



1965

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Recommended Citation

Francis R. O'Hara, *The Foreign Agents Registration Act - The Spotlight Of Pitiless Publicity*, 10 Vill. L. Rev. 435 (1965).

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THE FOREIGN AGENTS REGISTRATION ACT — “THE SPOTLIGHT OF PITILESS PUBLICITY”

By FRANCIS R. O'HARA†

We believe that the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda.*

THE FOREIGN AGENTS Registration Act of 1938¹ (hereinafter referred to as the “Act”) has been part of our federal law for more than a quarter of a century. It was adopted as a national safety measure in the critical period just prior to the outbreak of World War II.² The legislative history indicates that the basic purpose of the Act was to regulate the Nazi propaganda activities and other similar activities which were prevalent in this country in the decade prior to World War II.

As a result of subsequent legislation,³ aimed more specifically at the activities of subversive agents, the Act has been rather dormant for much of its existence. However, a series of staff studies and hearings by the Committee on Foreign Relations of the United States Senate conducted over the past four years, the proposed amendments to this Act offered by Senators Fulbright and Hickenlooper as a result of these hearings, and the decision of the United States Supreme Court in *Rabinowitz v. Kennedy*⁴ have served to turn the spotlight on this statute itself. The amendments proposed by Senators Fulbright and Hickenlooper in this and the last session of Congress contain some potentially far-reaching changes for the American business community in general, and particularly for those lawyers, consultants, and advisers who counsel foreign interests or United States corporations having substantial international operations.⁵

The purpose of this article is to briefly examine the legislative history of this Act and the regulations issued thereunder, to discuss the *Rabinowitz* case and other case law which has developed under the Act and to examine the proposed amendments and some of the implications thereof.

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* H.R. Rep. No. 1381, 75th Cong., 1st Sess. 2 (1951).

1. 22 U.S.C. §§ 611-21 (1958).

2. *United States v. German-American Vocational League*, 153 F.2d 860, 864 (3d Cir. 1946), *cert. denied*, 329 U.S. 760 (1946).

3. The most notable piece of legislation aimed at subversive agents is the Smith Act, 18 U.S.C. § 2384 (1958).

4. *Rabinowitz v. Kennedy*, 376 U.S. 605 (1964).

5. S. 2136, 88th Cong., 2d Sess. (1964).

I.

LEGISLATIVE HISTORY

In the post-depression period of the late 1930's, there was much public concern with the Nazi and other subversive propaganda that was literally flooding the country.⁶ The Foreign Agents Registration Act traces its genesis to House Resolution 198 introduced in the United States House of Representatives in 1934. This resolution called for the creation of a special committee of seven members :

for the purpose of conducting an investigation of (1) the extent, character and object of Nazi propaganda activities in the U.S., (2) the diffusion within the U.S. of subversive propaganda that is instigated from foreign countries and attacks the principle of the form of government guaranteed by our Constitution, and (3) all questions in relation thereto that would aid Congress in any necessary remedial legislation.⁷

The Committee was appointed and its chairman was John W. McCormack, the present Speaker of the House of Representatives. In 1935, after a series of hearings, the McCormack Committee filed its report, which set forth its primary legislative recommendation as follows :

That the Congress should enact a statute requiring all publicity, propaganda, or public relations agents or other agents or agencies, who represent in this country any foreign government or a foreign political party or foreign industrial or commercial organization, to register with the Secretary of State of the United States, and to state name and location of such foreign employer, the character of the service to be rendered, and the amount of compensation paid or to be paid therefor.⁸

Approximately three years later on June 6, 1938, the Foreign Agents Registration Act, embodying the recommendations of the McCormack Committee, became law.⁹ For a quarter of a century, this Act, born of a Congressional desire to control Nazi propaganda activities in this country, has become the primary medium for providing the public with information regarding the ever increasing activities of lobbyists, consultants, and other nondiplomatic advisers who act on behalf of foreign interests.

6. H.R. REP. No. 153, 74th Cong., 1st Sess. (1950).

7. H.R. RES. 198, 73d Cong., 2d Sess. (1950).

8. H.R. REP., *supra* note 6, at 23.

9. Both the House and Senate committee reports, urging enactment of the McCormack bill which became the 1938 Act, declare that its purpose was to carry the recommendations of the McCormack committee. See H.R. REP. No. 1381, 75th Cong., 1st Sess. 1 (1951), and S. REP. No. 1783, 75th Cong., 3d Sess. 2 (1951).

II.

SUMMARY OF THE ACT AND REGULATIONS

As clearly indicated by the legislative history, the general intent of the Act was to prevent secrecy as to any kind of political propaganda activity carried on by foreign agents.¹⁰ Section 2 of the Act, as originally passed, provided that every person acting as an "agent of a foreign principal," unless covered by one of the exemptions in the Act, had to file a registration statement with the Secretary of State.¹¹ In 1942, the Act was substantially amended and the registration functions of the Secretary of State were transferred to the Attorney General.¹²

The form of the registration statement is provided by the Attorney General and requires the furnishing of extremely detailed information regarding the nature of the agency relationship.¹³ Included in the information required to be furnished is a copy of the registrant's contract with his foreign principal or if such contract is oral, a written statement of its terms and conditions. This initial registration statement must be filed within ten days after the agency relationship arises.¹⁴ In addition, every registrant is required to file a supplemental registration statement at the end of each six month period following his original registration. This statement is also to be filed on a form prescribed by the Attorney General and must set forth, with respect to the preceding six month period, "such facts as the Attorney General, having due regard for national security and the public interest, may deem necessary to make the information required under this section accurate, complete and current. . . ."¹⁵

The definitions section is one of the key sections of the Act. In it is found the usual provision that the term "person" includes "an individual, partnership, association, corporation, organization, or any other combination of individuals."¹⁶

The term "foreign principal" is defined to include a government of a foreign country, a foreign political party, and a corporation "organ-

10. *Ibid.*

11. 52 Stat. 631 (1938).

