

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

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INTRODUCTION

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

1. Roy Peled, *Sunlight Where it's Needed: The Case for Freedom of Medial Information*, 7 SW. J. INT'L MEDIA & ENTMT'L L. 65, 76 (2017) (“Freedom of Press itself is guaranteed in democracies because of the important role of the press as a monitoring mechanism, a watchdog to those in power.”); *see also* Peled, *supra*, at 68 (“inflict harm on the service provided by the press, compromise its standards, taint its content, and you have harmed social unity[.]”). Thomas Jefferson famously stated in defense of the press that:

[T]he basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.

Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), in MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON, II, 84, 85 (Thomas Jefferson Randolph ed., Charlottesville, F. Carr & Co. 1829).

2. Social and governmental structures in Norway, Sweden, Russia, France, and the American Colonies, as well as other revolutions, such as the Protestant Reformation, followed the invention of the printing press. In each case, the spread of ideas through printed material led to the downfall of the then-in-power political regimes. This pattern demonstrates that governments interested in maintaining power have a strong interest in maintaining the status quo. Stanislav Getmanenko, Comment, *Freedom from the Press: Why the Federal Propaganda Prohibition Act of 2005 is a Good Idea*, 114 PENN. ST. L. REV. 251, 259-60 (2009) (citing HEINZ LUBASZ, REVOLUTIONS IN MODERN EUROPEAN HISTORY (1966); W. CHAMBERS, FRANCE, ITS HISTORY AND REVOLUTIONS (1873); BYRON J. NORDSTROM, THE HISTORY OF SWEDEN (2002); R. NISBET BAIN, SCANDINAVIA, A POLITICAL HISTORY OF DENMARK, NORWAY AND SWEDEN FROM 1513 TO 1900 (1905); MERRILL JENSEN, THE FOUNDING OF A NATION, 1763-1766 (1968)).

because information is easily communicated globally over the Internet, instances of State corruption and human rights violations are increasing more difficult to shield from the international community, and consequently, are more likely to be met with general public condemnation and possible intervention by organizations such as the United Nations. Thus, the news and the media is a more effective political tool than governmental or military force because, as revolutionary linguist and political activist Noam Chomsky explained, “when you can’t control people by force, you have to control what people think[.]”³

Practices of past and present-day Russian governments accumulated to form a highly illustrative study in how a government can shape political narratives by controlling information received by the public and, most importantly for this article, by concealing its command over that information.⁴ A full account of Russia’s political and social evolution, while remarkable, is too vast to cover in detail here. However, three practices perfected by the various Russian regimes – defamation liability for news and media actors, financial takeover and ownership of news and media organizations, and deployment of covertly-controlled news and media internationally – gave way to Russian-regulated information outlets in the United States for which U.S. law provides no oversight.

In the United States, the Foreign Agents Registration Act of 1938 (FARA) is one of the only means of regulating foreign influences accomplished by domestic actors.⁵ Passed in 1938, FARA was Congress’ response to Nazi propaganda disseminated in the U.S. during World War II that sought to undermine American democracy.⁶ As amended, the Act now requires agents engaged in political activity on behalf of a foreign principal to register with the Department of Justice (DOJ) and submit any

3. PETER WINTONICK & MARK ACHBAR, *MANUFACTURING CONSENT* 43 (Mark Achbar ed., 1994). Noam Chomsky explains that the “manufacture of consent” is essentially the creation of “necessary illusion.” See *MANUFACTURING CONSENT: NOAM CHOMSKY AND THE MEDIA* (Humanist Broadcasting Foundation 1992), discussed in Getmanenko, Comment, *supra* note 2, at 254.

4. Irina Naoumova et al., *Informal Instruments of Formal Power: Case of Russian Mass Media*, 6 *INT’L BUS.: RES., TEACHING, & PRAC.* 96, 97-99 (2012) (explaining that corrupt mass media limits opportunities for social change). The authors assert that Russian powers have traditionally used a variety of formal and informal pressures that limited its opportunities for political change. *Id.*

5. Getmanenko, Comment, *supra* note 2, at 279 (noting that, in light of First Amendment protections, “a regulatory framework forbidding political propaganda is largely nonexistent. However, [FARA] is a rare example of an effectual, although somewhat imperfect and antiquated, legislative response.”).

6. *Id.*

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

Unfortunately, it remains unclear how to interpret the formed and the degree of “control” that is required before an agent is subject to FARA’s registration requirements.¹⁰ Although FARA does not exempt indirectly controlled agents, in practice a foreign principal generally must exercise direct control over an agent’s activities in the U.S.¹¹ Because organizations like Russian-based media entities RT and Sputnik were indirectly controlled by the Russian government, RT and Sputnik successfully evaded DOJ oversight despite both entities maintaining close financial and political ties to the Russian government.¹² To account for future agents and principals similarly evading FARA, Congress must explicitly define “control” to include a bright-line approach to aid the FARA Enforcement Unit in its efforts to identify agents operating under indirect or obscured control of

7. Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 611-621 (2012); U.S. DEP’T OF JUSTICE, JUSTICE MANUAL: CRIMINAL RESOURCE MANUAL OF THE FOREIGN AGENTS REGISTRATION ACT ENFORCEMENT (2017) [hereinafter U.S. DEP’T OF JUSTICE MANUAL]; David Danner, *Propagandists by Statute: Reviewing the Foreign Agents Registration Act in the Post-Cold-War World*, 16 MEDIA L. & PRAC. 44, 44-45 (1995).

8. Foreign Agents Registration Act of 1938, 22 U.S.C. § 614(b) (2012); see 22 U.S.C. § 611 (providing that the policy and purpose of the Act is 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.”).

9. *Meese v. Keene*, 481 U.S. 465, 481 (1987) (“Congress did not prohibit, edit, or restrain the distribution of advocacy materials in an ostensible effort to protect the public from conversion, confusion, or deceit. To the contrary, Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda By compelling some disclosure of information and permitting more, the Act’s approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech.”).

10. 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, 27 (1990).

11. Samantha Laufer, Comment, *A Difference in Approach: Comparing the US Foreign Agents Registration Act with Other Laws Targeting Internationally Funded Civil Society*, 19 INT’L J. NOT-FOR-PROFIT L. 5, 7-8 (2017).

12. See NAT’L INTELLIGENCE COUNCIL, OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, ICA 2017-01D, INTELLIGENCE COMMUNITY ASSESSMENT: ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS (2017) [hereinafter NAT’L INTELLIGENCE COUNCIL].

foreign principles. This type of definite standard of “control” is necessary to qualify actors like RT and Sputnik as agents of foreign principles under FARA, which is required in order to allow the DOJ to compel compliance with the Act’s registration, monitoring and disclosure provisions.

This article will first explain FARA’s theoretical framework and its failure to account for agents indirectly controlled by foreign governments and will draw on past proposed amendments to advance new amending language. Second, by demonstrating how the Russian Federation’s defamation laws and ownership of national media entities established its control over public opinion, this article will show how these practices rendered FARA, as currently written, incapable of identifying Russian-led RT and Sputnik as foreign agents as the Russian Federation expanded its media operations internationally. Third, this examination will conclude that FARA must provide a more explicit measurement of control, integrating ownership as well as management considerations, by demonstrating how such language, if in force, would have successfully identified RT and Sputnik. Overall, this article aims to propose several amendments to the act that would empower the DOJ to monitor and label foreign influences, RT and Sputnik as illustrative examples of the benefits that a more bright-line standard would provide with regard to other similar covert agents of foreign principles.

I. IDENTIFYING FOREIGN AGENTS: HOW U.S. ACTORS OPERATING UNDER FOREIGN DIRECTION EVADE FARA AND DOJ OVERSIGHT

FARA, one of the only frameworks for monitoring activities of foreign influences acting through domestic actors, was designed to “neutralize the deceptive power of foreign agents.”¹³ Enacted in 1938, FARA was Congress’ attempt to combat Nazi propaganda influencing U.S. policy and subverting the democratic process.¹⁴ FARA provides registration, monitoring and disclosure requirements to help U.S. voters make informed appraisals of information in light of potential foreign interests and biases. Through these mechanisms, FARA ensures that the public is not “deceived

13. Randall H. Johnson, *The Foreign Agents Registration Act: When is Registration Required?*, 34 S.C.L. REV. 687, 711 (1983).

14. H.R. REP. NO. 75-1381, at 1-2 (1937).

Incontrovertible evidence had been submitted to prove that there are many persons in the United States representing foreign governments or foreign political groups, who are supplied by such foreign agencies with funds and other materials to foster un-American activities, and to influence the external and internal policies of this country, thereby violating both the letter and the spirit of international law, as well as the democratic basis of our own American institutions of government.

Id.

by the belief that the information comes from a disinterested source.”¹⁵ As Congressman Emanuel Celler stated, FARA focuses the “spotlight of pitiless publicity” on the activities of foreign agents.¹⁶

In *Viereck v. United States*, the Supreme Court elaborated that FARA is founded on the assumption that only adequately informed people may be trusted to distinguish truth and falsity.¹⁷ As such, FARA does not authorize the DOJ to prohibit agents from disseminating information. Instead, agents of foreign principals operating in the U.S. must register with the DOJ as agents.¹⁸ A registrant must then disclose the ties, financial or otherwise, that it maintains with the foreign principal to the DOJ.¹⁹ Based on this information, the DOJ may require that the agent submit informational materials for review and, if deemed necessary, the Attorney General may require that the agent include a conspicuous statement on those materials to notify the public of the agent’s relationship to a foreign government.²⁰ Thus, as the Supreme Court held, the Act fosters free speech by providing more information, specifically regarding the foreign interests that may be motivating the agent in disseminating such information, so that the public

15. *Viereck v. United States*, 318 U.S. 236, 251 (1943) (Black, J., dissenting) (agreeing that FARA “[rests] on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source.”); see S. COMM. ON FOREIGN RELATIONS, 95TH CONG., THE FOREIGN AGENTS REGISTRATION ACT (Comm. Print 1977). (“[FARA] presuppose[s] that the public interest can best be served through disclosure and consequent publicity concerning persons and activities intended to influence governmental actions.”).

16. H.R. REP. NO. 75-1381, at 2 (1937) (“We believe that the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda. We feel that our people are entitled to know the sources of any such efforts, and the person or persons or agencies carrying on such work in the United States.”).

