ATTORNEYS, PROPAGANDISTS, AND INTERNATIONAL BUSINESS: A COMMENT ON THE FOREIGN AGENTS REGISTRATION ACT OF 1938

I. INTRODUCTION

The purpose of this study is to examine the Foreign Agents Registration Act of 1938, in regard to its effectiveness in controlling the efforts of foreign interests to promote favorable public opinion, policy, and legislation within this country, and its effect upon personal freedoms and legitimate interests which must operate within the framework of this law.

Whether clothed with the respectability of the term "public relations" or referred to in such sinister terms as "political warfare" or "psychological warfare," propaganda is a tool for molding opinion and promoting specific action. The control of this tool in the hands of foreign interests is the object of the Act. This sought-after ability to control the propaganda disseminated by agents operating in this country in behalf of foreign principals is intended to result from (1) disclosure of information regarding the source of propaganda disseminated and (2) imposition of penalties for failure to comply with disclosure requirements of the Act.

The goal of controlling propaganda is greatly hampered in a democratic society by the concept of freedom of speech and the corollary right to hear such speech, but as the Honorable Jerry Voorhis remarked,

[It is contrary to our sense of fair play for anyone to pretend to be disinterested, or to speak as an individual and yet really to represent an ulterior interest.]

Thus the answer, under the American philosophy, is not the suppression of propaganda, but disclosure of its sources.

Propaganda is not a device invented by the Bolsheviks or the Nazis; it is, rather, a tested tool of interest groups and governments, both free and totalitarian, the origins of which are lost in antiquity. Propaganda was successfully used by Gideon against the Midianites and by Themistocles against the

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387 CONG. REC. A4417 (1941) (comments of Mr. Voorhis on a report by the Institute of Living Law).

4Judges 7:1-25. Here is described Gideon's inspired use of psychology to rout an astronomically
Ionians at Artemesium. Hannibal, having crossed the Alps, is said to have assured the Italians that he had not come to fight against them, but against Rome in their behalf. Development of propaganda or "opinion engineering" is not limited, however, to the battlefield. Lord Oxford, a Tory leader, is reported to have paid Jonathan Swift to write verbal attacks upon the Whigs. Another commentator cites Uncle Tom's Cabin, published in 1852, as the most important example of propaganda to emerge from the 19th century. It is easily seen, then, that Lord Haw Haw represented an approach to the influence of public opinion which was novel only because of the medium used and the lack of subtlety demonstrated.

In reporting the need for legislation aimed at the control of propagandists' activities in this country, the Committee on the Judiciary of the House of Representatives made the following statement:

Incontrovertible evidence has been submitted to prove that there are many persons in the United States representing foreign governments or 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 the letter and the spirit of international law, as well as the democratic basis of our own American institutions of government.

II. THE FOREIGN AGENTS REGISTRATION ACT OF 1938

Sometimes referred to as the McCormack Act, the Foreign Agents Registration Act may be characterized as a legislative response to the increasing dissemination of Nazi and Communist propaganda which was revealed during the post-depression years by the first House Un-American Activities Committee. The stated purpose of the statute was to achieve an element of control and knowledge of activities of propagandists and subversives operating in this coun-

superior force with his own force of 300. This miraculous victory had the propaganda effect of uniting the Israelites against the Midianites in an effort which led to forty years of peace.

8 History of Herodotus 438 (M. Komroff ed. Rawlinson transl. 1947). Themistocles posted invitations to desert on stone tablets at the water sources likely to be used by the Ionians. This tactic might be paralleled with modern day psychological warfare ("PSYOPS") efforts in the vein of leaflet drops conducted as part of the amnesty (Chieu Hoy) program operated in the Republic of Viet Nam in recent years.


10 W. Coxe, I Walpole 112 (1798).


12 William Joyce, a Briton of U.S. birth, who acted as a broadcast propagandist for the Nazis from 1939 to 1945, demoralized the British by demonstrating the Reich's intimate knowledge of day-to-day occurrences in England. He supplemented the small number of facts broadcasted with large volumes of falsehood, abuse, and threats against Britain. Tried at Old Bailey for treason after his capture in Germany, Joyce was hanged in London on January 3, 1946. See Joyce v. Director of Public Prosecutions, [1946] A.C. 347.


try by requiring their registration with the Secretary of State and by imposing sanction upon failure to register or upon operation otherwise outside the Act.

The focus of the statute has since been changed to the extent that the Act is also directed at the agent of non-governmental principals whose aim is not to subvert or overthrow our government, "but rather to influence its policies to the satisfaction of his particular client." A study of the one-third century of development shows a considerable broadening of purpose from the original intent of placing Communist or Nazi propaganda agents in this country in the "spotlight of pitiless publicity."

Sections of 612 and 614 of the Act are the primary operational bases of the statute. They establish disclosure requirements by ordering registration of agents of foreign principals who are not exempt under the statute and by requiring labeling and filing of propaganda disseminated by such agents. The potentially broad application of these provisions derives in part from the extremely broad language of the definitional portions of the statute which are discussed below.

Section 611(a) contains a broad definition of "person" which includes "an individual, partnership, association, corporation, organization or any other combination of individuals."

Section 611(b) applies the same sort of sweeping definition to "foreign principals" so that the term is stated variously to include foreign governments and political parties and individuals or entities financed by same, foreign business entities, or domestic entities and individuals subsidized by foreign principals.

"Agent of a foreign principal" as used in section 611(c) encompasses any person who acts, agrees to act, or holds himself out within the United States as a public relations counsel, publicity agent, political consultant, employee of an information service, servant, agent, or representative of a foreign principal. The term is then operationally defined by the solicitation, disbursement or dispensation of contributions, loans, or money for or in the interest of or representation of such foreign interest before any agency or official of the United States Government. Section 611(d) contains an exclusion from the

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13 Id.; H.R. REP. No. 1381, 75th Cong., 1st Sess. (1937); S. REP. No. 1783, 75th Cong., 3rd Sess. (1938). It seems equally apparent that the early statute did not have as a joint purpose the exposure to publicity of the activities of mere agency arrangements with foreign principals. This is borne out by the facts that: (a) all of the early indictments were brought against subversives or propagandists; and (b) the statute only provided for extended confinement and heavy fines. See Hearings on Activities of Non-Diplomatic Representatives of Foreign Principals in the United States Before the Senate Committee on Foreign Relations, 88th Cong., 1st Sess. 64-70 (1963) (hereinafter cited as 1963 Senate Hearings or by other appropriate year).

