

Political Action Committees (“PACs”), present a major problem that has only recently come into being. While PACs did exist at the time of FARA’s revision in 1966, they did not play a major role in lobbying until campaign finance reform laws were interpreted to allow PACs to contribute far more money than any one individual could under such laws.<sup>112</sup> While campaign contributions by PACs are not the subject FARA, PACs 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 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

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<sup>107</sup> 22 U.S.C. § 611(b)(2) (2006).

<sup>108</sup> See Lawson, *supra* note 44, at 1178 (stating reasons for removal of corporate entities from the LDA by the framers).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See Holman, *supra* note 80, at 11 (“Lobbyists registering under FARA . . . [lists] detailed business and financial information and must label all lobbying materials as representing the interests of the foreign government or party. The financial disclosure requirements are considerably more extensive under FARA than under LDA.”).

<sup>112</sup> See Fed. Election Comm’n v. Nat’l Conservative Political Action Comm., 470 U.S. 480, 501 (1985) (holding that the campaign finance law unconstitutionally limited PACs due to its breadth).

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another country.”<sup>113</sup> However, unlike domestic subsidiaries where it is arguable that they “are not seeking to subvert policy,”<sup>114</sup> PACs representing purely foreign interests, such as foreign governments, are in fact seeking to affect foreign policy for the foreign principal.<sup>115</sup> It should not matter the form that one takes to influence policy, but the substance of the attempted influence.

Notwithstanding potentially representing a purely foreign interest, PACs may pose an enforcement problem that corporations do not. In order to fall under FARA, the organization must be the agent of a foreign principal; likewise, for a foreign corporation, it is not difficult to determine the jurisdiction of incorporation of the company that hired the lobbyist. However, for PACs that represent a foreign government’s interests, the task is much more difficult because PACs are essentially domestic creations. PACs, as domestically created organizations, act as a buffer between the lobbyist and the true foreign agent. In order to determine accurately the foreign principal, one would have to analyze how the PAC is funded, who benefits from policies the PAC advocates, and the PAC’s leadership structure. Theoretically, this task is not different from how actual FARA non-compliance enforcement should work. As with domestic lobbying firms representing foreign interests, the DOJ would still have to determine who the principal is. Moreover, “‘agency’ does not always require top-down payment flows from the principal to the foreign agent; only demonstrable policy direction and coordination are necessary to prove [agency].”<sup>116</sup> If an agent has not registered, under FARA, it is the duty of the DOJ to determine if any violation occurred.<sup>117</sup>

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<sup>113</sup> 22 U.S.C. § 613(b)(1) (2006).

<sup>114</sup> See Lawson, *supra* note 44, at 1178 (discussing and approving of the reasons given by the LDA’s framers for exempting commercial entities).

<sup>115</sup> For example, when Senator Fulbright investigated the American Zionist Council PAC in 1963, the Council admitted that the contributions they made to the AZC were to assist the “Zionist groups...to help them provide the services to the campaign, to assist fundraising for Israel through their publications.” *Fulbright Hearings*, *supra* note 31, at 1704-08 (testimony by Isador Hamlin of the American Zionist Council).

<sup>116</sup> SMITH, *supra* note 30, at 137.

<sup>117</sup> However, such a determination is not impossible. For the most part, it is often quite clear when a PAC is working as an agent for a foreign government. For example, the DOJ in the past has traced funding back to foreign entities, or often the PACs themselves will admit to working for the purpose of a foreign nation. See Sari Horwitz & Dan Eggen, *FBI Searches Saudi Arabia’s PR Firm*, WASH. POST, Dec. 9, 2004, at A08 (describing an FBI raid of a lobbying firm for alleged FARA violations).

Unfortunately, this problem is exacerbated by the DOJ's inability to investigate potential violations.<sup>118</sup>

#### 4.1.4. *Meetings Not Occurring on U.S. Soil*

FARA currently does not regulate any contact between lobbyists and politicians or their staff that does not take place in the United States.<sup>119</sup> When the law was last amended in 1966, this was not a problem, as world travel was still in its infancy and lobbying had not reached the global scale it has today.<sup>120</sup> As the law currently stands, the meetings abroad are completely undisclosed leaving it very tough for the public to "link the dots" on influence.<sup>121</sup> As Senator Carl Levin once mentioned, "[t]he purpose of our lobbying laws is to tell the public who is being paid how much to lobby whom on what. That purpose is not being served under the status quo as we now see it."<sup>122</sup> Therefore, in order to effectuate FARA's purpose of adequate disclosure, we must ensure that each of the aforementioned loopholes is closed.

#### 4.2. *Potential Policy Effects and Examples of FARA's Failures*

While the failures of FARA noted above have shown why the Act should have been reformed after past scandals, the evidence from current scandals demonstrates not only a need but also an opportunity for reform. Lobbying regulation does not seek to limit what lobbyists are allowed to say<sup>123</sup>—it recognizes that the "full

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<sup>118</sup> This does not relieve the DOJ of its duty. As the agency of the executive branch charged with enforcement power, it is their duty to ensure that the law is faithfully executed to its fullest extent.

<sup>119</sup> See Barry Meier, *Lawmakers Seek to Close Foreign Lobbyist Loopholes*, N.Y. TIMES, June 12, 2008, at A23 ("[The proposed FARA amendment] would require those who meet with American officials outside the country on behalf of foreign politicians to register as lobbyists, a step that existing law does not require.").