17. *Viereck*, 318 U.S. at 251.

18. Foreign Agents Registration Act of 1938, 22 U.S.C. § 612(a) (2012). FARA states that: No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement and supplements thereto as required by subsections (a) and (b) of this section or unless he is exempt from registration under the provision of this subchapter. Except as hereinafter provided, every person who becomes an agent of a foreign principal shall, within ten days thereafter, file with the Attorney General, in duplicate, a registration statement, under oath on a form prescribed by the Attorney General.

Id.

19. 22 U.S.C. § 612(a)-(b).

20. 22 U.S.C. § 614(b).

It shall be unlawful for any person within the United States who is an agent of a foreign principal and required to register under the provisions of this subchapter to transmit . . . any informational materials for or in the interests of such foreign principal without placing in such informational materials a conspicuous statement that the materials are distributed by the agent on behalf of the foreign principal The Attorney General may by rule define what constitutes a conspicuous statement for the purposes of this subsection.

Id.

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

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

21. *Meese v. Keene*, 481 U.S. 465, 480-81 (1987) ("Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda By compelling some disclosure of information and permitting more, the Act's approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech.").

22. *See* 22 U.S.C. § 614(b).

23. *Attorney Gen. of U.S. v. Irish N. Aid Comm.*, 530 F. Supp. 241, 256 (S.D.N.Y. 1981), *cert. denied* 409 U.S. 1080 (1972) ("It is clear from the legislative history that before requiring an organization to register as an agent of a specific foreign principal, the Attorney General must establish the existence of an agency relationship."); *see Baker, supra* note 10 (explaining that subsidiary companies of foreign agents pose a particular difficulty for FARA identification methods).

24. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT OF THE NATIONAL SECURITY DIVISION'S ENFORCEMENT AND ADMINISTRATION OF THE FOREIGN AGENTS REGISTRATION ACT, ii (2016) [hereinafter OFFICE OF THE INSPECTOR GEN. AUDIT] ("[A] major difficulty [with FARA] is a lack of authority to compel the production of information from persons who may be agents.").

25. *Id.* at 5-6.

The FARA Unit attempts to identify and make contact with individuals or entities that may have an obligation to register under FARA. Identification is made primarily through review of a range of publications, web sites, and [Lobbying Disclosure Act] filings for indications of a connection between a potential agent and a foreign principal. Potential registrants may also be identified through review of existing registrant information, or through referral from other government offices or agencies, or from the public.

Id. at 13 (explaining typical identification procedures employed by the FARA enforcement unit).

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

FARA requires individuals “doing political or advocacy work on behalf of foreign entities in the United States to register with the Department of Justice and to disclose their relationship, activities, and disbursements in support of their activities.”²⁶ Under the Act, a foreign principal includes a foreign government or foreign political party, a person who is neither a citizen of nor domiciled in the United States, or an association or business having its principal place of business in a foreign country. A party is an agent of a foreign principal if it “acts at the order, request, or under the direction or control of a foreign principal” and engages in political activities, public relations, financial contributions, or representations before government officials or agencies on behalf or in representation of the principal.²⁷ While FARA provides several exceptions to the requisite agency relationship,²⁸ any party qualified as an agent of a foreign principal must register under FARA and is then subject to the Act’s filing and disclosure requirements.²⁹ The government must, however, establish the agency relationship before any of FARA’s mandates attach to a domestic actor.

Today, FARA’s registration requirements do not apply unless (1) an agent-principal relationship exists, and (2) the agent undertakes political activities, public relations, financial contributions, or representations before

26. *Foreign Agents Registration Act: An Overview*, CONG. RES. SERV. (Feb. 5, 2019), <https://fas.org/sgp/crs/misc/IF10499.pdf>.

27. Foreign Agents Registration Act of 1938, 22 U.S.C. § 611 (c)(1). FARA defines an agent of a foreign principle as any person who acts at the “order, request, or under the direction or control, of a foreign principal” or whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal” and “who directly or through any other person” engages in political activities in the U.S. for or in the interests of the foreign principle. *Id.*

28. FARA supplies exceptions for diplomatic or consular officers, officials of foreign governments, and persons qualified to practice law. 22 U.S.C. § 613(a)-(h). Importantly, FARA also excludes news or press organizations from qualifying as agents of a foreign principal *provided* that the organization is “at least [eighty percent] beneficially owned by, and its officers and directors, if any, are citizens of the United States[.]” In addition, to be exempt, news, press, or other publications may not be “owned, directed, supervised, controlled, subsidized, or financed” by a foreign principle and none of the organization’s policies may be determined by any foreign principal or any agent of a foreign principal. 22 U.S.C. § 611(b)-(d).

29. 22 U.S.C. § 614(a) (“Every person within the United States who is an agent of a foreign principal and required to register under the provisions of this subchapter and who transmits . . . any informational materials for or in the interests of such foreign principal [must] file with the Attorney General two copies thereof [within forty-eight hours].”). See *Foreign Agents Registration Act: An Overview*, *supra* note 26, for an explanation of the Act’s registration requirements. See U.S. DEP’T OF JUSTICE, *Advisory Opinion Concerning Application for the Foreign Agents Registration Act* (Sept. 7, 2018), <https://www.justice.gov/nsd-fara/page/file/1092646/download>.

Government officials or agencies on behalf or in representation of the principal.³⁰ In its original form, FARA only required persons employed to disseminate political propaganda for foreign principals to register with the Federal Government.³¹ That is, whereas the original Act required an actor employed by a foreign principal to disseminate propaganda on its behalf register with the government, FARA's 1966 amendments altered the "agent of a foreign principal" definition to mean any person who acts at the "order, request . . . direction, or control" of a foreign principal.³² When the 1966 amendments eliminated this employment criteria, the changes inadvertently lodged several impediments to FARA's enforceability as the new broader definition failed to substitute the employment standard with another "control" criteria.³³

The new broad definitions created definitional loopholes which now allow otherwise qualified agents to evade the registration requirements. To illustrate, under the amended Act, even direct international funding is not enough to subject a U.S. agent acting to the Act's registration requirements,³⁴ unless such person or entity activities are substantially subject to a foreign entity's direction.³⁵ Moreover, the Act is silent as to what constitutes

30. 22 U.S.C. § 611(c)(1).

[A] party is an 'agent of a foreign principal' who must register under FARA if it acts 'at the order, request, or under the direction or control of a foreign principal' and engages within the United States in one of the following activities:

- (i) political activities for or in the interests of such foreign principal;
- (ii) public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal;
- (iii) solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or
- (iv) represents the interests of such foreign principal before any agency or official of the Government of the United States[.]

Id.; see Elena Postnikova, *Agent of Influence: Should Russia's RT Register as a Foreign Agent?*, ATLANTIC COUNCIL 6, 8 (2017); U.S. DEP'T OF JUSTICE, *Advisory Opinion Concerning Application for the Foreign Agents Registration Act* (Sept. 7, 2018) (quoting 22 U.S.C. § 611(c)).

31. "Political propaganda" was removed from the Act in 1995 and replaced with the term "informational materials." Foreign Agents Registration Act of 1938, Pub. L. No. 104-65, sec. 9(1), §§ 611(j), 614(a)-(c), 109 Stat. 691, 669-700 (codified as amended at 22 U.S.C. § 611).

32. Foreign Agents Registration Act of 1938, Pub. L. No. 75-583 (codified as amended at 22 U.S.C. §§ 611-622). The original act required "persons employed by agencies to disseminate propaganda in the United States" to register. *Id.*

33. See OFFICE OF THE INSPECTOR GEN. AUDIT, *supra* note 24, at 9; Philip J. Perry, *Recently Proposed Reforms to the Foreign Agents Registration Act*, 23 CORNELL INT'L L.J. 133, 137 (1990).

34. Laufer, *supra* note 11, at 8 ("A principal-agent relationship is not created simply because one party agrees to provide funding to a second party.").

35. The direction or control language has been interpreted to mean that the relationship must be one that "substantially obligates the agent to the foreign principal" to conclude that an individual is acting as an agent of the foreign principal. *Inquiry into the Matter of Billy Carter and Libya: Hearings Before the Subcomm. to Investigate the Activities of Individuals Representing the Interests*

substantial direction or control. As such, FARA provides little guidance regarding how the DOJ is to identify parties or agents under the control of a foreign principal, let alone an agent of an agent, or subsidiary of a subsidiary.³⁶

FARA wholly fails to account for this type of indirect control and the absence of clear legal standards explains the DOJ's "lack of spirited enforcement."³⁷ With the exception of this peak in registration between 1985 and 1993, the number of registered agents remains essentially identical to the agents registered in the 1950s.³⁸ Further, even in the years in which registrations were highest, the number of registered agents account for a small fraction of the agents that are, or should have been, subject to the Act. From 1942 until 1966, agent registrations increased slowly, and, though registrations fell below those in 1966 until 1974, the 1966 amendments produced substantially higher active registrations from 1975 until 1998. Active registrations peaked in 1986, with 842 active registrants, and FARA saw its second-highest count in 1991, with 788 active registrants.³⁹ Still, even at its most effective, the agents registered accounted for only a small fraction of parties actually subject to the registration requirements,⁴⁰ and only half of those registered agents accurately and fully disclosed their activities.⁴¹ After 1991, registration declined, and agent registration, until as recently as 2018, remains below the number of agents registered at the time the 1966

of Foreign Governments of the S. Committee on the Judiciary, 96th Cong. 701 (1980) (statement of Phillip B. Heymann, Assistant Attorney General, Department of Justice).

36. Joseph E. Pattison & John L. Taylor, *Legislating Away the Mask: A Guide to the Foreign Agents Registration Act*, 5 DIST. L. 39, 44 (1980) ("[The commercial exemption], exempting 'other activities not serving predominantly a foreign interest,' often covers the activities of agents for U.S. subsidiaries of foreign companies or, similarly, foreign subsidiaries of U.S. companies."); Baker, *supra* note 10 ("FARA's definition of a foreign principal does not include subsidiaries incorporated in the United States with their principal places of business within the United States, so an agent of such a subsidiary is not an agent of a foreign principal.").