14 52 Stat. 631, 632 (1938). This function was transferred to the Attorney General in 1942. 56 Stat. 248, 251 (1942).


17 H.R. REP. No. 1381, supra note 10, at 1-2; see O'Hara, supra note 2.
term "agent of a foreign principal" for predominantly U.S. owned and controlled news media and news services engaged in "bona fide news or journalistic activities."

Because of their significance to the impact of the current Act, selected portions of section 611 are reprinted here in their entirety or in pertinent part:

(g) The term "public-relations counsel" includes any person who engages directly or indirectly in informing, advising or in any way representing a principal in any public relations matter pertaining to political or public interest, policies, or relations of such principal;

(h) The term "publicity agent" includes any person who engages directly or indirectly in the publication or dissemination of oral, visual, graphic, written, or pictoral information or matter of any kind, including publication by means of advertising, books, periodicals, newspapers, lectures, broadcasts, motion pictures or otherwise;

(i) The term "information service employee" includes any person who is engaged in furnishing, disseminating, or publishing accounts, descriptions, information, or data with respect to the political, industrial, employment, economic, social, cultural, or other benefits, advantages, facts, or conditions of any country other than the United States or of any government of a foreign country or of a foreign political party of a partnership, association, corporation, organization, or other combination of individuals organized under the laws of, or having its principal place of business in, a foreign country;

(j) The term "political propaganda" includes any communication or expression by any person (1) which will, or which he intends to prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence.

(o) The term "political activities" means the dissemination of political propaganda and any other activity which the person engaging therein believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, persuade, or in any other way influence any agency or official of the Government of the United States or any section of the public within the United States with reference to formulating, adopting, or changing the domestic, or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or foreign political party;

(p) The term "political consultant" means any person who engages in informing or advising any other person with reference to the domestic or foreign policies of the United States or the political or public interest, policies, or relations of a foreign country or of a foreign political party;
For the purpose of section 613(d) of this title, activities in furtherance of the bona fide commercial, industrial or financial interests of a domestic person engaged in substantial commercial, industrial, or financial operations in the United States shall not be deemed to serve predominantly a foreign interest because such activities also benefit the interests of a foreign person engaged in bona fide trade or commerce which is owned or controlled by, or which owns or controls, such domestic person: Provided, that (i) such foreign person is not, and such activities are not directly or indirectly supervised, directed, controlled, financed or subsidized in whole or in substantial part by, a government of a foreign country or foreign political party, (ii) the identity of such foreign person is disclosed to the agency or official of the United States with whom such activities are conducted, and (iii) whenever such foreign person owns or controls such domestic person, such activities are substantially in furtherance of the bona fide commercial, industrial or financial interests of such domestic person.

Section 612 requires that any person within the Act register within ten days after having become an agent of a foreign principal. It is further required that a supplementary update be filed with the Attorney General every six months thereafter, or within ten days of any change. The reporting requirement is extremely detailed, calling for information regarding ownership and nationality in corporate structure, any organizational documents of the entity concerned, financial statements, copies of written or oral agreements between agent and principal, details of exchange or cash flow, and such other information as might be required to prevent statements in the registration from being misleading. The Attorney General is also empowered under section 612 both to require supplementary filings at more frequent intervals or to exempt from registration or any portion of registration any person under the Act. The only stated limit upon this discretionary power is the Attorney General's "due regard for the national security and the public interest."

Section 613 establishes exemptions from registration requirements for those agents of foreign principals who are engaged in certain activities. Foreign diplomats and consular officers, along with officials of foreign governments and employees or staff members in these categories are exempt from registration so long as they are engaged in activities recognized by the Department of State as "being within the scope of the functions" of such offices. This exemption includes those agents not American citizens who act as accredited and accepted representatives in or to an international organization in accordance with the provisions of the International Organizations Immunities Act, 22 U.S.C. § 288 (1970).

The so-called "commercial exemption" of section 613(d) exempts from registration those persons engaging or agreeing to engage only in such activities in furtherance of the bona fide trade or commerce of the foreign principal. To fall within this exemption, the agent's activities must be private and non-political in nature. As long as the activities of the agent do not directly promote the political interests of the principal, this exemption is extended by
28 Code of Federal Regulations § 5.304 to complying agents whose foreign principal is owned by a foreign government. Solicitation and collection of funds for specified humanitarian purposes is also exempt under section 613(d).

The section 613(e) exemptions are extended to those engaged in furtherance of "bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts" while those persons engaged in activities in behalf of a foreign principal whose common interests with those of the United States may properly be said to fall back within the Attorney General's discretionary exemption under section 612 or within the section 613 exemptions.

The "attorney's exemption" contained in section 613(g) covers legal representation before courts of law or governmental agencies so long as the agent confines his attempts to influence to the course of formal or informal official proceedings.

The remainder of the Act is devoted to administrative and enforcement provisions involving filing and labeling of propaganda,\textsuperscript{18} maintenance of books and records,\textsuperscript{19} public examination of records,\textsuperscript{20} liability of registrants and their officers,\textsuperscript{21} enforcement of the Act and accompanying penalties,\textsuperscript{22} applicability of the Act,\textsuperscript{23} and Attorney General's reporting requirements and authorization to promulgate rules or regulations in implementation of the Act.\textsuperscript{24}

An examination of cases in which the Act was applied reveals a shift in focus of the Foreign Agents Registration Act. This change in application from the "subversive" to the "lobbyist" is also readily seen in the shift in defendants in the cases brought under the Act — from the Nazi propagandist to the public relations or legal counsel for business or politico-economic interests seeking to expand his principal's U.S. operations and influence via manipulation of public opinion and influence upon legislation. Though the machinery for prosecution of subversive propaganda activities still exists, the focus of the Act is almost entirely changed.

