TORRES TRADE LAW
INTERNATIONAL TRADE & NATIONAL SECURITY

# Episode 10- FARA Part 1

**Olga Torres:** My name is Olga Torres and I'm the Founder and Managing Member of Torres Trade Law, a national security and national trade law firm. Today, we're joined by David. Laufman, a former Chief of the Counterintelligence and Export Control section, "CES," in the National Security division at the Department of Justice. Where he supervised the investigation and prosecution of cases affecting national security, foreign relations, and the export of military and sensitive technologies. Today we are going to be discussing a lot of very interesting information including FARA, the Foreign Agents Registration Act, which is seeing a renaissance of enforcement by DOJ. And David has very good information at the forefront of reform efforts. He submitted comments to the Agency, and he's involved in a task force with the ABA, and obviously from his time at DOJ, he can share some information with us. And obviously we are also going to get into export controls and economic sanctions enforcement cases and some of the high-profile cases, where David was supervising and overseeing the enforcement of. For example, a few things that come to mind, ZTE enforcement. I'm sure he will have a lot of very, very good and detailed information to share with us.

And I do want to apologize before we get started, for some of you who are maybe wanting to watch our videos. We typically have the audio along with the video, this time we are having a bit of technical difficulties. And rather than postpone the podcast we decided that we would just hold the podcast and transmit via audio only. Having said that we will be available to answer any questions you may have. Typically, during our videos, we have definitions of acronyms, we have links to websites. So, we will try to give you information, as much as we can without using the video. But if not, feel free to contact me or David direct with any questions you may have on any of the discussions, of any of the items we are discussing today. We apologize for the inconvenience, thank you. And thanks for tuning in. Welcome David.

**David Laufman:** Happy to be with you Olga.

**Olga Torres:** I saw in your bio that you're from Houston, is that right?

**David Laufman:** That's right.

**Olga Torres:** Well, , we, we like you even more now. I'm based out of Dallas, Texas, and we have an office in Washington, but I spend a lot of my time obviously in, in Dallas. So, it is always fun to have a fellow Texan on with us.

**David Laufman:** Indeed, as long as you're not a Cowboys fan, we'll be okay.

**Olga Torres:** Oh, well, you just took all your points away. What's your team?

**David Laufman:** I remain an unrepentant, stalwart Houston Astros fan. So, I'm focused on baseball right now.

**Olga Torres:** Oh, okay, okay. So,  , you get, you, you just got some points back. Can you give us a little bit of background on how you ended up at DOJ and sort of your background as an attorney and your focus currently? I know you're in private practice, so, if you can tell us more about the work that you do and your background generally.

**David Laufman:** Well, I have had a somewhat uncharacteristically vagabond, zigzagging career as an attorney in Washington, DC over my 30-40 plus years in Washington now. I began my career at the Central Intelligence Agency as a young, all-source analyst before leaving to go to law school to Georgetown. And since then, I have toggled back and forth between private law practice and government. Most of my career has been spent in government service and public service, and most of that at the Department of Justice in different positions. I spent some time at the highest levels of the department in 2001 through 2003, as Chief of Staff to the Deputy Attorney General, who's the second in command of the Justice Department. And was in that capacity on 9/11 and in the years to come, helping to oversee the havoc brought by the 9/11 attacks and the Department's responses to them. After a considerable period in that job, I left to become an Assistant U.S. attorney, a line federal prosecutor in the U.S. Attorney's Office for the Eastern district of Virginia and Alexandria, where I mostly prosecuted terrorism-related cases in the post-9/11 era. As well as some other technology transfer and other espionage-related cases.

I've also spent time in the Fraud Section of the Criminal Division, prosecuting Iraq-related procurement in fraud cases during the U.S. military presence in Iraq, working for the Special Inspector General for Iraq Reconstruction on a detail to the Fraud Section. And then I was lured back to the Department after running my own law practice to come and serve as Chief of the Counterintelligence and Export Control Section, which historically had been known as the Counter Espionage Section in late 2014. And on top of all the sort of day-to-day areas of responsibility that you detailed Olga in your intro, including oversight over the department's national program for investigating and prosecuting export control in sanctions cases and building a FARA enforcement program, I wound up having to oversee a couple of 500-year flood type matters, which were the investigation into Hillary Clinton's use of a private server to

engage in email communications, and then we segued directly into the sensitive counterintelligence investigation regarding Russian interference in the 2016 election and was helping to oversee that until Special Counsel Robert Mueller was appointed.