37. Jahad Atieh, Comment, *Foreign Agents: Updating FARA to Protect American Democracy*, 31 U. PA. J. INT'L L. 1051, 1058 (2010); see OFFICE OF THE INSPECTOR GEN. AUDIT, *supra* note 24, at 8 (finding seven criminal cases brought between 1966 and 2015, only one of which resulted in a conviction).

38. *Id.*

39. U.S. Dep't of Justice, 1986 U.S. ATT'Y GEN. ANN. REP 3 ("During the calendar year 1986, the Department received 155 new registration statements and terminated 98 registrations, leaving a total of 824 active registrations on file as of December 31, 1986."); see OFFICE OF THE INSPECTOR GEN. AUDIT, *supra* note 24, at I, 5.

40. *Modification of the Foreign Agents Registration Act of 1938: Hearing Before the Subcomm. on Administrative Law & Governmental Relations of the H. Comm. on the Judiciary*, 102d Cong. 31 (1991) (statement of Rep. Dan Glickman) (emphasizing that the 900 registrants in 1991 represented "only a fraction of the total [persons] who should register under FARA"); see Danner, *supra* note 7, at 45 (quoting Rep. Glickman, *supra*).

41. Danner, *supra* note 7, at 45.

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

The DOJ's inability to enforce the Act explains why there were only 428 active registrants on file with the DOJ in 2018;⁴³ compared to the 517 active registrants in 1965, 502 registrants in 1966, and 470 in 1967 – the period immediately before and after the pivotal 1966 amendments.⁴⁴ Strangely, the number of agents registered with the DOJ from 2000 to 2018 is nearly identical to those registered in the 1950s and 1960s despite enormous advances in communication technologies, business globalization, and media prevalence.⁴⁵ If the Act functioned properly, and in light of significant communication and information technologies, the number of active registrants today surely would neither be equal to those registered sixty years ago nor less than those reported when Congress passed the 1966 amendments. Thus, a new approach is necessary to prevent the Act from becoming obsolete entirely.

B. Prior Attempts to Fix FARA: Possible Bright-Line Solutions to the Act's Long-Standing Definitional Issues

Concern that FARA is unable to account for intermediaries and subsidiaries is not a new issue. Since FARA's inception, Congress discussed the Act's failure to set bright-line guidelines specifying which actors must register as agents.⁴⁶ In an effort to boost enforcement, Congress began amending FARA in 1939. Just one year after the Act's enactment. Its most significant changes came in 1966 to account for increasing foreign influence over economic policies.⁴⁷ Following the 1966 amendments, Congress continued to investigate FARA's ongoing deficiencies in 1974, 1977, 1980, 1988, and even as recently as 2017.⁴⁸ Despite clear failures to enforce the registration requirements and unsuccessful attempts to set bright-line criteria

42. U.S. Dep't of Justice, 1942-2018 U.S. ATT'Y GEN. ANN. REP.; see OFFICE OF THE INSPECTOR GEN. AUDIT, *supra* note 24, at I, 5. The reports to Congress containing information relating to registration statistics are available at <https://www.justice.gov/nsd-fara/fara-reports-congress>.

43. *Id.*

44. *Id.*

45. The number of registrants from 2000 to 2018 is identical to those registered in the 1950s and 1960s. *Id.*

46. Perry, *supra* note 33, at 144-45.

47. *Id.* at 133-34.

48. U.S. GEN. ACCOUNTING OFFICE, B-177551, Report to the Committee on Foreign Relations: Effectiveness of the Foreign Agents Registration Act of 1938 (Mar. 13, 1974), <http://archive.gao.gov/f0302/095964.pdf> ("Since 1938, the Act has been amended several times, including a general revision in 1942 and major amendments in 1966.").

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

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

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

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

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

50. *Id.* at 7 ("The proposed amendment would make it clear that mere receipt of a bona fide subsidy not subjecting the recipient to the direction or control of the donor does not require the recipient of the subsidy to register as an agent of the donor. However, the amendment would insure, in order to curtail the use of subsidies as a means of avoiding the act's requirements, that, where the foreign principal subsidizes a domestic person to the extent that the subsidy involves . . . direction and control of the activities subsidized, then the domestic person or group as well as any agents employed to carry out the functions subsidized will be treated as acting for the foreign principal.").

51. *Id.* ("The proposed amendment would make it clear that mere receipt of a bona fide subsidy not subjecting the recipient to the direction or control of the donor does not require the recipient of the subsidy to register as an agent of the donor. However, the amendment would insure, in order to curtail the use of subsidies as a means of avoiding the act's requirements, that, where the foreign principal subsidizes a domestic person to the extent that the subsidy involves . . . direction and control of the activities subsidized, then the domestic person or group as well as any agents employed to carry out the functions subsidized will be treated as acting for the foreign principal.").

52. FARA's 1966 amendments changed the definition of "agent of a foreign principal" to mean:

any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal[.]

Foreign Agents Registration Act of 1938, Pub. L. No. 89-486, 80 Stat. 244 (1966) (codified as amended at 22 U.S.C. § 611(c)).

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

Again in 1988, as a direct response to the Toshiba scandal of 1987, which again brought attention to FARA's inadequacies, Senator John Heinz proposed several amendments.⁵⁴ Toshiba Corporation, a subsidiary of Toshiba Machine Co., began selling submarine propellers to the Soviet Union, even though these submarine propellers were included on the Coordinating Committee for Multilateral Security Control's international list of prohibited exports.⁵⁵ When the sales became public in 1987, Congress banned all imports from Toshiba from anywhere between two to five years.⁵⁶ This ban prompted wholly-owned Toshiba subsidiary Toshiba America to hire advocates on behalf of parent-company Toshiba.⁵⁷ As a result of Toshiba's lobbying, Congress imposed only a three-year restriction on government purchases of Toshiba products.⁵⁸

Senator Heinz was primarily concerned that Toshiba's subsidiary successfully mitigated the initial sanctions because congressmen had insufficient notice of the Toshiba America's foreign interests.⁵⁹ The Senator thus proposed reforms to address companies like Toshiba that fail to register lobbying efforts to affect U.S. trade policy.⁶⁰ Recognizing the potential for registration evasion, Senator Heinz proposed redefining "agent" and "principal" to specify exactly who should register under FARA.⁶¹ Specifically, Senator Heinz proposed that "principal" should include domestic companies sponsored by foreign entities, pointing to FARA's "vague approach to controlled subsidiaries" as a significant impediment to

53. Atieh, Comment, *supra* note 37, at 1058-59 ("[W]hile these amendments did much to increase the class of people 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.' 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.") (quoting U.S. GEN. ACCOUNTING OFF., Effectiveness of the Foreign Agents Registration Act of 1938, as Amended, and its Administration by the Department of Justice 6 (1974)) (citing 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)).

54. CONG. REC. 28,862 (1988) (statements of Senator Heinz); Baker, *supra* note 10, at 28-32, 37.

55. Baker, *supra* note 10, at 30.

56. *Id.*

57. *Id.* at 31.

58. *Id.* at 31-32.

59. *See id.* at 31; Perry, *supra* note 33, at 146.

60. *See* Perry, *supra* note 33, at 145-46.

61. Atieh, Comment, *supra* note 37, at 1085.

its enforcement.⁶² Heinz proposed defining “control” to include over 50% foreign ownership of a U.S. entity and less than 20% as presumptively not controlling.⁶³ Ultimately, however, Senator Heinz bright-line initiative failed.⁶⁴

In 2017, Senator Shaheen introduced the Foreign Agents Registration Modernization and Enforcement Act (FMEA). The amended Act purports to “preserve the integrity of American elections” by providing the Attorney General with additional tools to investigate, identify, and prosecute foreign agents circumventing FARA’s registration requirements in order to influence domestic political processes.⁶⁵ While the recent proposal would improve FARA by means of requiring disclosures of social media and email, the 2017 amendments still struggle to bring foreign actors like RT and Sputnik under the Act because FMEA similarly does not account for control through intermediaries.

Russia has mastered media control without overt coercion – methods which only bright-line rules like those offered by Senator Heinz can bring intermediary links-in-the-chain like RT and Sputnik under FARA’s screening procedures. In addition to adopting Senator Heinz’ bright-line control standard, the DOJ should investigate ways governments have historically controlled agents.⁶⁶

C. A Combined Approach to Enforcing FARA: Definitional Solutions and Practical Issues

Several possible solutions to the DOJ’s identification and enforcement barriers, outlined in prior debates and amendment proposals, include increasing the FARA Enforcement Unit’s manpower, providing the DOJ with judicial enforcement mechanisms, and incorporating a bright-line agency standard in the Act itself. Though its definitional issues are complex, past proposals and initiatives provide solutions Congress may still adopt. First, and most importantly, Congress must narrow FARA’s concept of the agency relationship because the DOJ must first establish an agency relationship exists before compelling the agent to comply. Clearly the

62. *Id.* at 1085-86; Perry, *supra* note 33, at 148-49 (citing 134 CONG. REC. S14,926 (daily ed. Oct. 6, 1988) (remarks by Senator Heinz)).

63. 134 CONG. REC. S. 14,926 (daily ed. Oct. 6, 1988) (remarks by Senator Heinz).

64. Charles Lawson, *Shining the Spotlight of Pitiless Publicity on Foreign Lobbyists? Evaluating the Impact of Lobbying Disclosure Act of 1995 on the Foreign Agents Registration Act*, 29 VAND. J. TRANSNAT’L L. 1151, 1168-69 (1996).