12. Sec. 2 Act of Apr. 29, 1942, 56 Stat. 248. See also Exec. Order No. 9176, 7 Fed. Reg. 4127 (1942).

13. See U.S. Department of Justice Forms FA-1, FA-1-6M, FA-2, FA-2-6M, FA-4, FA-10 and FA-11. These forms are available from the Registration Section of the Internal Security Division, Department of Justice, Washington, D.C. 20025.

14. 22 U.S.C. § 612(a) (1958). See also 28 C.F.R. § 5.201. This section of the Act was amended in 1950 to make the failure to file a registration statement a continuing offense. See S. REP. No. 1900 and H.R. REP. No. 1775, 81st Cong., 2d Sess. (1958).

15. 22 U.S.C. § 612(b) (1958).

16. 22 U.S.C. § 611(a) (1958).

ized under the laws of or having its principal place of business in a foreign country. . . ."¹⁷ The definition of "foreign principal" excludes any person who is both a citizen and domiciliary of the United States and any corporation incorporated in the United States and having its principal place of business in this country.

The term "agent of a foreign principal" is defined as "any person who agrees to act . . . as a public relations counsel, publicity agent, information service employee, servant, agent, representative or attorney for a foreign principal."¹⁸ Specifically excluded from the definition of an agent of a foreign principal are "news or press services or associations organized under the law of the United States . . . or any newspaper, magazine, periodical, or other publication," engaged in bona fide news or journalistic activities. . . ." This exemption applies only if the news gathering media is "at least 80 per centum beneficially owned by . . . citizens of the United States" and is not owned, directed or controlled by a foreign principal or agent thereof.¹⁹

The term "political propaganda" is also broadly defined to include "any communication or expression" which is intended to (1) "influence a recipient or any section of the public within the United States with reference to the political or public interest, policies or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States. . . ." or (2) promote "any racial, social or religious disorder . . . or other conflict involving the use of force or violence . . . in any American Republic"²⁰

Section 3 establishes certain exemptions from the registration requirements. Exemptions are provided for "duly accredited diplomatic or consular" officers of foreign governments "recognized by the Department of State" Exemption is also granted to "any official of a foreign government . . . recognized by the United States." This exemption also extends to "any member of the staff of . . . a duly accredited diplomatic or consular officer." All of these exemptions are valid only as long as the named officials are "engaged in activities recognized by the Department of State as being within the scope of the function of such officers and officials."²¹

17. 22 U.S.C. § 611(b)(1)(4) (1958). Also included within the definition of foreign principal are domestic entities supervised, controlled or financed by any foreign government or political party. 22 U.S.C. § 611(b)(6). See also 22 U.S.C. § 611(e) and (f).

18. 22 U.S.C. § 611(c)(1) (1958).

19. 22 U.S.C. § 611(d) (1958).

20. 22 U.S.C. § 611(j) (1958). See also 22 U.S.C. § 611(l) (1958), for the definition of the term "American Republic."

21. 22 U.S.C. § 613(a)(b) and (c) (1958). See also *United States v. Fitzpatrick*, 214 F. Supp. 425 (S.D.N.Y. 1963), in which the petitioner, an attaché and resident member of the Permanent Mission of Cuba to the United Nations, was charged with

Exemptions are also provided for those persons "engaging . . . only in activities in furtherance of bona fide religious, scholastic, academic or scientific pursuits or of the fine arts . . ." ²² There is also a provisional national security exemption which extends to persons in the employ of "a government of a foreign country, the defense of which the President deems vital to the defense of the United States. . ." ²³

The most significant exemption is the so-called commercial exemption provided in section 613(d). This was the section involved in the *Rabinowitz* case, and it is also the subject of the amendments proposed by Senators Fulbright and Hickenlooper. These amendments will be discussed in some detail later, and it is sufficient at this point simply to note that the exemption applies to persons "engaging . . . only in private and nonpolitical, financial or mercantile activities in furtherance of bona fide trade or commerce. . ." ²⁴

Section 4 of the Act requires every registrant transmitting "any political propaganda . . . by the mail or any instrumentality of interstate or foreign commerce" to file copies thereof within 48 hours of such transmittal with the Librarian of Congress and the Attorney General. ²⁵ This section also makes the transmission in interstate or foreign commerce of such political propaganda unlawful unless it is conspicuously marked as required by the Act. ²⁶

Section 5 requires "every agent of a foreign principal to keep . . . such books of account and other records with respect to all his activities . . . as the Attorney General . . . may by regulation prescribe as necessary or appropriate . . ." ²⁷ At this point, it also should be noted that section 10 contains a general authorization to the Attorney General to "prescribe such rules, regulations and forms as he may deem necessary . . ." to carry out the provisions of the Act. ²⁸ This broad regulatory power has not been fully utilized and those regulations which have been issued generally follow the statutory language very closely. ²⁹

conspiracy to commit sabotage and to violate the Act. Petitioner sought release on a writ of habeas corpus. The court dismissed the writ and found that the petitioner did not enjoy "diplomatic immunity" from prosecution. See also on this point, *United States v. Melekh*, 190 F. Supp. 67 (S.D.N.Y. 1960).

22. 22 U.S.C. § 613(e) (1958).

23. 22 U.S.C. § 613(f) (1958).

24. 22 U.S.C. § 613(d) (1958). This exemption is also extended to the collection of funds and contributions within the United States to be used for medical aid and assistance or for food and clothing to relieve human suffering.

25. 22 U.S.C. § 614(a) (1958). This provision was not part of the original Act but was added by the amendments of 1942. *Supra* note 12.

26. 22 U.S.C. § 614(b) (1958). See also 28 C.F.R. §§ 5.402 and 5.403.

27. 22 U.S.C. § 615 (1958). See also 28 C.F.R. §§ 5.500 and 5.501.

28. 22 U.S.C. § 620 (1958).

29. 28 C.F.R. §§ 5.1 to 5.601.

