

# Client Alert

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## *Attorney General of the United States v. Wynn*: D.C. Circuit Rules Out Injunctive Relief for Past FARA Violations, Leaving Criminal Prosecution as the Only Remedy

On June 14, 2024, a panel of the U.S. Court of Appeals for the District of Columbia held that the Department of Justice (DOJ) may not seek an injunction to compel retroactive registration under the Foreign Agents Registration Act (FARA) after an alleged agency relationship ends.<sup>1</sup> The decision in *Attorney General of the United States v. Wynn* leaves DOJ's National Security Division (NSD) with only one remedy against alleged foreign agents who have failed to register or failed to comply fully with other statutory obligations for past engagements: criminal prosecution that carries a potential five-year prison sentence.<sup>2</sup>

FARA is a broad and complex statute. It may require registration if a person acting in the U.S. directly or indirectly on behalf of a foreign principal (1) contacts any federal official;<sup>3</sup> (2) seeks to influence a federal official concerning U.S. domestic or foreign policies or a foreign government's or foreign political party's political or public interests, policies, or relations;<sup>4</sup> (3) seeks to influence a section of the U.S. public concerning domestic or foreign policies or a foreign government's or foreign political party's political or public interests, policies, or relations;<sup>5</sup> (4) acts as a public relations counsel, publicity agent, information-service employee, or political consultant;<sup>6</sup> or (5) solicits, collects, or dispenses things of value.<sup>7</sup> The statute exempts certain categories of persons from registration.<sup>8</sup>



Anyone deemed a foreign agent faces onerous obligations. The law requires a foreign agent who engages in covered activities to (1) file a registration statement with the Attorney General within ten days;<sup>9</sup> (2) file a supplemental statement every six months reporting activities undertaken on behalf of the foreign principal along with other details;<sup>10</sup> (3) include a disclosure statement in any informational materials disseminated to two or more persons on behalf of the foreign principal;<sup>11</sup> and (4) file such informational materials with the Attorney General within 48 hours.<sup>12</sup> Failure to file a required document may give rise to criminal liability, as may making a material false statement or omission in any filed document.<sup>13</sup>

FARA establishes two remedies for a FARA violation: criminal prosecution for failing to register or registering incorrectly, or a civil injunction prohibiting a person from acting as an agent or requiring FARA compliance.<sup>14</sup>

Prosecutors chose the latter approach in *Wynn*, seeking a civil injunction requiring real-estate developer Stephen Wynn to register as a foreign agent several years after the alleged representation ended.<sup>15</sup>

In the summer and fall of 2017, Wynn allegedly agreed to lobby the Trump Administration on behalf of the Chinese government in an effort to persuade then-President Trump to cancel a certain Chinese businessperson's visa or otherwise remove that person from the U.S.<sup>16</sup> Wynn's alleged efforts concluded, unsuccessfully, in October 2017.<sup>17</sup>

In May 2018, NSD sent a letter to Wynn advising him to register under FARA as a foreign agent.<sup>18</sup> Over the next four years, Wynn disputed NSD's opinion that he was required to register.<sup>19</sup>

In 2022, NSD filed a civil lawsuit alleging that Wynn was in violation of the FARA registration requirement and asking the district court to issue a permanent injunction requiring him to register.<sup>20</sup> Relying on the D.C. Circuit's earlier holding in the criminal case *United States v. McGoff* that an agent's duty to file under FARA ends when the person stops acting on behalf of the foreign principal,<sup>21</sup> the district court concluded that the civil injunctive remedy is no longer available after the engagement ends.<sup>22</sup>

The question to the D.C. Circuit on appeal was "whether Wynn has a continuing obligation to register under FARA even if he ceased his representation of a foreign principal nearly seven years ago."<sup>23</sup> Citing *McGoff*, the D.C. Circuit panel unanimously answered that question in the negative, confirming that Wynn's duty to register expired when he stopped his alleged representation in October 2017.<sup>24</sup>

There are several significant implications.