65. Foreign Agents Registration Modernization and Enforcement Act, S. 625, 115th Cong. (2017).

66. *See* Part I.B.1 (detailing the Russian Federations historical practice of controlling media).

employment standard of the original act was at least more effective than the current articulation. However, employment alone does not cover the range of methods a foreign principal may use to control an agent.⁶⁷

Ownership percentage, proposed by Senator Heinz in 1988, combined with management authority are viable measurements in determining control. For instance, a New York district court determined that a parent company with a mere 25% ownership share that had ties to a foreign government did not satisfy the agency requirement.⁶⁸ The court explained the ownership share did not permit the shareholder to exercise control over the independent 75% shareholder. In addition, the majority shareholder's management position prevented the 25% owner from directing or controlling the defendant company. The court determined the company was not subject to foreign control because neither the majority shareholders nor its general managing agent were subject to the direction or control of the foreign intermediary.⁶⁹

Another workable option is the proposed Repelling Encroachment by Foreigners into U.S. Elections (REFUSE) Act. The Act would set "two thresholds" of foreign ownership interest/funding: First, REFUSE would target foreign nationals not directly connected with foreign governments, but those which receive 20% of their total funding from foreign governments; and second, the Act would target foreign nationals directly connected with foreign governments and which receive only 5% of their total funding from the foreign government.⁷⁰ However, the REFUSE Act's bright-line rules would apply only to prohibit "election spending by foreign-influenced corporation . . . and organizations" under the Federal Election Campaign Act (FECA).⁷¹ Regarding FARA, the REFUSE Act purports only to enhance FARA's enforcement by expanding the media considered "informational material" and by requiring the Attorney General to formulate "a comprehensive strategy to enforcement and administration."⁷² Unclear is

67. *See* Part II.

68. *Figli v. Fisheries Dev. Corp.*, 499 F. Supp. 1074, 1082 (S.D.N.Y. 1980).

69. *Id.* ("Neither FDC nor Gerson were therefore subject to the control of the Amorusos. A fair reading of the agreements compels the conclusion that Amfish, formed as an American general partnership for the construction and operation of American-built vessels, was under the management, direction and control of Gerson, its designated general managing agent and the principal stockholder of FDC.")

70. *See* Press Release, U.S. House of Representatives, Marcy Kaptur, Kaptur Introduces Bill to Boost Transparency and Reduce Influence of Foreign Money on American Democracy (June 27, 2018), <https://kaptur.house.gov/media-center/press-releases/kaptur-introduces-bill-boost-transparency-and-reduce-influence-foreign>.

71. *Id.*

72. *Id.* ("[Proposed section 207 would require] the Attorney General to promulgate final regulations for the implementation of a comprehensive strategy to improve enforcement and administration of FARA. Requires the Inspector General of the Department of Justice to review

why this proposed definition would not similarly apply to FARA's agency standard, which would itself aid the DOJ and the Attorney General in formulating a strategy to boost FARA's enforcement since definitional issues continue to be the Act's greatest hurdle.

The DOJ also needs more effective enforcement measures. Addressing practical barriers such as weak enforcement measures and staffing shortages will at least give FARA a more immediate boost in effectiveness. FARA authorizes the DOJ to seek injunctive remedies from a district court to compel an agent to comply with the Act.⁷³ However, the FARA Registration Unit needs more manpower to identify actors failing to register as agents before an injunction can be sought. In 2010, for example, the Unit employed only eight staff members, making it impossible to monitor not only the registered agents but also to investigate agent's failing to register.⁷⁴ As a result, the Unit "does not have the resources to undergo any investigations of fraudulent filings, let alone non-compliance altogether."⁷⁵

FARA is a potentially powerful avenue for monitoring foreign influence particularly over public opinion, and it is unfortunate the Act has gone virtually unenforced at least since 1966. While FMEA proposals would update the Act to include technology not yet developed during the 1966 amendments, they fail to update the most problematic definitions: the 1966 vague standard of control. Bright-line ownership and management measures, like those proposed by Senator Heinz, the New York district court, and the REFUSE Act, would give the DOJ a guideline to identify agents subject to registration. Like Russia's legal and extra-legal methods used over the last several decades, the management standard would also help the DOJ identify obscure methods of control that direct ownership does not necessarily account for. While the definitional issues with its control standard may be more difficult to remedy, the DOJ's enforcement procedures and appropriate staffing of the FARA Unit serve as remedies that may at least give the Act a shot at achieving the democracy-preserving goal Congress envisioned in 1938.

that comprehensive strategy and requires the Inspector General to issue a report to Congress on the results of that review.").

73. See Foreign Agents Registration Act of 1938, 22 U.S.C. § 618(f) (2012). FARA authorizes the Attorney General to seek an order requiring an agent to comply with the Act. *Id.*

74. Atieh, Comment, *supra* note 37, at 1068 (citing U.S. GEN. ACCOUNTING OFFICE, GOV'T ACCOUNTABILITY OFF., Post-Government Employment Restrictions and Foreign Agent Registration: Additional Action Needed to Enhance Implementation of Requirements 2-4 (2008); S. Comm. on Foreign Relations, 95th Cong., The Foreign Agents Registration Act 30 (Comm. Print 1977)).

75. *Id.*

II. HISTORY OF RUSSIAN MEDIA: THE RUSSIAN GOVERNMENT'S METHODS TO CONTROL PUBLIC OPINION AND ITS CONTROL OF THE MEDIA

This section focuses on three factors that make Russian-based news and media outlets particularly First, media protection under the Soviet “duty to criticize” was not only eliminated after the collapse of the U.S.S.R. but produced a total paradigm shift, and even slightly critical publications exposed journalists, editorial boards, and media and news organizations and their owners to defamation suits by the newly established Russian Federation. Second, the Russian Federation inherited ownership of a significant number of news and media organizations, and subsequently obtained ownership of and control over nearly every other previously independent informational outlet through progressively hostile corporate take-overs. Finally, the Russian Federation now devotes significant assets and efforts to expanding its media operations on a global scale, and these outlets are subject to State oversight similar to Russia’s own media.

The Russian constitution expressly prohibits censorship of the press,⁷⁶ however, legal and financial advantages, specifically plaintiff-friendly defamation laws and media ownership, facilitate a high degree of state influence over public opinion. Media and news entities and individuals risk incurring defamation suits for criticizing the government and these media defendants often fail to establish a successful defense or fall into bankruptcy attempting to do so. In addition, direct and indirect control over nearly every media network⁷⁷ enables Russian authorities to selectively authorize or reject

76. KONSTITUTSIYA ROSSIYSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 29 (Russ.). Translated, Article 29 states “The freedom of the mass media shall be guaranteed. Censorship shall be prohibited.”; see Frances H. Foster, *Information and the Problem of Democracy: The Russian Experience*, 44 AM. J. COMP. L. 243, 246 (1996) (“Throughout the post-Soviet era, the right to information has been established constitutional law in Russia. The Constitution of 1978, which remained in effect until December 1993, guaranteed each citizen the ‘right to seek, receive, and disseminate information freely.’ Likewise, the current Constitution stipulates that ‘[e]veryone has the right to seek, receive, pass on, produce, and disseminate information freely by any legal means.’”) (first quoting KONSTITUTSIYA RSFSR (1978) [KONST. RSFSR] [RSFSR CONSTITUTION] art. 43 ¶ 2 (Russ.), and then quoting KONST. RF, *supra*)).

77. According to Freedom House, “[t]he government controls, directly or through state-owned companies and friendly business magnates, all of the national television networks and many radio and print outlets, as well as most of the media advertising market.” *Freedom in the World 2018: Russia*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2018/russia> (last visited Jan. 17, 2019). The State specifically campaigns to control media, specifically television networks, because television “is regarded as the most effective medium for rapid dissemination of information” in modern Russia. Frances H. Foster, *Information and the Problem of Democracy: The Russian Experience*, 44 AM. J. COMP. L. 243, 278 n.220 (1996) (“Russian authorities have made a concerted effort to manage information in order to mold Russian populace into ‘democratic’ citizenry, loyal to ‘democratic’ leadership and reform program. In their campaign to transform public attitudes and behavior, they have placed particular emphasis on central control of mass media

certain publications that could be unfavorable to the State. As a result, the Russian Federation's legal and financial leverage provides strong incentives for journalists and media organizations to support rather than criticize the administration.⁷⁸

Former President Boris Yeltsin's 1996 election and current President Vladimir Putin's 2000 election illustrate the real impact that manipulation of the media has over political results.⁷⁹ Prior to the 1996 election, Boris Yeltsin's administration led Russia in to serious economic turmoil, with significant "disintegration" of social welfare and health care systems.⁸⁰ Despite polling a mere eight percent approval rate just before the campaign began, Yeltsin won the 1996 election "by a comfortable margin."⁸¹ Chomsky explains that Yeltsin's successful reelection despite such negative circumstances demonstrated "a seriously flawed election."⁸² One explanation for the dramatic shift in public opinion regarding Yeltsin is the "massively mobilized" media campaign initiated in 1996 in an effort to secure Yeltsin's reelection.⁸³ Similarly, Vladimir Putin's 2000 election was successful in large part because state-run television and radio entities "campaign[ed] furiously" in Putin's favor, heavily criticized his opponents, and gave Putin's opponents no broadcasting time.⁸⁴ In both elections, the media was an effective tool for political leaders to maintain political power.

(especially television) access and output."). Because state-controlled broadcasts reach the widest audience in Russia, the information issued by these outlets facilitates control over public opinion. According to Freedom House, "[t]he government sets editorial policy at state-owned television stations, which dominate the media landscape." *Freedom of the Press 2015: Russia*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-press/2015/russia> (last visited Jan. 15, 2019).

78. Russian journalist "stress their role in shaping the political agenda twelve times more than American journalists," whereas journalists in the United States view media's role in shaping the political agenda as "of least importance." Hedwig de Smaele, *Values Underlying the Information Culture in Communist and Post-Communist Russia (1917–1999)*, 3 MEDIA & COMM. 15, 19 (2015) (citing Wei Wu, David Weaver & Owen V. Johnson, *Professional Roles of Russian and U.S. Journalists: A Comparative Study*, 73 JOURNALISM & MASS COMM. Q. 534 (1996)).

79. Laura Belin, *The Rise and Fall of Russia's NTV*, 38 STAN. J. INT'L L. 19, 27 (2002); see Dmitry L. Stovsky, *The Media as a Tool for Creating Political Subordination in President Putin's Russia*, 7 STYLES COMM. 128, 136-37 (2015) ("Despite numerous failures in international and domestic affairs . . . , in particular, in the above-mentioned war in Ukraine and the economic sanctions from the USA and EU countries that followed this situation, Putin feels support from most of Russian population and seems to be confident, publicly at least, about his political course.").

80. EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT* xxvi (2000 ed. 1988) (noting that, under Yeltsin, the disintegration of social welfare and health care systems contributed to a "startling rise" in infectious diseases and mortality rates).

