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## The Foreign Agents Registration Act: A New Standard for Determining Agency

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# The Foreign Agents Registration Act: A New Standard for Determining Agency

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## **Abstract**

This Note will give an overview of the development, operation and enforcement of FARA. It will then discuss the INAC case and the confusion it is likely to cause among voluntary groups as to their duty to register under FARA. This Note will also discuss how the INAC informative purposes standard will exacerbate current problems in administering FARA. Lastly, this Note will recommend that the INAC standard not be followed.

# THE FOREIGN AGENTS REGISTRATION ACT: A NEW STANDARD FOR DETERMINING AGENCY

## INTRODUCTION

The Foreign Agents Registration Act<sup>1</sup> (FARA) was enacted in 1938 to control subversive activities and propaganda dissemination<sup>2</sup> by Nazi and Communist agents in the United States.<sup>3</sup> FARA's scope has since been expanded<sup>4</sup> and now requires representatives of various types of foreign entities to register with the Attorney General of the United States even though their activities do not directly threaten national security.<sup>5</sup> Today, it provides the government with

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1. 22 U.S.C. §§ 611-621 (1976). The statute requires certain representatives of foreign principals to register with the Attorney General and disclose all their information regarding their activities in the United States. See *infra* notes 33-36 and accompanying text.

2. H.R. REP. No. 1381, 75th Cong., 1st Sess. 1-2 (1937) [hereinafter cited as HOUSE REPORT]. The Committee on the Judiciary of the House of Representatives explained the purpose of FARA in the following statement:

Incontrovertible evidence has 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 a result of such evidence, this bill was introduced, the purpose of which is to require all persons who are in the United States for political propaganda purposes . . . to register with the State Department and to supply information about their political propaganda activities, their employers, and the terms of their contracts. This required registration will publicize the nature of subversive or other similar activities . . . so that the American people may know those who are engaged in this country by foreign agencies to spread doctrines alien to our democratic form of government, or propaganda for the purpose of influencing American public opinion on a political question.

*Id.*

3. STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 87TH CONG., 2D SESS., A PRELIMINARY STUDY ON THE NONDIPLOMATIC ACTIVITIES OF REPRESENTATIVES OF FOREIGN GOVERNMENT 6 (Comm. Print 1962) [hereinafter cited as SENATE REPORT].

4. Act of July 4, 1966, Pub. L. No. 89-486, 80 Stat. 244 (1966) (codified as amended at 22 U.S.C. § 611 (1976)).

5. In 1966, a series of amendments to FARA was proposed and passed by the Senate. Act of July 4, 1966, Pub. L. No. 89-486, 80 Stat. 244 (1966) (codified as amended at 22 U.S.C. § 611 (1976)). These amendments were to affect American agents representing economic interests of foreign governments. See, e.g., 22 U.S.C. § 611(b), (c) (1976). A preliminary study prepared by the Senate Committee on Foreign Relations indicated the purpose of these amendments in the following statement:

information on individuals in the United States who advance their foreign principal's interests through "non-diplomatic" channels.<sup>6</sup>

FARA's coverage has been broadened further by *Attorney General of the United States v. Irish Northern Aid Committee*<sup>7</sup> (*INAC*), a recent case of the United States Court of Appeals for the Second Circuit. In *INAC*, the Second Circuit created a new standard for the determination of the agency relationship under FARA.<sup>8</sup> The test introduced by *INAC* is whether the relationship between the representative and the foreign interest warrants registration to fulfill the "informative purposes" of FARA.<sup>9</sup> Previously, the *Restatement of Agency*<sup>10</sup> was used to define the agency relationship, and control of the agent by the principal was a necessary element.<sup>11</sup> The informative purposes standard broadens FARA's definition of

In recent years there has been an increasing number of incidents involving attempts by foreign governments, or their agents, to influence the conduct of American foreign policy by techniques outside normal diplomatic channels . . . .  
 . . . [M]any foreign governments with diplomatic representation in Washington retain public relations counselors, law firms, or private individuals to assist in bringing particular foreign policy points of view to the attention of the U.S. government . . . .

The purpose of examining foreign government lobbying is not to show that these activities are necessarily wrong . . . . [I]t is believed that . . . the American people [should obtain] a full and accurate picture of activity of this kind, particularly since the tempo of such activity has increased in almost direct proportion to our Government's growing political, military, and economic commitments abroad.

SENATE REPORT, *supra* note 4, at v. As a result of this study by Committee Chairman Senator Fulbright, FARA was amended in 1966. Act of July 4, 1966, Pub. L. No. 89-486, 80 Stat. 244 (1966) (codified as amended at 22 U.S.C. § 611 (1976)). This amendment required not only registration of agents representing foreign governments, but also provided coverage of agents representing non-governmental interests. 22 U.S.C. § 611(b)(3) (1976).

6. See SENATE REPORT, *supra* note 3, at 1.

7. *Attorney Gen. of the United States v. Irish N. Aid Comm.*, 668 F.2d 159 (2d Cir. 1982), *aff'g*, 530 F. Supp. 241 (S.D.N.Y. 1981). The Attorney General sought to enjoin defendant Irish Northern Aid Committee from violating certain registration and disclosure requirements of the Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 611-621 (1976). The government sought injunctive relief to compel the Irish Northern Aid Committee to register as an agent of the Irish Republican Army (IRA). 668 F.2d at 160. Plaintiff's motion for summary judgment was granted by the district court. 530 F. Supp. at 267.

8. See *infra* notes 75-84.

9. 668 F.2d at 161.