First, *Wynn* imposes a temporal limitation on the statutory duty to register. The law states that "[f]ailure to file a registration statement or supplements thereto as required by FARA *shall be considered a continuing offense for as long as such failure exists*, notwithstanding any statute of limitation or other statute to the contrary."<sup>25</sup> Under *Wynn* and *McGoff*, however, any "continuing offense" ends when the agent stops acting on behalf of the foreign principal. The D.C. Circuit's reading construes the "continuing offense" to end on the date the duty to file terminates.<sup>26</sup>

Second, *Wynn* leaves prosecution as the only practical remedy for past FARA violations, at least for cases venued in the District of Columbia. While NSD has encouraged Congress to establish additional civil remedies for FARA violations, specifically civil monetary penalties, *Wynn* renders the only existing statutory civil remedy—seeking an injunction— toothless in most cases.<sup>27</sup> Given the FARA regulatory regime's complexity—both in determining whether registration is appropriate and in complying with the onerous requirements—this enhances concern about the risk of NSD making overzealous use of criminal prosecution.



*Wynn* significantly limits the government’s authority to pursue injunctive relief for violations of the intricate and complicated FARA statute. By eliminating the option of a civil remedy for non-filing, the new ruling increases the probability that DOJ may pursue criminal prosecution in a close case. This risk is exacerbated by DOJ’s recent threats to interpret FARA more expansively as a tool to mandate broader reporting.<sup>28</sup> Anyone who might fall within FARA’s expansive sweep by promoting the interests of foreign countries, entities, or individuals in the United States should seek informed legal advice.

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<sup>1</sup> See *Att’y Gen. of United States v. Wynn*, 2024 WL 2983869, at \*5 (D.C. Cir. June 14, 2024).

<sup>2</sup> See 22 U.S.C. § 618(a).

<sup>3</sup> 22 U.S.C. § 611(c)(1)(iv).

<sup>4</sup> 22 U.S.C. § 611(c)(1)(i), (o).

<sup>5</sup> 22 U.S.C. § 611(c)(1)(i), (o).

<sup>6</sup> 22 U.S.C. § 611(c)(1)(ii).

<sup>7</sup> 22 U.S.C. § 611(c)(1)(iii).

<sup>8</sup> FARA exempts from the registration requirement certain agents who are: (1) serving as foreign government officials or diplomatic officers or employees; (2) engaging in nonpolitical commercial activities; (3) engaging in activities that do not predominantly serve a foreign interest; (4) soliciting funds for humanitarian purposes; (5) acting in furtherance of religious, academic, scientific, or artistic pursuits; (6) acting in furtherance of the interests of both the United States and a foreign country the defense of which the President deems vital to the defense of the United States; (7) practicing law before a federal court or agency in the course of judicial proceedings, criminal or civil law enforcement investigations, or agency proceedings conducted on the record; (8) engaging in lobbying activities and registered under the Lobbying Disclosure Act; or (9) exempted by a federal regulation. 22 U.S.C. § 613.

<sup>9</sup> 22 U.S.C. § 612(a).

<sup>10</sup> 22 U.S.C. § 612(b).



<sup>11</sup> 22 U.S.C. § 614(b).

<sup>12</sup> 22 U.S.C. § 614(a)

<sup>13</sup> 22 U.S.C. § 618(a).

<sup>14</sup> 22 U.S.C. § 618(a), (f).

<sup>15</sup> *Att'y Gen. of United States v. Wynn*, 2024 WL 2983869, at \*2 (D.C. Cir. June 14, 2024).

<sup>16</sup> *Id.* at \*3–4.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at \*2.

<sup>21</sup> 831 F.2d 1071 (D.C. Cir. 1987).

<sup>22</sup> *Wynn*, 2024 WL 2983869, at \*5.

<sup>23</sup> *Id.* at \*2.

<sup>24</sup> *Id.* at \*3.

<sup>25</sup> 22 U.S.C. § 618(e) (emphasis added).

<sup>26</sup> For a person who has registered under FARA, the duty to file a supplemental statement presumably ends when the registration form is due, even if the engagement has already ended. See 22 U.S.C. § 612(b).

<sup>27</sup> See “Deputy Assistant Attorney General Eun Young Choi Delivers Keynote Address at 5th National Forum on Foreign Agents Registration Act,” (Dec. 1, 2023), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-eun-young-choi-delivers-keynote-address-5th-national> (“[A]uthority to issue civil penalties for FARA violations ... would create a middle path that avoids the current circumstance in which the Department is forced to choose between bringing criminal charges and bringing a civil injunctive suit with no possibility of civil monetary penalties.”).

<sup>28</sup> See Robert Kelner, et al., “DOJ Officials’ Remarks Signal New Trends In FARA Activity,” Law360 (Dec. 14, 2023), <https://www.law360.com/articles/1776917/doj-officials-remarks-signal-new-trends-in-fara-activity> (reporting on remarks by senior NSD officials about potential regulations expanding FARA’s applicability to multinational corporations).