81. Belin, *supra* note 79, at 27; see WINTONICK & ACHBAR, *supra* note 3, at 396.

82. See WINTONICK & ACHBAR, *supra* note 3.

83. de Smaele, *supra* note 78.

84. HERMAN & CHOMSKY, *supra* note 80, at xi, xxvii. The State continued to consume media organizations into the 2011 elections. *Freedom in the World 2012: Russia*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2012/russia> (last visited Jan. 15, 2019) ("As the

Globalization of media operations through outlets like RT and Sputnik similarly allows the Russian Federation to implement its influence on public opinion on a global scale through the same tools that allowed the Russian Federation to successfully control public opinion domestically.⁸⁵ According to a 2017 U.S. National Intelligence Council report, Russian efforts to influence the 2016 U.S. presidential election reflect a significant escalation of the country's historical efforts to undermine Western democracy.⁸⁶ The Council concluded RT's criticisms of U.S. elections were the latest facet of its longstanding messaging operations likely aimed at undermining trust in democratic procedures and U.S. criticisms of Russian politics.⁸⁷ State-run domestic media outlets,⁸⁸ specifically RT and Sputnik, contributed to this multi-faceted campaign to influence the recent election.⁸⁹

A. Legal Bases: Defamation Laws and Internet Control

Before 1990, the Soviet Union's "duty to criticize" insulated media and press from most legal repercussions, even for abusive publications.⁹⁰ Because the Soviet Government considered media critical to its political agenda, the Communist Party used extra-legal safeguards to shield the press – at least the state run press – from defamation actions.⁹¹ Criminal and civil actions for defamation emerged most prominently in Russian law in the 1960s.⁹² In the Soviet-era, the criminal code provided for prosecution of

2011 Duma elections approached, businessmen close to Putin purchased additional television, radio, and newspaper assets.”).

85. Christopher Walker, *The New Containment: Undermining Democracy*, 178 WORLD AFF. 42, 44 (2015) (stating that Russia progressed from originally subverting democratic principles within its borders, to “methodically disrupting [democracy] beyond them”).

86. NAT'L INTELLIGENCE COUNCIL, *supra* note 12, at ii.

87. *Id.* at 7.

88. *Id.* at 3.

89. *Id.* at 6.

90. The Russian press operated under a duty to criticize from 1990 to 1995, which allowed it to subject others to public criticism and even ridicule. Peter Krug, *Civil Defamation Law and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution*, 13 CARDOZO ARTS & ENTMT L.J. 847, 860-62 (1995) (citing Serge L. Levitsky, *Copyright, Defamation, and Privacy in Soviet Civil Law*, in 22 LAW IN EASTERN EUROPE SERIES xii (1979)); see Belin, *supra* note 79, at 23 (explaining that the role of Soviet-era press was not only to report objective truths, but also to publicly ridicule opponents of the Soviet regime).

91. Krug, *supra* note 90, at 870 (citing Olympiad S. Ioffe, *Soviet Civil Law*, in 36 LAW IN EASTERN EUROPE SERIES 4 (1988)).

92. See UGOLOVNIY KODOKS ROSSIISKOI FEDERATSII (1960) [UK RF] [Criminal Code] art. 130-131 (Russ.); GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII (1964) [GK RF] [Civil Code] art. 7 (Russ.). Article 7 provided:

A citizen or an organization shall have the right to demand in court retraction of statements reflecting upon his or its honor and dignity, where the person who has circulated such statements fails to prove that they are true. If such statements are circulated through the press,

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

Changes to defamation law following the fall of the Soviet Union, however, led to a massive increase in defamation litigation, particularly against members of the news community.⁹⁵ Importantly, the Russian Federation eliminated the Soviet-era duty to criticize that provided news and media organizations a safeguard against defamation liability. Without this safeguard, news founders, editorial boards, and journalists became subject to civil and criminal prosecution for stories about the new administration and its members.⁹⁶ Under the revised defamation laws, publications concerning political figures were especially subject to defamation actions. Media outlets and their founders, publishers, and editorial offices became liable for defamation based on insult rather than truth or falsity.⁹⁷ As a result, most of Russia’s free-thinking journalists disappeared from television by the 2000s.⁹⁸

In early 1994, for example, State Duma Deputy Vladimir Zhirinovskii publicly announced that any publication defaming the administration or a

they must, if untrue, be retracted also in the press. The manner of retraction in other cases shall be established by the court. If the court decision is not carried out, the court may impose a fine on the offender which shall be collected for the benefit of the state. Payment of the fine does not relieve the offender from the duty to perform the act prescribed by the court judgment.

Id.; see Peter B. Maggs & Karl F. Winkler, *Libel in the Soviet Press: The New Civil Remedy in Theory and Practice*, 41 TUL. L. REV. 55, 55 n.1 (1966). Intent distinguished a criminal action from a civil action: Criminal defamation required malicious intent, but a civil claim remained viable absent intent to harm. Elspeth Reid, *Defamation and Political Comment in Post-Soviet Russia*, 38 REV. CENT. & E. EUR. L. 1, 7 (2013).

93. Maggs & Winkler, *supra* note 92, at 56 (noting that, even if the press could have been prosecuted, the State would have had difficulty proving the malice element required under the criminal law).

94. Reid, *supra* note 92, at 8.

95. The 1991 Russian Federation Civil Code “offers a remedy where: (i) the plaintiff can establish that the offending statement or publication have a damaging effect on honor, dignity or business reputation; and (ii) the defendant is unable to demonstrate the accuracy of its underlying factual basis.” GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 150, 152 (Russ.); see Reid, *supra* note 92, at 15; Krug, *supra* note 90, at 848-49 (citing 1990 Press Law; Civil Code pt. 1 (enacted Nov. 30, 1994)) (explaining that the 1990 Press Law and 1994 Civil Code exposed the press to extensive post-publication civil responsibility for statements injurious to personality and privacy interests).

96. See Krug, *supra* note 90, 860-62.

97. *Id.* at 855-56, 861-62.

98. Freedom House records Russia’s press as “Partially Free” until 2003. From 2004 until 2017, however, Freedom House recategorized Russia’s press as “Not Free.” *Freedom of the Press 2017: Russia*, FREEDOM HOUSE, <https://freedomhouse.org/report/table-country-scores-fotp-2017> (last visited Jan. 15, 2019).

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

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

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

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

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

102. *Id.*

103. Article 10 of the Convention reads:

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

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

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

105. *Id.* at 998, ¶¶ 13-14.

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

Concern that defamation litigation stifle governmental criticism remains relevant today, as Russian law continues to provide extensive remedies for defamation actions and greater liability for media persons or entities.¹⁰⁷ In 2012, the Steering Committee on Media and Information Society (CDMSI) reiterated its concerns from 2006 that Russia's officials use civil and criminal defamation statutes to manipulate and intimidate the media.¹⁰⁸ The CDMSI warned that these laws were "a serious impediment to the practice of investigative journalism."¹⁰⁹ Though the only independent source of information in Russia today is the Internet,¹¹⁰ journalists are still legally responsible for the content of and comments posted to online blogs.¹¹¹ Therefore, in either print or online publications, journalists and media organizations in Russia risk heightened criminal and civil liability for criticizing the Government.

106. *Id.* at 1002, ¶ 31.

107. Thomas M. Callahan, *Cauldron of Unwisdom: The Legislative Offensive on Insidious Foreign Influence in the Third Term of President Vladimir V. Putin, and ICCPR Recourses for Affect Civil Advocates*, 38 *FORDHAM INT'L L.J.* 1219, 1234-35 (2015); Rebecca Favret, *Back to the Bad Old Days: President Putin's Hold on Free Speech in the Russian Federation*, 12 *RICH. J. GLOBAL L. & BUS.* 229, 304 (2013).

108. Steering Committee on Media and Information Society [CDMSI], COUNCIL OF EUR., *Study on the Alignment of Laws and Practices Concerning Defamation with the Relevant Case-Law of the European Court of Human Rights on Freedom of Expression, Particularly with Regard to the Principle of Proportionality*, at 98, Doc. No. CDMSI(2012)Misc11Rev2 (Mar. 25, 2013), <https://rm.coe.int/09000016804915c5> ("Articles 151 and 152 of the Civil Code and Articles 129 and 130 of the Criminal Code are still being used by public figures in order to intimidate or silence hostile media. They are a serious impediment to the practice of investigative journalism, with its potential to publicize and thus to reduce incidents of corruption and wrongdoing in public life.").

109. *Id.*

110. Rachel Vanderhill, *Limits on the Democratizing Influence of the Internet: Lessons from Post-Soviet States*, 23 *DEMOKRATIZATSIYA* 31, 36 (2015).

111. Chip Pitts & Anastasia Ovsyannikova, *Russia's New Treason Statute, Anti-NGO and Other Repressive Laws: "Sovereign Democracy" or Renewed Autocracy*, 37 *HOUS. J. INT'L L.* 83, 130 (2015).

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

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

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

112. IVAN ZASURSKII, *MEDIA & POWER IN POST-SOVIET RUSSIA* 16-17, 25 (2016) (emphasizing the “enormous power” Russian press held through the first years of Yeltsin’s presidency).

113. *Freedom in the World 2018: Russia*, *supra* note 77; see Barbara Junisbai et al., *Mass Media Consumption in Post-Soviet Kyrgyzstan and Kazakhstan: The View from Below*, 23 *DEMOKRATIZATSIYA* 233, 252 (2015); Strovsky, *supra* note 79, at 130 (noting that seventy-five percent of all news outlets are controlled by state authorities).

114. Elisabeth Schimpfossel & Ilya Yablokov, *Coercion or Conformism? Censorship and self-Censorship Among Russian Media Personalities and Reporters in the 2010s*, 22 *DEMOKRATIZATSIYA* 295, 298 (2014).

115. Frances H. Foster, *Information and the Problem of Democracy: The Russian Experience*, 44 *AM. J. COMP. L.* 243, 271 (1996) (“Economic subsidies, which for most Russian media spell the difference between economic survival or collapse, have been a particularly popular means to encourage obedience to official directives.”).