10. RESTATEMENT (SECOND) OF AGENCY (1957).

11. The *Restatement of Agency* defines an agency relationship as the "fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." RESTATEMENT (SECOND) OF AGENCY § 1 (1957). An agency relationship exists if "there is an understanding between the parties which . . . creates a fiduciary relation in which the fiduciary is subject to the directions of the one on whose account he acts." *Id.* § 1 comment b.

agent<sup>12</sup> because, contrary to the *Restatement* standard, it does not look to control as a determinative element in establishing agency.<sup>13</sup>

This Note will give an overview of the development, operation and enforcement of FARA.<sup>14</sup> It will then discuss the *INAC* case<sup>15</sup> and the confusion it is likely to cause among voluntary groups as to their duty to register under FARA.<sup>16</sup> This Note will also discuss how the *INAC* informative purposes standard will exacerbate current problems in administering FARA.<sup>17</sup> Lastly, this Note will recommend that the *INAC* standard not be followed.<sup>18</sup>

## I. THE FOREIGN AGENTS REGISTRATION ACT

### A. Historical Development of FARA

FARA was promulgated in 1938 as a legislative response to the increasing use of propaganda in the United States by agents of foreign governments.<sup>19</sup> Congress believed that national security made it necessary for the government to obtain knowledge of these activities through the registration and disclosure mandates of FARA.<sup>20</sup> Under FARA, foreign agents were required to register with and disclose to the government<sup>21</sup> their activities and the identities of their foreign principals.<sup>22</sup> Agents whose principals were foreign governments or political parties constituted the first category to come within the scope of FARA.<sup>23</sup>

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12. 22 U.S.C. § 611(c) (1966).

13. 688 F.2d at 161.

14. See *infra* notes 19-39 and accompanying text.

15. See *infra* notes 56-84 and accompanying text.

16. See *infra* notes 105-09 and accompanying text.

17. See *infra* notes 94-98 and accompanying text.

18. See *infra* notes 112-17 and accompanying text.

19. See SENATE REPORT, *supra* note 3, at 6.

20. HOUSE REPORT, *supra* note 2, at 2. It was Congress' belief that the registration and disclosure mandates of FARA were a "spotlight of pitiless publicity [which] will serve as a deterrent to the spread of pernicious propaganda." *Id.* The purpose of FARA was to "force propaganda agents representing foreign agencies to come out 'in the open' in their activities, or to subject themselves to the penalties provided in said bill." *Id.* at 3. For a detailed discussion on FARA's registration and disclosure requirements, see *infra* notes 31-39 and accompanying text.

21. Prior to 1942, registration and supervisory functions were performed by the Secretary of State. These functions are now under the authority of the Attorney General and the Justice Department. Exec. Order No. 9176, 3 C.F.R. 1165 (1942).

22. SENATE REPORT, *supra* note 3, at 7.

23. 22 U.S.C. § 611(b)(1) (1976).

With the emergence of the United States as the political and commercial focal point of the western world after World War II,<sup>24</sup> foreign governments and private enterprises have developed a stake in this nation's foreign and domestic policies.<sup>25</sup> As a result, foreign principals have hired political consultants, public relations firms and attorneys to lobby for their economic and political interests.<sup>26</sup> The 1966 FARA amendments<sup>27</sup> broadened FARA's coverage to include as agents those persons who seek to influence legislators and American public opinion by lobbying for economic and political interests of foreign entities.<sup>28</sup> In many countries, business enterprises are controlled or operated by the government.<sup>29</sup> Therefore, the 1966 amendment included in FARA those who promote the interests not only of foreign governments but also of foreign enterprises which are closely connected to a foreign government.<sup>30</sup>

Pursuant to FARA, agents of foreign principals must file with the Attorney General a detailed registration statement within ten

24. Since World War II, the United States has become the center of attention for political and economic affairs of the world. The policies of the United States have tremendous impact upon many nations. Therefore, many foreign governments hire American individuals to lobby for their interests. SENATE REPORT, *supra* note 3, at v. The Senate Committee on Foreign Relations found in 1962 that such "nondiplomatic" lobbying activities have "increased in almost direct proportion to our Government's growing political, military, and economic commitments abroad." *Id.* For an excellent discussion on the 1966 amendment process, see Note, *Foreign Agents Registration Act: Proposed Amendments*, 40 N.Y.U. L. REV. 311 (1965).

25. See SENATE REPORT, *supra* note 3, at v. Private enterprises are affected by United States policies in that, for instance, any high import tariff imposed by the United States might hinder an importing country's profit margin.

26. *Id.*

27. See Note, *supra* note 24, at 311-14.

28. 22 U.S.C. § 611(b) (1976). Under § 611, a "foreign principal" could be either a "person outside of the United States," *id.* § 611(b)(2), "a partnership, association, corporation, organization or other combination of persons organized under the laws of or having its principal place of business in a foreign country." *Id.* § 611(b)(3). Therefore, an agent of a private foreign corporation engaging in political activities is required to register under FARA. *Id.* § 611(c)(1)(iv).

29. See SENATE REPORT, *supra* note 3, at 1. In "newly developing" and "controversial" countries, industrial and financial entities are owned by the governments. *Id.* See generally *Rabinowitz v. Kennedy*, 376 U.S. 605 (1964) (attorneys representing Banco Nacional de Cuba, a bank operated by the communist Cuban government, were required to register under FARA).

30. 22 U.S.C. § 611(b) (1976). Under the broad definition of "foreign principal" as provided in § 611, a government-related business enterprise would still be considered a "foreign principal." *Id.* § 611(b)(1), (3).

days<sup>31</sup> of becoming an agent,<sup>32</sup> unless their status falls within one of the statutory exemptions.<sup>33</sup> The registration statement requires disclosure of information regarding the identity and status of the agent himself and of his principal,<sup>34</sup> the nature of his activities,<sup>35</sup> and all relevant financial and contractual agreements reached between the agent and his foreign principal.<sup>36</sup> In addition, the Attorney General may inspect the books and records of the foreign agent.<sup>37</sup> A person who willfully violates any registration or disclosure requirement is subject to a fine of not more than \$10,000 or imprisonment for not more than five years, or both.<sup>38</sup> The Attorney General may request

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31. *Id.* § 612(a).