\textbf{III. Internal Administration of the Act.}

As earlier indicated, the enforcement of the Act is one of the responsibilities of the Attorney General. The Assistant Attorney General in charge of the Internal Security Division is the operational head of activities in this area.\textsuperscript{25}

The registration section of this division has actual responsibility for administration and enforcement of the Act as well as two related statutes, (18 U.S.C. § 219 and § 613); the Voorhis Act (18 U.S.C. § 2386); and the Act

\textsuperscript{19} Id. § 615.
\textsuperscript{20} Id. § 616.
\textsuperscript{21} Id. § 617.
\textsuperscript{22} Id. § 618.
\textsuperscript{23} Id. § 619.
\textsuperscript{24} Id. §§ 620-21.
\textsuperscript{25} 28 C.F.R. § 5.1 (1972); accord, 1967 ATT'Y GEN. ANN. REP. 278.
of August 1, 1956 (50 U.S.C. §§ 851-57). In serving the Act's purpose of disclosure of the identity and activities of agents of foreign principals, the registration section maintains public files of registration statements submitted. These files are updated via the addition of supplements, amendments, dissemination reports, and other materials which are posted as received. The "housekeeping" details of administration of the Act are prescribed in title 28, section 5, of the Code of Federal Regulations.

Based upon information received from the Federal Bureau of Investigation or other sources, the registration section initiates efforts to obtain registration of those persons or organizations who might fall within the coverage of the Act. It is worthy of note that the majority of registrations obtained result from this administrative procedure and not from inquiries of potential registrants as to their obligations under the Act. Frequently, too, the information channeled to this section by the FBI will reveal that registered agents should file amendments to their current statements in order to comply with the Act. Receipt of such information generally occasions a request that the agent file additional disclosure.

Secondary sources of information are reports obtained from other agencies or private citizens. Pursuant to section 5 of the statute, attorneys of the section are also empowered to conduct visits to registrants for inspection purposes or to provide on the spot advice or assistance.

To disseminate the information gathered, the section provides periodic reports to Congress on the nature, source, and content of propaganda distributed by agents. These reports are, of course, made available to the general public by sale through the Superintendent of Documents. The section also makes information gathered available to the news media, schools, and libraries upon request. Further, as of 1960, it was estimated that telephone inquiries and personal visits by those seeking information about registrants averaged some 250 to 300 per month.

The Assistant Attorney General has adopted the practice of providing copies...
of this report to the foreign officers and national desks of the State Department as well as to other committees and agencies of the government. The 1967 report indicates that the feedback received from these sources as review and comment has proven a real aid to administration and enforcement of the Act.\footnote{1967 ATT'Y GEN. ANN. REP. 281.}

IV. JUDICIAL INTERPRETATION OF THE ACT

The cases which follow are chosen for discussion as best exemplifying the limited judicial applications of the Foreign Agents Registration Act.

In the case of United States v. Auhagen,\footnote{39 F. Supp. 590 (D.D.C. 1941).} Friedrich Auhagen was charged with failure to register under the Act while employed as an agent of the government of Germany. Mr. Justice Letts made it clear in his opinion that the Congress did not intend to suppress information directed to U.S. citizens, “even if such information be the propaganda of a foreign Government or foreign principal.”\footnote{Id. at 591.} The Act, he said, was directed toward making known the identity of those persons engaged in such activities and the source of the financing of dissemination. Though this case dealt primarily with a discovery issue, judicial reiteration of the statutory purpose of the Act did serve a useful purpose.

The defendant in United States v. Kelly\footnote{51 F. Supp. 362 (D.D.C. 1943).} was convicted of failure to register under the Act. Overruling defense motions for judgment non obstante veredicto and for new trial, Mr. Justice Morris opined that, notwithstanding the fact that an organization is established by an agent of a foreign government sent here for that purpose, that organization is still a “domestic organization” within the meaning of the Act.\footnote{Id. at 363.} This opinion restated the concept that the Act was intended to reach further than those organizations seeking the overthrow of the government or the establishment of a foreign system of government. He noted that the disclosure of the principal-agent relationship was required, whether the principal be friend or foe.

In a 1946 case, the Third Circuit ruled on questions as to the nature of the principal-agency relationship under the Act.\footnote{United States v. German-American Vocational Language League, Inc., 153 F.2d 860 (3rd Cir. 1946), cert. denied, 329 U.S. 760 (1946).} Defendants were convicted of conspiracy to violate the Act in that they had represented their organization as being social and fraternal while in reality serving as a propaganda agency for the German Reich. Arguing on appeal that the Act as originally passed contemplated registration of only those agencies created by express contract, defendants could take solace only in the dissent of Judge Biggs. Relying upon the custom of strict construction of penal statutes, Judge Biggs argued that the legislative history of the Act revealed an intent in the 1942 amendments to
bring within the Act those agents operating "without an express contract of employment."\(^{38}\) This indicates that existence of express contract has to be shown in order to convict for violations occurring prior to passage of the 1942 amendments. A two to one majority, however, rejected this contention, finding that:

Section 2(c) does provide that a copy of the contract, if written, or a statement of its terms and conditions, if oral, be attached to the agent's statement, but we fail to see that such language restricted the necessity of filing a statement to propaganda agents who were admittedly such and who had express oral or written contracts containing that fact.\(^{39}\)

In the *Viereck Case*,\(^{40}\) defendant was convicted of violations of the Act via omission of material facts in three supplemental registrations. The omissions were shown to be of activities which defendant pursued in his own behalf and not in behalf of his foreign principal. The violations were alleged to have occurred prior to the 1942 amendments. Defendant, arguing that the amendments served to make explicit the requirement for an agent's listing all his activities, contended that no such requirement existed prior to passage of the amendment.