116. The “squeeze on the media became more visible with Media-Most’s forced change of ownership . . . to the state-controlled energy giant Gazprom in 2001[.]” Dorothea Schonfeld, *Tilting at Windmills: The European Response to Violations of Media Freedom in Russia*, 37 *REV. CENT. & E. EUR. L.* 233, 246 (2012). Also, in 2001, ORT, a channel similarly critical of the government, came under Gazprom’s ownership “under duress.” *Id.* It is now clear that media in Russia is controlled by political authorities and government directed corporations like Gazprom, with some analysts estimating more than 80% of broadcast media and 70% of print were news under direct or indirect government control as of 2012. *Id.* at 247 (first citing Victor Shenderovich, *Tales From Hoffmann: Putin Fails to See the Funny Side*, 37 *INDEX ON CENSORSHIP* 48, 57 (2008), and then citing Nadezhda Azhgikhina, *The Struggle for Press Freedom in Russia: Reflections of a Russian Journalist*, 59 *EUR.-ASIA STUDIES* 1245, 1253 (2007)); see generally Belin, *supra* note 79, at 19-20.

Boris Yeltsin presidency.¹¹⁷ Under President Putin's administration, however, NTV's independently owned parent company, Media-Most, lost ownership of NTV to Gazprom Media.¹¹⁸ Pursuant to a loan reimbursement agreement, Gazprom Media became the majority shareholder in NTV after Media-Most could not repay its \$211 million loan.¹¹⁹ When NTV journalists staged a ten-day protest declaring Gazprom's takeover illegal, Gazprom took NTV's headquarter by force with the assistance of armed guards.¹²⁰

Once NTV came under Gazprom ownership, the corporation immediately proclaimed loyalty to the Federation, and established its own editorial staff and policies.¹²¹ Many journalists either resigned or were terminated as a result of the forcible takeover and Gazprom-appointed management.¹²² For example, NTV terminated successful political reporter Leonid Parfenov's employment in 2004 after Parfenov violated a ban on reporting the Chechnya war.¹²³ Like Parfenov, most of Russia's free-thinking media personalities disappeared in the 2000s after expressing independent views, while individuals demonstrating solid loyalty to the Government retained their positions.¹²⁴

Organizations in the oil and gas industry are either directly controlled by the government or are "subject to heavy government influence."¹²⁵ In addition to NTV, companies like Gazprom Media own a considerable number of other news entities. In 1998, for example, Gazprom Media and other Gazprom subsidiaries owned controlling stakes in daily and weekly publications such as *Rabochaya Tribuna*, *Profil*, and *Kompanya*, and

117. Belin, *supra* note 79, at 19.

118. *Id.* at 35; Schonfeld, *supra* note 116, at 246. Though formally independent from the Russian government, Gazprom and nearly all other major media-holding companies, like Profmedia and Sviazinvestbank, align with the Kremlin. *Id.* at 248.

119. Belin, *supra* note 79, at 34 n.99.

120. *Id.* at 37.

121. Katja Lehtisaari, *Market and Political Factors and the Russian Media* 8 (Reuters Inst. for the Study of Journalism, Working Paper, Oct. 2015); Strovsky, *supra* note 79, at 134.

122. Lehtisaari, *supra* note 121, at 8.

123. Schimpfossel & Yablokov, *supra* note 114, at 306.

124. *Id.*

125. Jim Nichol, *Russian Political, Economic, and Security Issues and U.S. Interests*, CONG. RES. SERV. 22 (Mar. 7, 2014), <http://advocacy.calchamber.com/wp-content/uploads/international/trade/CRS%20Report-Polit-Ec-Security-Iss-and-US-Interests.pdf> ("The Russian oil and natural gas industries are important players in the global energy market, particularly in Europe and Eurasia. In 2010, Russia had by far the largest natural gas reserves in the world, owning nearly 24% of the world's total. It was seventh in the world in oil reserves, with over 5% of the global total. Firms in these industries are either directly controlled by the Russian government or are subject to heavy Russian government influence.").

financed around 100 other regional publications.¹²⁶ As of 2015, *Ekho Moskvyy* (“Echo of Moscow”), Russia’s only radio station embracing wide and sometimes heated political discussions, was financially dependent on Gazprom.¹²⁷ A 2012 study determined that in the majority of cases, media entities were acquired by or consolidated with private media companies, and most were acquired directly or indirectly through large companies like Gazprom.¹²⁸ Similar to Gazprom’s takeover strategy of NTV, these private companies substantially reorganized media entities shortly after acquisition.¹²⁹

The majority of news outlets and media personalities, even those once critical of the government, demonstrate full loyalty to the Russian Federation.¹³⁰ The majority of personalities and reporters already held pro-Kremlin convictions and viewed their journalistic roles as one “defending the status quo.”¹³¹ For example, in an interview published in 2014, Maksim Shevchenko of Channel 1 explained that, while he experienced no censorship from the state, if the state invests money in a media outlet, “it has the right to demand that it follow the state’s policy.”¹³² Because the primary and most trusted sources of news and information are distinctively bias, public opinion is effectively shaped in the Government’s favor.¹³³

C. International Expansion of Russian Media

Russia devotes significant effort and financial support to its expanding operations throughout the Middle East, Latin America, Europe, and the United States.¹³⁴ Russia’s media presence in France, the Baltic states, Moldova, Georgia, Kyrgyzstan, and Kazakhstan serve as examples of successful Kremlin-sponsored, counter-democracy media campaigns by

126. See generally Floriana Fossato & Anna Kachkaeva, *Russia: The Origins of a Media Empire*, RADIOFREEEUROPE (Mar. 9, 1998, 12:00 AM), <https://www.rferl.org/a/1088157.html> (detailing the extent to which Gazprom and its subsidiaries owned Russian media organizations in 1998).

127. Strovsky, *supra* note 79, at 136.

128. Naumova et al., *supra* note 4, at 103.

129. *Id.*

130. Schimpfossel & Yablokov, *supra* note 114, at 300, 306; see Maria Lipman, *Russia’s Nongovernmental Media Under Assault*, 22 DEMOKRATIZATSIYA 179, 183 (2014).

131. Schimpfossel & Yablokov, *supra* note 114, at 297, 311.

132. *Id.* at 305.

133. See Junisbai et al., *supra* note 113, at 255; Strovsky, *supra* note 79, at 130. Due to Russian authorities’ successful control over all media, if political authorities wish to manipulate public opinion, they have “all the levers in [their] hands to do so.” Schonfeld, *supra* note 116, at 249 (explaining that there are almost no independent television broadcast outlets after NTV and ORT were “brought into line” by Gazprom’s takeover).

134. Walker, *supra* note 85, at 50.

“raising doubts about the integrity of [those] young democracies.”¹³⁵ In France, for example, Sputnik and RT are two of the main information communicators sponsored by the Russian government.¹³⁶ In Kazakhstan, electronic media is largely either broadcasted from the Russian Federation, or owned by the Russian Federation. According to Christopher Walker, the Vice President for studies and analysis at the National Endowment for Democracy,¹³⁷ the Russian Federation used similar tactics in Moldova and Georgia, areas also considered politically as aspiring democracies.¹³⁸

Globalization of its media operations through outlets like RT and Sputnik allows the Russian Federation to expand its influence campaigns from subverting democratic evolution internationally.¹³⁹ According to the U.S. Intelligence Council, the Russian Government historically used “covert influence campaigns” to sway foreign politics in favor of Russian interests.¹⁴⁰ Specifically, its influence campaigns are implemented through the State’s national and international media outlets, which are owned or controlled by the Government.¹⁴¹ Its international outlets devote the majority of their efforts to attack and distort perceptions of Western democracy rather than supply an affirmative case for the Russian government’s system and achievements.¹⁴²

Ultimately, the Russian Government, by threatening media entities, their owners, publishers, editorial boards, and journalists with personal liability for civil and criminal defamation, deters critical publications to control public opinion.¹⁴³ By gaining such exclusive control over public information, the administration effectively secures its political position, even in the face of severe economic failures and highly questionable political strategies.¹⁴⁴ As Russian-based media entities operate on a global scale, the Government

135. *Id.* at 47-48; Junisbai et al., *supra* note 113, at 241.

136. Claire Demesmay, “*There are Always Two Sides to the Truth*”: *French Susceptibility to Russian Propaganda*, 4 DGAP KOMPAKT 1, 2 (Feb. 2016).

137. Christopher Walker is New President for Studies and Analysis at National Endowment for Democracy, NAT’L ENDOWMENT FOR DEMOCRATIC STUDIES (Feb. 5, 2016), <https://www.ned.org/christopher-walker-is-new-vice-president-for-studies-and-analysis-at-national-endowment-for-democracy/>.

138. Walker, *supra* note 85, at 48.

139. *Id.* at 44.

140. NAT’L INTELLIGENCE COUNCIL, *supra* note 12, at ii.

141. See Junisbai et al., *supra* note 113, at 253, 256.

142. Walker, *supra* note 85, at 50.

143. See WINTONICK & ACHBAR, *supra* note 3.

144. Strovsky, *supra* note 79, at 136-37 (noting that despite questionable practices President Putin and his administration managed to secure more than eighty-eight percent of the public support).

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

Under FARA, the Act's failure to take into account the effect that Russian defamation laws has on its the press, editorial policies, and individual journalists, as well as the influence of state media ownership through subsidiaries like Gazprom – the mechanisms that brought nearly every media network under State control – renders it ineffective in identifying true agents of foreign principals. Arming FARA with provisions that direct the DOJ to investigate these factors would contribute to the disclosure requirements, since an agent cannot be compelled to disclose its foreign ties until the agent is first identified.

III. REQUIRING REGISTRATION AND NOTIFICATION OF THE SOURCE OF INFORMATION TO COMBAT RUSSIAN INTERFERENCE

Launched in 2005, RT is the most widely recognized entity of Russia's international media empire, with broadcasts reaching an estimated 500 to 700 million viewers in more than 100 countries.¹⁴⁵ Sputnik, launched in 2014, broadcasts in over 30 languages, totaling more than 800 hours per day in broadcasting time.¹⁴⁶ In 2017, RT and Sputnik registered as foreign agents in order to avoid criminal liability.¹⁴⁷ In each entity's case, the agency relationship qualified RT and Sputnik to register as agents of a foreign principal, as their compelled registration demonstrates, but why did this relationship go undetected for thirteen years in RT's case and four years in Sputnik's?