32. The term an "agent of a foreign principal" is defined in § 611 of FARA. *Id.* § 611(c).

33. Under § 613 of FARA, certain individuals and organizations are exempt from FARA. 22 U.S.C. § 613 (1976). There are basically four groups of agents whose activities exempt them from FARA's disclosure and registration requirements. They are diplomatic or consular officers, *id.* § 613(a), officials of foreign government, *id.* § 613(b), persons engaging in activities promoting commercial interest of a foreign principal, *id.* § 613(d), persons engaging in activities in furtherance of bona fide pursuits that are scholastic or scientific, *id.* § 613(e), and certain persons qualified to practice law, provided that their activities are non-political, *id.* § 611(g). Attorneys representing foreign governments before United States agencies or officials are not exempt by § 613(g) and therefore must register. This section was amended after *Rabinowitz v. Kennedy*, 318 F.2d 181, 182 (D.C. Cir. 1963), *aff'd*, 376 U.S. 605, 610 (1964). In that case, Attorney General Kennedy sought the registration of the attorneys representing Banco Nacional de Cuba. 376 U.S. at 606. In an action for a declaratory judgment, the attorneys for Banco Nacional claimed that they were exempt under § 613(g) in that their activities were limited to litigation "involving the mercantile and financial interests of the Republic of Cuba." *Id.* The Supreme Court held that a foreign government's commercial interest being adjudicated in litigation could be deemed "financial or mercantile" but could not be deemed "private and non-political" within the meaning of § 613(g). *Id.* at 609-10. Thus lawyers representing a foreign government's commercial interests in litigation must register under FARA. *See id.*

In response to the *Rabinowitz* ruling, Congress in 1966 amended § 613(g) by deleting the phrase "financial or mercantile." *See Note, supra* note 24, at 319-20. The *Rabinowitz* decision created confusion among attorneys with foreign private or governmental clients as to their registration requirements. *Id.* at 320. The decision could be interpreted as requiring only attorneys representing hostile governments, such as Cuba, to register, or as requiring all attorneys representing foreign governments to register. *Id.*

34. 22 U.S.C. § 612 (1976). This detailed statement must be updated by a supplemental statement filed every six months. *Id.* § 612(b).

35. *Id.*

36. *Id.*

37. 22 U.S.C. § 615 (1976). Section 615 states that the Attorney General, "having due regard for the national security and the public interest," may open the books and records of a foreign agent. *Id.* For a detailed discussion on how this provision may impinge upon the attorney-client privilege, see Attorney Gen. of the United States v. Covington & Burling, 411 F. Supp. 371 (D.D.C. 1976). *See infra* note 103.

38. 22 U.S.C. § 618 (1976).

from an appropriate district court temporary or permanent injunctive relief.<sup>39</sup>

Agents of foreign principals have the duty to fulfill FARA's requirements if they engage in political activities, whether they be propaganda dissemination<sup>40</sup> or lobbying for economic and political interests.<sup>41</sup> More importantly, prior to *INAC* only those who had a legally binding agency relationship with their foreign principals were required to register as agents under FARA.<sup>42</sup>

### B. *Traditional Interpretation of Agency*

To trigger the registration requirement under FARA, an agency relationship must exist between an American representative and a foreign interest.<sup>43</sup> Under FARA, an agent is defined as "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."<sup>44</sup> One case, *United States v. German-American Vocational League*<sup>45</sup> (*German-*

39. 22 U.S.C. § 618(f) (1976). The provision for injunctive relief was promulgated during the 1966 amendment process. Act of July 4, 1966, Pub. L. No. 89-486, § 7, 80 Stat. 244, 248 (1966) (codified as amended at 22 U.S.C. § 618(f) (1976)). Section 618 states that: [T]he Attorney General may make application to the appropriate United States district court for an order enjoining such acts or enjoining [an unregistered agent of a foreign principal] . . . from continuing to act as an agent of such foreign principal, or for an order requiring compliance with any appropriate provision of the subchapter or regulation thereunder. The district court shall have jurisdiction and authority to issue a temporary or permanent injunction, restraining order or such other order which it may deem proper. The proceedings shall be made a preferred cause and shall be expedited in every way.

*Id.*

40. See 22 U.S.C. § 612(a); 2 U.S.C. § 611(o).

41. See 22 U.S.C. § 612(a); 2 U.S.C. § 611(o), (q).

42. See *United States v. German-American Vocational League*, 153 F.2d 860 (3d Cir.), *cert. denied*, 329 U.S. 760 (1946). For a discussion of this case, see *infra* notes 45-55 and accompanying text.

43. The need to establish the existence of control before finding an agency relationship was specifically expressed in the 1966 amendment process. HOUSE COMM. ON THE JUDICIARY, FOREIGN AGENTS REGISTRATION ACT AMENDMENTS, H.R. REP. NO. 1470, 89th Cong., 2d Sess. 5-6 (1966). The committee on the Judiciary stated that "the Justice Department must establish as a first step in requiring registration that an agency relationship exists." *Id.*

44. 22 U.S.C. § 611(c) (1976).

45. 153 F.2d 860 (3d Cir.), *cert. denied*, 329 U.S. 760 (1946). This is the only case in which the meaning of agency was adjudicated. Most FARA cases involve defendants who admitted that an agency relationship existed between them and a foreign principal, but litigated on issues of exemption status and disclosure requirements. See, e.g., *Rabinowitz v. Kennedy*, 376 U.S. 605 (1964) (discussed *supra* note 33); *Attorney Gen. of the United States v. Covington & Burling*, 411 F. Supp. 371 (D.C.C. 1976) (discussed *infra* note 102).



*American*), interpreted the meaning of the agency relationship under FARA. The defendant organization in that case was an organization of German-Americans which sought to introduce Nazi propaganda into the United States during the 1940's.<sup>46</sup> To avoid FARA's registration and disclosure requirements, the officers of the organization conspired among themselves to disguise the organization as a social and fraternal club.<sup>47</sup>

The *German-American* court applied the *Restatement* standard to determine the existence of agency under FARA.<sup>48</sup> The *Restatement* defines an agent as one who "act[s] on . . . [the principal's] behalf and subject to . . . [the principal's] control."<sup>49</sup> Similarly, FARA defines an agent as one "who acts . . . at the order, request, or under the direction or control, of a foreign principal."<sup>50</sup> Therefore, FARA's statutory definition of agency resembles closely the *Restatement* definition.<sup>51</sup> Both are based on the determinative criterion of control.<sup>52</sup> Because of the similarity of the language<sup>53</sup> and the lack of any legislative history indicating that a different type of agency was intended by Congress,<sup>54</sup> the *German-American* court

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46. 153 F.2d at 862.

