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Foreign Agents' Registration: A Practitioner's Note

by James N. Hyde*

An American lawyer about to be retained by a foreign government should consider what responsibilities, if any, he has to register as a foreign agent under the provisions of U.S. law. This involves consideration of the statutes, the relevant decisions construing them, and the administrative practices of the Departments of State and Justice. Counsel must also approach these matters in terms of their impact on the particular case with which he and his colleagues are involved.

The reader is invited to ponder three different fact situations in approaching the statutes:

(a) an American lawyer, with or without public relations colleagues, is active in the United States and perhaps involved in fund raising activities on behalf of a foreign government or agency. This situation will be discussed rather briefly.

(b) an American lawyer or law firm acts as counsel for a foreign government, involving activities within and outside the United States and with professional contacts with U.S. government agencies and officials.

(c) an American lawyer and his colleagues engage in negotiations or litigation abroad on behalf of a foreign government with another foreign government. The lawyer's colleagues may include American scientific experts. Here the writer will draw on his personal experience.

The Foreign Agents Registration Act of 1938,¹ as amended, is essentially a disclosure statute intended to publicize the nature, source and content of political propaganda disseminated or distributed within the United States by agents of foreign principals. Such agents must register under the Act. This is essentially situation (a) postulated above.²

The language and definitions of the Act have wider implications and can affect the activities of American lawyers outside the United States as well, such as those activities outlined in situations (b) and (c).

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¹ 22 U.S.C. §§ 611-621 (1976); 28 C.F.R. §§ 5.1-.801 (1979).

² See Report of the Attorney General to the Congress of the United States on Administration of the Foreign Agents' Registration Act for the calendar year 1977.

The definitions provided in the Act are broad. For example, section 611(b)(1) defines a "foreign principal" as including the government of a foreign country and a foreign political party.³ There are two elements in the definition of "agent". The first element includes "[a]ny person who acts . . . at the order, request, or under the direction or control, of a foreign principal. . . ."⁴ This element would therefore include an American lawyer acting as an agent, in a traditional sense. The Act specifically exempts from the registration requirement any person qualified to practice law, insofar as he provides legal representation for a disclosed foreign principal before any court of law or government agency of the United States.⁵ The restrictive language of this exemption suggests that American lawyers in the situations under consideration come under the definition of foreign agents and thus are required to register.

Such a suggestion would, however, overlook the second element of the definition of a foreign agent. Four enumerated functional activities form essential elements of the definition. All four are based on activities *in the United States*:

- (i) Political activities within the United States;
- (ii) Public relations activities;
- (iii) Financial solicitation or disbursement;
- (iv) Representation of the interests of the foreign principal before any agency or official of the government of the United States.⁶

Considering these four activities, (iv) comes closest to the activities of counsel. The conclusion in a particular fact situation depends on how substantial the activities of counsel and his colleagues within the United States are in relation to those activities abroad.

Whether counsel for a foreign principal and his expert colleagues are required to register is an important question. First of all, registration gives rise to an obligation to provide and keep up to date an account of the registrant's travels, writings, current associations and fees from the government client.⁷ Additionally, the Act requires each registrant to keep books and records, to preserve all written records with respect to his activities, and to hold these materials available for inspection by the Attorney General or his designate.⁸ Thus, if counsel feels a particular case presents the substantial possibility of a need to register, the possibility of U.S. government access to the documents should be discussed frankly with the foreign government client whose documents would be involved before representation is begun. Counsel will appreciate that international negotiations or litigation are likely to extend from three to six years. During this period the assembly and analysis of factual material is an important task of counsel. Thus, maintaining the confidentiality of

³ 22 U.S.C. § 611(b)(1) (1976).

⁴ *Id.* § 611(c)(1).

⁵ *Id.* § 613(g).

⁶ *Id.* § 611(c)(1).

⁷ *Id.* § 612(a) & (b).