Judge Vinson, on the other hand, noted that the amendment did not change the law, but was "merely declaratory" of its original intent:

> It is considered a healthy aspect of our legal system that no person who sees a sign, "Danger! Thin Ice," is supposed to skate around until he finds the exact breaking point.\(^{41}\)

Hearing the case on certiorari, the Supreme Court, speaking through Chief Justice Stone, reversed and remanded, holding that an agent did not (prior to 1942 amendments) have to disclose political activities conducted in his own behalf. Justices Black and Douglas framed their dissent in the same reasoning that Judge Vinson used.\(^{42}\) *Viereck* has since been frequently cited as a paradigm of conservatism in interpretation of statutes imposing criminal sanction.\(^{43}\)

The constitutionality of the Act was not directly challenged until 1951 in *United States v. Peace Information Center*\(^{44}\) where both the organization and its officers were indicted. The defendants moved for dismissal on grounds of the unconstitutionality of the Act. Judge Holtzoff described the power of the Congress to enact such legislation as one not arising directly or entirely from the "affirmative grants of the Constitution."\(^{45}\) This power, he said, predated

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\(^{38}\) *Id.* at 867.

\(^{39}\) *Id.* at 864.


\(^{41}\) 130 F.2d at 957-58.

\(^{42}\) 318 U.S. 236, 252 (1943).

\(^{43}\) See, e.g., *Ventimiglia v. United States*, 242 F.2d 620, 624-25 (4th Cir. 1957).


\(^{45}\) *Id.* at 260.
the Constitution in that the power to regulate such activities in this country in-hered "when the external sovereignty of Great Britain in respect to the colo-
nies came to an end." 44 Relying upon a universal doctrine of the right of self-
preservation, he maintained that a government must have the capacity to guar-
antee its survival by defending itself from any effort to subvert or destroy it.

Defendants had challenged the constitutionality of the Act on the basis that the Act exceeded first and fifth amendment limitations upon the powers of Congress. Rejecting the argument of abridgement of free speech guarantees, Judge Holtzoff indicated that requiring persons who engaged in certain activi-
ties to identify themselves in no way limited their freedom of speech. Likewise, he found that the self-incrimination clause of the fifth amendment was not violated in that the information required by the statute would not be incrimi-
nating on its face. But, he stated, if any item to be disclosed was thought to be incriminating, the registrant might claim his fifth amendment privilege. 47

Defendants' final attack was grounded in the repugnancy of the Act to the fifth amendment's due process clause by reason of indefiniteness. This argu-
ment was rejected by stating that, while (as in many other laws) borderline cases could arise where a person might have doubts as to his obligations under the law, these situations were insufficient to vitiate the law. As to this argu-
ment, the statute was held to be "sufficiently precise." 48

The case with the most impact upon current developments under the Foreign Agents Registration Act is Rabinowitz v. Kennedy. 49 Victor Rabinowitz and Leonard Boudin, attorneys representing a Cuban instrumentality before the Supreme Court of the United States, 50 were advised by the Attorney General to register in accordance with pertinent provisions of the Act. 51

Rabinowitz and Boudin then instituted a declaratory judgment proceeding naming Attorney General Robert Kennedy as respondent, whereby they sought judgment to the effect that their activities as legal counsel for Banco Nacional did not subject them to the registration requirements of the Act. 52 They alleged that their representation of Banco Nacional was an activity specifically ex-
empted from the registration requirements by section 3(d) 53 in that their repre-
sentation was limited to "legal matters, including litigation, involving the mer-
cantile and financial interests of the Republic of Cuba." 54 The District Court denied the government's motion for judgment on the pleadings but certified to

44Id.
45This particular point in Judge Holtzoff's opinion has been supported in United States v. Melekh, 193 F. Supp. 586, 592 (N.D. Ill. 1961).
4697 F. Supp. at 263-64.
49It should be noted that this prosecution was for violations of the Act which occurred prior to passage of the "attorney's exemption" contained in section 613(g).
the Court of Appeals the question of whether the Attorney General could be enjoined from prosecuting under the Act. The Court of Appeals for the District of Columbia, with one dissent, held that the doctrine of sovereign immunity dictated dismissal of the case as an "unconsented suit against the United States."

On grant of certiorari, the question of sovereign immunity was bypassed by the Supreme Court in considering the construction of the Act. Mr. Justice Goldberg, speaking for a unanimous Court in dismissing the complaint, held that the Act required registration by Rabinowitz and Boudin. It was noted that the interest of the Cuban state in the outcome of such litigation would disqualify petitioners under any construction from exemption under the "nonpolitical activities" clause. Further, Justice Goldberg indicated that since notations on the registration form revealed the availability of waiver of certain of the disclosure provisions, the matter did not even have requisite ripeness for adjudication.

V. DEVELOPMENT AND APPLICATION OF THE ACT.

The cases discussed above represent the salient judicial determinations in the history of the Act. Only three cases might be considered as offering decisions which fall into the landmark category: first, Viereck for judicially correcting a problem which had already been rectified by the Congress; second, Peace Information Center for upholding the constitutionality of the Act; and third, Rabinowitz for providing the judicial construction which pointed up a need for amendment of the Act.

The broad language of Justice Goldberg's opinion in Rabinowitz not only narrowed the "mercantile exemption" of the Act and extended registration requirements but also accounted for a flurry of new registrations. The number of new registrations filed in the wake of this decision almost doubled the previous year's new registrations. Further, the registration section of the Internal Security Division, noted that considerable inquiry was occasioned and frequent conferences were held with representatives of legal and other professions seeking an official interpretation of the decision and its scope. Those attorneys (in particular) or U.S. representatives (in general) of foreign interests not engaged in lobbying activities or propaganda dissemination were left in a


Foreign Agent Registration Forms contain the following language:

If compliance with any requirement of the form appears in any particular case to be inappropriate or unduly burdensome, the Registrant may apply for a complete or partial waiver of the requirement.

Thus, waiver should have been requested prior to seeking any judicial remedy. 376 U.S. at 610, supra note 54.

The 1963 Report on the Act, supra note 30, at 2, noted only 87 new long-form registrants while the report for 1964 reflected 162 new registrations. This figure has not even been approached since 1965.

quandry as to their obligations under a federal law which carried criminal sanctions. The natural response usually elicited by such developments in the law are the lobbying for more specific legislation, compliance with the law when in doubt, or the execution of both of the above while seeking a more ideal test case.

The Court certainly must have left little doubt in the minds of practicing attorneys, at least, that their activities in behalf of foreign clients would be subject to close scrutiny by the Justice Department.