47. *Id.*

48. *Id.* at 864.

49. RESTATEMENT (SECOND) OF AGENCY § 1 (1957).

50. 22 U.S.C. § 611(c)(1) (1976). A person or or an organization is an agent of a foreign principal if his activities are "indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal." *Id.* Such individual or organization is deemed a foreign agent if he "agrees, consents, assumes or purports to act as, or who is or holds himself out to . . . [others as a representative of a foreign interest], whether or not pursuant to contractual relationship." *Id.* § 611(c)(2).

51. *See supra* note 48. The *Restatement of Agency* defines agency as a relationship "which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." RESTATEMENT (SECOND) OF AGENCY § 1 (1957). Similarly, FARA defines an "agent" as one who "acts in any . . . capacity at the order, request, or under the direction or control of a foreign principal." 22 U.S.C. § 611(c)(1) (1976).

52. As defined in the *Restatement*, control is present when the agent is "subject to the directions" of his principal. RESTATEMENT (SECOND) OF AGENCY § 1 comment b (1957). Control is a "continuous subjection to the will of the principal." *Id.* Control may be exercised by the principal "prescribing what the agent shall or shall not do before the agent acts, or at the time when he acts, or at both times." *Id.* § 14 comment a.

53. *See supra* notes 49-51 and accompanying text.

54. RESTATEMENT (SECOND) OF AGENCY § 212 (1957). It states that:

A person is subject to liability for the consequences of another's conduct which results from his directions as he would be for his own personal conduct if, with knowledge of the conditions, he intends the conduct, or if he intends its consequences, unless the one directing or the one acting has a privilege or immunity not available to the other.

*Id.*

used the *Restatement* standard and found that the German-American Vocational League was in fact an agent of the German Reich.<sup>55</sup>

## II. INTERPRETATION OF AGENCY UNDER INAC

As a result of the recent *INAC* decision,<sup>56</sup> uncertainty has been created among voluntary groups regarding their duty to fulfill FARA's registration and disclosure requirements. In *INAC*, the United States Court of Appeals for the Second Circuit affirmed the district court's summary judgment compelling the Irish Northern Aid Committee to register under FARA as an agent of the IRA.<sup>57</sup> In affirming the district court opinion, the circuit court was not concerned with imposing liability upon a foreign principal.<sup>58</sup> Rather, the court affirmed by reasoning that the "relationship warrants registration by the agent to carry out the informative purposes" of FARA.<sup>59</sup> This ruling was made without first establishing that the IRA in fact had control over defendant Irish Northern Aid Committee.<sup>60</sup>

### A. District Court Opinion

Since 1971, the Irish Northern Aid Committee has been registered under FARA as a group of individuals that voluntarily sends money and aid to the Northern Aid Committee in Northern Ire-

Congress was aware of and intended to keep the element of control when it enacted FARA to impose liability upon a foreign principal. Another disclosure-type statute, the Voorhis Act, 18 U.S.C. §§ 2381-2391 (1976), also focuses on the element of control in defining an agency relationship. In the Voorhis Act, an organization "subject to foreign control" is required to register with the Attorney General under the statute for the purposes of controlling subversive activities such as treason and sedition. 18 U.S.C. § 2386(A)(a) (1976). Since both FARA and the Voorhis Act specifically included the element of control in defining an agency relationship, it appears that Congress did not intend to create a different type of agency relationship when it enacted FARA.

55. 153 F.2d at 864.

56. 530 F. Supp. 241 (S.D.N.Y. 1981), *aff'd per curiam*, 668 F.2d 159 (2d Cir. 1982). See also *supra* note 7.

57. 668 F.2d at 160. In a *per curiam* opinion, the Court of Appeals for the Second Circuit affirmed the district court's opinion that defendant "is the 'agent' of the IRA within the meaning of [FARA]." *Id.*

58. *Id.* at 161.

59. *Id.*

60. *Id.* The court stated: "We agree that the agency relationship sufficient to require registration need not, as *INAC* urges, meet the standard of the *Restatement* (Second) of Agency with its focus on 'control' of the agent by the principal." *Id.* (footnote omitted).

land.<sup>61</sup> The members of the Irish Northern Aid Committee have a common concern: an independent “Republican Movement” in Northern Ireland.<sup>62</sup> An action against the defendant was initiated by the Attorney General who complained that the defendant had failed to meet FARA’s requirements by not registering as the agent of the IRA.<sup>63</sup> The Attorney General sought injunctive relief compelling compliance with FARA.<sup>64</sup> In its answer, defendant claimed it was not an agent of the IRA but a representative of the Northern Aid Committee located in Belfast, Ireland.<sup>65</sup> It argued that it acted only voluntarily in sending aid and money to the Northern Aid Committee,<sup>66</sup> without subjecting itself to the control of the Irish Republican Army.<sup>67</sup>

The district court rejected defendant’s “control” argument and granted summary judgment compelling defendant to register as an agent of the IRA.<sup>68</sup> Exhibits supporting the Attorney General’s motion for summary judgment showed that the IRA had requested that defendant provide financial and emotional support for the “Republican Movement.”<sup>69</sup> The district court strictly construed FARA’s definition of agency and held that defendant was an agent of the IRA because it acted at the “order, request, or under the direction or control”<sup>70</sup> of the IRA.<sup>71</sup> The use of the disjunctive “or” in the statutory definition, the court reasoned, was dispositive of Congress’ intent to include those representatives who merely act upon the “request” of a foreign interest.<sup>72</sup> Therefore, the district

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61. 530 F. Supp. 241, 245.

62. See generally *id.* at 258 (the Republican Movement authorized the Irish Northern Aid Committee to collect funds and aids to send to Northern Ireland). In its registration statement, defendant organization “described itself as a ‘voluntary group who collect what money and clothing we can and send it on for use by the oppressed people’ of Northern Ireland.” *Id.* at 245.