The agency relationship and level of influence between Russia and RT and Sputnik illustrates the legal and historical factors FARA does not take into account. Elena Postnikova identifies three factors indicating Russia controls RT, which can also be applied in Sputnik's case. These factors include “(1) founding and continued control by a Russian state-owned news agency, (2) reliance on the Russian state for ninety-nine percent of its budget, and (3) non-transparent governance structure that . . . allows the Kremlin to

145. STAFF OF S. COMM. ON FOREIGN RELATIONS, 115TH CONG., PUTIN'S ASYMMETRIC ASSAULT ON DEMOCRACY IN RUSSIA AND EUROPE: IMPLICATIONS FOR U.S. NAT'L SEC'Y 41 (Comm. Print 2018) [hereinafter PUTIN'S ASYMMETRIC ASSAULT ON DEMOCRACY].

146. *About Us*, SPUTNIK NEWS, <https://sputniknews.com/docs/about/index.html> (last visited Feb. 4, 2019).

147. Brett Samuels & Megan R. Wilson, *RT Chooses Registering as a Foreign Agent Over "Criminal Case,"* HILL (Nov. 13, 2017, 4:17 PM), <http://thehill.com/homenews/360110-rt-choose-s-registering-as-foreign-agent-in-us-over-criminal-case?rnd=1510608036>; Megan R. Wilson, *Russian News Outlet Sputnik Registers with DOJ as Foreign Agent*, HILL (Nov. 17, 2017, 1:15 PM), <http://thehill.com/business-a-lobbying/business-a-lobbying/360912-russian-news-outlet-sputnik-registers-with-doj-as>.

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

Agents like RT and Sputnik highlight the Act’s deficiencies that foreign principals may exploit to evade DOJ oversight. Of course, while RT and Sputnik offer especially illuminated answers to FARA’s difficulties, these are merely examples of how foreign principals avoid FARA detection and infiltrate and influence public opinion in the U.S. RT and Sputnik successfully operated without FARA’s obligations for an extended period of time, but they are by no means the only agents doing so. In general, however, the Office of the Inspector General determined in 2016 that FARA compliance rates were unacceptable overall, and that modifications and improvements were necessary.¹⁴⁹ Specifically, the inspector General Audit determined that nearly half of the informational materials submitted by seventy-seven (out of the total seventy-eight) registered agents failed to include the required disclosure statement.¹⁵⁰ The improvements and modifications must come from the legislature. Thus, Congress must re-examine FARA considering these most recent mistakes, as it did with the Toshiba scandal, and take steps to prepare FARA to combat future and more malevolent actors than RT and Sputnik.

148. Postnikova, *supra* note 30, at 6.

149. *See id.* at 14. “While FARA provides tools to expose RT as an agent of a foreign principal, the fact that RT has not yet registered may be indicative of gaps in the administration and enforcement of the Act The RT case demonstrates a compelling example of [FARA’s] shortcomings and highlights the need for DOJ and, where needed, Congress to modernize how the DOJ administers and enforces FARA.” *Id.*; OFFICE OF THE INSPECTOR GEN. AUDIT *supra* note 24, at 16.

150. OFFICE OF THE INSPECTOR GEN. AUDIT, *supra* note 24, at 15-16. The results, specifically, stated that:

We tested informational materials submitted by the 78 agents of foreign principals we reviewed to determine if the documentation was submitted within the 48-hour requirement and included the required disclosure statement. We identified a total of 1,278 pieces of informational material, 780 pieces of which were submitted by one agent, and 498 of which were submitted by the other 77 agents. It appears that many of the one agent’s submissions were late because they were batched and mailed monthly without apparent regard to the date and time of transmission to the recipients, although each contained the requisite disclosure statement. As for the 498 pieces of information submitted by the other 77 agents, we found that only 457 included a date and time of transmittal to the recipients. The remaining 41 did not, which made determining timeliness for them impossible. Of the 457 pieces of informational materials with an identifiable transmittal date and time, we found that 179 (39%) were submitted timely within 48 hours of transmittal, but 278 (61%) were not. We also found that almost half or 234 of the 498 items of information materials (47%) did not include the required disclosure statement.

Id.

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

Russian-based media outlets like RT and Sputnik successfully avoided FARA's registration and disclosure requirements because the organizations' funding is filtered through the obscure organizational structure.¹⁵¹ In its U.S. operations, the Russian government provides significant funding for RT and Sputnik, spending \$190 million annually on RT program distributions alone.¹⁵² From 2005 to 2013, RT received approximately \$2 billion from the Russian government.¹⁵³ And from 2013 to 2016, this government funding accounted for 99 percent of RT's "operational expenditures."¹⁵⁴

RT's and Sputnik's corporate structures obscure who controls its management and editorial policies, giving these entities grounds to deny any association with the Russian Federation that would give rise to an obligation to comply with FARA.¹⁵⁵ Understanding Postnikova's second and third factors requires a deeper look into the organizational structure of both entities. Initially, Sputnik and RT are both organized under the same parent organization, RIA Novosti ("RIA").¹⁵⁶ In 2013, to distance the Government's connection to RT,¹⁵⁷ President Putin liquidated RT's then

151. See discussion *supra* Part IV(A).

152. NAT'L INTELLIGENCE COUNCIL, *supra* note 12, at 10.

153. Postnikova, *supra* note 30 (citing Katie Zavadski, *Putin's Propaganda TV Lies About Its Popularity*, DAILY BEAST (Sept. 17, 2015, 1:13 AM), <http://www.thedailybeast.com/articles/2015/09/17/putin-s-propaganda-tv-lies-about-ratings.html>).

154. *Id.* (citing ANO TV-Novosti 2013-2015 reports "On financial expenditures and use of other property by nonprofit organizations, including those received from foreign and international organizations, foreign and stateless persons," available at <http://unro.minjust.ru/NKORreports.aspx> (in Russian)).

155. *Id.* at 6 ("RT's opaque corporate structure obscures who actually decides its management and editorial policy, so RT could deny that the news organization is controlled by the Russian government within the meaning of FARA."); see generally Nathan Layne, *U.S.-Based Russian News Outlet Registers as Foreign Agent*, REUTERS (Feb. 17, 2018, 7:07 PM), <https://www.reuters.com/article/us-usa-trump-russia-propaganda/u-s-based-russian-news-outlet-registers-as-foreign-agent-idUSKCN1G201H>.

156. Postnikova, *supra* note 30, at 6, 11. RIA Novosti and MIA Rossiya Segodnya are apparently used interchangeably, although MIA Rossiya Segodnya is the official legal name of RT's parent company. See *id.* A possible explanation is that in 2013 President Putin created MIA Rossiya Segodnya ("MIA") and simultaneously liquidated RIA Novosti, transferring all RIA's assets and subsidiaries to newly created MIA. *Id.* MIA then became RT's parent organization. *Id.*

157. *Id.* at 6 ("[RT's] autonomy can manifest as follows: (1) the assets contributed by the founder become property of the nonprofit, and (2) the founder cannot be held liable for the actions of the autonomous nonprofits, and the latter have no liability for the founder. In all other respects, the autonomous nonprofits are subject to control by the founder Therefore, the nonprofit's management decisions about its . . . hiring and employee relations, and – most importantly in this case – editorial policy, remain subject to control of the founder, unless the founder provides otherwise.").

state-owned founder, RIA, merging RIA's subsidiaries into a simultaneously created entity, MIA Rossiya Segodnya ("MIA").¹⁵⁸ MIA was officially declared RT's parent company, and RT along with all of its assets were transferred to MIA.¹⁵⁹

To further distance itself from RT, the Government created ANO TV-Novosti (autonomous nonprofit organization TV news), which took over RT's financing and operation in the U.S.¹⁶⁰ This structure was "set up to avoid the Foreign Agents Registration Act[.]"¹⁶¹ Even though ANO-Novosti is a subsidiary of the federal news agency, formerly known as RIA Novosti, RT claims it is independent from the state because its underlying legal entity, ANO TV-Novosti, is now an autonomous nonprofit organization.¹⁶² Under Russian law, autonomous nonprofit organizations and their founders are not liable for each other's liabilities, and the nonprofit assumes the assets contributed by the founder.¹⁶³ Nonetheless, the Russian Federation is expressly responsible for its own participation in the nonprofits "managerial bodies."¹⁶⁴ Thus, the RT-Russian Federation relationship may be summarized as follows: The Russian Federation owns RIA/MIA, which owns ANO TV-Novosti, which owns RT.¹⁶⁵

158. *Id.* at 6-7 ("In RT's case, the single founder was Russia's state-owned news agency RIA Novosti, which was liquidated in 2013.").

159. *Id.* at 6, 11.

160. *Id.* at 11.

161. NAT'L INTELLIGENCE COUNCIL, *supra* note 12, at 12.

162. Postnikova, *supra* note 30, at 6 ("RT claims it is 'independent from the state' because ANO TV-Novosti, the legal entity behind RT, is an 'autonomous non-profit organization.'"); Exhibit A to Registration Statement, U.S. DEP'T OF JUSTICE (Dec. 11, 2017), <https://www.fara.gov/docs/6496-Exhibit-AB-20171211-2.pdf>. ANO TV-Novosti registered with FARA's registration unit on December 11, 2017 as an "autonomous non-profit organization."; see *About RT*, RT, <https://www.rt.com/about-us/> (last visited Feb. 11, 2018); NAT'L INTELLIGENCE COUNCIL, *supra* note 12, at 12.

163. Federal'nyi Zakon RF o Grazhdanstve Rossiiskoi Federatsii [Federal Law of the Russian Federation on Nonprofit Organizations], ROSSIKAIA GAZETA [ROS. GAZ.] Feb. 12, 1998, 229 (Russ.) [hereinafter Russian Federal Law No. 7-FZ]; see Postnikova, *supra* note 30, at 6 (citing Russian Federal Law No. 7-FZ on Non-Commercial Organizations, Jan. 12, 1996, art. 10).

164. Russian Federal Law No. 7-FZ on Non-Commercial Organizations, Jan. 12, 1996, art. 10(5) ("Where the founder of an autonomous non-commercial organization is the Russian Federation, a constituent entity of the Russian Federation or a municipal entity, a procedure for participation of their representatives in managerial bodies of the non-commercial organization shall be established by the Government of the Russian Federation, a state power body of the constituent entity of the Russian Federation or local authority.").