Section 6 of the Act requires the Attorney General to retain one copy of all registration statements and statements concerning the distribution of political propaganda and to keep these statements available for public inspection.³⁰

Section 7 deals with the liability of officers and directors of an agent of a foreign principal. This section places the individual officers and directors under an obligation to see to it that the agent complies with the requirements of the Act. If the agent fails to comply with the Act "each of its officers . . . shall be subject to prosecution therefor," and the dissolution of any organization acting as an agent of a foreign principal does not relieve the officers and directors thereof of their obligation under this section.³¹ Also, it should be noted that in this instance, the regulations go somewhat beyond the scope of the Act and also require the officers, directors, partners, associates or employees of an agent to file an individual registration statement.³²

Section 8 provides that any person who "willfully violates any provision of this subchapter . . ." and is convicted thereof, shall be punished "by a fine of not more than \$10,000 or by imprisonment for not more than five years or both."³³ This section also permits the Postmaster General to declare items of political propaganda to be nonmailable under certain conditions.³⁴

Finally, section 11 requires the Attorney General "from time to time" to make reports to Congress concerning the administration of this subchapter including the nature, sources, and content of political propaganda disseminated or distributed . . ." by agents of foreign principals registered under the Act.³⁵

30. 22 U.S.C. § 616 (1958). See also 28 C.F.R. §§ 5.600 and 5.601.

31. 22 U.S.C. § 617 (1958). The provision placing a continuing obligation on the officers and directors even after dissolution of the agent was added by the amendment of 1950. *Supra* note 14.

32. 28 C.F.R. § 5.202. Under this regulation, unless otherwise determined by the Chief of the Registration Section, the individual officers, directors, partners, associates and employees can satisfy this obligation by filing a short form registration statement.

33. 22 U.S.C. § 618(a) (1958). See also § 618(b), which provides that in any proceeding under the Act in which it is charged that a person is an agent of a foreign principal, "proof of the specific identity of the foreign principal shall be permissible, but not necessary."

34. 22 U.S.C. § 618(d) (1958). The Postmaster General may declare the material to be nonmailable if he is informed in writing by the Secretary of State that the duly accredited diplomatic representative of an American Republic has made written representation to the Department of State that the admission of such circulation in the American Republic is prohibited by the laws thereof and has requested in writing that its transmittal thereto be stopped.

35. 22 U.S.C. § 621 (1958). Reports have been filed annually with the Congress since 1950. See 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 1963. (Apr. 1964) 1.

III.

CASE LAW

There has been very little case law developed under the Act.³⁶ There would appear to be at least two reasons for this. First, the original target of this legislation, i.e., the subversive agents and propagandists of pre-World War II days were covered by more specific subsequent legislation.³⁷ The second reason is the reluctance of the Justice Department to initiate a criminal proceeding, with its accompanying burden of proof of guilt beyond a reasonable doubt under a statute punishing only "willful" violations, except in the clearest of cases. The Justice Department's attitude toward this statute is summed up in the testimony of Attorney General Nicholas Katzenbach before the Senate Foreign Relations Committee:

Senator Sparkman. Do you not have any injunctive powers now in connection with this law? I assume if there is a clear violation of it, you do have, do you not?

Mr. Katzenbach. I think not, Senator. There have been a couple of instances of a declaratory judgment, but this is where the action is brought not by the Government but by a potential defendant, and he has the capacity to go into court and say that the Government is threatening him with a criminal prosecution if he does what he is entitled to do, and he can get a declaratory judgment on it. We do not have the same sort of power, and it is not normally possible to enjoin the commission of a crime. Normally your remedy is to prosecute for the crime when it is committed.

Senator Sparkman. Is it just prosecution or not?

Mr. Katzenbach. Pretty much in those terms. I quite sincerely believe, as I think I said when I testified before to this committee, that that choice of doing nothing in an unsatisfactory situation or prosecuting for a felony has led to some of the difficulties with enforcement which have come to the attention of this committee.³⁸

36. Research reveals only nine reported cases dealing with prosecutions under the Act, most of which are discussed herein. See also Note, Attorneys under the Foreign Agents Registration Act of 1938, 78 HARV. L. REV. 619 (1965), at 623, which states that only 31 indictments have been returned under the Act in its 26-year history. See also *In re Burch*, 73 Ohio App. 97, 54 N.E.2d 803 (1943), which involved a disbarment proceeding based in part on an attorney's conviction of a violation of the Act. On appeal the question was whether a violation of the Act constituted a crime involving moral turpitude under the Ohio disbarment statute. The court reversed the disbarment and held that the Act was a "political regulatory enactment which in no sense dealt with questions of morality."

37. *Supra* note 3.

38. Hearings on S. 2136 before the Senate Committee on Foreign Relations, 88th Cong., 1st Sess. 24-25 (1964) [hereinafter *1964 Hearings*]. See also 110 Cong. Rec. 15488 (daily ed. July 6, 1964).

A. *Early Prosecutions*

One of the first reported prosecutions under the Act is found in *United States v. Auhagen*.³⁹ While this opinion dealt primarily with a discovery problem, it did make it quite clear that the Act was not directed at the dissemination of foreign political propaganda itself, but at the activities of those engaged in the dissemination of such propaganda. Judge Letts said:

The dissemination of foreign political propaganda is not prohibited by statute and Congress did not intend to deprive citizens of the United States of political information even if such information be the propaganda of a foreign Government or foreign principal. Congress did intend to bring the activities of persons engaged in disseminating foreign political propaganda in this country out into the open and to make known to the Government and the American people the identity of any person who is engaged in such activities, the source of the propaganda and who is bearing the expense of its dissemination in the United States.⁴⁰

Another early prosecution is found in *U. S. v. Kelly*,⁴¹ in which the defendant was charged with failing to register as an agent for the Spanish Library of Information. The defendant was found guilty and the court denied his motion for judgment n.o.v. and for a new trial. The court found that the evidence supported the finding that the Spanish Library with which the defendant was connected was a "domestic organization subsidized . . . by a foreign government" within the meaning of the Act, even though the organization was brought about through the medium of one individual.⁴²

One other early prosecution is found in *U. S. v. German-American Vocational Language*.⁴³ In this case the defendants were convicted of a conspiracy to violate the Act. On appeal, the defendants argued that the Act (as originally passed in 1938) required registration only if there was an express contract between the agent and the foreign principal and since the defendants had no express contract, they could not be guilty of violating the Act. In a 2-1 opinion, the Court of Appeals for the Third Circuit rejected this argument and found nothing in the Act warranting the contention that it contemplated the registration only of those agencies created by an express contract. In so holding, the court said:

We find nothing in the McCormack Act as applicable to the present facts, warranting the contention that it contemplated only

39. 39 F. Supp. 590 (D.D.C. 1941).

