1-1-2010

# America's Sizzling Summer of Espionage Enforcement has Roots in Obscure Registration Laws that Govern Foreign Intercourse

Amos N. Jones
*Campbell University School of Law*, ajones@campbell.edu

**Amos N Jones***
Amos Jones Law Firm,
Washington DC
jones@
amosjoneslawfirm.com

# America's sizzling summer of espionage enforcement has roots in obscure registration laws that govern foreign intercourse

Washington, DC, 5 August 2010. First, a retired US Department of State intelligence analyst was accused of spying for Cuba for nearly 30 years while his wife assisted. Then, a year later, a group of 17 Russian spies were arrested on a variety of charges, following years of federal surveillance that officials said amounted to a case study in counter intelligence. In July, after a year of proceedings, the Cuba spies – Walter Kendall Myers, age 73 and Gwendolyn Steingraber Myers, age 72 – were sentenced, respectively, to life in prison and more than six years behind bars. They also had to forfeit US$1.7 million in cash and property, including every penny of his federal salary over the years. The Russian spies, who reportedly came nowhere near obtaining national secrets, were deported and swapped for American spies to settle scores with Russia.

As the charging documents from the *Myers* case suggest, the simplest way for the federal government to go after a suspected spy is to charge them under 22 U S C § 611 *et seq*, the Foreign Agents Registration Act of 1938, as amended ('FARA'). This statute requires any agent of a foreign principal who acts within the United States in the interests of the foreign principal to register contacts, contracts, financial transactions, and printed disseminations relating to the representation within strict time limits. The purpose of the FARA is to ensure that the United States Government is informed in detail as to all political or quasi-political foreign intercourse of all persons working on behalf of foreign governments inside the United States. Semi-annual reports must be filed during the entire period of the principal-agency relationship in which registrable activities are undertaken. Through the various statements required by the implementing regulations at Title 28 C F R Part 5, officials within the FARA Registration Unit of the Counterespionage Section of the Criminal Division of the Department of Justice scrutinise the actions of agents as reported in the statements. Sometimes the FARA Registration Unit requests follow-up reporting through the issuance of a 'deficiency letter' that can suspend an agent's right to act on behalf of the principle if not answered sufficiently within ten days of the agent's receipt.

## Enforcing the FARA

The FARA is a compliance statute, and thus, enforcement is heavily reliant on the voluntary reporting by the agents of foreign principals. Though prosecutions and criminal sanctions have been applied only when the government concludes the law has been grossly violated, failure to register is a serious offense. Federal agents are adept at discovering unregistered activity through media reports and other forms of observation and/or surveillance and commencing investigations.

Enacted in 1938 amid the growing threat of Nazi propaganda within the United States and refined through the Cold War years that brought a surge in Soviet espionage inside the United States, the FARA embodies a public policy of disclosure and transparency. The filings, which must include even the written agreement between principal and agent or a detailed summary of any oral agreement, are available for public inspection and are now online, giving journalists a treasure trove of sensitive and often competitive information about registrants. Reportable information includes compensation details, political contributions, expenditures, meetings with political figures, and other activities carried out by the agent on behalf of the foreign

principal. According to the Department of Justice, 'Disclosure of the required information facilitates evaluation by the government and the American people of the statements and activities of such persons in light of their function as foreign agents.'

## Recent developments

In June 2008, Senator Charles Schumer of New York and Senator Claire McCaskill of Missouri, both Democrats, proposed in section 3123, 'The Closing the Foreign Lobbying Loophole Act', which would have required lobbyists who work for foreign-owned companies to disclose more about those relationships than they currently do. At the time, lobbying by foreign agents caused the presidential campaign of Senator John McCain to lose aides who resigned because of their ties to foreign governments and private interests, ties that escaped the reach of the FARA. The Schumer-McCaskill bill, which stalled in committee, would have required those who meet with American officials outside the United States on behalf of foreign politicians to register as lobbyists.

In the wake of the Supreme Court decision in *Citizens United v Federal Election Commission*, 558 US 50 (2010), Senator Schumer and Congressman Chris Van Hollen, a Maryland Democrat, have proposed additional disclosure requirements that substantially expand the reach of the Lobbying Disclosure Act of 1995, 2 U S C § 1601, under which agents of foreign principals can register in lieu of filing under FARA, so long as the foreign principal is not a governmental entity as broadly defined in the FARA.

Today, the list of FARA registrants – and there were 379 active registrants in the federal database as of 5 August 2010 – is dominated by public-relations and lobbying firms that represent foreign principals before the American public and governmental officials. A number of classes of activity are exempted from the FARA, including most activities that are not fundamentally political in nature, such as bona fide trade and commerce activities. Astute agents of foreign principals are aware of the FARA reporting burdens and draft their contracts with foreign principals to anticipate the required disclosure or exemptions arising from the FARA.

**Note**

* Amos N Jones is Visiting Assistant Professor at the North Carolina Central University School of Law, where he teaches Constitutional Law I, Comparative Constitutional Law, and Public International Law. A member of the Bar of the District of Columbia, he is also Principal in the Amos Jones Law Firm of Washington, DC. Jones belongs to the Multidisciplinary Practices Committee and the North American Regional Forum of the IBA.