We conclude, therefore, that petitioners, attorneys representing a foreign government in legal matters including litigation, are not exempt from registering under the Foreign Agents Registration Act.59

It was fortunate at this point in time, that there was already considerable activity in the Senate Committee on Foreign Relations to amend the Act.60 This activity culminated in Senate bill 2136 under the sponsorship of Senators Fulbright and Hickenlooper and Mr. Celler's companion bill from the House, number 9212. Both bills sought changes, the need for which had been partially pointed up by the Rabinowitz case.

Essentially, the proposed legislation sought clarification in the definitional portions of the Act;61 more detailed disclosure requirements;62 requirements for identification of agents to federal officials, legislative committees, or agencies with whom they might be dealing;63 addition of injunctive remedies to compel compliance;64 and miscellaneous controls upon political activities by agents. These changes would, hopefully, deal with the trend toward change in application of the law by focusing the law upon those individuals performing political or semi-political activities.65

The end product of the legislative effort was Senate bill 693 (H.R. 290 in the House) which was signed into law on the fourth of July, 1966.66 This legislation should be of current interest to American businesses having foreign interests, affiliates, or correspondents or to American representatives of foreign interests, whether those interests be governmental, political, or pure business. In light of the purpose of this study, it is notable that a stated intent of this bill was one of placing

... primary emphasis on protecting the integrity of the decision-making process of our Government and the public's right to know the source of foreign propaganda to which they are subjected.67

59376 U.S. at 610, supra note 54.
60See generally 1963 Senate Hearings, supra note 13.
61S. 2136, 88th Cong., 2nd Sess. §§ 1, 3 (1964).
62Id. § 2.
63Id. § 4.
64Id. § 7.
65S. REP. No. 875, 88th Cong., 2d Sess. 1 (1964); See, e.g., id. §§ 7, 8.
66The most recent amendments deal with "housekeeping" matters; e.g., 22 U.S.C. § 611(d) (1970) which substitutes "Postal Service" for "Postmaster General."
67SENATE FOREIGN RELATIONS REPORT quoted in the 1966 Report on the Act, at 3, which
XI. Conclusions

It seems that certain other pieces of legislation, such as the Smith Act,8 have somewhat displaced the Foreign Agents Registration Act as a vehicle for control of subversives. This possibly accounts, in part, for the absence of prosecutions under the Act in the area of subversive control in recent years.9 Thus, the shift in the focus of the Act has been brought about by broader, though corollary, legislation. This shift is probably attributable also to several other factors such as the changing world situation and consequent changes in U.S. policy toward its neighbors; the international shift from "wartime" espionage and subversion to more subtle means of effectuating the goals of foreign states with regard to U.S. policy and legislation; and the change in the world business community from a capsulized and for the most part, self-sufficient economy to an overlapping, ever expanding, international community which determines boundaries more on an economic basis than did a world engaged in warmaking.

Here emerges the dichotomy that must always exist under a democratic government which seeks to guarantee certain personal freedoms and to promote unhampered commercial intercourse across national boundaries but which, at the same time, seeks to control those activities which might pose a threat to the national security or the public interest. These two goals are neither incompatible nor unrelated, but they are so divergent that it must be realized from the outset, that, in order to approach attainment of both goals, sacrifices must be made in one or both areas. It is clear that to require the filing of the detailed information called for in section 612 imposes a genuine burden upon those complying. But if the registrants are persons or entitles in whose activities the federal government and the American public should legitimately take an interest, then the burden is one which must be imposed and the hardship involved must be subordinated to the greater good.

On the other hand, if the effect of the Act is so sweeping as to affect those whose conduct does not tend toward the evil which the law seeks to remedy, then the administrative processes could become congested with useless information to the extent that the "innocent" registrant is needlessly burdened while the wrongdoer might find it easier to "hide in a crowd" of registrants. Thus, it is difficult to describe the administrative situation which currently exists under the Act. A quick review of the Act shows a potential of extremely broad

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"Hearings on Activities of Non-Diplomatic Representatives of Foreign Principals in the United States Before the Senate Committee on Foreign Relations, 88th Cong., 1st Sess. 64-73 (1963) (List of indictments) (Hereinafter cited as 1963 Senate Hearings). Conversely, all nineteen of the indictments under the Act between 1938 and 1945 involved classic subversives or propagandists.
application, yet a review of the statistics reveals that only 462 active registrations were on file as of 31 December 1971.\footnote{1971 Report on the Act, supra note 30, at 1.}

\textbf{A. The Act and the Businessman or Professional}

As of 1967 over 3200 U.S. corporations controlled over 15,000 foreign business enterprises representing U.S. assets and investments in foreign countries of some $122.3 billion; at the same time, foreign investments in the United States totaled almost $70 billion.\footnote{American Encyclopedia of International Information (7th ed. J. Angel comp. 1969). As of 1969 there were more than 1700 U.S. subsidiaries and Anglo-American firms operating in the United Kingdom alone. Dunning, American Growth in Britain Today, in International Business 148 (E. Cracco ed. 1970).} In light of these raw statistics, it seems absurd on the surface that such a small number of registrants under the Act (i.e. 473 in 1967) would appear in the Attorney General's report for that year.\footnote{1967 ATT'Y GEN. ANN. REP. 279. This trend of spiraling overseas expansion is not reflected in vast increases in the number of registrants under the Act.} Realizing the fact that overseas business interests would constitute only one area which might create the obligation to register, and also the amount of lobbying pressure which would likely have to be exerted in obtaining favorable tax and tariff treatment, it does not take a cynic to imagine that a fair number of "fish" are "slipping through the net."

Granted that the Attorney General's discretionary exemption, the predominately domestic interest exemption, the commercial exemption, and the trade exemption save a fair number of those otherwise under the Act from registering, it would still seem that a number of U.S. business interests or U.S. representatives for foreign interests would be caught in the broad definition of "political activities" found in the Act. Congress has indicated that routine contacts by an agent with government employees or officials would not bring the agent within the purview of the Act.\footnote{S. REP. NO. 143, 89th Cong., 1st Sess. 6-9 (1965). An interesting question has been raised as to the liability of a retired government employee or officer under the Act. Section 219 of the Act clearly prohibits government employees and officers from engaging in any activity which would require registration under the Act and imposes criminal sanction for violations. Would a retired regular or reserve military officer, already subject to other post-retirement restrictions, be subject to the provisions of section 219? The answer is unclear at best. See Irwin, Retired Military Personnel — New Restrictions on Foreign Employment, 21 JAG J. 83 (1967).} Conversely, any person or organization otherwise excused from registration under the stated exemptions would rightly sacrifice his exempt status the moment he undertook to influence agencies or officials of government to take favorable action on matters of domestic or foreign policy.