<sup>120</sup> See Baker, *supra* note 22, at 33 (noting that the world has become increasingly globalized since FARA was last substantively updated, resulting in "massive growth in lobbying by foreign nations . . .").

<sup>121</sup> See Posting of Andrew Zajac to Swamp Politics, *Black Hole of Lobbying Disclosure*, [http://www.swamppolitics.com/news/politics/blog/2008/09/black\\_hole\\_of\\_lobbying\\_disclos.html](http://www.swamppolitics.com/news/politics/blog/2008/09/black_hole_of_lobbying_disclos.html) (Sept. 23, 2008, 7:00 EST) (discussing the difficulty in transparency with regards to lobbying that occurs outside of the country).

<sup>122</sup> LDA Hearing, *supra* note 88, at 60 (statement of Sen. Levin).

<sup>123</sup> As noted by the Supreme Court, the First Amendment's right to petition the government guarantees a right to lobby Congress. See *Harriss*, 347 U.S. at 625 (1954) (holding that Congress merely sought to "provide[] for a modicum of information from those who for hire attempt to influence legislation" and therefore did not violate freedoms guaranteed by the First Amendment.).

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realization of the American ideal of government by elected representatives depends to no small extent on [members of Congress'] ability to properly evaluate" the political pressures to which they are regularly subjected.<sup>124</sup> Without this public information, "the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal."<sup>125</sup>

However, in this regard, none of the events described below are per se wrong, that is to say, the policies advocated by these agents on behalf of their foreign principals may or may not be in the best interests of the U.S. government or the American public. However, when such access flies under the radar, neither the American public nor members of Congress are able to discern who is attempting to influence policy. This undermines the spirit of FARA, causes the American ideal of government to fail, and threatens to "drown[] out" the opinion of the American public.<sup>126</sup>

#### 4.2.1. Foreign Policy

##### 4.2.1.1. Policy Effects

There exists great potential for lobbyists to influence U.S. foreign policy. For the most part foreign policy is an area in which most members of Congress are admittedly not experts, especially when it concerns the more remote areas of the world.<sup>127</sup> As President Kennedy noted, even though lobbyists are "concededly . . . biased," they are "in many cases expert technicians and capable of explaining complex and difficult subjects in a clear, understandable fashion."<sup>128</sup> Although knowledgeable, their concededly biased nature, when combined with the lack of

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> See HOWE & TROTT, *supra* note 27, at 16 (quoting Barber Conable, Republican Congressman of New York: "The system couldn't work half as well without the hundreds of professional representatives of the various interest groups who make it their business to be sure a congressman knows the implications and effects of the sometimes complicated technical legislation.").

<sup>128</sup> John F. Kennedy, *To Keep the Lobbyist Within Bounds*, N.Y. TIMES MAG., Feb. 19, 1956, at SM6, reprinted in 102 CONG. REC. 3802 (1956) (statement of Sen. Neuberger).

knowledge a Member of Congress may have, can create several problems. First, as noted by former Attorney General William B. Saxbe, foreign lobbyists are often very subtle; as he puts it, "you don't always know you're being lobbied."<sup>129</sup> This is only exacerbated by the fact that many foreign agents are often former members of Congress.<sup>130</sup> "The familiarity that former officials have with ex-colleagues in the federal service is their greatest asset," as they are able to have much more sway over their ex-colleagues, ultimately convincing them that their cause is correct.<sup>131</sup> Without proper disclosure, members of Congress who are unaware that they are being lobbied may accept the information given as truth. Second, and related to the purpose of lobbying laws counteracting the collective action problem, without disclosure, the public is unaware that the issue has even been raised and is therefore less likely to counter-lobby.<sup>132</sup> "The danger is that high-powered lobbyists representing the concerns of foreign parties may crowd out the legitimate concerns of Americans in the governmental decision-making process."<sup>133</sup> Third, even after the issue has been passed, a lack of registration prevents the public from determining what issues are being lobbied by whom. The public will be unable to appreciate fully the relative change in policy if it cannot ascertain whether the change was *sui generis* or the product of undue foreign influence. Finally, even while some argue that Congress will always ultimately act in the best interest of the voter,<sup>134</sup> Congress cannot make a fully informed decision by only

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<sup>129</sup> HOWE & TROTT, *supra* note 27, at 20-21 (quoting Attorney General William B. Saxbe).

<sup>130</sup> See GAO 2008, *supra* note 40, at 11-12 (identifying "29 former senior federal officials who left U.S. government service between 2000 and 2007 and registered as foreign agents with Justice."); see also Spak, *supra* note 35, at 274 (discussing former federal officials becoming lobbyists for foreign principals); Amanda B. Carpenter, *Q & A with Congress: It's OK to Lobby for Foreign Governments*, HUM. EVENTS, Mar. 3, 2006, <http://www.humanevents.com/article.php?id=12924&keywords=It%E2%80%99s+Okay+to+Lobby+for+Foreign+Governments> (last visited Apr. 3, 2010) ("[F]ormer Sen. Bob Dole had been hired as a lobbyist for the United Arab Emirates.").

<sup>131</sup> Spak, *supra* note 35, at 274.

<sup>132</sup> See GAO 2008, *supra* note 40, at 7-8 ("[A] statement is 'detailed' within the meaning of the Act when it has the degree of specificity necessary to permit meaningful public evaluation of each of the significant steps taken by the registrant to achieve the purposes of the foreign principal-agent relationship.").

<sup>133</sup> Spak, *supra* note 35, at 238.