So that's a thumbnail sketch of my background. I left the Department, wistfully in early 2018. I felt I had given as much as I had to give. I wanted to kind of recalibrate as best I can in Washington, DC, the so-called work life balance. And, I can't say I've always pulled it off, but I've had a great experience at Wiggin and Dana, working on a wide range of matters: export control and sanctions cases, congressional investigations. I recently represented the two Capitol police officers, Harry Dunn and Aquilino Gonel in their testimony before the House Select Committee on January 6th, back in July of 2021. That was extremely meaningful representation to me. And my practice consists of a great deal of FARA compliance and investigative defense matters.

**Olga Torres:** That's really interesting. Your background is really amazing. And you probably have so many good stories to share in terms of some of the latest and in high profile work that you've done. It's very, very interesting. In terms of the Foreign Agents Registration Act and a lot of people, a lot of listeners may not be as familiar with it, but in a nutshell, for persons in the U.S. that want to let's say represent foreign governments or to change U.S. policy, you have to register, there are requirements that you register with the Department of Justice. And you're not prohibited from doing that, right? Think of, an example, a lobbyist working for the Chinese government to change some U.S. policy. You're not obviously prohibited from doing that, but you have to have this registration and we've had a bit of a renaissance in the sense that for many years, we just didn't hear much about enforcement of this particular statute. Recently, and I think, correct me if I'm wrong, David, but I think a lot of it started after the Russia meddling with the U.S. election. Right?

**David Laufman:** First I think your listeners will be interested to know that this is a law that has been on the book since the late 1930s. The Foreign Agents Registration Act was enacted in 1938 specifically in response to both covert and overt activities by Nazi Germany and the Soviet Union in the United States.

It has been amended several times since then, most recently in about 1995 were the last really substantive amendments. But in large, part owing to how old the statute is, it is somewhat antiquated and cumbersome and outdated in much of the terminology it uses, some key definitions, and is plagued by a certain degree of vagueness in certain key provisions. And it is why the American Bar Association decided to establish a task force to evaluate potential reforms to

FARA, which I was privileged to co-chair and we produced a comprehensive report several months ago recommending several reforms to FARA. I mean, you're right that this is a law that does not regulate speech insofar as it doesn't prohibit any speech or conduct, even if it's lobbying conduct provided that applicable registration or disclosure requirements are satisfied. I mean, the way FARA works, in a nutshell, is that if you're acting within the United States as what is defined as an agent of a foreign principle and you are engaged in certain types of covered activity, then you have to register with the Department of Justice within 10 days of even agreeing to perform registerable work, unless you qualify for an exemption, where the party claiming an exemption has the burden of demonstrating their eligibility for that exemption.

Agency under FARA is quite elastic and broad. It's broader than what lawyers would construe agency to be saying or the Restatement of Agency. You think of it essentially as doing anything on behalf of a so-called foreign principle. FARA talks about work on behalf of foreign principles in the term foreign principle is so broadly defined that it includes not only a foreign government or a foreign political party, but also, foreign business entities, it could be a foreign corporation, it could be a foreign non-governmental organization, it could be an individual living outside the United States. Basically, anything living or inanimate outside the United States can constitute a foreign principle under FARA.

That makes the scope of this statute, inordinately broad. And, we contended in our ABA reform venture, broader than it needs to be. If a person of an individual or company law firm consulting firm in the United States is doing things on behalf of a foreign principal in the United States, and they're among the specified types of activities in the United States, they may have an obligation to register. A classic example of conduct covered by fair that could trigger a registration obligation is seeking to influence U.S. government officials, to influence U.S. policy, to influence U.S. public opinion, particularly on behalf of a foreign government. Those are classic core examples of conduct that come within the scope of the statute and that's really what we should care most about from a policy standpoint. But as I said, foreign principles also include foreign companies. For example, I represent a major global strategic communications company and they represent foreign companies on major media and communications campaigns, sometimes Chinese companies. It requires considerable due diligence to assess the degree to which the Chinese government in particular has any involvement with these companies that alter the fairer registration risk profile for a company performing work for them in the United States.