40. *Id.* at 591. See also H.R. REP. No. 1381, 75th Cong., 1st Sess. 2 (1960).

41. 51 F. Supp. 362 (D.D.C. 1943).

42. *Id.* at 363.

43. 153 F.2d 860 (3d Cir. 1946), *cert. denied*, 329 U.S. 760 (1946).

agencies created by an express contract. 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 agreements containing that fact.⁴⁴

Judge Biggs in his dissenting opinion emphasized that a penal statute must be construed strictly and found that an express contract was required. Judge Biggs found confirmation of his views in the legislative history of the 1942 Amendments which, in his words, were "designed to cover situations in which a person serves as a propaganda agent for a foreign principal and subject to its direction but without an express contract of employment."⁴⁵

B. *Constitutional Issues*

The constitutionality of the Act has never been expressly passed on by the United States Supreme Court. However, it has withstood challenges on constitutional grounds in two federal district court cases. In *U. S. v. Peace Information Center*,⁴⁶ the defendant was charged with failing to register and its individual officers were also indicted for failing to cause the Center to register. Defendants moved to dismiss on the ground that the Act was unconstitutional. The court denied these motions.

The court first took up the question of whether the subject matter of the Act was within the legislative powers of Congress. On this point, it was found that the subject matter was within the regulatory powers of Congress, but that such a holding did not rest on strictly constitutional grounds. It was held that the power of Congress to legislate with respect to foreign relations did "not depend upon the affirmative grants of the Constitution. . . ."⁴⁷ The court said that the power to regulate foreign relations would have vested in the federal government "as one of the necessary concomitants of nationality. . ." even if it "had never been mentioned in the Constitution."⁴⁸ Judge Holtzoff in speaking for the court further stated:

It is a power that automatically passed from Great Britain to the United States as an entity, and not to the individual States, when the external sovereignty of Great Britain in respect to the colonies came to an end.

44. *Id.* at 864.

45. *Id.* at 867. Defendant's conviction was based on violations of the Act occurring prior to the 1942 amendments.

46. 97 F. Supp. 255 (D.D.C. 1951).

47. *Id.* at 260.

48. *Ibid.*

As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency — namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. * * * When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union.⁴⁹

Judge Holtzoff next took up the question of whether the Act transcended the limitations on the powers of Congress set forth in the first and fifth amendments of the Constitution of the United States.⁵⁰ In rejecting the argument that the Act violated the free speech guarantees of the first amendment, Judge Holtzoff said:

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.

The statute involved in the case at bar, paraphrasing the words of Mr. Justice Jackson, relates to practicing a vocation as an agent of a foreign principal, rather than to making a public speech.⁵¹

The defendants also challenged the constitutionality of the Act under both the self-incrimination and due process clauses of the fifth amendment. Finding no violation of the self-incrimination privilege, the court said:

The privilege against self-incrimination is, however, personal to the individual and may be either asserted or waived by him. It does not constitute a basis for invalidating a statute. For example, a corporation or an unincorporated association, such as the first named defendant in this case, does not possess the privilege and may not invoke it. . . .

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.⁵²

49. *Id.* at 259-60.

50. U.S. CONST. amends. I and V.

51. *United States v. Peace Information Center*, 97 F. Supp. 255, 262-63 (D.D.C. 1951).

52. *Id.* at 263. See also *United States v. Melekh*, 193 F. Supp. 586 (N.D. Ill. 1961), which also rejected the argument that the Act violated the constitutional privilege against self-incrimination.

Finally, the defendants objected to the Act on the ground that it was repugnant to the due process clause of the fifth amendment, in that its provisions were not sufficiently definite to establish an ascertainable standard of guilt. The court rejected this contention in the following words:

Undoubtedly, a criminal statute must define the crime. Otherwise, it is lacking in due process and hence is unconstitutional. The statute is, however, sufficiently precise. It requires the filing of a registration statement. Obviously, this provision is definite. The persons who are required to register are agents of foreign principals. A foreign principal is likewise defined. True, there may be borderline cases in which a person may have some doubt whether he is within the terms of the Act. This circumstance is not sufficient, however, to vitiate the law. It occurs in numerous statutes.⁵³

C. *United States Supreme Court Cases*

The Act has been before the United States Supreme Court on two occasions. The first occasion was in the case of *Viereck v. U. S.*⁵⁴ In this case the defendant was charged with violating the Act in willfully omitting material facts in three supplemental registrations. The activities which the defendant failed to disclose were clearly political but were pursued on his own behalf and not pursuant to his agency relationship with a foreign principal. The trial court instructed the jury that the proper construction of the Act and regulations required the registrant to reveal *all* of his political activities for the previous six months whether or not the activities were undertaken as agent for the foreign principal.⁵⁵ The jury found the defendant guilty.

Since the charge left the jury free to return a verdict of guilty if it found that the defendant had willfully failed to disclose activities which were carried on wholly on his own behalf, the conviction could be sustained only if the registrant was required to disclose such activities. The defendant argued that the Act did not require him to disclose

53. *Id.* at 263-64. See also Judge Vinson, Vinson's opinion in *Viereck v. United States*, 130 F.2d 945 (D.C. Cir. 1942), *cert. granted*, 317 U.S. 501 (1942), *rev'd and remd.*, 318 U.S. 236 (1943), in which the court discussed the definiteness of the Act in the following language:

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. There cannot be the slightest doubt that this defendant knew that the warning to disclose had been given. He also knew that he was skirting the line of demarcation in leaving unrevealed many of the things he did. Under such circumstances, one would be giving the outlaw more than the famous American sporting chance, if all possible doubts were to be resolved in favor of the defendant.

54. 318 U.S. 236 (1943).