<sup>134</sup> See generally HOWE & TROTT, *supra* note 27 (noting that some believe that members of Congress are able to adequately filter out information from lobbyists).

hearing one side of the issue. Many members of Congress will often sincerely believe that their actions are helping those in a far-off region while having little effect at home. By hearing only one side of the story, the member effectively makes a decision with only half the pertinent information. In each of these situations, adequate disclosure can prevent such issues.

#### 4.2.1.2. *Recent Examples*

##### 4.2.1.2.1. AIPAC

Two recent foreign policy examples portray the need for disclosure of foreign lobbyists. In each situation, after learning about the full extent of the lobbying, members of Congress expressed deep reservations for the policies they had just approved. The American Israel Public Affairs Committee (“AIPAC”) is the first example. As shown through the Fulbright hearings of 1963, the pre-cursor to AIPAC, the American Zionist Council (“AZC”),<sup>135</sup> was forced by the DOJ to register under FARA.<sup>136</sup> Learning from the experience of the AZC, AIPAC has been able to evade registration since its inception despite multiple attempts by the DOJ to enforce registration.<sup>137</sup> Furthermore, as it was with the AZC, it is beyond argument that AIPAC is an agent

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<sup>135</sup> The AZC and AIPAC were both created by Isaiah Kenen; however, AIPAC was created to be more domestically rooted. See DAVID HOWARD GOLDBERG, FOREIGN POLICY AND ETHNIC INTEREST GROUPS: AMERICAN AND CANADIAN JEWS LOBBY FOR ISRAEL 19 (1990) (explaining how the lessons that Kenen learned from the AZC eventually led him to create AIPAC, which was “acknowledged as the effective political arm of the organized AZC.”); see also HOWE & TROTT, *supra* note 27, at 6 (noting that Kenen saw AIPAC as more domestically rooted than the AZC). Before shifting from the AZC to AIPAC, Kenen was forced by the DOJ to register the AZC under FARA. See ISRAEL OFFICE OF INFORMATION, DEPARTMENT OF JUSTICE SUPPLEMENTAL REGISTRATION STATEMENT PURSUANT TO SECTION 2 OF THE FOREIGN AGENTS REGISTRATION ACT OF 1938 (filed Oct. 30, 1950), available at [http://www.irmep.org/ila/Kenen/IOI/1950IOI\\_FARA/default.asp](http://www.irmep.org/ila/Kenen/IOI/1950IOI_FARA/default.asp) (showing Kenen’s supplemental registration statement under FARA).

<sup>136</sup> See generally *Fulbright Hearings*, *supra* note 31, at 1307–12.

<sup>137</sup> See STEPHEN SCHWARTZ, IS IT GOOD FOR THE JEWS?: THE CRISIS OF AMERICA’S ISRAEL LOBBY 242 (2006) (describing AIPAC’s ability to evade registration under FARA and quoting one official as saying that registration would be AIPAC’s “death knell”); see also GOLDBERG, *supra* note 135, at 17 (noting that those within the organization have “consistently emphasized: AIPAC is not a foreign agent”); SMITH, *supra* note 30, at 98 (describing the creation of AIPAC as a “successful exercise that bent the letter and spirit of at least two other laws—the Foreign Registration Act and the Logan Act.”).

of Israel.<sup>138</sup> While it has registered under the LDA, thereby taking advantage of the lax requirements and not disclosing copies of agreements, the lack of enforcement by the DOJ is viewed as the main reason why AIPAC is not registered under FARA.<sup>139</sup> This lack of monitoring eventually led to the indictment of two high-ranking AIPAC officials for espionage for Israel.<sup>140</sup> Stephen Rosen, AIPAC's director of foreign policy issues, and Keith Weissman, AIPAC's senior Middle East analyst, worked with Colonel Lawrence Franklin, who held top-secret military intelligence clearance, to send sensitive information about terror threats in the Middle East to Israel.<sup>141</sup> While the trial for Weissman and Rosen is still pending, Franklin, who pleaded guilty of conspiracy to commit espionage after cooperation with the FBI against Weissman and Rosen, was sentenced to twelve and a half years for passing classified information to AIPAC and an Israeli diplomat.<sup>142</sup> This is exactly the type of incident FARA was designed to prevent: the contact and lobbying of U.S. officials by those representing foreign principals, in this case the State of Israel. Had FARA been enforced in the context of AIPAC, its regulations would have required that all communications between Colonel Franklin and AIPAC be filed with the DOJ. Moreover, even if AIPAC chose not to file for the meetings where the intelligence documents were passed, had they been registered under FARA, other meetings, documents, and funds transfers may have been filed that could have created a

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<sup>138</sup> For example, AIPAC was able to lobby successfully for the passage of the Saudi Arabia Accountability Act, which threatened to cut off military aid to Saudi Arabia, because it was against Israel's interest to have an armed neighbor. See SCHWARTZ, *supra* note 137, at 241 (discussing details of the Saudi Arabia Accountability Act and the harsh sanctions provided in cases of non-compliance). See also SMITH, *supra* note 30, at 137 (noting several instances of direct lobbying orders from the Israeli government to congress on their behalf); Walter Pincus, *Intelligence Pick Blames "Israel Lobby" for Withdrawal*, WASH. POST, Mar. 12, 2009, at A1 (reporting that Charles Freeman withdrew from appointment for an intelligence post as a result of intense pro-Israel lobbying).

<sup>139</sup> See SMITH, *supra* note 21, at 202 (describing lack of DOJ enforcement as the main reason for non-registry).

<sup>140</sup> See *United States v. Rosen*, 445 F. Supp. 2d 602, 602 (E.D. Va. 2006) (denying defendants' motion to dismiss charges).