When I took over as chief of CES in late 2014, I naturally made it my business to assess the degree to which we were meeting our enforcement responsibilities across the spectrum of all the areas of law enforcement jurisdiction that we had. Whether it was export control or sanctions or national security, cyber, or trade secret theft, and FARA. To my surprise, I determined that we were not nearly meeting our responsibilities with respect to FARA enforcement and that enforcement had been rather dormant for a considerable period. So, I set about to fix that by enhancing our enforcement prioritizations and policies, bringing more scrutiny to bear, That began as early as early 2015 substantially before the Russian election interference matter arose. I oversaw the required registrations of major Russian media organizations like RT TV and it's domestic production arm.

I oversaw the FARA registration of Paul Manafort, of Michael Flynn, and a host of other things. Those were the foothills, so to speak of the current surge of FARA enforcement that continue now and that is in the public mind most palpable in the headlines regarding criminal prosecutions. But below the surface of the water is where most of the FARA enforcement activity really takes place which is the Department seeking to effect compliance by individuals and companies deemed to require registration by bringing them into compliance, requiring them to register.

**Olga Torres:** I have a couple comments and questions because you've given us a lot of very good information. One comment I had when we look at the definitions that you're right, they're so broad. I remember even, just as a practical example, we also represent a lot of foreign companies and I remember looking at the statute and just the way it's written, I was like, “Oh my gosh, should I have registered?” Right? But it goes back to how broad it is. So, you need to make sure that you've fall under one of these exceptions. But then I had a question on the actual enforcement. How does the FARA unit work, or is it the division. Do they have people? Because a lot of people don't know about it. I mean many people don't know about it, so I can see so many examples of individuals, businesses, even lawyers, I will venture to say that they currently, they don't even do that assessment of “Do I have to register with this act?” How do you go about, or DOJ, how do they review for this? Do they have a team of people looking at activities and how do they find out who's doing what and representing whom and all of that? How does that work?

**David Laufman:** Well, within the Counterintelligence and Export Control Section or CES, that I used to lead, resides a special unit called the FARA Unit. And that unit is headed by a prosecutor, a deputy chief of FARA for FARA enforcement and below her is a staff of attorneys and non-attorneys.

Information that ultimately results in administrative or criminal enforcement action arises in different ways. They read the news and investigative journalists often unearth information, raising questions about whether an individual or a company should be registered. Information may be learned about a potential FARA violation through investigations about other things. Look at the Rudy Giuliani case in New York. It may be that Mr. Giuliani may have FARA liability that came to light through investigation of other issues. So, it arises in different contexts. They also review the filings with Congress in the House and Senate under the Lobbying Disclosure Act, looking for filings that may more properly should have been filed under FARA rather than under the Lobbying Disclosure Act, which requires substantially less itemized disclosure than FARA. So, there's a certain degree of forum shopping for registration by some folks under LDA then FARA.

So, information that results in investigations arises in lots of different ways. Ordinarily, the first thing the Department would do if a question arises as to whether a company or individual should register is to send a letter commonly referred to as a Letter of Inquiry to the individual or entity. That's the first indication of an administrative investigation, not a criminal investigation, but an administrative investigation. That letter will include multiple interrogatories, requests for documents. Compliance with that is not compulsory as a matter of law. As a practical matter, if you ignore or flout a Letter of Inquiry you're going to buy yourself a criminal investigation. That's a pretty serious undertaking to send such a letter. And there can be a lengthy back and forth between the Department and the recipient to assess from the Department's standpoint, whether there really was an obligation to register; if one was found; whether the failure to register was willful or not. Because only violations regarding a failure to register that were willful can result in criminal liability. And the same definition of willfulness, Olga, is applied in FARA cases as an export control and sanctions cases.

And the Department may sometimes send a subsequent letter, called a Determination Letter, advising the party of its judgment about whether registration was necessary or not. I would say in about 99.9% of the cases, someone receiving an adverse Determination Letter is going to register. In a few outliers, parties will flout that or refuse to cooperate. In that case, the department has the option under the statute to bring a civil injunctive action in federal court seeking a court order to determine that the party has an obligation to register and an order compelling them to register.

**Olga Torres:** Very interesting. Let me ask you something: let's say I'm a company or an individual that reviews this statute and now realizes, oops, I

should have registered. What are the actions, high-level, that you think they should do? I mean, is there something like a retroactive registration? If you come in later on and register, when you've been conducting activities without registration, how do people approach that? I keep thinking for export controls and economic sanctions, is there like a VSD-type mechanism or any kind of cooperation credit that you get? If you come clean?