55. *Viereck v. United States*, 130 F.2d 945, 946 (D.C. Cir. 1942), *cert. granted*, 317 U.S. 501 (1942), *rev'd and remd.*, 318 U.S. 236 (1943).

political activities pursued on his own behalf. In support of this argument, the defendant stressed the fact that the Act was amended in 1942 to make it explicit that the registration requirements extended to all of the agent's activities.⁵⁶

The Court of Appeals for the District of Columbia in a comprehensive opinion by then Judge Vinson rejected the defendant's argument and found that the 1942 amendment did not add anything to the original act in this regard, but was "merely declaratory" of existing law.⁵⁷ Judge Vinson, speaking for the court, said:

We interpret the regulation to mean that all political activities of an agent, whether they are done as a part of his agency or on his own, shall be fully disclosed.

It is true that the 1942 Act is more definite The defendant stresses this 1942 Act and argues that the fact that the 1938 Act, as amended in 1939, fails to make this point or make it so definitely and explicitly, is conclusive proof that such a point was not within the intentment of the earlier Act. In fact, this argument is made so often and so fervently that one wonders what defendant would have done if there had been no 1942 Act. While there is some force in subsequent legislative history to show what earlier Acts covered, a certain amount of wariness must prevail. There is a chance that a later Act merely provided the same as an earlier in better language, or as may be the case here, the later statute may have directed that a detailed statement of activities in the registrant's own behalf be made, whereas the earlier Act authorized the Secretary to make the requirement. The fact that a certain provision is better said or is changed to a requirement rather than an authorization is not conclusive proof that it was never in the first Act, as defendant in practical substance contends.⁵⁸

The United States Supreme Court, in a 5 to 2 decision, reversed the Court of Appeals and remanded for a new trial holding that the Act (prior to the 1942 amendments) did not require the defendant to disclose political activities conducted on his own behalf, but only those activities engaged in on behalf of his foreign principal. Justice Jackson speaking for the majority, said:

While Congress undoubtedly had a general purpose to regulate agents of foreign principals in the public interest by directing them to register and furnish such information as the Act prescribed, we cannot add to its provisions other requirements merely because

56. *Id.* at 958.

57. S. REP. No. 913, 77th Cong., 1st Sess.

58. *Viereck v. United States*, 130 F.2d 945, 951, 958 (D.C. Cir. 1942), *cert. granted*, 317 U.S. 501 (1942), *rev'd and remd.*, 318 U.S. 236 (1943).

we think they might more successfully have effectuated that purpose. And we find nothing in the legislative history of the Act to indicate that anyone concerned in its adoption had any thought of requiring, or authorizing the Secretary to require, more than a statement of registrants' activities in behalf of their foreign principals.⁵⁹

Justice Black in his dissent, in which Justice Douglas concurred, would have sustained the conviction on the basis of the reasoning of the Court of Appeals that the 1942 amendment was merely declaratory of existing law and did not add any new requirements to the original Act of 1938.⁶⁰

Recently, the Act was once again before the United States Supreme Court in the case of *Rabinowitz v. Kennedy*.⁶¹ In this case, the attorneys who represented the Republic of Cuba in legal matters, including litigation,⁶² brought an action against the United States Attorney General seeking a declaratory judgment that their activities did not subject them to the registration requirements of the Act. The District Court denied the Attorney General's motion for judgment on the pleadings, but certified to the Court of Appeals for the District of Columbia the question of whether persons requested to register under the Act may have their rights adjudicated by a declaratory judgment suit.⁶³

The Court of Appeals for the District of Columbia, noting that the petitioners did not challenge the constitutionality of the Act, held, with one judge dissenting, that the "doctrine of sovereign immunity required that the case be dismissed as an unconsented suit against the United States."⁶⁴

On certiorari, the Supreme Court, without discussing the sovereign immunity question, affirmed the Court of Appeals in a unanimous decision by Justice Goldberg and held that the Act required registration by the attorneys. In so holding, Justice Goldberg said:

The Foreign Agents Registration Act was first enacted by Congress on June 8, 1938. It required agents of foreign principals to register with the Secretary of State Exempted from the definition of "agent of a foreign principal" was "a person, other than a public relations counsel, or publicity agent, performing *only private, nonpolitical, financial, mercantile, or other activities* in furtherance of the bona fide trade or commerce of such foreign

59. *Viereck v. United States*, 318 U.S. 236, 243-44 (1943).

60. *Id.* at 252.

61. *Rabinowitz v. Kennedy*, 376 U.S. 605 (1964).

62. The Plaintiffs in the *Rabinowitz* case represented the Republic of Cuba in the case of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

63. The district court certified the question to the Court of Appeals under the provisions of 28 U.S.C.A., § 1292(b).

64. *Kennedy v. Rabinowitz*, 318 F.2d 181, 183 (D.C. Cir. 1963).

principal.” (Emphasis added.) 52 Stat. 631, 632. In 1961, the exemption section was amended to apply to persons “engaging or agreeing to engage *only in private and nonpolitical financial or mercantile activities* in furtherance of the bona fide trade or commerce of such foreign principal. . . .”

Although the work of a lawyer in litigating for a foreign government might be regarded as “*private and nonpolitical*” activity, it cannot properly be characterized as only “*financial or mercantile*” activity. It is clear from the statute and its history that “financial or mercantile” activity was intended to describe conduct of the ordinary private commercial character usually associated with those terms. See, e.g., S. Rep. No. 1783, 75th Cong. 2d Sess. Furthermore, although the interest of a government in litigation might be labeled “financial or mercantile,” it cannot be deemed only “private and nonpolitical.” Since an attorney may not qualify for exemption “if any one of these characteristics is lacking,” it would be impossible to conclude, under any construction of the statute, that petitioners are engaging “only in private and nonpolitical financial or mercantile activities.”

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.⁶⁵

It is also interesting to note that in this case, the attorneys argued that if they were required to register under the Act, that it would be necessary for them, in order to properly complete the registration forms, to make public disclosure, not only of their relationship with the foreign principal, but of numerous private, personal and business affairs unconnected with their representation of the Republic of Cuba.