It is beyond the scope of this study to delve into the intricacies of the Federal Regulation of Lobbying Act\footnote{2 U.S.C. §§ 261-70 (1970).} which were treated in President (then Senator) John F. Kennedy's article on lobbying.\footnote{See Kennedy, Congressional Lobbies: A Chronic Problem Re-Examined, 45 GEO. L.J. 535 (1957).} Suffice it to say, however, that activi-
ties which might be a borderline area not requiring registration under the
Lobbying Act might well require registration under the Foreign Agents Regis-
tration Act and that it is possible that registration under both acts could be
necessary.

A good example of those engaging in "political activities" within the rubric
of the Act are those persons and organizations, not all of whom were lobbyists,
who "came out of the woodwork" to register under the Act after the Senate
Committee on Foreign Relations took a closer look at the efforts of agents to
influence the allocation of quotas under the Sugar Act.\(^6\) How many other
businesses or interest groups would be affected by closer scrutiny? How casual
or explicit would efforts to exert influence have to be before registration would
be required? Here, the answers lie in that penumbra between that which is legal
and that which is illegal, between social amenity or professional esprit and
conscious manipulative effort to influence policy and lawmaking.

Other questions arise in this area as to applicability of the Act to otherwise
exempt agents or representatives appearing before administrative agencies at
any type of proceeding or negotiation with U.S. contracting officers on service
or procurement matters. It is clear that the attorney acting in such a capacity
would be exempt under the plain language of section 613(g).\(^7\) Apparently the
only current alternative for those agents who are not attorneys is to seek an
informal ruling or to register when in doubt. It seems that the attorney's
exempt status ceases when he is engaged in anything less than "sanctioned"
proceedings.

The attorneys’ exemption should probably cover submission of comments or
amicus briefs at agency proceedings or in contract negotiations. The real ques-
tion as to the attorneys’ exemption is raised in the above paragraph. That is,
does this exemption, though it does not reach into the congressional cloak-
rooms, reach into the congressional committee room? Section 614(f) makes it
plain that registered attorneys would be obligated to provide a copy of their
most recent registration statement when appearing before a congressional com-
mittee in behalf of their foreign principals. This "plain language," however,
leaves to conjecture the question of whether an otherwise exempt attorney
would have to register in order to present the views of a disclosed foreign client

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\(^6\) See generally Part 3 of the 1963 Senate Hearings, supra notes 13, 69. This writer's survey of
the most recent list of registrants under the Act leads to the conclusion that at least eight per cent
and possibly as much as 13 per cent of all listings during 1970-71 represented sugar interests either
directly or indirectly.

\(^7\) The attorney's exemption is most likely a direct result of a strong lobbying effort by the bar.
An example of this effort is a 1964 report by the Commission on International Law of the
Association of the Bar of the City of New York. See Volume 3, Bull. 2 (July 1964). The attorney's
exemption which was incorporated into the 1966 amendments deleted the operational language
upon which the Rabinowitz case was decided, which is a fairly successful "grassroots" effort if it
may be attributed to the work of the Bar. It has since been held that an attorney representing a
disclosed foreign principal in an extradition proceeding falls within this exemption. Schonbrun v.
at a hearing. Since Congressmen are aware that such voluntary or called appearances are a long-standing method of promoting or discouraging legislation and that the bar looks upon such appearances as a form of advocacy, the otherwise exempt attorney should not be required to register. It is further suggested that any collateral effort outside the committee room should trigger operation of the Act and create the requirement for registration.

The sections 611(g) and 613(d) commercial exemption extensions for activities not serving predominantly foreign interests or activities benefiting U.S. parent corporations or subsidiaries should be of value to business. At this juncture, however, one can only guess as to the full reach of this exemption and is well advised when in doubt to inquire before assuming he or his company is exempt from registration. Some guidance is available in comments in the House Report regarding the activities of foreign sugar interests where the committee felt that registration was necessary for these interests because “their operations were almost entirely foreign and their interest in the United States was solely as a market for their products.” At the same time, it would seem that an agent for an investment banking house, for example, whose sole interest in the U.S. was market development might still be exempt if he fell within the “substantial commercial, industrial, or financial” definition of section 611(q).

Furthermore, it is a natural consequence to question whether the commercial exemption is available to such entities as El Al, the Israeli airline system, in light of its government ties. The Senate Report for 1965 indicates that the exemption is available so long as the foreign state’s political interest is not directly “tied in” to the business enterprise in question. A long standing example of this facet of the law is the fact that the first postwar indictment under the Act was returned in 1949 against the Soviet trade group, Amtorg Trading Corporation, and six of its officers. Immediately following indictment, Amtorg registered as agent for three Soviet Government departments and eighteen trading combines, then filed a plea of nolo contendere. The indictment was dismissed as to the six officers and the $10,000 fine as to Amtorg was suspended.

It is immediately clear from reading the section 611(p) definition of “political consultant” and the section 611(o) definition of “political activities” that one who merely advises a foreign principal without engaging in political activities would not be required to register. Further reading into the Act, however, is confusing on this point, for section 612(a) reflects a requirement that all

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78See Paul, supra note 2, at 607.
80But this same report made it very clear that this interpretation would not extend to sugar or coffee interests where these products are closely related to internal policy. S. REP. NO. 143, 89th Cong., 1st Sess. 11 (1965).
81The Oct. 21, 1949 indictment was reported in the Internal Security Division portion of the 1950 ATT’Y GEN. ANN. REP. 20.
agents of foreign principals register unless specifically exempted by the Act. Thus, unless the political consultant finds some means by which to place himself within the commercial exemption, he must register.

The Act, though it is now geared toward the "influence peddler" and the "hidden persuader" representing foreign interests, still provides a viable device for controlling true (later referred to as classic) subversion.