**David Laufman:** Well, there's nothing quite as formal as the VSD policy for export control and sanctions disclosures that you referenced. But the statute, the Foreign Agents Registration Act does impose a continuing obligation to register. So even if you allegedly realized years after the fact that you should have registered before, that obligation continues. in effect. It's not uncommon for companies or individuals to determine far down the road that they should have registered and then to retroactively register. They're complicated enormously burdensome registrations to put together when they're years down the road because you then have to go back to the very beginning of when you entered into an agreement requiring registration. But at the end of the day the Department of Justice isn't looking for a scalp, they're looking to bring parties into compliance. So, unless there was a willful failure to register, and those cases are outliers, then all the Department is going to want is for the company to satisfy its registration and disclosure obligations over those past several years. That will mean having to conduct extensive background research and record keeping review to determine all kinds of things, revenues that were income that was received from the engagement expenditures that were made. Detailing, for example, in cases where there was outreach to U.S. government officials or to the news media the whole litany of context that that occurred.

It's quite a cumbersome thing to put together a retroactive registration, but it's not uncommon. And law firms have gone through this too. And sometimes law firms run into privilege-related issues and having to register. For lawyers, the type of work that you do that I often do, I'm doing it right now, representing parties before OFAC, for example, the Office of Foreign Assets Control at Treasury, that work is within the scope of this exemption for legal representation when we're representing parties in an administrative matter or in a court proceeding or a prosecution, a government investigation, and we're basically either in an official judicial or administrative proceeding or we're operating under established administrative norms. For example, appealing the denial of a license or trying to appeal a designation, that conduct is subject to the exemption for legal representation. But lawyers sometimes mistakenly engage in what I like to call mission creep. It's not uncommon for clients to want, adjacent to that type of representation, to try to engage in kind of reputation management through a public relations campaign. Even in cases where a law firm, for example, is representing a criminal defendant. If they then

undertake or coordinate either directly or indirectly with a public relations firm, a public relations initiative, they have now stepped outside the safe harbor of the legal exemption under FARA and have exposed themselves to FARA registration risk. And that happens not infrequently for law firms.

**Olga Torres:** A lot of it is about the scope of the representation, right? Like anything outside of that specific exemption, you're not, it's fair game, basically. That makes sense. We briefly talked about reforming the statute and we saw this with EAR the Export Administration Regulations and the International Trafficking Arms Regulations: a lot of the changes in the reform can happen by the executive agencies. But at some point there's certain types of reforms that would require Congress getting involved. Can you talk about what would be the difference? And I know you provided comments that DOJ published the notice of proposed rulemaking, I don't think they've finalized anything as far as I could tell. And I know you filed a comment there. But what are those reforms that we would need to get Congress involved? And the reason I ask is because, just based on how Congress works lately, that would seem something that may not go anywhere, right? So, what do you think is something that it will happen versus we're trying, but it's unlikely that it will.

**David Laufman:** Well, I think it's going to be a reach for FARA reform legislation to emerge from Congress. Every Congress, recently, has included several bills that have been introduced. Several months ago, it looked like the Senate foreign relations committee, which has jurisdiction over FARA in the Senate, was interested in putting together a bill and then Russia invaded Ukraine and all hell broke loose. So, we'll see whether the Senate Foreign Relations Committee gets a bill out. I know there's interest, but we haven't seen anything concrete to demonstrate that. Certain things can only be reformed by congressional action, by legislation, changes to the statute can only be accomplished through amendments to FARA by legislation changes to definitions, changes to the scope of the statute. We proposed several statutory reform recommendations in our ABA task force report, including even reimagining the name of the statute, the Foreign Agents Registration Act, because it is perceived as so stigmatizing in many quarters to have to register. There are people who don't want to be branded in the shorthand form that journalists often do “foreign agents,” because they find it reputation damaging. And so, we even proposed renaming the statute in a way that would try to lessen the stigma associated with it.

**Olga Torres:** What's the name that you're proposing?

**David Laufman:** I think we recommended that it be the Foreign Representative Registration Act, which is really what's at issue here. If you're representing a foreign interest, that should be sufficient. It should be "Let's focus on the substance and think about ways to facilitate compliance without raising the cost to people by causing damage to their reputations." I have clients who have foregone taking on engagements where there is considerable registration risk because they don't want to run the risk of being branded as a foreign agent.