The Court rejected this argument in the following language:

In concluding that petitioners must register, we do not suggest that they may be required to answer all the questions in the registration forms. The Government says that some of the questions are “clearly inapplicable” to petitioners, that others may satisfactorily be answered in conclusory language, and that others, while “framed in general terms” may satisfactorily be answered by disclosing only those facts which “bear a reasonable relationship to the representation of the foreign principal.”⁶⁶

65. *Rabinowitz v. Kennedy*, 376 U.S. 605, 608–10 (1964).

66. *Id.* at 610. The Court also noted that the regulations of the Justice Department clearly provided that “if compliance with any requirement were printed on the registration forms themselves” and clearly stated that “if compliance with any requirement of the form appears in any particular case to be inappropriate or unduly burdensome, the registrant may apply for complete or partial waiver of the requirement.” See 28 C.F.R. § 5.201.

The *Rabinowitz* case involved the basic exemption section of the Act and this exemption is also changed by the proposed amendments to the Act introduced by Senators Fulbright and Hickenlooper in the last Congress and just recently in the present Congress by Representative Celler.⁶⁷ Thus, the case affords a convenient starting point for a discussion of these proposed amendments.

IV.

PROPOSED AMENDMENTS

A. *Background*

Since World War II, and particularly since the end of the Korean War, United States overseas commitments in the political, military, and economic sphere have grown markedly.⁶⁸ Simultaneously with the increase in United States overseas commitments, foreign governments, along with foreign political and commercial interests, have become more active in attempting to influence the direction of United States policies. In place of the foreign agent of the pre-World War II days, we now have "the lawyer-lobbyist and the public relations counsel whose object no longer is to subvert or overthrow the United States government, but rather to influence its policies to the satisfaction of his particular client."⁶⁹

This increase in the tempo of activity outside of the normal diplomatic channels, has not gone unnoticed by the Congress, and in the Spring of 1961, the staff of the Senate Committee on Foreign Relations began a preliminary investigation into the nondiplomatic activities of representatives of foreign governments.⁷⁰

This preliminary study formed the basis of Senate Resolution 362 which authorized "a full and complete study of all diplomatic activities of representatives of foreign governments and their contractors and agents in promoting the interests of those governments and the extent to which such representatives attempt to influence the policies of the United States and affect the national interest."⁷¹

In March, 1963, the Senate approved Senate Resolution 26 which authorized the continuation of the study and expanded it to include the activities of agents with nongovernmental foreign principals.⁷²

67. *Supra* note 5.

68. One example of this type of commitment is found in the Foreign Assistance Act of 1961, 22 U.S.C. §§ 2181-184. See also Armstrong, *The United States Government's Investment Guaranty Program*, 20 BUS. LAW. 27 (1964).

69. S. REP. No. 875, 88th Cong., 2d Sess. 4 (1964).

70. *Id.* at 2. See also 110 CONG. REC. 15487 (daily ed. July 6, 1964) (remarks of Senator Fulbright).

71. S. RES. 362, 87th Cong., 2d Sess. (1963).

72. S. RES. 26, 88th Cong., 1st Sess. (1964).

The result of this investigation which covered a period of almost three years and included numerous public hearings by the Senate Committee on Foreign Relations and many executive sessions, was the introduction of various proposed amendments to the Act by Senators Fulbright and Hickenlooper.⁷³ After considerable debate on the Senate floor, the proposed amendments were passed by the Senate and referred to the House Judiciary Committee.⁷⁴ No action was taken in the House on the bill prior to the adjournment of the 88th Congress. However, new bills which are identical to the bill previously passed were again introduced in the Senate and also in the House of Representatives early in the first session of the 89th Congress.⁷⁵

B. *Summary of Proposed Amendments*

One of the most important changes included in the proposed amendments to the Act is the grant to the Attorney General of the power to seek injunctions in the federal district courts to restrain violations of the Act.⁷⁶ The injunctive remedy is in addition to and not in replacement of the present criminal sanctions.

In the hearings before the Senate Foreign Relations Committee, it was brought out quite clearly that one of the reasons for the lack of enforcement of the Act was the severity of the criminal sanction.⁷⁷ The grant to the Attorney General of the power to seek injunction to restrain violations would most certainly result in increased enforcement activity on the part of the Justice Department since it would give the Department the option of enforcing the Act in a criminal proceeding or by seeking an injunction in a civil proceeding.

S.2136 would also make some changes in existing definitions found in the Act and also add some new definitions. It would also change the commercial exemption which was at issue in the *Rabinowitz* case.⁷⁸ These changes in the definitions and in the commercial exemption are closely related and they must be considered together in order to properly appreciate their possible effect on existing law.

(1) New Definitions —

“Political Activities” and “Political Consultant”

Under existing law the mere existence of an agency relationship with a foreign principal is sufficient to require registration by the agent

73. *Supra* note 5. S. 2136 was introduced on Sept. 10, 1963.

74. S. 2136 was passed on July 6, 1964, and referred to the House of Representatives on July 20, 1964.

75. H.R. 290 and S. 693, 89th Cong., 1st Sess. (1965).

76. S. 2136, 88th Cong., 2d Sess. § 7 (1964).

77. 1964 *Hearings*, *supra* note 38.

78. *Supra* note 76, at §§ 1 and 3.

unless the agent is covered by one of the exemptions. At first glance, the changes made in the definitions of the terms "foreign principal" and "agent of a foreign principal" would appear to narrow the scope of the Act, since the new definitions require a showing not only of a foreign connection, but of the performance of certain activities of a political nature. For example, the new definition of "agent of a foreign principal" omits the word "attorney" from the list of the various types of relationships included in the definitions.⁷⁹ However, the addition of two new exceedingly broad definitions of the terms "political activities" and "political consultant" raises some question concerning the effect of these amendments.⁸⁰ The all inclusive nature of these new definitions seems to create the possibility of the inclusion within the ambit of the Act of many legitimate business activities not previously covered.