63. 530 F. Supp. at 246-47. Defendant organization claimed that the complaint filed constituted selective enforcement of FARA because the government was hostile towards defendant’s beliefs. *Id.* at 253.

64. *Id.* at 245. For a discussion of FARA’s injunctive relief provision, see *supra* note 39.

65. 530 F. Supp. at 245-48.

66. *Id.* at 245. The Irish Northern Aid Committee is an “unincorporated association” having its office in the Bronx, New York. *Id.*

67. *Id.* at 256. Defendant argued that control should be the determinative factor in finding an agency relationship under FARA. *Id.*

68. *Id.* at 256, 267.

69. *Id.* at 257-58.

70. 22 U.S.C. § 611(c)(1) (1976).

71. 530 F. Supp. at 257.

72. *Id.* at 256-57. The court noted that:

In the case at bar, there is no indication that the disjunctive “or” means anything

court did not apply the *Restatement* standard, as set forth in *German-American*,<sup>73</sup> and held that there was an agency relationship between the Irish Northern Aid Committee and the Irish Republican Army.<sup>74</sup>

### B. Circuit Court Decision

The circuit court affirmed the district court's ruling.<sup>75</sup> In affirming the district court decision, the circuit court was not concerned with the liability aspect posed by the traditional "control" standard of agency;<sup>76</sup> the court did not consider the issue of whether

but what it says. Accordingly, it is not necessary for plaintiff to prove that defendant is an "agent," in the Restatement sense, or a "person who acts in any other capacity . . . under the direction or control" of the IRA; it is sufficient to establish agency under the Act that defendant is a "representative" of the IRA, or acts at its "request."

*Id.* at 257 (footnote omitted).

73. 153 F.2d 860 (3d Cir. 1946). See *supra* notes 44-54 and accompanying text for a discussion of *German-American*.

74. 530 F. Supp. at 256-57. Shortly prior to the circuit court's decision, the Department of Justice stated its enforcement policy before the Special Committee on Investigations of the Senate Judiciary Committee on Individuals Representing Interests of Foreign Governments. Assistant Attorney General, Phillip B. Heymann, testified:

As we read [FARA] . . . a person is a foreign agent, and must register with the Department, if he engages in the activities specified in the statute and if he does so at the order of a foreign principal, or under the direction or control of a foreign principal. What this language emphasizes is that the relationship between the agent and the foreign principal must be one that substantially obligates the agent to the foreign principal. Only then is it fair to draw the conclusion that an individual is not acting independently, is not simply stating his or her own views, but is acting as an agent or alter ego of the foreign principal.

. . . [FARA] defines a foreign agent as anyone who acts . . . at the "order, request, or under the direction or control" of a foreign principal. The critical language is "order, request, or under the direction or control." *If we broadly construed the word "request" to include all forms of argument or persuasion, it would be totally out of line with the other terms "agent," "order," and "direction and control." It would also cause some unintended results.*

*Inquiry into the Matter of Billy Carter and Libya: Hearings before the Subcomm. to Investigate the Activities of Individuals Representing the Interests of Foreign Governments, Senate Comm. on the Judiciary, 96th Cong., 2d Sess. 700-01 (1980) (statement of Phillip B. Heymann, Assistant Attorney General) (emphasis added).* In affirming the district court's decision, the circuit court did not consider the admission by the Department of Justice as to its own enforcement policy of FARA. The court held that defendant was the agent of the IRA, without finding that defendant was under its control. 668 F.2d at 160-61.

75. 668 F.2d at 160.

76. *Id.* at 161.

liability could be imposed upon a foreign principal.<sup>77</sup> The court was troubled by the broad district court ruling, however, because such strict construction of FARA would require all voluntary relief groups to register, including those groups that "Congress did not intend to regulate."<sup>78</sup> Therefore, the circuit court reasoned that registration is not required unless the relationship between the foreign interest and the representative is such that registration is necessary to fulfill the informative purposes of FARA.<sup>79</sup>

The circuit court qualified its informative purposes standard by stating that not all voluntary groups acting upon a "plea" from a foreign government are considered foreign agents under FARA.<sup>80</sup> The court stated that large groups of Americans which respond to "pleas" for aid from a foreign government in emergency situations are not foreign agents under FARA.<sup>81</sup> The court noted, however, that when a limited group of individuals acts upon the "request" of a foreign government, the group may be required to register as an agent.<sup>82</sup> Therefore, a "request" falls somewhere between a "plea" and a "command."<sup>83</sup> The surrounding circumstances, the court stated, would indicate to the recipient of a "request" whether registration is warranted to serve the informative purposes of FARA.<sup>84</sup>

### III. CRITIQUE OF INAC

In view of the district court's strict construction of the statutory definition of agency<sup>85</sup> and the circuit court's informative purposes standard for determining agency,<sup>86</sup> the Third Circuit's endorsement of the *Restatement* standard for agency as set forth in *German-American*<sup>87</sup> was not followed by *INAC*.<sup>88</sup> This creates a

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77. *Id.*

78. *Id.* (footnote omitted).

79. *Id.* Although the *INAC* court did not explain what the "informative purposes" of FARA were, it could nonetheless be inferred from the legislative history of FARA that the "informative purposes" referred to information of foreign political activities conducted in the United States. See *supra* notes 2, 5 and accompanying text.

80. 668 F.2d at 161-62.

81. *Id.* at 161.

82. *Id.*

83. *Id.*

84. *Id.*

85. See *supra* notes 70-72 and accompanying text.

86. See *supra* notes 79-84 and accompanying text.

87. 153 F.2d 860 (3d Cir.), cert. denied, 329 U.S. 760 (1946). See *supra* notes 45-48, 55 and accompanying text for a discussion of *German-American*.

88. 668 F.2d at 161.

conflict between the Second Circuit and the Third Circuit as to which agency standard should be employed for the purposes of determining an agency under FARA.