There sometimes has practical employment effects. For example, the Biden administration, when it came into power made clear that people who had been registered as lobbyists were registered under FARA were not going to get jobs in this administration, even though registering simply means compliance with U.S. law.

**Olga Torres:** Yeah.

**David Laufman:** So that was among the recommendations we made. We also recommended that Congress refine and amend the definition of an "agent of a foreign principle," which is the core term in the statute, to take the statute back to core roots to focus only on serving as a representative foreign interest where those foreign interests are a foreign government or a foreign political party, or someone acting on behalf of a foreign government and foreign political party. Whereas now, as I mentioned before, even foreign commercial entities operate as foreign principals under the statute. So, it's just enormously broad. There are other things that the department can do on its own. Those the statute authorizes the attorney general to promulgate or seek the promulgation of regulations. They can't be ultra vires to the statute, but there are a number of things the Department can do. And I'm happy to say, and they announced this, I think, on the eve of our last legal conference at ACI. ACI produces an annual FARA conference that I've co-chaired these last several years.

And so, the Department, as you said, published an advanced notice of rulemaking, several months ago, and the public comment period ensued. They're talking about doing some of the things that we have raised questions about. Including, for example, clarifying the exemption for legal representation. Clarifying the rules regarding when representing the interest of foreign commercial entities can trigger FARA registration. There are some nebulous, vague terms involved in the exemptions regarding representing non-governmental foreign entities.

The Department understands that social media did not exist in 1938 and among the core requirements of this law, and I think probably the most valuable one or

among the most valuable, is that when content disseminated in the United States on behalf of a foreign principal, it must be accompanied by a conspicuous label, a conspicuous statement that prominently discloses to the consumer that this content is being disseminated on behalf of the, whoever the foreign principal is, and that documentation is available at the Department of Justice. So, if you're putting out a white paper, if you're writing a newspaper op-ed, if you're broadcasting something it has to include in some form, this conspicuous statement, putting the consumer on notice that there's a foreign interest behind this content. And then the consumer can assign whatever weight they want to the content in light of that factor. It doesn't alter the content of the message, but it does require that that labeling. Well, what do you do with a tweet? Which is now what 280 characters. It was when I was in charge FARA was like 140 characters. So, it wouldn't have been fair to try to squeeze a conspicuous statement into 140-character tweet. They're trying, they're trying to come to grips so that they've asked the public for suggestions on how to deal with conspicuous labeling requirement in the content of social media. And think about just how much social media is the primary means by which content is now consumed.

It's important for the department to get this right. And we know through criminal prosecutions and intelligence gathering that the Russians and Chinese and other foreign adversaries use social media to bombard directly and indirectly the American public with propaganda. So, it's important to get this right.

**Olga Torres:** Do you have any sense for the timeframe? Is this something that can happen quickly?

**David Laufman:** Nothing happens…

**Olga Torres:** We're looking at years?

**David Laufman:** Nothing happens quickly when it comes to regulatory forum and even less quickly when it comes to action by Congress. I do think it's more likely than not that in the next few months we'll see a proposed rulemaking by the Department of Justice. The cynic in me wonders whether they will want to spring this upon us on the eve of our next ACI conference on FARA.

**Olga Torres:** Well, that will make it an interesting conference.

**David Laufman:** Which will be in early December. So, we shall see. But, I'm gratified that they have done this as the major rulemaking they have undertaken

in decades. I think it signifies a seriousness of purpose and hopefully improvements will come from.

**Olga Torres:** Great. Well, very interesting. We'll be monitoring as well. And this concludes today podcast. Please join us next week for a continued discussion with David. Where we will discuss DOJ export and economic sanctions enforcement including high profile cases such as ZTE. We will also discuss DOJ's voluntary self-disclosures for economic sanctions and export violations. As well as some recent announcements made by DOJ regarding compliance programs certifications by CEOs and COOs. Thanks again for tuning in and have a great week.

1201 Main St. Suite 1350, Dallas, TX 75202 •Phone: 214.295.8473 •Fax: 214.396.1583
1050 Connecticut Avenue NW, Suite 500, Washington, DC 20036 • Phone: 202.851.8200