

DC Circuit Upholds Bar on Retroactive Registration for Former Foreign Agents

Client Alerts

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On June 14, 2024, in *Attorney General of the United States v. Stephen A. Wynn*, a panel of the US Court of Appeals for the DC Circuit held that the Department of Justice (“DOJ”) cannot civilly compel an individual to retroactively register under the Foreign Agent Registration Act (“FARA” or “Act”) after their agency relationship with a foreign principal has ended. The decision upheld the 2022 DC District Court dismissal of a DOJ lawsuit seeking an injunction to require Las Vegas casino mogul Stephen Wynn to retroactively register for alleged efforts to lobby the Trump administration on behalf of the Chinese government. The unanimous panel determined that, based on prior DC Circuit precedent *United States v. McGoff* and the plain text of the Act itself, FARA only allows DOJ to seek a civil injunction to require registration against an individual with an ongoing agency relationship with a foreign principal. The ruling has far-reaching implications for the FARA Unit’s (“Unit”) ability to pursue civil enforcement under FARA.

Lower Court’s Dismissal of DOJ’s Affirmative Civil Suit to Compel Retroactive Registration

In May 2022, DOJ filed an action in the US District Court for the District of Columbia, seeking a civil injunction against Steve Wynn under Section 612(a) of FARA to compel him to retroactively register with the FARA Unit for 2017 lobbying efforts on behalf of the Chinese government. DOJ alleged that Wynn had lobbied certain US government officials to deny or revoke the US visa of Chinese businessman Guo Wengui in exchange for preferential treatment of his casino properties on the Chinese island of Macau. In an October 2022 decision, District Court Judge James E. Boasberg dismissed the suit, holding that Steven Wynn’s prosecution under FARA was time-barred because Wynn’s alleged agency relationship with the Chinese government had long since ended.

In dismissing the suit, the court relied on the more than thirty-year-old decision, *United States v. McGoff*, 831 F.2d 1071 (D.C. Cir. 1987). In *McGoff*, DOJ attempted to prosecute an alleged agent of the South African government for failure to register under FARA. Despite the five-year statute of limitations to pursue an individual for FARA violations, the DOJ filed a criminal information against McGoff seven years after his alleged political activities on behalf of the South African government concluded. Appealing the district court’s dismissal of the information as time-barred, the government argued that a failure to register for past activities was a continuing offense under

Sections 612 and 618, so the statute of limitations on the violations had not expired. The appellate court disagreed, holding that the statute of limitations started to run once the allegedly registrable activities stopped. As a part of its decision dismissing the case as time-barred, the *McGoff* court held that the alleged foreign agent's statutory duty to file under Section 612(a) terminated when he stopped acting as an agent of the foreign principal.

Given the precedent in *McGoff*, Judge Boasberg concluded that DOJ could not require Wynn to retroactively register under FARA after his alleged agency relationship with the Chinese government ended.

DC Circuit Decision

In a unanimous panel decision, the DC Circuit upheld the district court's decision, affirming that Wynn's statutory obligation to register under FARA expired when he stopped representing the Chinese government. While the panel relied on *McGoff* for its decision, it also undertook a structural and textual analysis of the relevant sections of FARA to dispatch with the government's effort to distinguish the case from *McGoff*.

Specifically, the government argued (for the first time on appeal) that the second clause of Section 618(f) of FARA provided it with the authority to seek an injunction to compel registration for past registrable activities. Section 618(f) states:

Whenever . . . any person is engaged in or about to engage in any acts which constitute or will constitute a violation of any provision of this subchapter, or regulations issued thereunder, or whenever any agent of a foreign principal fails to comply with any of the provisions of this subchapter or the regulations issued thereunder, or otherwise is in violation of the subchapter[.]

22 U.S.C. § 618(f). The available civil remedies for such a violation are “an order enjoining such acts or enjoining such person from continuing to act as an agent . . . or an order requiring compliance with any appropriate [FARA] provision[.]” *Id.*

DOJ asserted that, while Section 618(f)'s first “whenever clause” allows DOJ to seek injunctions to register for all imminent or ongoing violations of FARA, its second “whenever” clause allows the Attorney General to seek an injunction compelling retroactive registration for past violations.

However, the panel dismissed this argument. It reasoned that the present-tense language of the statute only allows suits for injunctions against individuals who are presently engaged or about to engage in violations, not those who have failed to comply with FARA regulations in the past, because the latter no longer have a legal obligation to register. According to the panel, the specific choice of wording and tenses of the referenced clauses indicate clear congressional intent to limit injunctive relief to present and future violations, not “long-ago completed violations.”

The panel also observed that the forms of injunctive relief available in Section 618(f) would not apply to Wynn's situation since he was (1) not presently engaged in FARA-prohibited acts since he was no longer an agent of the Chinese government, (2) he similarly was not continuing to act as its agent, and (3) he was "compliant" with the statute because he had no present duty to register.

While the court acknowledged that *McGoff* had only addressed a temporal limitation on the duty to register under Sections 612(a) in the criminal context, it held that the temporal restriction nonetheless existed in both the criminal and civil context absent a "contrary statutory directive."

The panel concluded by noting that it was bound by *McGoff* and, accordingly, must affirm the district court.

Takeaways

While DOJ is almost certain to seek *en banc* review of *Wynn*, the decision has a number of implications for the FARA Unit's ongoing pursuit of individuals for past FARA violations.

First, the Unit will be effectively limited to pursuing criminal prosecutions against individuals for past FARA violations where the conduct requiring registration is not continuing, at least in the District of Columbia, since the only statutory civil remedy is now foreclosed.

Second, the DC Circuit's detailed textual analysis of the FARA statute may persuade courts in other jurisdictions to limit civil injunctions as a remedy for ongoing failure to register. While not binding precedent, courts in other jurisdictions have long-cited *McGoff* as persuasive authority in FARA cases (though not in the context of retroactive registration), raising the potential for *Wynn's* logic to be adopted outside of DC and for the Unit's civil enforcement capability to be further limited.

Third, as previously noted, after the original *Wynn* district court decision, the FARA Unit was nonetheless able to obtain retroactive registrations from two individuals for past FARA violations through deferred prosecution agreements. Now that criminal prosecution is the remaining remedy available for past FARA violations, DOJ is only more likely to try to seek and obtain retroactive registration through prosecutions resolved by deferred prosecution agreements.

Jenner & Block will continue to monitor new developments regarding FARA enforcement. Our team is counseling clients on these issues and is available to provide guidance. Shreve Ariail and Keisha Stanford are partners in the firm's National Security and Crisis Practice, with Shreve serving as co-chair. Philip Chertoff is an associate.

With thanks to summer associate Daniel Freedline for his contribution to this client alert.

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