The *Restatement* standard should be retained as the only standard for the purposes of FARA because the *INAC* informative purposes standard for determining agency is overly broad and ambiguous.<sup>89</sup> The *INAC* standard creates uncertainty for those who have to register under FARA,<sup>90</sup> and burdensome workloads for those charged with administering and enforcing FARA.<sup>91</sup> The ambiguity inherent in the *INAC* agency standard causes uncertainty among foreign representatives as to their duty to register.<sup>92</sup>

### A. General Criticisms of *INAC*'s Agency Standard

#### 1. Effects of *INAC*'s Broad Interpretation

The informative purposes standard for agency is overly encompassing in that an agency may be found despite the fact that there is no legally binding relationship between the American representative and the foreign interest.<sup>93</sup> Consequently, after *INAC* the number of foreign representatives required to register under FARA will probably be greatly increased. *INAC*'s broad agency standard will exacerbate the current administrative problems for the Justice Department. As of 1979, more than 6,000 individuals filed short-form registration statements.<sup>94</sup> Most of these registrants are representatives of foreign business interests.<sup>95</sup> It is estimated that among lobbying groups only about thirty percent provided adequate disclo-

89. See *infra* notes 105-09 and accompanying text.

90. See *infra* text accompanying notes 100-03.

91. See *infra* notes 94-98 and accompanying text.

92. See *infra* notes 105-09 and accompanying text.

93. Cf. RESTATEMENT (SECOND) OF AGENCY § 1 (1957). Under the *Restatement of Agency*, the criterion of control is important in an agency relationship because it renders the relationship legally binding. See also *supra* note 51 and accompanying text for a discussion of the similarities between the *Restatement* and FARA definitions of agency.

94. 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 CALENDAR YEAR 1977, at 2 (1979). "Short-form statements are filed for individuals working on a foreign principal's behalf in the employ of a long-form (usually organizational) registrant foreign agent." Pattison & Taylor, *Legislating Away the Mask: A Guide to the Foreign Agents Registration Act*, 5 DIST. LAW., Nov.-Dec. 1980, at 39, 65 n.5.

95. Pattison & Taylor, *supra* note 94, at 42.

sure.<sup>96</sup> The increasing number of foreign entities engaging in political activities in the United States may generate a heavy workload for the Justice Department in its administration and enforcement of FARA. Because the *INAC* agency standard is broader than the *Restatement* standard,<sup>97</sup> the current problems of administration and enforcement will predictably be made worse if the *INAC* standard is applied.<sup>98</sup>

By enlarging FARA's coverage to include those relationships that cannot be considered genuine agency under the *Restatement* standard,<sup>99</sup> the *INAC* interpretation of agency also imposes a burden upon those who represent legitimate foreign interests.<sup>100</sup> Under section 615 of FARA, books and records of agents are subject to

96. UNITED STATES GENERAL ACCOUNTING OFFICE, IMPROVEMENTS NEEDED IN THE ADMINISTRATION OF FOREIGN AGENTS REGISTRATION, enclosure I at 2 (1980).

97. See *supra* note 93 and accompanying text.

98. See *Note, supra* note 24, at 313; Note, *Attorneys, Propagandists, Internanational Business: A Comment on the Foreign Agents Registration Act of 1938*, 3 GA. J. INT'L COMP. L. 408, 421-22 (1973). In addition to testifying before a particular congressional committee, a foreign agent may lobby for or against certain legislation by making campaign contributions to favorable candidates on behalf of his foreign principal. See Note, *supra* note 24, at 421-22.

Two statutes, the Federal Election Campaigns Act, 2 U.S.C. §§ 431-455 (1976 & Supp. V 1981), and the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261- 270 (1976), are more effective in regulating lobbying activities than FARA. Under the Federal Election Campaigns Act, every candidate receiving campaign contributions must disclose to the Federal Election Commission the amount of contributions and the identity of the contributors. 2 U.S.C. § 432(c) (1976 Supp. V 1981) (requiring treasurer of a political committee to keep records); 2 U.S.C. § 434(a) (1976 & Supp. V 1981) (requiring reports to be filed). The Federal Election Campaigns Act's definition of a "person" does not distinguish between foreign and domestic individuals and entities. 2 U.S.C. § 431(11) (1976 & Supp. V 1981). This Act therefore also covers foreign contributors.

While the Election Campaigns Act keeps a watchful eye on election activities, the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270 (1976), requires disclosure of lobbying activities. *Id.* The Lobbying Act requires disclosure of relevant information every three months. *Id.* § 264(a). The Lobbying Act seems more effective than FARA because it provides more up to date information on lobbying activities.

FARA, the Election Campaigns Act and the Lobbying Act were promulgated to inform the government of political activities which try to influence legislators. FARA covers political activities which include "dissemination of political propaganda and any other activity . . . [intended to] . . . influence any agency or official of the Government . . . with reference to formulating, adopting, or changing the domestic or foreign policies of the United States." 22 U.S.C. § 611(o) (1976). FARA's impact is broader than the Election Campaigns Act and the Lobbying Act because it also covers agents appearing before United States officials and agencies to influence policy-making. *Id.* § 611(c)(1)(iv) & (o). The Election Campaigns Act and the Lobbying Act, however, cover only those who influence members of Congress, 2 U.S.C. § 267(a) (1976), and congressional candidates, 2 U.S.C. § 432 (1976 & Supp. V 1981).

99. See *supra* notes 50-54 and accompanying text.

100. See *supra* notes 26, 98 and accompanying text.

inspection by the Attorney General.<sup>101</sup> This provision allows the Attorney General a means of acquiring relevant information for enforcement of FARA. If no genuine agency relationship exists and FARA is invoked to compel disclosure of confidential material, such disclosure may constitute an impingement of the purported agent's constitutionally protected rights of free speech,<sup>102</sup> privacy,<sup>103</sup> or association.

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101. 2 U.S.C. § 615 (1976). See also *supra* note 37 and accompanying text for a detailed discussion of § 615 of FARA.

