

# Debevoise National Security Update: D.C. Circuit Weighs in on When FARA's Registration Duty Ends in *Attorney General v. Wynn*

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On June 14, 2024 the D.C. Circuit released its much-anticipated opinion in *Attorney General v. Wynn*, holding that the Department of Justice (“DOJ”) could not compel Steve Wynn to retroactively register as a foreign agent under the Foreign Agents Registration Act (“FARA”).<sup>1</sup> As the Court explained, FARA aims to “protect the national defense, internal security, and foreign relations of the United States” by requiring public disclosure of foreign efforts to influence U.S. policy. The Act requires “agents of a foreign principal” to register as such. In mid-2017, Wynn allegedly agreed to ask the Trump Administration to expel a Chinese businessman on behalf of the People’s Republic of China. Wynn raised the issue with the President and others but by October 2017 informed a senior Chinese official that he had tried but could not help any further. The following year, Wynn received a letter from the DOJ’s National Security Division advising him to register as a foreign agent. Wynn refused and DOJ eventually sued Wynn seeking a civil injunction requiring him to register as a foreign agent. Last year, the district court dismissed the complaint because D.C. Circuit precedent made clear that FARA’s civil registration requirement expired when Wynn’s agency relationship with China ended in 2017.

**D.C. Circuit Disallows Retroactive Injunctions under FARA.** As the Court explained, Wynn’s case was not the first attempt by DOJ to retroactively enforce FARA. Back in 1987, in *United States v. McGoff*, the D.C. Circuit considered whether criminal charges could be filed for non-registration under FARA long after the agency relationship had ceased.<sup>2</sup> McGoff was a businessman, surreptitiously working as an agent of the South African government from 1974 to 1979, but DOJ filed criminal charges under FARA in 1986. Given FARA’s five-year statute of limitations, the DOJ’s ability to prosecute depended on whether FARA’s registration requirement expired once McGoff stopped working on behalf of South Africa. The court held that an individual’s obligation to register under FARA expires at the time the individual ceases working as a foreign agent, placing the criminal charges against McGoff beyond the statute of limitations. Judge

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<sup>1</sup> *Attorney Gen. of United States v. Wynn*, 2024 WL 2983869 (D.C. Cir. June 14, 2024).

<sup>2</sup> *U.S. v. McGoff*, 831 F.2d 1071 (D.C. Cir. 1987).

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Bork dissented, correctly positing that the majority's reading would significantly curtail the government's ability to enforce FARA.

Finding that it was bound by the *McGoff* court, the *Wynn* court held that an agent working on behalf of a foreign principal does not have a continuing statutory obligation to register under FARA once his representation has ended. Put another way, the court held that the obligation to register under FARA expires the day an individual stops working as a foreign agent. DOJ has not yet filed a petition for rehearing *en banc*, but this holding forecloses retroactive injunctive relief for individuals who never registered but have since stopped working as foreign agents, leaving only criminal prosecution as a remedy for the DOJ's National Security Division.<sup>3</sup>

**The Future of FARA.** Prior to the *Wynn* opinion, DOJ had advocated various reforms to FARA. Among other requests, it asked Congress to grant DOJ authority to issue civil investigative demands under FARA; allow DOJ to issue civil penalties for FARA violations as a "middle path" of enforcement; eliminate the exemption to file under FARA for lobbyists who register under the Lobbying Disclosure Act; and pass a "*McGoff* fix" to make clear that an agent must register and comply with FARA's requirements covering the period of an agency relationship, even where the agency relationship has ended.<sup>4</sup>

Following the district court's dismissal of the *Wynn* case, a bipartisan and bicameral collection of Senators and Members of Congress moved to clarify that FARA's registration obligation continues after the termination of the agency relationship by introducing the Retroactive Foreign Agents Registration Act.<sup>5</sup> However, the bill has failed to reach a hearing in either chamber and has since stalled. Notwithstanding these challenges, DOJ has increased enforcement in recent years. In 2023, the FARA Unit conducted 25 inspections, which is the highest number since 1985. This increase is part of an upward trend in FARA activity and coincides with the DOJ's recent focus on corporate compliance in matters of national security.<sup>6</sup>

Though inspections have increased, DOJ has recently had several high-profile acquittals on FARA charges brought against Trump and Obama-administration affiliates.<sup>7</sup> DOJ has

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<sup>3</sup> 22 U.S.C. § 618(a).

<sup>4</sup> Eun Young, Deputy Assistant Attorney General, Department of Justice, Keynote Address at 5th National Forum on Foreign Agents Registration Act (Dec. 1, 2023).

<sup>5</sup> S. 2229, 118<sup>th</sup> Cong. (2023); H.R. 4545, 118<sup>th</sup> Cong. (2023).

<sup>6</sup> See Eun Young, Deputy Assistant Attorney General, Department of Justice, Keynote Address at 5th National Forum on Foreign Agents Registration Act (Dec. 1, 2023).

<sup>7</sup> Luc Cohen, *Trump Ally Barrack Acquitted of Acting as UAE Foreign Agent*, Reuters, Nov. 4, 2022, <https://www.reuters.com/legal/trump-ally-barrack-acquitted-acting-uae-foreign-agent-2022-11-04/>; Rachel Weiner, *Justice Department Drops Case Against Michael Flynn's Business Partner*, Wash. Post, Sept. 11, 2023, <https://www.washingtonpost.com/dc-md-va/2023/09/11/michael-flynn-bijan-rafiqian-turkey-charges->

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also recently employed a creative alternative to FARA enforcement in the form of deferred prosecution agreements (DPAs), a tool usually reserved for corporate criminal investigations. In two cases against individuals covertly lobbying for a foreign government, DOJ deferred prosecution when the individuals admitted to failing to register under FARA, paid significant fines, agreed not to engage in any FARA-registrable conduct, and retroactively registered under FARA.<sup>8</sup> Without an *en banc* reversal of the *Wynn* decision or congressional intervention to permit retroactive injunctive relief, DPAs could become a popular tool for DOJ to resolve retroactive FARA violations.

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Please do not hesitate to contact us with any questions.



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<sup>8</sup> Eun Young, Deputy Assistant Attorney General, Department of Justice, Keynote Address at 5th National Forum on Foreign Agents Registration Act (Dec. 1, 2023).

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