

## Post-Wynn Dismissal FARA Reform Bill May Have A Shot

By **Robert Kelner, Brian Smith and Alexandra Langton** (September 18, 2023, 12:55 PM EDT)

Recently, a bipartisan, bicameral group of legislators introduced the Retroactive Foreign Agents Registration Act in the U.S. Congress.[1]

Led by U.S. House of Representatives Select Committee on the Chinese Communist Party Chairman Mike Gallagher, R-Wis., and Ranking Member Raja Krishnamoorthi, D-Ill., the bill would amend the Foreign Agents Registration Act to clarify that foreign agents have an ongoing obligation to register under the statute even after ceasing to act on behalf of a foreign principal.

A companion bill was also introduced in the U.S. Senate by Sens. Chuck Grassley, R-Iowa, and Gary Peters, D-Mich.

The legislation was prompted by the U.S. District Court for the District of Columbia's decision last October in Attorney General of the U.S. v. Wynn, which interpreted FARA's requirements.[2]

If passed, RFARA would allow the U.S. Department of Justice to seek civil injunctions under FARA, even after an agent has terminated its relationship with a foreign principal.

### The Foreign Agents Registration Act

FARA requires any "agent of a foreign principal" to register and file detailed reports with the DOJ for engaging in certain activities in the U.S. on behalf of interests outside of the U.S., unless an exemption applies.

The statute is often misperceived as focusing exclusively on those who lobby the U.S. government on behalf of foreign governments. Although it does apply to such activities, it also applies more broadly.

For example, in addition to direct lobbying to influence the U.S. government, the statute also covers any activity that is intended to influence any section of the U.S. public with regard to U.S. policies or foreign public interests.

Congress initially enacted FARA in 1938 as part of a prewar effort to require Nazi propagandists operating in the U.S. to register and disclose their activities.



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For many years, FARA was an obscure, rarely enforced law. Since at least 2016, however, the DOJ has renewed its focus on FARA, significantly increasing enforcement activities.

The increased enforcement actions have led to new questions regarding the scope of the statute — which contains numerous vague or sweepingly defined terms — and the DOJ's enforcement authority.

### **Wynn Decision**

In Wynn, the DOJ pursued a civil injunction to force casino developer and former Republican National Committee Finance Chair Stephen Wynn to register retroactively for activities allegedly conducted on behalf of the People's Republic of China.

The DOJ alleged that Wynn "conveyed to former President Donald J. Trump and his Administration ... the PRC's request to remove from the country a PRC national who had sought political asylum in the United States."<sup>[3]</sup>

The Washington federal court dismissed the complaint, holding that because Wynn terminated his agency relationship with the PRC — if one even existed — prior to the lawsuit, as both parties had acknowledged, Wynn no longer had an obligation to register.

The court concluded that he therefore could not be enjoined to register under FARA, even retroactively.

The court's reasoning underlying its holding was complicated and based on a 1987 decision by the U.S. Court of Appeals for the District of Columbia Circuit in U.S. v. McGoff,<sup>[4]</sup> as well as textual analysis of the statutory provision relating specifically to civil injunctive actions.

The government has appealed the district court decision, and the appeal is pending.

### **Congress' Response**

Although the Wynn decision only applies in the D.C. Circuit, members of Congress have expressed concerns that it could have more far-reaching consequences.

For example, the House Select Committee on the Chinese Communist Party lamented in a recent press release that an "unregistered agent could simply announce that he is ending the agent relationship, never register, and face no penalty."<sup>[5]</sup>

The new legislation is designed to overturn the conclusion in Wynn. The bill provides that the DOJ "may make application for an order requiring a person to comply with [FARA and its regulations] ... while the person acts as an agent of a foreign principal or at any time thereafter."

Additionally, the bill makes clear that it applies to "any individual who serves as the agent of a foreign principal ... at any time before, on, or after the date of the enactment of [the] Act."

Accordingly, agents who have previously relied on the Wynn decision as a basis for nonregistration would have a FARA registration obligation under this bill, if enacted.

While RFARA would allow the DOJ to seek a civil injunction to force registration, it would not change the

law with respect to who must register as an agent of a foreign principal under FARA.

Curiously, the language of the bill only applies to "any individual who serves as the agent of a foreign principal." This language would seemingly not extend to partnerships, associations, corporations, organizations or any other combinations of individuals currently covered by the definition of a "person" under FARA.

It is unclear whether Congress intends for the bill to only cover individuals like Wynn, or whether the reference to "any individual" was a drafting error that could be changed in future iterations of the bill.

### **What Comes Next**

Given the strong bicameral and bipartisan support to regulate foreign agents, there may be an appetite in the full House to consider the bill.

Gallagher and Krishnamoorthi were originally joined by nine other members of the House in their sponsorship of the bill: Reps. Chip Roy, R-Texas; Jamie Raskin, D-Md.; Rob Wittman, R-Va.; Seth Moulton, D-Mass.; Jim Banks, R-Ind.; Mikie Sherrill, D-N.J.; Dusty Johnson, R-S.D.; Abigail Spanberger, D-Va.; and Shontel Brown, D-Ohio.

Reps. Don Davis, D-N.C., and John Moolenaar, R-Mich., have since become co-sponsors, too.

In the Senate, a bipartisan group of three senators joined Grassley and Peters in sponsoring the companion legislation: Sens. Marco Rubio, R-Fla.; Todd Young, R-Ind.; and Elizabeth Warren, D-Mass.

There are a number of other bipartisan bills related to FARA reform pending in Congress, revealing Congress' continued bipartisan attention to the statute.

For example, the Lobbying Disclosure Improvement Act, S. 264, and Disclosing Foreign Influence in Lobbying Act, S. 829, are both pending in the Senate.

These bills would increase disclosure under FARA by making changes to the Lobbying Disclosure Act registration exemption to FARA and certain LDA registration requirements.

Although prior efforts to reform FARA have not succeeded, RFARA may be sufficiently narrow to become law, provided that the bill does not attract additional or unrelated floor amendments.

Moreover, the bipartisan support from the leaders of the House Select Committee on the Chinese Communist Party lends further momentum to the effort, as both Democratic and Republican members of the committee have focused heavily on national security issues related to China.

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[1] [https://selectcommitteeontheccp.house.gov/sites/evo-subsites/selectcommitteeontheccp.house.gov/files/evo-media-document/retroactive-fara-118th\\_signed.pdf](https://selectcommitteeontheccp.house.gov/sites/evo-subsites/selectcommitteeontheccp.house.gov/files/evo-media-document/retroactive-fara-118th_signed.pdf).

[2] <https://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2022cv01372/243397/21/>.

[3] [https://storage.courtlistener.com/recap/gov.uscourts.dcd.243397/gov.uscourts.dcd.243397.1.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.dcd.243397/gov.uscourts.dcd.243397.1.0_1.pdf).

[4] <https://law.justia.com/cases/federal/appellate-courts/F2/831/1071/398365/>.

[5] <https://selectcommitteeontheccp.house.gov/media/press-releases/gallagher-leads-bipartisan-bicameral-coalition-introduce-retroactive-foreign>.