102. To avoid impinging on an individual's right of free speech, FARA was designed not to suppress propaganda, but to inform the American public of its propaganda sources. See HOUSE REPORT, *supra* note 2, at 2-3. The constitutionality of FARA was challenged in *United States v. Peace Information Center*, 97 F. Supp. 255 (D.D.C. 1951). In this case, defendants Peace Information Center and its officers were charged with violating FARA by failing to register. *Id.* at 258. The institutional defendant claimed that FARA was unconstitutional because it infringed its officers' first amendment right of free speech and their fifth amendment right against self-incrimination. *Id.* at 262-63. The court readily rejected the argument, stating:

The statute under consideration neither limits nor interferes with freedom of speech. It does not regulate expression of ideas. Nor does it preclude the making of any utterances. It merely requires persons carrying on certain activities to identify themselves by filing a registration statement.

. . . .

Moreover, the statute does not require the disclosure of any information except on a voluntary basis as a condition of carrying on certain occupations or certain activities. The information called for by the statute is not incriminating on its face. *Id.* This decision reflects the court's deference to the legislative powers of Congress "to take preventive measures against activities that may cause international misunderstandings . . . as well as against endeavors to subvert, undermine, or overthrow the government." *Id.* at 261.

The Supreme Court of the United States has never reviewed the constitutionality of FARA, although it has interpreted the meanings of certain of its provisions. See *Rabinowitz v. Kennedy*, 376 U.S. 605 (1964) (discussed *supra* note 39). See also *Viereck v. United States*, 318 U.S. 236 (1943) (although defendant's activities were political, defendant did not have to disclose activities conducted on his own behalf).

103. A recent case illustrates the problems of disclosing confidential material to the government. In *Attorney Gen. v. Covington & Burling*, 411 F. Supp. 371 (D.D.C. 1976), the defendant, a law firm, represented the Republic of Guinea before various agencies and courts of law in litigations involving a series of contract disputes. *Id.* at 372. When the Attorney General sought to inspect the law firm's records in connection with Guinea, the law firm made available to the Attorney General only 95% of these records, claiming the other 5% were confidential information protected by the attorney-client privilege. *Id.* at 372. Recognizing the potential for governmental abuse if the privilege were found inapplicable in this situation, the court held that the defendant could validly claim the attorney-client privilege. However, the court left to its discretion to decide which documents out of the 5% were to be disclosed to the government. *Id.* at 377. Where there is no attorney-client relationship the Attorney General conceivably may request disclosure of records that are highly confidential. See, e.g., *Attorney Gen. of the United States v. Irish N. Aid Comm.*, 346 F. Supp. 1384 (S.D.N.Y.) (agent must disclose membership), *cert. denied*, 409 U.S. 1080 (1972).



In addition, because of the *INAC* ruling that the *Restatement of Agency's* control criterion is not determinative, a person's reputation could be damaged if he were compelled to register as an agent of an unpopular foreign entity.<sup>104</sup>

## 2. Effects of *INAC's* Ambiguous Agency Standard

The informative purposes standard<sup>105</sup> for the determination of agency is inherently ambiguous. The ambiguity lies in ascertaining who has the responsibility of determining whether registration is warranted to fulfill the informative purposes of FARA.<sup>106</sup> It is unclear who must determine whether a certain "request" made by a foreign interest falls between a "plea" and a "command."<sup>107</sup> Although the *INAC* court did attempt to clarify the ambiguity by stating that the surrounding circumstances will generally indicate

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104. For example, a group of sympathetic individuals may voluntarily solicit and send money and aid to their friends and relatives in a country unfriendly to the United States. If the Attorney General is allowed to compel registration without establishing that a genuine agency relationship exists, see *supra* notes 42-43, those individuals might be mistaken for subversives in the eyes of the public.

A recent example is the Senate investigation into Billy Carter's trip to Libya. Billy Carter's visit stirred much controversy and aroused public attention. See Pattison & Taylor, *supra* note 94, at 39. The Senate investigation focused on whether Billy Carter was an "agent" of Libya, a hostile country, and whether registration under FARA was required. See SENATE COMM. ON THE JUDICIARY, SUBCOMMITTEE TO INVESTIGATE INDIVIDUALS REPRESENTING THE INTERESTS OF FOREIGN GOVERNMENTS, INQUIRY INTO THE MATTER OF BILLY CARTER AND LIBYA, S. REP. NO. 96-1015, 96th Cong., 2d Sess (1980). See also *supra* note 74 for a statement of the Justice Department's enforcement policy of FARA made during the investigation.

Conceivably, any private individuals having the slightest connection with a hostile country might be subject to public inquiry. With mass media and press coverage, such individuals may be perceived by the public as "agents" of unfriendly foreign governments. The general public may mistake a "foreign agent" for someone conducting criminal activities for a foreign government. Individuals labeled as "foreign agents" are likely to have their personal and business reputations severely damaged.

105. 668 F.2d at 161. See also *supra* note 79 and accompanying text.

106. The Attorney General has the authority to administer and enforce FARA. See *supra* notes 2, 21. Unless the dispute is adjudicated in a court of law, the Attorney General seems to have much discretion in determining who must register to fulfill the "informative purposes" of FARA. In addition to registration, an "agent" is subject to FARA's various disclosure requirements. See *supra* note 37. This creates a precarious possibility of selective enforcement by the Attorney General. Cf. Attorney Gen. of the United States v. Irish People, Inc., 684 F.2d 928 (D.C. Cir. 1982) (defendant newspaper company claimed that the Attorney General's action constituted selective enforcement of FARA). See also 530 F. Supp. 241, 251-52 (Irish Northern Aid Committee claimed that prosecution was based upon the Attorney General's hostility towards its beliefs).

107. 668 F.2d at 161.

whether a person has a duty to register,<sup>108</sup> it nonetheless provided no definitive guidelines. Furthermore, FARA covers agents who represent both foreign governments and foreign business enterprises involved in political activities.<sup>109</sup> The *INAC* case involved a voluntary group representing a foreign political interest.<sup>110</sup> The court, however, opened the door to further confusion by failing to indicate whether the informative purposes standard applies equally to voluntary groups representing foreign commercial interests. As a result, the informative purposes standard may be violative of an individual's due process guarantees because the definition of an agent is so vague that a person may not receive adequate notice of his duty to comply with FARA's requirements.<sup>111</sup>

### B. Proposal: The Restatement of Agency Standard

The district court's strict construction of the statutory definition of agent<sup>112</sup> and the circuit court's informative purposes stand-

108. *Id.* at 161-62.