⁸ *Id.* § 615.

such material in an adversary proceeding will be his concern.⁹

Some lawyers have felt that registration, with their resulting listing in the *Report of the Attorney General*,¹⁰ is a useful means of gaining public recognition through identification with important clients. However, the effect of registration on the confidentiality of the client's documents is a more important consideration.

In *Attorney General v. Covington & Burling*,¹¹ for example, a Washington law firm registered "out of an abundance of caution."¹² Later, the firm was forced to argue that its activities did not actually make it subject to the Act at all and that therefore its client's documents should not be subject to inspection. This argument was not pressed when the Attorney General then sought access to certain of these documents under section 615.

Brief mention should be made of the clear impact of the Act on access to books and records related to public relations, political activities, and fund raising activities in the United States on behalf of foreign entities. The Act was intended to publicize such activities and the bulk of the Attorney General's Reports list the particulars of registrants. In *Attorney General v. Irish Northern Aid Committee*,¹³ Judge Bauman stated:

The purpose of the Act is to protect the interests of the United States by requiring complete disclosure by persons acting for or in the interests of foreign principals where their activities are political in nature. These disclosures offer the Government and our people the opportunity to be informed and therefore enable them to understand the purposes for which they act.¹⁴

This brings us to the fact situation (b) concerning an American lawyer or law firm retained in negotiations or proceedings taking place both inside and outside the United States who, having registered, is then faced with a request by the Department of Justice for inspection of records covering relations with a foreign government. In *Covington & Burling*,¹⁵

⁹ Based on the author's personal experience, the negotiating team for each party may include perhaps two dozen lawyers and experts of various nationalities; and, characteristically, a majority are non-American. These non-Americans are not subject to regulation similar to our own for their activities outside the United States. Their only concern, therefore, is common sense security restriction to protect documents that have been highly classified by their government client. The author can recall an instance in which he and a British Q.C. drafted a document that the government client then classified as "Top Secret." As a result both counsel felt they could not retain copies in their own working files.

Preservation of confidentiality, then, is a consideration which will bear on counsel's approach to the relevant statutes and practice, as they may relate to his particular situation.

¹⁰ See Report of the Attorney General, *supra* note 2.

¹¹ 411 F. Supp. 371 (D.D.C. 1976), *modified*, 430 F. Supp. 117 (D.D.C. 1977).

¹² *Id.* 371 n.1.

¹³ 346 F. Supp. 1384 (S.D.N.Y. 1972). See also press accounts of the retainer of Marian Javits, wife of the New York Senator Jacob Javits, as a consultant to Ruder and Finn, Inc., a public relations firm having a contract with Iranian Airways. This firm's retainer was duly noted in the Attorney General's Report for 1977, at 231, and it subsequently appeared that the retainer was on behalf of the then government of Iran. N.Y. Times, May 30, 1979, at 6, col. 4.

¹⁴ 346 F. Supp. at 1390.

¹⁵ 411 F. Supp. at 372.

the law firm had registered under the Act as an agent of the Republic of Guinea. The firm had been concerned with the development of the bauxite industry in Guinea and in this connection had some contacts with United States Government agencies, including the Agency for International Development, the Export-Import Bank, the Guinea Desk Officer at the U.S. Department of State, and the United States Ambassador to Guinea. Judge Sirica denied an injunction sought by the Attorney General which would have permitted the Justice Department to inspect certain documents Covington & Burling had withheld relating to its representation of Guinea. The law firm had made ninety-five percent of its records available to the Justice Department but withheld five percent claiming attorney-client privilege. Judge Sirica examined this five percent under seal and held the attorney-client privilege applicable to some, but not all, of the documents for which the privilege was claimed.¹⁶

In his first memorandum opinion, Judge Sirica established the existence of an attorney-client privilege under the Act, the scope of which must depend on the facts in a particular case. In his second memorandum opinion, Judge Sirica recognized that any materials made available to the Department of Justice would be subject to inspection by other government agencies¹⁷ such as the F.B.I. and would also be subject to disclosure under the Freedom of Information Act.¹⁸ He therefore concluded that the court could not delegate authority to the Registration Unit of the Department of Justice to review the documents to determine whether the attorney-client privilege applied.¹⁹