<sup>141</sup> See *id.* at 608 (describing how the officials obtained sensitive information).

<sup>142</sup> Mark Mathews, *This is the FBI – Can We Talk?*, WASHINGTONIAN, Jan. 01, 2008, at 76, available at <http://www.washingtonian.com/articles/people/6215.html>.

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paper trail.<sup>143</sup> As written, FARA has very strenuous disclosure requirements, and many of these requirements could have led to an investigation into the matter. Similarly, it may have even provided deterrence against the incident, because of the potential for DOJ investigation and criminal penalties.

#### 4.2.1.2.2. USINPAC

The DOJ's enforcement failure against AIPAC, as described above,<sup>144</sup> has not gone unnoticed by other foreign lobbying groups. "Following consciously in AIPAC's footsteps, the India lobby is getting results in Washington—and having a profound impact on U.S. policy, with important consequences for the future of Asia and the world."<sup>145</sup> The main lobby of India in the United States is the United States India Political Action Committee ("USINPAC"). USINPAC has had major recent success in Congress by successfully lobbying the passage of a U.S.-Indian nuclear fuel deal, whereby the United States will now sell nuclear fuel to India (despite such a sale being against the Nuclear Non-proliferation Treaty ("NPT")).<sup>146</sup> Whether or not this deal is in the United States' best interest is not for this comment to argue, however what is clear is that even with round-the-clock lobbying, much like AIPAC, USINPAC did not register its lobbying activities under FARA.<sup>147</sup> Similar to AIPAC, USINPAC should have registered under FARA, as an agent of a foreign government. The Indian government has admitted using USINPAC as a tool, even stating that the lobbying "constitutes an invaluable asset in strengthening India's

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<sup>143</sup> See *Fulbright Hearings*, *supra* note 31, at 1326-28 (discussing payments made by the Jewish Agency to the AZC); SMITH, *supra* note 21, at 203 ("[I]t is obvious that when FARA faced its biggest challenge, it completely failed the American people.").

<sup>144</sup> See *supra* text accompanying notes 89-103 (giving reasons for lack of enforcement).

<sup>145</sup> Mira Kamdar, *Forget the Israel Lobby. The Hill's Next Big Player is Made in India*, WASH. POST, Sept. 30, 2007, at B3. See also JOHN J. MEARSHEIMER & STEPHEN M. WALT, *THE ISRAEL LOBBY AND U.S. FOREIGN POL'Y* 359 n.20 (2007) (noting the ascendance of the Indian lobby as another example of a major ethnic lobby).

<sup>146</sup> See Kamdar, *supra* note 145, at B03 (noting the round-the-clock efforts by the lobby to ensure passage of a U.S.-Indian nuclear fuel deal and the resulting waiver of the MPT for India).

<sup>147</sup> See Jason A. Kirk, *Indian-Americans and the U.S.-India Nuclear Agreement: Consolidation of an Ethnic Lobby?*, 4 FOREIGN POLICY ANALYSIS 275, 278 (2008) (noting that the USINPAC did not have to register under FARA, and arguing against registration).

relationship with the world's only superpower."<sup>148</sup> This creates the exact foreign principal and agent relationship that requires disclosure and filing under the Act. In terms of actual ability to influence, many commentators have noted that the Indian lobby was "critical in pressing members of Congress to support the agreement."<sup>149</sup> In 2006 when the bill was first introduced, congressional support was so low that some considered the deal to be "dead in the water."<sup>150</sup> However, the lobby then began their efforts in 2006, pushing its view to members of Congress. They "frame[d] the issue in a way that emphasized its positive linkages to other goals in U.S. policy toward India," in particular, outsourcing, the war on terror, and global warming.<sup>151</sup> Eventually, despite significant opposition early on, the bill passed Congress by a significant margin.<sup>152</sup>

This process illustrates FARA's failure in the foreign policy realm. As stated above, without FARA registration, the public and specifically the non-proliferation counter-lobby were unaware of the significant efforts being made by the Indian lobby to insure passage. Much of the success of the bill resided in one-sided lobbying. While the Indian lobbyists may have provided expert information regarding their point of view, little was provided against the bill.<sup>153</sup> Additionally, while we know that the Indian lobby was involved with lobbying Congress for this bill, the extent and amount remains a mystery because the LDA does not require itemized spending lists or lists of meetings. Finally, because the United States is beginning to sign similar deals with other

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<sup>148</sup> MEARSHEIMER & WALT, *supra* note 145, at 13 n.20 (quoting an Indian Government Committee).

<sup>149</sup> Kirk, *supra* note 147, at 276; *see also* Kamdar, *supra* note 145, at B03 ("The nuclear pact brought together an Indian government that is savvier than ever about playing the Washington game, an Indian American community that is just coming into its own and powerful business interests that see India as perhaps the single biggest money-making opportunity of the 21st century.").

<sup>150</sup> Kirk, *supra* note 147, at 294 (describing initial reaction to the bill).

<sup>151</sup> *Id.* at 295.

<sup>152</sup> *See* Peter Baker, *Civilian Nuclear Trade Deal for India Is Backed by Senate*, N.Y. TIMES, Oct. 2, 2008, at A8 (reporting that "[t]he Senate ratified the deal 86 to 13 a week after the House passed it").