109. For a discussion of who is an agent under FARA, see *supra* notes 21-30 and accompanying text.

110. 530 F. Supp. at 245.

111. The "requirement of fair notice . . . is included in the conception of 'due process of law.'" *Winters v. New York*, 333 U.S. 507, 524 (1947) (Frankfurter, J., dissenting). As a constitutional limitation, due process requires a criminal statute to be precise so that it provides a "person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss*, 347 U.S. 612, 617 (1953). *Harriss* also sets forth the due process principle that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id.* FARA has both criminal and civil sanctions. 22 U.S.C. § 618 (1976). See also *supra* text accompanying notes 38-39. The vagueness of *INAC*'s informative purposes standard for agency might not provide notice to those individuals acting upon the request of a foreign interest that registration is required in order to avoid sanctions. See *supra* text accompanying notes 80-84.

A precarious effect of a vague statute is the "unfettered discretion it places in the hands" of the enforcement authority. *Papachristou v. Jacksonville*, 405 U.S. 156, 168 (1972). Where no definite standard of enforcement exists, the statute has the adverse effect of providing "arbitrary and discriminatory enforcement of the law." *Id.* at 170. Conceivably, the *INAC* informative purposes standard will open the door for the Attorney General to use wide discretion in enforcing FARA. A claim to that effect has been made in *Attorney Gen. of the United States v. Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1982). The defendant newspaper company claimed that the Attorney General's enforcement of FARA constituted selective prosecution. *Id.* at 931. This case was decided after the Irish Northern Aid Committee was ordered to register as an agent of the IRA. 668 F.2d 159, 160 (2d Cir. 1982). Because The Irish People, Inc. is controlled and operated by the Irish Northern Aid Committee, and because of a lack of evidence showing that prosecution was improperly motivated, The Irish People, Inc. was ordered to comply with FARA's registration and disclosure requirements. 684 F.2d at 930-31. This recent case illustrates that the informative purposes standard might provide arbitrary and improper enforcement of FARA.

112. 530 F. Supp. at 255-57. See *supra* notes 71-72 and accompanying text.

ard culminated in the overly broad and ambiguous test for determining the existence of an agency relationship under FARA. In enacting FARA, Congress intended to adhere to the *Restatement of Agency* by specifically including the element of control in FARA's definition of agency.<sup>113</sup> In *United States v. German-American Vocational League*,<sup>114</sup> the court applied the *Restatement* standard in deciding the case.<sup>115</sup> In so doing, the *German-American* court applied the basic principles of agency and avoided creating a different agency relationship which Congress did not intend.<sup>116</sup> If the *INAC* court had followed the *Restatement* standard as set forth in *German-American*, the overly broad and ambiguous informative purposes standard would have been avoided.<sup>117</sup>

By returning to the *Restatement* standard for the determination of an agency relationship for the purposes of FARA, Congressional intent to adhere to the *Restatement* would be followed while confusion would be eliminated.

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113. Congressional intent is evidenced by the statutory definition of agent which is similar to that of the *Restatement* definition. *See supra* note 50. Moreover, Congress was consistent with *Restatement* principles when it excluded relief groups from FARA because their foreign beneficiaries would invariably have no control over them. *See supra* note 52. The *Restatement* explains that "[t]here are many relationships in which one acts for the benefit of another which are to be distinguished from agency by the fact that there is no control by the beneficiary." RESTATEMENT (SECOND) OF AGENCY § 14 comment c (1957).

During the 1966 amendment process, Congress expressed its intent to exempt those whose activities incidentally benefit a foreign principal. It stated:

[I]t is possible because of the broad scope of the definitions contained in section 1(c) to find an agency relationship . . . of persons who are not, in fact, agents of foreign principals but whose acts may incidentally be of benefit to foreign interests, even though such acts are part of the normal exercise of those persons' own rights of free speech, petition, or assembly. This may have been desirable under conditions which existed when [FARA] was amended in 1942, but does not appear warranted in present circumstances.

HOUSE COMM. ON THE JUDICIARY, FOREIGN AGENTS REGISTRATION ACT AMENDMENTS, H.R. REP. No. 1470, 89th Cong., 2d Sess. 6 (1966).

114. 153 F.2d 860 (3d Cir. 1946). *See supra* notes 45-48 and accompanying text.

115. 153 F.2d at 864.

116. *See supra* notes 52, 113 and accompanying text.

117. 668 F.2d at 161. The informative purposes standard is whether the relationship between a representative and a foreign interest is warranted "to carry out the informative purposes" of FARA. *Id.* In *INAC*, the Irish Northern Aid Committee had already fulfilled the "informative purposes" of FARA, because it had faithfully registered as an agent of a foreign principal in 1971. 530 F. Supp. at 245. The "informative purposes" were arguably fulfilled because defendant informed the government that its disclosed principal, the Northern Aid Committee, was one of the several groups comprising the "Republican Movement" in Northern Ireland. *See id.* at 258. *Cf.* *United States v. German-American Vocational League*, 153 F.2d 860 (3d Cir. 1945) (defendants conspired to avoid registering under FARA by disguising their German Reich organization as a social and fraternal club).

### CONCLUSION

The *INAC* informative purposes standard expanded the interpretation of agency under FARA. By not following the *Restatement* definition, this new standard results in a different type of agency which Congress had not intended to create when it enacted FARA. Because the informative purposes standard is inherently broad and ambiguous, it will create confusion among voluntary representatives of foreign interests as to their duty to register under FARA. To eliminate uncertainty, the traditional *Restatement* standard of agency should be the only standard employed when determining whether an agency exists under FARA. Utilization of the *Restatement* approach will provide the United States a means for preserving its national security.

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