Comments on this case have emphasized the existence of a limited attorney-client privilege. However, one comment concludes that even this privilege represents a dangerous precedent in that documents essential to government interests will not be revealed.²⁰

A lawyer who has registered as an agent of a foreign government and is engaged in negotiations or litigation abroad will want to confer or negotiate with the Department of Justice about the treatment of factual material, including evidence, in his case. Alternatively, he may conclude it is important not to keep such materials in his custody. Documents or files in the custody of the client's embassy in Washington or at the United Nations would, presumably, be covered by diplomatic immu-

¹⁶ 430 F. Supp. 1117.

¹⁷ *Id.* at 1120. See also *Attorney Gen'l v. Irish Northern Aid Comm.*, 346 F. Supp. 1384, 1387 (1972).

¹⁸ 5 U.S.C. § 552 (1976), as amended 5 U.S.C.A. § 552 (West Supp. 1980).

¹⁹ 430 F. Supp. at 1119.

²⁰ Note, *Note on Attorney General v. Covington & Burling*, 3 BROOKLYN J. INT'L L. 308, 317 (1977). See, e.g., Comment, *Foreign Agents Registration Act—Attorney-Client Privilege Exception to Disclosure Requirements—Attorney General v. Covington & Burling*, 19 HARV. INT'L L.J. 329 (1978); Comment, *Enforcement of Foreign Agents Registration Act: A New Emphasis*, 9 LAW & POL'Y INT'L BUS. 985 (1977); Note, *The Attorney Client Privilege under the Foreign Agents Registration Act of 1938: Attorney General v. Covington and Burling*, 4 N.C.J. INT'L L. & COM. REG. 59 (1978).

nity.²¹ Another possibility would be to maintain a center for evidence and research materials outside the United States. One drawback of this option is that it would involve even more travel and expense for counsel and his client. Another important consideration, is that although the client's materials might be insulated from disclosure, counsel himself as a registrant would need to make certain that deposit of the client's materials at locations beyond the access of the U.S. government did not constitute concealment within the meaning of section 615 of the Act.²²

The third type of situation, outlined in Case (c) above, is the immediate occasion for this note. According to the facts, an American lawyer and his associates have been or are about to be retained by a foreign government for litigation before an international tribunal or for inter-governmental negotiations which could lead to either settlement or subsequent international litigation. The writer and his colleagues have twice confronted this situation. In both instances they consulted the Department of Justice and were advised that they would not be required to register. These two instances, occurring in 1960 and 1976, suggest an administrative practice which may not be widely known. In the 1976 situation, the author and his colleague described their role as advisors to a government in negotiations with another government on the proper delimitation of a continental shelf or shelves. Legal and factual research was conducted in the United States, but all negotiations and some meetings with the clients were abroad. Expert help was sought from an American geographer. No part of the work involved publicizing, informing, or advancing any views of the client in the United States.

In an opinion drafted to be helpful should similar situations arise in the future, officials of the Department of Justice stated that the author and his legal and scientific colleagues had not incurred an obligation to register under the Act. Although agents or employees of the foreign government client in the traditional sense, they would not be considered agents within the meaning of the Act. To be an agent of a foreign principal for purposes of the Act, one must (1) act or agree to act as an agent, and (2) directly or through some other person engage within the United States in an activity enumerated in section 611(c)(1).²³ Activities undertaken outside the United States, unrelated to a decision of the federal

²¹ RESTATEMENT, SECOND, FOREIGN RELATIONS LAW OF THE UNITED STATES § 77 (1965).