Under the proposed amendments, the term "political activities" would be added to the Act and defined as follows :

(o) The term "political activities" includes 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 other person or any section of the public within the United States with reference to the political or public interests, policies, or relations or a government of a foreign country, or a foreign political party or with reference to the *domestic* or foreign policies of the United States.⁸¹

The amendments would also add the term "political consultant" which would be defined as follows :

(p) The term "political consultant" means any person, including, without limitation, any economic, *legal* or other consultant, who engages in informing or advising any person with reference to the political or public interests, policies or relations of a foreign country or of a foreign political party or with reference to the *domestic* or foreign policies of the United States.⁸²

Serious concern with the all encompassing nature of these definitions was expressed in the hearings before the Senate Foreign Relations Committee, and also in the debate on the Senate floor.⁸³ Senator Javits, while agreeing with the necessity for legislative change in this area,

79. *Supra* note 76, at §§ 1(1) and (2). See also S. Rep. No. 875, *supra* note 69, at 6-7.

80. *Supra* note 76, § 1(5).

81. *Ibid.* See also S. REP. No. 875, *supra* note 69, at 19.

82. *Ibid.*

83. See testimony of Mr. Arthur Dean, *supra* note 38, at 43-56. See also 110 CONG. REC. 15489-95 (daily ed. July 6, 1964) (remarks of Senators Fulbright and Javits).

expressed concern that the changes which were designed to catch felons might also catch many innocent victims engaged in the pursuit of legitimate business activities, and that the net effect of these broad definitions might be the nullification of the commercial exemption granted by §3(d).⁸⁴

The Senator from New York introduced into the record about ten instances of typical situations involving United States companies and their foreign subsidiaries⁸⁵ or foreign companies and their United States subsidiaries, which conceivably would be brought within the scope of the registration requirements of the Act.⁸⁶ Senator Fulbright reviewed each of the examples given and was of the opinion that practically all of them would fall within the commercial exemption, and rejected Senator Javits' proposal to amend the bill to provide a generic exemption for companies and businesses "substantially owned in the United States."⁸⁷ In rejecting this proposed amendment, Senator Fulbright said he "would rather have no bill than provide an exemption on the basis of relationships rather than on the basis of the kinds of activities involved."⁸⁸

The result of this debate was a compromise amendment in §3(d) providing an additional exemption for those "other activities not serving predominantly a foreign interest." Thus, under S.2136 the § 3(d) ex-

84. See 110 CONG. REC. 15489-90 (daily ed. July 6, 1964) (remarks of Senator Javits).

85. For a great variety of reasons, legal and practical, many United States companies doing business abroad are required to conduct their operations through corporations incorporated in the country in which they are doing business. It also should be noted that in many cases, the foreign government has an equitable interest along with the United States company in the foreign corporations.

86. See 110 CONG. REC. 15490-91 (daily ed. July 6, 1964). Among the examples cited by Senator Javits were the following:

The U.S. oil companies' international operations would like the Interior Department to increase the import tax on residual fuel oil. Among the major beneficiaries would be its subsidiary in Venezuela, where production would be increased. Nevertheless, a great beneficiary would also be the American company concerned.

Another example is an automobile company which has a German subsidiary which assembles and markets cars in Europe. The Germans propose a tax on horsepower, which would have the effect of discriminating against cars of the type handled by subsidiaries of U.S. companies, but would benefit smaller German cars. The parent company wishes to discuss the subject with the State Department. That is, an American company seeking to discuss the question with the State Department, so that the State Department might intervene to prevent a subsidiary of the American company from being discriminated against.

A Brazilian subsidiary of a U.S. utility is threatened with expropriation or with unfair competition from a government-owned company. The parent wants to familiarize the executive branch and the Congress with this situation.

An American cosmetics company, with a French subsidiary which manufactures perfume, wants to testify in behalf of lower U.S. excise taxes on cosmetics. If the excise tax were lowered, a principal beneficiary would be the French perfume subsidiary, whose production would increase.

87. See 110 CONG. REC., *supra* note 86, at 15491-92. Senator Javits' proposal to have exempted companies which were at least 80% owned as of record by citizens of the U.S. and which were regularly engaged in bona fide commerce, industry or finance.

88. See 110 CONG. REC. 15492 (daily ed. July 6, 1964).

emption would be applicable to "private and nonpolitical activities in furtherance of the bona fide trade or commerce of such foreign principal or other activities not serving a predominantly foreign interest."⁸⁹ It is interesting to note that the effect of this compromise amendment is to restore to §3(d) essentially the same language that was removed by the amendment of 1961.⁹⁰

In sponsoring this amendment, Senator Javits expressed the hope that the inclusion of this additional standard and the discussion of the specific examples of the type of activity which he and Senator Fulbright agreed should not be covered by the Act would furnish the Attorney General with some helpful guidelines for administering the law.⁹¹

(2) *Effect on the Rabinowitz Decision*

Section 3(d) of the Act in its present form clearly states that in order to be exempt, an activity must be either "private and nonpolitical and financial" or "private and nonpolitical and mercantile."⁹²

In the *Rabinowitz* decision, the Court found that while the work of a lawyer representing a foreign government in litigation was certainly private and nonpolitical, it could not properly be characterized as financial or mercantile. Thus, the Court held that the petitioners were subject to registration under the Act.⁹³

Under the proposed amendments, the words "financial or mercantile" would be stricken from §3(d) of the Act.⁹⁴ The Senate Report and the Congressional Record, without specifically referring to the *Rabinowitz* case,⁹⁵ make it quite clear that the intent of this amendment is to exempt all private and nonpolitical activities "even though they may not be financial or mercantile."⁹⁶ Thus, it seems fairly clear that the amendments to §3(d) viewed by themselves would have the effect of overruling the *Rabinowitz* decision. However, when these amendments to §3(d) are considered together with the changed definition of "agent of foreign principal" and the new definitions of the terms "polit-

89. *Supra* note 76, at § 3.

90. *Supra* note 88, at 15499. See also S. 2136, *supra* note 76, at § 3. The 1961 Amendment substituted the words "private and nonpolitical, financial or mercantile activities in furtherance of bona fide trade or commerce" for "private, nonpolitical, financial, mercantile or other activities in furtherance of bona fide trade or commerce."