<sup>153</sup> *See* Kirk, *supra* note 147, at 285 ("[I]t came as much as a surprise to many members of Congress as it did to incredulous nonproliferation specialists in Washington.").

countries, such as the United Arab Emirates,<sup>154</sup> it is important that this information be disclosed, in order to fully understand the amount of lobbying for each deal. Again, whether or not such a deal is in the best interests of the American people is debatable; however, it *does* matter that the American people remain informed for the “full realization of the American ideal of government.”<sup>155</sup>

#### 4.2.2. Domestic Trade Policy

##### 4.2.2.1. Japan

The ability of foreign lobbyists to affect U.S. economic policy is an area that most are familiar with. Similar to foreign policy, without adequate disclosure, many members of Congress may believe that they are enacting changes for the benefit of American businesses, not recognizing the actual foreign elements pushing for the changes.<sup>156</sup> However, it was the perceived entrenchment of Japanese economic lobby that triggered the reform that created the LDA.<sup>157</sup> In the late 1980s, the Japanese were very successful at lobbying for one-sided tariff reductions on electronics imports by arguing that they provided thousands of jobs to Americans.<sup>158</sup> This spurred calls for increased registration through the LDA. However, it has become clear today that many foreign companies are able to hide behind their subsidiary or register under the more-permissive LDA to escape FARA’s scrutiny, while still having an adverse effect on policy.<sup>159</sup> The switch to the LDA has been such a failure that Congress has recently proposed to put foreign

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<sup>154</sup> Robert Burns, *US Inks Nuclear Cooperation Deal with Gulf Ally*, ASSOCIATED PRESS, Jan. 15, 2009, available at <http://www.istockanalyst.com/article/viewiStockNews/articleid/2958347> (last visited Apr. 5, 2010).

<sup>155</sup> *United States v. Harriss*, 347 U.S. 612, 625 (1954).

<sup>156</sup> See CHOATE, *supra* note 42, at 174 (noting, through the example of Harald Malmgren, that without FARA disclosure, it is difficult to determine for whom someone is actively lobbying).

<sup>157</sup> See generally Baker, *supra* note 22, at 25 (discussing how Congress amended FARA to cover lobbying government officials and added commercial activities to registration requirements).

<sup>158</sup> See *id.* at 30–32 (discussing how Toshiba was able to successfully lobby for a decrease in penalties from the U.S. government by arguing that Toshiba provided thousands of jobs to Americans, despite having sold military grade electronics to the USSR).

<sup>159</sup> See generally CHOATE, *supra* note 42, at 110 (noting “only...party chiefs know how much of [foreign monies paid to political campaigns] came from the U.S. subsidiaries of foreign-owned corporations.”).

corporations back under FARA because “such fuller disclosures should take place so lawmakers and the public could better understand how lobbyists for foreign entities were trying to influence Congress.”<sup>160</sup> As noted above, “in this era of global competition, it is not realistic to expect foreign companies doing business with the United States to avoid attempting to influence U.S. policy in their favor.”<sup>161</sup> Similarly, foreign corporations’ interests lie in their own self-preservation; hence, their desire is to affect American policy for their own betterment regardless of its effect on the American people.<sup>162</sup>

#### 4.2.2.2. *Dubai Ports World*

The Dubai ports deal is a recent example of the need for adequate disclosure through FARA, as opposed to the LDA. The deal was structured so that DP World International (“DPW”), a United Arab Emirates state-owned company, would acquire several U.S. ports through its acquisition of the former owner.<sup>163</sup> Due to national security concerns, such a sale must undergo a forty-five day review by the President. During this time, DPW hired several firms to lobby the President for the deal’s approval. However, because of the foreign business exemption under FARA, DPW was allowed to file under the LDA. Unlike FARA, the LDA does not require a description of lobbying activities or agreements undertaken. The LDA, unlike FARA, does not require a description of the underlying entity. In this situation, the entity was able to register simply as “DPW” without further description. This created a situation where no member of Congress was put on alert when Alston & Bird was lobbying for approval of the deal.<sup>164</sup> Even if a diligent member would have researched DPW, the LDA allows one to file up to forty-five days after the actual lobbying

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<sup>160</sup> Meier, *supra* note 119, at A23 (quoting Senator Claire McCaskill).

<sup>161</sup> Lawson, *supra* note 44, at 1178.

<sup>162</sup> See Baker, *supra* note 22, at 33 (“Increased foreign investment in United States property leads foreign owners to protect their interests by increasing their involvement in domestic policies.”).

<sup>163</sup> See *Timeline of Controversial Ports Deal*, CNN, Mar. 9, 2006, <http://www.cnn.com/2006/US/02/23/ports.timeline/index.html> (describing the structure of the deal).

<sup>164</sup> See Posting of Bill Allison to Sunlight Foundation Blog, *Why We Need Faster Lobbying Disclosure*, <http://blog.sunlightfoundation.com/2006/12/20/why-we-need-faster-lobbying-disclosure/> (Dec. 20, 2006, 13:17 EST) (discussing how DPW was able to go under the radar).