²² The author, thirty years ago, registered as a foreign agent for an Asian state in negotiations of a river dispute. A recently deceased senior partner of Covington & Burling represented the other government. The two counsel were never permitted to meet during a summer of negotiations in Washington, although they were friends with professional associations. Their respective views were forwarded by diplomatic notes in the language of the parties. It is not clear to the author, in retrospect, that such activities gave rise to a duty to register, since his only contacts were with his government client. Most of the materials drawn on, apart from his own legal research, remained in the Embassy files in Washington, and the Department of Justice showed no interest in them.

²³ See text accompanying notes 3-6, *supra*.

government or an agency or official thereof, and unrelated to influencing American public opinion on the respective merits of the parties' contentions are outside the Act; and this is not altered by the fact that research and writing and the work of counsel's assistant or expert take place within the United States.

This opinion provides a clear interpretation of the Act for counsel playing a role in international negotiations or litigation without substantial contacts with American public opinion or government officials. In such a situation, it would probably be wise for counsel and his associates not to write or lecture in the United States about the case while it is pending. Perhaps, in light of Judge Sirica's opinions, counsel should also limit himself to polite talk or a frigid bow if the American ambassador in his client's country asks him how the case is progressing.

The opinion of the Department of Justice received by the writer in 1960, before the 1966 Amendment to the Act, stated that the writer and his colleague were not obligated to register as trial counsel for a foreign government in a contentious case before the International Court of Justice. The Department concluded that the author and his colleagues were engaged principally in activities outside the United States.

One further situation is that of counsel who *has* registered for general legal services for a foreign principal and, as part of his activities, then focuses on a particular negotiation or litigation which is primarily outside the United States. Are his records and evidential materials as to this matter withdrawn from the possible requirement of inspection? In *Attorney General v. Covington & Burling*²⁴ one secondary argument made by the law firm was that none of the documents sought by the Department of Justice related to an activity for which registration was required and therefore the Act did not require disclosure of them. A footnote to the 1976 opinion stated that the law firm was willing to have it assumed that this argument had failed.²⁵ Thus the court never directly addressed this contention and it remains for future resolution.

A subsidiary matter for counsel is presented by a completely separate registration statute, Agents of foreign governments.²⁶ Its single paragraph reads: "Whoever, other than a diplomatic or consular officer or attaché, acts in the United States as an agent of a foreign government without prior notification to the Secretary of State, shall be fined not more than \$5,000 or imprisoned not more than ten years or both."²⁷

The definition of an agent of a foreign government is quite separate from that of the Foreign Agents Registration Act. Under this provision, the obligation is to notify the Department of State rather than the De-

²⁴ 411 F. Supp. 371 (D.D.C. 1976).

²⁵ *Id.* at 372-73 n.1.

²⁶ 18 U.S.C. § 951.

²⁷ *Id.*

partment of Justice. The Department of Justice, however, has responsibility for the enforcement of both statutes.

Compliance by counsel with this statute is simple: a brief letter to the Secretary of State provides adequate notification.²⁸ Thus as a practical matter this statute surfaces mainly in criminal cases of espionage or where the Department of Justice is reacting to the general failure of a person to comply with either registration statute. It has been held that the separate registration requirements of the two statutes are quite separate and not inconsistent with each other.²⁹

Another question is presented to counsel and his associates, quite apart from the routine requirement of a letter to the Secretary of State. Some lawyers and scientific advisers are likely to be members of State Department Advisory Committees, such as the Committee on the Law of the Sea. In some instances, they may serve as consultants to the Department of State in an individual capacity. This is a distinction of some importance because of the conflict of interest statutes and their possible applicability to these two differing situations.³⁰

It is beyond the scope of this note to analyze conflict of interest law and practice beyond noting the definition of "special government employee" contained in 18 U.S.C. § 202(a) and its implications. While the State Department, usually after consultation, will proceed on a case-by-case basis, a member of an advisory committee is *not* likely to be regarded as a "special government employee" and thus will not be subject to the basic conflict of interest statutes.³¹ This is the situation when the member of an advisory committee does not go beyond giving advice to an advisory committee, receives no compensation beyond per diem and travel expenses, and represents some body or point of view in his or her profession. A formal clearance procedure exists which designates the Deputy Under Secretary for Management as the appropriate official to be consulted in the State Department.³²

A particular case could involve whether or not the State Department wants academicians who also practice, and practitioners themselves, on an advisory committee. For individuals who undertake participation in a particular case, it would always be possible to resign from an advisory committee if clearance were not accorded. That could

²⁸ In one instance, a letter by the author's colleague to the Legal Adviser was acknowledged as constituting compliance with this reporting requirement.