B. The Act and the Classic Subversive or Propagandist

Having made a general review of the more visible application of the Act to the agent attorney and businessman, it is instructive to inquire into the effects of the Act on the "classic" subversive or propagandist. Both the intelligence or security specialist and the subversive must look at the Act from a standpoint of how it does or does not control his activities.

Although it is an interesting area, it does not serve the purposes of this study to examine the overlap between this Act and the myriad legislation (some fifty statutes, depending upon how the reader would classify them) involving control of subversion and espionage. Most of the other legislation in this area deals with a broader spectrum of activity than does this Act, which is directed toward control of propaganda activities.\(^{82}\)

Again, it must be remembered that democratic society, by its nature, must strike some balance between guaranteed freedoms and encroachment upon those freedoms which necessarily results from any effort to control that which poses a threat to the national security. This balance seems to tilt in either direction with the fluctuations in the world and national situation. For instance, there were some nineteen prosecutions, all for subversive activities, under the Act during the period of international and national tension from 1938 to 1942 while there have been no prosecutions in the period from 1968 to 1972.

Likewise the primary foreign sources of propaganda fed into the United States seem to shift in accordance with the individual nation's needs of currying favor with the U.S. in light of conditions within that nation.\(^{83}\) 1954 is a vintage year from which to draw examples of this phenomenon. The Assistant Attorney General in charge of the Internal Security Division of the Justice Department noted increased propaganda efforts and registrations by representatives of both the French Government and the Moroccan Office of Information and Documentation resulting from conflicts between France and her colonies. The same result was occasioned by Greek, Turkish, and British propaganda efforts in the face of the Cyprus unrest and by Arab and Israeli sources in response to the


\(^{83}\)As a matter of no more than casual observation it might be noted that efforts to improve a state's image before the American public might be called "propaganda" if that state happened to be the People's Republic of China while a similar effort by Canada would probably be referred to as "public relations." Here one begins to realize the degree of correlation which might exist between the shadow world of propaganda and the more visible world of international politics and diplomacy.
Middle East situation. From a standpoint of improving relations as opposed to increased tension, the year of 1958 found an easing of travel and commercial restrictions between the U.S. and the Soviet Union which led to an increase in registration of Soviet bureaus and agencies engaged in promotion of travel to and trade with Soviet-bloc states.

To completely examine the Foreign Agents Registration Act in terms of its effect upon programs of foreign propaganda or subversion, it is necessary to step outside the legal frame of reference and to look at the Act through the eyes of the internal security specialist. In this vein, the writer relies in large measure upon the views of Mr. Ladislas Farago, author and former intelligence officer under Admiral Ellis M. Zacharias.

Mr. Farago observed that seven principles must guide the successful use of propaganda:

1. Propaganda should be directed toward personalities, not issues. Complex issues cannot be handled in the simple manner required for effective propaganda.
2. Propaganda must not appear to be propaganda. "Conducted in the name of propaganda it is bound to fail."
3. Propaganda must be based on a high degree of knowledge of the national trends and emotional direction of the target state.
4. Propaganda must not create issues, but must deal with existing issues in a favorable manner. (i.e., Communist propaganda can twist issues of labor or race so that Communism itself never becomes an issue.)
5. Propaganda must be sufficiently flexible to fit changing situations.
6. "The actual tenor of propaganda material must be left to the men who disseminate it."
7. Propaganda must maximize its use of citizens of target states by making them "unwitting carriers."

Given strict implementation and compliance with the Act, it is this writer's opinion that the law can substantially negate the goals which the above propaganda principles seek to perpetrate. The citizen, government official, legislator or other party in a position of influence who receives propaganda material which is labeled as such is unlikely to become an "unwitting carrier." Further, he will probably look for the true implication of the material disseminated. These factors alone hamper the effective use of principles 2, 4, and 7. In theory, principle 6 should be made ineffective because, even though the U.S. agent responsible for dissemination determines the tenor of the propaganda material,
his effectiveness is reduced by the fact that his agency relationship to the foreign principal is made known to those responsible for informing the American public. Finally, though the propaganda message be flexible enough to meet changing situations, principle 5 is thwarted by the requirement that amendments, supplements, or new dissemination reports be filed to reflect this change.

Although Mr. Farago might agree with the above analysis and conclusion, given that the agent complied with the law, he calls the Act "inadequate" because it really does nothing more than provide a framework for prosecution, while doing little to control violations by means other than the threat of prosecution. He states that:

"[T]he only people who comply with the provisions of the Act are those who are not engaged in any surreptitious activity in the United States, or have effectively severed all connection with foreign espionage organizations."99

In other words, Mr. Farago implies that, while the Act might successfully control what is called "white activities" in intelligence parlance, the Act is largely ineffective in the control of "black activities." "Black activities," which include classic subversion and propaganda activities, might accurately fall within the internationalist concept of "subversive intervention"—what the Russians might refer to as "ideological aggression."90 It seems that the complete absence of correlation between the Attorney General's list of subversive organizations and the list of registrants under the Act would tend to support this contention until it is considered that first, those organizations more clearly fall within the scope of other disclosure laws91 and, second, that many of the organizations listed have possibly been reduced almost to inactive status through the efforts of the Justice Department to enforce internal security legislation.

C. The Focus of the Act

This study, like most others in this area, shows a regular progression of shifting the primary focus and intent of the Foreign Agents Registration Act—from control of classic subversion and propaganda activities to disclosure of efforts by foreign interests to manipulate U.S. policy and public opinion. Those most affected by the Act seem to have changed too—from the radical provocateur to such personalities as Victor Rabinowitz, noted advocate; Hal Roach, Jr., motion picture great; and Igor Cassini, popular New York society columnist.92

98Id. at 207-08.
99Id. at 252.
This change in focus has, likewise, been accompanied by a lessening in the criminal aspect of prosecutions as reflected in the lessening of punishment imposed. While the Act originally provided only for a fine (not more than $10,000) and/or imprisonment (not more than five years), the current version provides for other, lesser criminal penalties in addition (up to $5,000 fine and/or up to six months imprisonment). Section 618 of the current Act provides the Attorney General with injunctive powers for purposes of ordering registration or for enjoining continuance of alleged violative practices. This alone should provide an indicator of the refocusing of purpose. The injunctive power allows enforcement in areas which might previously have been considered inappropriate because of limitation to the remedies of fine or imprisonment.