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took place while FARA requires one to file within ten days.<sup>165</sup> Theoretically, DPW could have filed after the forty-five day review was over. This likely would have occurred were it not for a small port company in Florida, who notified Congress that DPW—a U.A.E. state-owned company—was seeking to purchase control of major U.S. ports.<sup>166</sup>

The situation of DPW and state-owned companies highlights the need for a return to the requirement of disclosure of commercial entities under FARA. In international trade, national security concerns are often raised: “The fear was that the U.A.E.-owned firm would be more susceptible to infiltration by terrorists, who would have access to U.S. port facilities and foreign (perhaps un-inspected) cargo.”<sup>167</sup> The ability of a foreign company to affect U.S. national policy is unlike that of any domestic corporation. In this case, the LDA prevented Congress and likewise the public from learning about the true nature of a deal before the President. FARA registration could have prevented this situation because it requires faster and more detailed disclosure. Similarly, a member of the public searching the file would have known the exact details of the lobbying effort. Foreign entities wishing to do business in America should be subject to increased disclosure, as Senator McCaskill noted, “[i]f they want to take foreign clients, . . . they must be willing to claim them.”<sup>168</sup>

## 5. IMPROVING FARA

FARA, in and of itself, is a very powerful tool in regulating lobbyists. While it may have certain loopholes that need to be plugged, its substantive provisions are quite strong. Thus, FARA reformations should first address the main problem of lack of DOJ enforcement. Next, comprehensive FARA reform should include slight changes to the Act itself to clarify exactly who qualifies as an agent of a foreign principal and what disclosure is required of them. Because such slight changes would make major differences, the chance for substantive changes to FARA is very feasible.

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<sup>165</sup> *Id.*

<sup>166</sup> See *High Court Clears P&O's Takeover*, BBC NEWS, Mar. 2, 2006, <http://news.bbc.co.uk/2/hi/business/4765262.stm> (noting that a Florida shipping firm, Eller & Co., first brought DPW to the U.S. government's attention because the purchase would have hurt it economically).

<sup>167</sup> Allison, *supra* note 164.

<sup>168</sup> Meier, *supra* note 119.

### 5.1. Increasing DOJ Enforcement

While most will argue that increased funding for the Foreign Agent Registration Unit would make the most substantive difference,<sup>169</sup> there are changes to the law itself that would also make the DOJ's enforcement task easier and therefore decrease non-registration.

First, requiring those who do not file under FARA to notify the DOJ that they are claiming an exemption will dramatically ease the DOJ's burden. Currently, because of the self-policing nature of FARA, the DOJ carries the affirmative burden to seek out those who are not registering due to a claimed exemption.<sup>170</sup> "Without imposing an affirmative duty on agents to notify FARA's administrators of reliance on an exemption, the short-staffed registration unit cannot possibly enforce FARA's objectives."<sup>171</sup> As GAO has recommended several times, this would ease the burden on the Foreign Agent Registration Unit by shifting their role from affirmatively "monitoring" applications to simply screening them.<sup>172</sup> This role is much better suited for a staff of only ten.<sup>173</sup>

Second, to increase the likelihood of the DOJ pursuing enforcement, the possibility of civil damages should be added. Many consider the inclusion of the possibility of civil trials to be a major accomplishment of the LDA.<sup>174</sup> As FARA currently stands, the only way for the DOJ to enforce FARA is to indict violators. This is a major disincentive for enforcement because the DOJ must convince a grand jury to indict, collect enough evidence to satisfy the higher burden of proof, face a jury who is often skeptical of sending someone to jail simply for not registering, and prove

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<sup>169</sup> See GAO 2008, *supra* note 40, at 14 ("Justice cited resources limitations as a barrier to monitoring FARA compliance..."). Increased funding for prosecutions would have the greatest deterrence effect. Currently, many do not obey the full letter of the law because the DOJ has not actively prosecuted violators since the 1970s. If the DOJ were to increase enforcement through more funding, it would also likely create a deterrence effect.

<sup>170</sup> See Perry, *supra* note 43, at 142 ("Agents have no affirmative obligation to apply for an exemption.").

<sup>171</sup> *Id.* at 147.

<sup>172</sup> See GAO 2008, *supra* note 40, at 15 (describing that the Unit monitors, among other things, news articles to identify potential registrants).

<sup>173</sup> See *id.* at 14 (explaining that FARA's Registration Unit staff has declined from thirteen members in 1990 to eight in 2008).

<sup>174</sup> See Lawson, *supra* note 44, at 1182 ("While the LDA provides for civil fines of up to \$50,000 for a violation of its registration requirements, these civil fines are not applicable to those who violate the registration imperatives of FARA.").

FARA's current mens rea of intent to fraudulently file.<sup>175</sup> "So long as FARA administrators are reluctant to impose the severe criminal penalties available under FARA, the continuing absence of civil fines for such violations seems to send potential registrants the message that they can ignore FARA's guidelines with impunity."<sup>176</sup> In 1987, Senator Heinz proposed to amend FARA to allow for the imposition of civil fines and investigations.<sup>177</sup> While Congress did not act on his proposal, it represents the best attempt at reform to date. His proposal included adding civil subpoena power in addition to allowing for the imposition of civil fines.<sup>178</sup> The addition of subpoena power will increase FARA compliance by giving the DOJ the "authority to inspect the records of persons Justice believes should be registered . . ."<sup>179</sup> This will also ease the DOJ's burden by lowering the standard of proof required at trial. The result would be to increase enforcement of FARA, thereby increasing its deterrent effect. Furthermore, as some commentators note, shifting the penalties from criminal to civil will remove the "stigma" seen with FARA registry.<sup>180</sup>

Finally, by conferring standing upon private citizens to sue under FARA, cases can be brought to the DOJ's attention. As the law stands now, FARA does not explicitly or implicitly give standing for private citizens to sue.<sup>181</sup> One way to offer standing, similar to the proposed reform for the Ethics in Government Act, is to "confer standing upon private citizens to challenge the Attorney General's refusal to" enforce FARA.<sup>182</sup> This would allow private citizens to bring cases of lax FARA enforcement to the attention of the DOJ. However, this proposal is problematic because it could easily tie the DOJ up with many frivolous lawsuits; it would allow

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<sup>175</sup> See Perry, *supra* note 43, at 152 (noting that civil fines would encourage compliance and provide a more proportional remedy than criminal sanctions).