²⁹ *United States v. Melekh*, 193 F. Supp. 586 (N.D. Ill., E.D. 1961). The State Department, so far as the author is aware, has no master list of persons registered under 18 U.S.C. § 951. In the absence of detailed regulations and listings by the Department of State there have been discussions within and outside government circles as to the usefulness of drafting State Department regulations, but that subject is beyond the scope of this note.

³⁰ See 18 U.S.C. § 202 (1976); C.F.R. § 10.735-301 to .735-306 (1979).

³¹ Several lawyer members of the Advisory Committee on the Law of the Sea have served as counsel for foreign governments while continuing their membership on the Committee.

³² 22 C.F.R. § 10.735-217 (1979).

well be a loss for both the committee and the individual.³³

The lawyer or scientific expert who is, or plans to become, an individual consultant is likely to be in a different situation. He is characteristically regarded as a "special government employee" as that term is defined by statute.³⁴ He may be advising the United States as to its position on a particular issue or assisting in formulating such a position. Analysis of the relevant statutory provisions is beyond the scope of this note. It is sufficient to indicate that the effect of these statutes and possible exemptions should be the subject of discussion with State Department officials. The statutes cover private activities that might, through financial implications or the use of inside information, affect the government's interests. The writer is aware of academicians who have served as consultants and who have also advised foreign governments in negotiations or litigation with other foreign governments. Under such circumstances, one State Department requirement is that the consultant file a Confidential Statement of Employment and Financial Interests.³⁵ One question asked is: "Have you ever been an agent or otherwise acted for a foreign principal under the terms of the Foreign Agents Registration Act of 1939 [sic]?"

Finally, a practitioner may want to consider the way his foreign government client, or its government opponent, may regard his contacts with the State Department as consultant or advisory committee member while international litigation is pending. Such a situation presents the possible appearance of bias or undue influence, however unwarranted.³⁶

Conclusion

American lawyers and scientists should be in a position to participate in negotiation and litigation before international tribunals on behalf of foreign governments when their abilities and the qualities of their research and analysis are on a level with those of their colleagues in other parts of the world. They should not be handicapped by the impact of United States disclosure statutes on the confidentiality of a foreign government's files.

³³ See Schachter, *The Invisible College of International Lawyers*, 72 NW. U.L. REV. 217, 217-18 (1977):

The invisible college thus extends into the sphere of government, resulting in a *pénétration pacifique* of ideas from the nongovernmental into official channels. It would be unrealistic, however, to think of this as a one-way penetration. Individuals who move from one role to another are unlikely to remain uninfluenced by the ideas and considerations which impinge on them in their different capacities.

³⁴ 18 U.S.C. § 202(a) (1976).

³⁵ See Confidential Statement of Employment and Financial Interests, Optional Form 107, Jan. 1975.

³⁶ The author recalls one instance in the sixties when a very senior State Department official maintained a consultancy role and even had a small office in the Department while simultaneously serving as trial counsel for a foreign government. The author's client felt that this former official's role as consultant for the United States implied indirect support by the United States for his foreign client. The author did not share this view.

Administrative practice under the American statutes limits this effect and is probably not widely understood. It is important for counsel to be aware of such practice in deciding how to handle his case to protect the confidential materials of a foreign client. He should also be aware of the possibility of informal consultation with officials of the two government departments involved. The approaches here outlined in no way detract from the primary purpose of the two statutes, to force public disclosure of those advocating the interests of foreign governments in the United States and their activities here.