The current scheme of “defense” to prosecutions under the Act reflects a pattern of registration as soon as an indictment is handed down, then the entering of a nolo contendere plea with permission of the court and finally receiving a relatively light fine, suspended confinement, and/or probation. In the case of organizations using this “defense,” the indictment would probably be dropped with respect to the officers and a fine imposed upon the organization itself. Fringe activities and minor infractions appear to be handled informally and administratively where possible, as is reflected in Attorney Generals’ Reports to Congress since 1966.

D. Adverse Effects and Loopholes

Aside from a minor narrowing of personal freedoms — a sacrifice necessarily made by those who would engage in activities covered by the Act — there seems to be at least one other adverse effect of the Act in operation. Due to the original criminal/subversive/“traitor” aura surrounding the Act and due to the psychosocial stigma which must attach to being known as a “foreign agent,” any attorney or businessman would probably be hesitant to register under the Act if it could be avoided. This factor might well account for the flurry of reluctant registrations which seems to follow almost any litigation or committee investigation into a particular area of coverage under the Act.
If, indeed, the Act does have a chilling effect upon legitimate endeavor across international boundaries, it is truly unfortunate. If this effect does exist, then it might serve to discourage the very business venture or attorney-client relationship which might help to develop new avenues toward curbing the gold flow and creating a favorable swing in the balance of payments, toward easing tariff barriers, and toward promoting good will in the international community of law and commerce.\footnote{Hearings on S. 693 and H.R. 290, supra note 95, at 54.}

Unfortunately, the reverse effect also exists. One of the gaping loopholes in the law is the fact that the classic subversive, unguided by "legal-moral compunction" or fear of punishment because of money or fanatic dedication, may simply be driven underground by the Act and be forced to use more subtle, and, consequently, harder to detect, techniques. Hopefully the FBI is effective in covering this loophole which cannot be covered by legislation. One can only conjecture in this regard, however, for the statistics only reveal those who are "caught."

Second, regardless of sanctions imposed, it is a simple matter for an "agent" within the intent of the Act to be appointed to some diplomatic or consular post if his principal is a government determined to accomplish its propaganda goal without registering. Again it is impossible to do more than guess how many "agents" are currently avoiding registration in this fashion.

A third possible means of avoiding registration is to bury the prohibited or questionable agency relationship so deep within an organization which is exempt from registration that an army of FBI special agents and accountants would be required to penetrate the cover. To choose specific examples, it would not be extremely difficult to place operatives within organizations having the legitimate charitable purpose of humanitarian efforts to aid orphans in Northern Ireland or in Israel. When much of the fund-raising activity takes place on a person-to-person, grassroots level, it should be a relatively simple matter to make the first and second generation American an "unwitting carrier" of propaganda or a willing contributor who gets a certain amount of gratification out of complicity in a cause. It has been well demonstrated that such activity can take place within a genuinely exempt organization. In the late forties and early fifties, knowledge was widespread that many contributions—ostensibly made to the United Jewish Appeal or other legitimate organization—ultimately made their way into the hands of the Irgun\footnote{Irgun Zvai Leumi (IZL) was an Israeli right wing extremist group formed during World War II by the Revisionist movement which had broken away from the Zionist Organization in 1935. The Irgun's operations which, depending upon the point of view or the specific instance, might be characterized as either guerrilla or terrorist, contributed to the containment of the Arabs and harassment of the British. See E. Birnbaum, The Politics of Compromise 61-62 (1970). The American League for a Free Palestine was very active in generating the financial and logistical support necessary for IZL operations. See generally B. Hecht, A Child of the Century (1954).} or the Haganah\footnote{Haganah was the underground Jewish defense force which aligned itself with David Ben Gurion in its approach to the Zionist movement in Palestine. Sponsored by the Labor Federation and the} at a time...
when the United States was just starting its trend away from neutrality with respect to Israel.\textsuperscript{100}

Granting that the above is based upon a special fact situation and much conjecture as to development of similar sympathies with other causes, it can only be said that where there is a loophole in the law there are usually those who will seek to exploit it.

VII. RECOMMENDATIONS

The needs which fostered the Foreign Agents Registration Act still exist. Therefore, some form of the Act \textit{must} remain in the body of active law.

However, this writer suggests the repeal of the Act under its present title and in its current form and urges its concurrent reenactment in segments. Portions directed purely at control of subversion and espionage might be reenacted as an amendment to analogous legislation, thus reducing overlap in the various disclosure and control statutes in that body of law. Second, those portions directed at control of lobbying or public opinion manipulating activities in behalf of nonpolitical foreign entities could be reenacted either as a new bill or as amendments to the Federal Regulation of Lobbying Act, the Federal Communications Act, and related legislation.

By thus placing affected businessmen and professionals in a position to be referred to as something other than a "foreign agent," the stigma of registration might be lifted\textsuperscript{101} with respect to those to whom the term sounds more like an epithet than an outdated choice of words. Perhaps "U.S. Relations Counselor" or a similar euphemism would better serve the purpose intended.

It is contended, then, that by having become a piece of "legislative patchwork" the Foreign Agents Registration Act of 1938 has sacrificed much by way of effectiveness. Nevertheless, it contains controls which seem essential in light of the current state of world affairs. The solution lies, not in making legislative litter of the law by discarding the Act entirely, but rather in "recycling" the Act so that the end product is one of dual focus and is better fitted to effectuating the goals of this nation as a member of the international community.

\textit{Claude-Leonard Davis}

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\textsuperscript{100}See generally Hearings on S. 693 and H.R. 290, supra note 95.

\textsuperscript{101}L. Slater, \textit{supra} note 99. This carefully documented work reveals that the effort of the Zionist movement in the United States was much more than a round of benefit performances and bond sales. The entire book is illustrative of a point in U.S. history where the population was ripe for a propaganda effort. It likewise illustrates a point in the history of democratic societies where the "official attitude" of a government has not yet caught up with the popular attitude.