<sup>176</sup> Lawson, *supra* note 44, at 1183.

<sup>177</sup> See generally Perry, *supra* note 43 (discussing all of the proposals to change FARA offered by Senator Heinz).

<sup>178</sup> See *id.* at 157 (discussing Senator Heinz's proposal for civil penalties).

<sup>179</sup> GAO 2008, *supra* note 40, at 5.

<sup>180</sup> See, e.g., Schor, *supra* note 16 (quoting a PR specialist who noted that registering under FARA makes one feel like a criminal); Perry, *supra* note 43, at 159-60 ("A simple modification of terms may increase compliance with the Act.").

<sup>181</sup> See *Comm. for a Free Namibia v. Sw. Africa People's Org.*, 554 F. Supp. 722, 726 (D.D.C. 1982) (dismissing a case by a private group for lack of standing).

<sup>182</sup> Spak, *supra* note 35, at 288.

“baseless allegations” of violations.<sup>183</sup> Perhaps a better proposal would be to allow for private citizens to sue organizations directly for equitable relief of FARA non-compliance. Standing could be conferred based on potential harm suffered by the change in policy or rule that could result from the lobbyist’s advocacy. This would decrease the chances of frivolous suits because only equitable relief would be available. Hence, only organizations with a significant enough stake in the outcome would sue.<sup>184</sup> Furthermore, if a FARA case before a court catches the attention of the DOJ, the DOJ would then be able to intervene as an interested party in the matter. This would increase the possibility of enforcement, thus creating deterrence and, ultimately increase registration.

Except for creating a private right of action,<sup>185</sup> most of the above changes are very feasible because they have been offered before. The passage of the LDA, which includes civil remedies, is proof that Congress is willing to consider such a change. Moreover, due to the LDA’s blatant failure with DPW and the increased calls to reform FARA, there is a substantial likelihood of reform.<sup>186</sup> Similarly, the scandals increase the likelihood that Congress will follow the GAO’s recommendation to reform FARA’s self-enforcement stance.<sup>187</sup>

### 5.2. Other Potential Reforms

While FARA itself has strong potential for significant disclosure, unclear language and certain loopholes hamper it substantially.<sup>188</sup> First and perhaps most feasible, would be an effort to close FARA’s loopholes. This could be done in part by approving a FARA reform bill introduced in Congress in 2008 that

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<sup>183</sup> *Id.*

<sup>184</sup> While there will still be a chance of frivolous suits, adding heightened pleading requirements would likely take care of many of them.

<sup>185</sup> Congress and the Supreme Court are generally averse to creating new rights of action for citizens, because of the increased strain it could have on the courts. *Cf. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 161 (2008) (declining to extend on implied cause of action, which would have allowed aider-abettor liability in a securities fraud class action).

<sup>186</sup> *See Schor, supra* note 16 (noting that Congress is beginning to hold hearings on reforming FARA, including the establishment of civil damages).

<sup>187</sup> *See GAO 2008, supra* note 40, at 14–15 (noting that GAO has called upon Congress several times to fix FARA’s self-enforcement mechanism).

<sup>188</sup> *See id.* at 12 (“Justice officials have cited a lack of clear legal authority and a lack of resources as barriers to monitoring compliance with FARA registration requirements.”).

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would bring foreign corporations back under FARA, and would extend FARA's reach to lobbying that occurs off U.S. soil.<sup>189</sup> Such measures would prevent incidents like DPW or the AIPAC espionage trial from reoccurring and provide the public with the information that it deserves under the Act. As mentioned above, foreign commercial interests can have a significant effect on U.S. policy; therefore, the increased disclosure requirements under FARA are necessary. Enacting change in this regard is substantively very easy. Congress can exempt those who file under the LDA by removing section 613(h) of the Act. Furthermore, officials should not be immune from scrutiny just because they are not on U.S. soil. While these officials are representing American interests, the public has a right to know when foreign entities are trying to obtain influence wherever such attempts are located. A new section should increase the scope of the Act to include the lobbying of officials that occurs on foreign soil.

Congress should also strive to improve FARA compliance by clarifying its substantive provisions. One of the most common complaints by lobbyists is that FARA does not clearly indicate who must register.<sup>190</sup> While FARA was amended in 1942 to include registration of lobbyists, the substantive text of the Act is still rooted in propaganda. A redefinition of the terms "agent" and "principal" should clarify exactly who should register under the Act. As Senator Heinz proposed, "principal" should be redefined to include domestic companies that are sponsored by foreign entities.<sup>191</sup> To do so, Senator Heinz proposed redefining "agent" to include someone *predominantly under the control of a foreign entity*.<sup>192</sup> Unfortunately, this change alone would not provide the clarity that is necessary to resolve whether actual agency exists. Instead, the Act should define "predominant" control as including both monetary and physical control.<sup>193</sup> This change would clearly put

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<sup>189</sup> See Meier, *supra* note 119, at A23 (discussing the FARA reform bill introduced by Senators Claire McCaskill and Chuck Schumer).

<sup>190</sup> See Lawson, *supra* note 44, at 1178 (describing the confusion under FARA as one of the driving forces towards creating the LDA exception).

<sup>191</sup> See Perry, *supra* note 43, at 149 (discussing Senator Heinz's proposal to redefine Agent and principal).