91. See 110 CONG. REC. 15498-99 (daily ed. July 6, 1964) (remarks of Senator Javits).

92. S. REP. NO. 1061 and H.R. REP. NO. 246, 87th Cong., 1st Sess. (1963).

93. *Supra* note 61.

94. *Supra* note 76, at § 3.

95. The Senate Report was issued on February 21, 1964, and the United States Supreme Court decision in this case was not handed down until March 30, 1964. Thus, there was no occasion to mention the *Rabinowitz* decision. The application of the commercial exemption granted in § 3(d) was not treated in the Court of Appeals decision.

96. S. REP. NO. 875, *supra* note 69, at 11, and 110 CONG. REC., *supra* note 88, at 15490.

ical activities" and "political consultant," there is considerable doubt regarding the status of the *Rabinowitz* decision.

The definition of the term "agent of a foreign principal" specifically makes representation of a "foreign principal before any agency or official of the government of the United States . . ." subject to registration.⁹⁷ This would seemingly include an attorney's representation of a foreign principal before the federal courts or any of the various federal regulatory agencies. Also, the new term "political consultant" clearly covers a lawyer who informs or advises any person with reference to the "domestic or foreign policies of the United States."⁹⁸ It is difficult to conceive how an attorney could engage in the type of activity involved in the *Rabinowitz* case or in the general counselling of any substantial foreign interest without at some time advising his client regarding the "domestic or foreign policies of the United States." Thus, the mere rendering of what would normally constitute legal advice concerning almost any aspect of the United States law or the myriad of rules and regulations issued by our various federal regulatory agencies might require an attorney to register under the Act.

Of course, it may be argued that the picture is not as bleak as painted above, since the lawyer could look to the exemption granted by §3(d), which under the proposed amendments is broadened by the elimination of the words "financial or mercantile." However, such an agreement begs the real question, for the exemption under §3(d) is limited to "private and nonpolitical activities" and the new term "political activities" is most sweepingly defined to include any activity designed to "persuade or in any other way influence any other person . . . with reference to the domestic or foreign policies of the United States."⁹⁹ Thus, the broad definitions of the terms "political activities" and "political consultant" seem to leave little room for the application of the §3(d) exemption to the lawyer counselling foreign interests. Consider the case of an attorney called upon to represent a foreign company in a United States tax matter who seeks an informal conference with the Internal Revenue Service to discuss the application to his client of a particular code section or a proposed regulation. Is the attorney engaging in this activity attempting to "persuade or influence . . . any person regarding the foreign or domestic policies of the United States"?¹⁰⁰

97. *Supra* note 76, at § 1(2).

98. *Supra* note 80.

99. *Ibid.*

100. 1964 *Hearings*, *supra* note 38, at 47-48, where Mr. Arthur Dean testified: All Federal statutes and rules and regulations of administrative agencies thereunder would seem to me to be manifestations of the policies of the United States — for these are certainly the principal ways in which at least the internal policies of our Nation are given expression by the Congress or by the regulatory agencies

The words "domestic policies" found in the new definitions of "political activities" and "political consultant" are new to the Act and have added a new dimension to it. Their introduction into the Act would also seem to add confusion to the administration of it, particularly in the area of the dissemination of political propaganda. The term "political propaganda" has been part of the Act since its original passage, and it makes no reference to United States domestic policies but refers only to those communications or expressions designed to influence "the foreign policies of the United States."¹⁰¹

Finally, there would also appear to be some question regarding the general availability of the commercial exemption granted by §3(d) to the lawyer who is called upon to counsel a foreign individual not engaged in "bona fide trade or commerce" who seeks advice regarding the United States Immigration and Naturalization Laws. This question might also be presented to the lawyer counselling a foreign embassy or other agency of a foreign government. Does not the very nature of the sovereign client preclude the availability of the § 3(d) exemption, which is limited to "private and nonpolitical activities in furtherance of bona fide trade or commerce"?¹⁰²

CONCLUSION

The rapid increase in United States overseas commitments in the last two decades — particularly in the field of economic aid — furnishes ample justification for a fresh review of the purpose and scope of the Federal Agents Registration Act. The need for some change in our approach to this law seems to have been well demonstrated by the findings of the Foreign Relations Committee of the United States Senate. However, it is questionable whether the hearings and findings of the Senate Foreign Relations Committee have shown any real need for broad changes in the Act itself, particularly the addition of the broad new definitions of "political activities" and "political consultant." Certainly, the hearings demonstrated a need for improved enforcement of the Act by the Department of Justice and the inclusion of the new au-

set up by the Congress. Thus merely rendering legal advice to a foreign client concerning almost any aspect of U.S. law might require a lawyer to register as an agent of a foreign principal, unless his activity can be said to come within the so-called commercial exemption spelled out in section 3(d) of the act, and this has been made somewhat cloudy by the amendment to the act put through in 1961.

101. 22 U.S.C. § 611(j) (1958).

102. 1964 *Hearings*, *supra* note 38, at 48. See also *Rabinowitz v. Kennedy*, 376 U.S. 605, 609 (1964), where the Court said:

Furthermore, although the interest of a government in litigation might be labeled "financial or mercantile," it cannot be deemed only "private and non-political."

thorization to the Department of Justice to seek injunctive relief against violations of the Act is a most desirable addition to this legislation. The elimination of the words "financial or mercantile" from §3(d) and the restoration of this section to its pre-1961 status should also prove to be a salutary change.

However, the interplay of the new broad definitions of the terms "political activities" and "political consultant" with the existing definition of "political propaganda" and the amendments to the §3(d) exemption section have introduced an undesirable element of uncertainty into the Act which can serve only to confuse the administration of it. While the debate on the Senate floor between Senators Javits and Fulbright should be most helpful in alleviating some of the fears expressed before the Senate Foreign Relations Committee, in the final analysis the administration of this broadly worded Act will, in the words of Senator Javits, require the application by the Attorney General of "good common sense and accommodation to the activities of the American business world."¹⁰³

103. See 110 CONG. REC. 15499 (daily ed. July 6, 1964).