165. This and subsequent summarizations are simplified versions of only these aspects of the agency relationship. Unsurprisingly, the corporate intermediary and subsidiary relationships are complex and difficult to pinpoint exactly; which corroborates the DOJ's difficulty in doing so. For example, to add another complexity, RT's production company, T&R Productions, filed paperwork with the DOJ disclosing that its work benefits ANO TV-Novosti. Samuels & Wilson, *supra* note 147.

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

On a larger scale, Gazprom, the major gas mogul whose majority shareholder is the Russian Federation, has registered as an agent of the Russian government since 2002, conducting enormously profitable "media relations" services in the U.S.¹⁶⁸ Gazprom owns many subsidiaries (e.g., Gazprom Export, Gazprom Media, RAO Gazprom, OAO Gazprom), and those subsidiaries own smaller media entities. For example, Gazprom, owned almost entirely by the Russian Federation, is the parent company of Gazprom Media, and Gazprom Media own media organizations like NTV.¹⁶⁹ NTV's relationship may be summarized as follows: Russian Federation to Gazprom to Gazprom Media to NTV.

In each case, as a subsidiary of a subsidiary of a company owned by the Russian Federation, the relationship between the Russian Government and RT, Sputnik, and NTV is difficult to identify and becomes increasing difficult as control is filtered through more subsidiaries. As such, the Russian Government sufficiently distanced itself from its subsidiary agents thus evading FARA's registration requirements. This is the exact "more than one intermediate link in the chain" problem Chairman Fulbright anticipated in 1965.¹⁷⁰ If the REFUSE standard were in place, the DOJ would only need to trace government funding or ownership interest equaling twenty percent or more. In addition, including a management standard would account for the Government's exclusive right under Russian law to manage entities, like RT's case, otherwise not expressly tied to the administration through liability or asset ownership.

166. Layne, *supra* note 155.

167. *Id.* ("RIA Global's customer of record is Federal State Unitary Enterprise Rossiya Segodnya International Information Agency, the Russian state entity that owns Sputnik and was created by a decree of Russian President Vladimir Putin in 2013.")

168. Gazprom earned up to \$4 million in only six months.

169. See discussion *supra* Part III(B).

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

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

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

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

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

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

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

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

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

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

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

C. Identifying the Agency Relationship and the Effect of Compelled Registration

Subjecting sources like RT and Sputnik to FARA's registration requirements does not necessarily guarantee that either will be subject to the Act's disclosure requirements. Under §614(a), a person required to register as an agent of a foreign principal must submit to the Attorney General any "informational material" intended or likely to be disseminated to at least one other person in the interest of the foreign principal.¹⁷⁷ Because the Russian Federation has separated itself from RT and Sputnik, these entities are not agents under the current FARA requirements and thus are not required to register as foreign agents and submit their publications to the DOJ for review.¹⁷⁸ While registration does not necessitate disclosure of the agent relationship, agents like RT and Sputnik that evade the registration requirements never come under DOJ review and, thus, are never required to inform the public of their ties to the Russian Federation through conspicuous statements.

RT and Sputnik contribute significantly to the marketplace of ideas by publishing different perspectives on national and international issues, and it is not within FARA's authority to prohibit the entities from doing so. The informational value of RT and Sputnik must be recognized, as both have significantly contributed to social and political discourse in the U.S. and abroad. For example, RT received an Emmy nomination for its 2012 Occupy Wall Street coverage.¹⁷⁹ In *Meese v. Keene*, the Supreme Court clarified, however, that FARA's registration requirements apply "equally to friendly, neutral, and unfriendly governments."¹⁸⁰ The Court presumed that the National Film Board of Canada had been registered as a foreign agent because it was in fact an agent of the Canadian government. Ultimately, the Court determined that the films produced by the National Film Board of Canada classified as political propaganda because they contained political

177. Foreign Agents Registration Act of 1938, 22 U.S.C. § 614(a) (2012).

178. See Danner, *supra* note 7, at 44.

179. Hannah Gais & Eugene Steinberg, *Russia's Foreign Media Outlets Aim to Undermine U.S. Credibility*, U.S. NEWS & WORLD REPORT, Nov. 24, 2014, 2014 WLNR 33184592; see NAT'L INTELLIGENCE COUNCIL, *supra* note 12, at 7. The Intelligence Committee emphasized that RT's editor in chief, Margarita Simonyan, characterized the coverage as "information warfare" meant to highlight dissatisfaction with the United States Government. *Id.*

180. *Meese v. Keene*, 481 U.S. 465, 469-70 (1987); see *Block v. Meese* 793 F.2d 1303, 1310 (D.C. Cir. 1986) (noting that FARA covers "all communications issued by foreign agents 'whether friendly or unfriendly, whether violent or mold'" and applies to "our allies as well as our enemies[.]" (first quoting H.R. Res. 424, 73d Cong., 78 CONG. REC. 11,069 (1934); and then quoting *United States v. Kelly*, 51 F. Supp. 362, 363 (D.D.C. 1943)) (citing 88 CONG. REC. 1139 (1942)).

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

RT's editor-in-chief, Margarita Simonyan, condemned the DOJ for compelling the registration, claiming the move was an attack on free speech.¹⁸³ However, other official news organizations, like Chinese newspapers Xin Min Evening News and China Daily, have complied with the Act with no evidence that the DOJ hindered publication, which would be in violation of the First Amendment and not permitted by FARA. China Daily registered in 1983 and has filed required statements every year since, including in 2018 without the DOJ interfering in the organization's operations.¹⁸⁴ Around thirty other registrants were similarly involved in "media relations" as of July 2017.¹⁸⁵ These organizations merely report their activities to the DOJ, and the DOJ neither can nor apparently has tried to prevent any of these agents from carrying-on their media pursuits.¹⁸⁶

Simonyan also objected to characterizing RT as "propaganda" in 2017 because the term comes with "a very negative connotation[.]"¹⁸⁷ The Supreme Court addressed the "propaganda" label in *Meese v. Keene*, holding that "political propaganda" for FARA purposes did not have a "pejorative connotation," as FARA defined the term to include materials that were misleading but also those that were "accurate and merit[ing] the closest attention and the highest respect."¹⁸⁸ Regardless, Congress amended FARA in 1995 to substitute "informational material" for "political propaganda"

181. *Meese*, 481 U.S. at 470.

182. *Id.* at 475.

183. Samuels & Wilson, *supra* note 147.

184. China Daily Document Submissions, U.S. DEP'T OF JUSTICE, https://efile.fara.gov/pls/apex/f?p=185:200:7376616772323::NO:RP,200:P200_REG_NUMBER:3457 (last visited Feb. 11, 2019); see Megan R. Wilson, *Russian News Outlet Sputnik Registers with DOJ as Foreign Agent*, HILL (Nov. 17, 2017 1:15 PM), <http://thehill.com/business-a-lobbying/business-a-lobbying/360912-russian-news-outlet-sputnik-registers-with-doj-as> ("Other state-owned media outlets are also registered as foreign agents, such as China Daily, and the foreign agent status does nothing to impede newsgathering or production activities.").

185. See U.S. DEP'T OF JUSTICE, Report of the Attorney General to the Congress of the United States on the Administration of the Foreign Agents Registration Act of 1938, as Amended, for the Six Months Ending June 30, 2017, <https://www.justice.gov/nsd-fara/page/file/1021601/download>.

186. Samuels & Wilson, *supra* note 147 ("Other state-owned media outlets are also registered as foreign agents, such as China Daily, and the foreign agent status does nothing to impede newsgathering or production activities.").

187. NAT'L INTELLIGENCE COUNCIL, *supra* note 12, at 8.

188. 481 U.S. 465, 477 (1987). Justices Blackmun, Brennan, and Marshal dissented on this point.

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

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

CONCLUSION

Through instilling fear of defamation suits, corporate takeover and control, and control over the Internet, the current administration manages what the citizens see and thereby controls public opinion. These same tactics are employed through Russian-based entities like RT and Sputnik to influence public opinion on an international scale. Members of the general public are not aware of the extent of government control over media organizations, which may well be the result of decades of calculated manipulation. Today, major media personalities and their respective employers primarily promote, rather than question, institutional goals after independent organizations are staffed with professionals who already agree with and support the Government. While the control illustrated by the Russian government is subtle, the Russian Federation does not need to take more blatant or forceful measures. This is because, as Chomsky warned, when people cannot be controlled by force, they must be controlled by what they think; and therein lies the danger.

News and media are essential to the functions of democratic societies. Because outlets like RT and Sputnik contribute to the free flow of information but potentially undermine democracy with inaccurate and biased information, their disseminations should be monitored by the DOJ under FARA. Though explicating FARA’s scope to account for entities and

189. See Foreign Agents Registration Act of 1938, 22 U.S.C. § 614 (2012) (amended 1995) (“Pub. L. 104–65, § 9(4)(A) and § 9(6) the substituted term ‘informational materials’ for ‘political propaganda.’ Pub. L. 104–65, § 9(5) . . . substituted ‘without placing in such informational materials a conspicuous statement that the materials are distributed by the agent on behalf of the foreign principal’ for clauses (i) and (ii) and concluding provisions which made it unlawful for an agent of a foreign principal to transmit in the United States political propaganda unless the propaganda identified the agent and contained information about the registration of the agent and authorized the Attorney General to prescribe regulations relating to the information to be provided.”).

190. See Reid, *supra* note 92, at 8.

individuals indirectly controlled by foreign authorities would bring these actors under the registration and require disclosure, the Act would still promote First Amendment principles. Once registered, the information flowing from these outlets can be labeled with a conspicuous statement identifying the agent-principal relationship if the DOJ finds they are subversive of American democracy. Such labeling would not violate the constitutionally protected freedom of speech.

Congress must explicitly define FARA's concept of "control" to account for actors operating under indirect and obscured control of foreign principles. FARA is a potentially powerful tool to combat insidious and subversive forces, though it is unfortunately ill equipped to execute its purpose as the statute stands. An explicit definition of "control" is necessary to qualify actors like RT and Sputnik as agents of foreign principles under FARA, and thus subject them to the Act's registration, monitoring, and dissemination requirements. This would ultimately allow the DOJ to evaluate and require a conspicuous statement identifying the foreign relationship on agent-disseminated materials.