<sup>192</sup> *Id.*

<sup>193</sup> See *id.* at 158 (proposing a definition for "predominantly a foreign interest" to complement to Senator Heinz's proposals).

PACs and domestic subsidiaries under FARA, thereby settling the question of its applicability.

Congress could also use the definitions of lobbying under the LDA in FARA. Many lauded the LDA for defining lobbying activities more clearly. Using this model, Congress could more accurately define the types of activities and relationships that are included under the Act. Similarly, Congress may consider changing the names of the terms “agent” and “principal” to reflect a move away from propaganda. The word “agency” connotes that the lobbyist is controlled by the foreign entity in the traditional common law manner.<sup>194</sup> When the focus turns to a foreign government’s control of the group the analysis becomes very difficult.

On the one hand, the fact that a group hopes to represent foreign interests cannot possibly be cause for labeling that group as foreign. People regularly, and promisingly, advocate positions on behalf of others that might otherwise be voiceless and unrepresented. On the other hand, once foreign money enters the equation, it is translated into domestic advocacy, and the use of levers of democracy to pursue foreign ends.<sup>195</sup>

Simply changing the Act to reflect the current realities of lobbying could potentially decrease confusion and likewise clarify registration requirements.<sup>196</sup> “Removing the stigma attached to the Act, it is argued, would lead to higher rates of compliance. People would not be as hesitant to register as an ‘international information aide’ as opposed to a ‘foreign agent.’”<sup>197</sup>

Most recently, President Obama proposed reforming FARA and the LDA to close many of the abovementioned loopholes. In his 2010 State of the Union speech, President Obama proposed updating the LDA to include FARA-like disclosure

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<sup>194</sup> See *Attorney Gen. v. Irish N. Aid Comm.*, 668 F.2d 159, 161 (2d Cir. 1982) (finding that agency as defined in FARA is broader than the common law definition).

<sup>195</sup> Zephyr Teachout, *Extraterritorial Electioneering and the Globalization of American Elections*, 27 *BERKELEY J. INT’L L.* 162, 188 (2009).

<sup>196</sup> See Lawson, *supra* note 44, at 1180 (proposing that a definition of terms would lead to greater clarity and thus greater compliance).

<sup>197</sup> Spak, *supra* note 35, at 278 (quoting Congressional Research Service, *The Foreign Agents Registration Act*, SEN. COMM. ON FOREIGN RELATIONS, 95 CONG., 1st Sess. (1977)).

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requirements.<sup>198</sup> Since the LDA created many of the loopholes found in FARA, this would fix the majority of the problems with lobbyist disclosure today. Foreign entities would no longer be able to register under a more permissive disclosure regime; instead, they will be forced to disclose all contacts with politicians within twenty-four hours of the meeting.<sup>199</sup>

As for the feasibility of passing these reforms, many were previously proposed and a majority were incorporated into the LDA. Initially, it was believed that the LDA would sufficiently clarify the regulations. However, given the LDA's inadequacy these regulations should be enacted to clarify FARA. Considering Congress has already passed these clarifications, passing them again is very feasible.

## 6. CONCLUSION

Lobbying is a function of the collective action dilemma. The public is at an information disadvantage compared to the lobbyists who have the most direct ability to influence legislation. However, once the public becomes aware and wary of a certain interest group's influence, such as Taiwan in the 1970s, Japan in the 1980s, or the UAE today, public outrage drives lobbying reform. In the realm of foreign lobbying, whether this will drive the reform of FARA remains to be seen. However, it is relatively clear that FARA should be restructured so that it will effectively uphold its charged task. FARA was charged with solving the collective action dilemma by providing the public information on potentially unfavorable, lobbyist-driven proposals before they reach the level of becoming a public scandal. As shown by the above examples, a strongly enforced FARA would have prevented many of the publicly unfavorable, lobbyist-driven proposals that simply slipped through the cracks. Foreign lobbying has typically been

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<sup>198</sup> Barack Obama, President of the United States, State of the Union Address (Jan 27, 2010) ("It's time to require lobbyists to disclose each contact they make on behalf of a client with my administration or with Congress."); Bogardus, *supra* note 4 ("The Foreign Agent Registration Act already requires lobbyists and other representatives of foreign governments and political parties to disclose all their contacts with policymakers on behalf of their clients. Public interest groups tried to include a similar requirement for the LDA in the 2007 ethics bill, but that effort failed.").

<sup>199</sup> See Bogardus, *supra* note 4 (discussing changes proposed by the Obama administration regarding foreign lobbyists, with an emphasis on closing the LDA loopholes).

seen as more nefarious than its domestic counterpart; however, the law as currently enforced, portrays the message that foreign lobbying does not matter and registration is unnecessary.

The purpose of lobbying law is to inform the public what relevant information members of Congress consider when making their decision to vote. Only through adequate disclosure of these activities, can the public truly understand who has attempted to influence members of Congress and how. FARA, if clarified and enforced, is a very powerful tool for the public. Thankfully, fixing the FARA statute is not a difficult task. FARA needs to further shift away from its roots in propaganda, close substantive loopholes regarding corporations and PACs, and take back jurisdiction for foreign trade lobbies from the LDA. For the most part, many of the pieces have either already been proposed or enacted elsewhere. The difficult part continues to be getting the DOJ to enforce it. While attempts at reformation could be made by giving the DOJ tools through civil actions, it will all be meaningless if the DOJ itself is unwilling to move forward. Unfortunately, it may take another scandal to activate the political branches.