

Hearing on China's Religious Freedom Violations: Domestic Repression and Malign Influence Abroad

Testimony before the U.S. Commission on International Religious Freedom

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Background

Good morning. My name is Zack Smith, and I appreciate the invitation to testify before the committee today.

I currently serve as a Legal Fellow in The Heritage Foundation's Edwin Meese III Center for Legal and Judicial Studies. Before joining Heritage, I served as an Assistant United States Attorney in the Northern District of Florida, worked at a large law firm here in Washington, DC, and clerked for the Honorable Emmett R. Cox on the United States Court of Appeals for the Eleventh Circuit.¹

Introduction

Let's be blunt: China is an international bad actor. The list of its human rights abuses—particularly its suppression of religious minorities—is long and growing longer by the day.² As Senator Marco Rubio (R-FL) has said, the Chinese Communist Party

¹ Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed here are my own and do not reflect an institutional position for The Heritage Foundation or its board of trustees.

² See, e.g., Michael Cunningham and Brett D. Schaefer, *Chinese Influence in the U.N. Threatens Human Rights Globally*, WASH. TIMES (Sept. 14, 2022),

does not believe in “universal rights,” “global engagement,” and “international law.” Instead, its leaders “believe in raw power.”³ And to date, they have used that raw power to effectively advance their own national interests across the globe.

It is undisputed that China has sought to influence U.S. policy not only at the federal level but at the state and local levels too.⁴ A recent Heritage Foundation Special Report makes clear that “China’s attempts to influence state, city, and local governance have been ongoing for decades and are widespread,”⁵ and that never “has a foreign adversary had such deep inroads in U.S. state and local politics. The range and persistence of China’s operations far surpass those of [any] previous geopolitical rivals”⁶ It “targets schools, churches, and community organizations”⁷ along with college campuses and companies. So, while China or the Chinese Communist Party can lobby Congress, state, and local governments directly, it often doesn’t have to. Sen. Rubio said that “Beijing deputizes American companies and turns them into their lobbyists and advocates in Washington.”⁸ To prove his point, he said that it “was American companies that lobbied to stop my bill to block imports made with Uyghur slave labor in China. Not just any companies, iconic brands—Nike, Coca-Cola, and Apple.”⁹

So what can be done about these lobbying efforts? Can Congress prohibit lobbying by the CCP or those working on its behalf? If so, are there any limitations? The answer to both questions is yes. But it can become tricky fast. That’s why it’s important to understand the current statutory framework and some relevant constitutional concerns that are likely to arise if Congress legislates in this area.¹⁰

<https://www.washingtontimes.com/news/2022/sep/14/chinese-influence-in-the-un-threatens-human-rights/>.

³ Press Release, Sen. Marco Rubio (R-FL), ICYMI: Rubio Speaks on the Threat of Communist China at The Heritage Foundation (Mar. 29, 2022), <https://www.rubio.senate.gov/public/index.cfm/2022/3/icymi-rubio-speaks-on-the-threat-of-communist-china-at-the-heritage-foundation>.

⁴ MICHAEL CUNNINGHAM, WHY STATE LEGISLATURES MUST CONFRONT CHINESE INFILTRATION, SPECIAL REPORT NO. 259, THE HERITAGE FOUNDATION (Jul. 27, 2022), <https://www.heritage.org/asia/report/why-state-legislatures-must-confront-chinese-infiltration>.

⁵ *Id.* at 3.

⁶ *Id.* at 1.

⁷ *Id.*

⁸ Rubio Speaks on the Threat of Communist China at The Heritage Foundation, *supra* note 3.

⁹ *Id.*

¹⁰ Portions of this written testimony comes from a Legal Memorandum I authored with my Heritage colleagues. See ZACK SMITH, THOMAS JIPPING, & PAUL J. LARKIN, CAN CONGRESS LIMIT THE ABILITY OF CHINA (OR OTHER FOREIGN NATIONS) TO LOBBY U.S. OFFICIALS? STATUTORY AND CONSTITUTIONAL CONSIDERATIONS, LEGAL MEMORANDUM NO. 307, THE HERITAGE FOUNDATION (Jul. 18, 2022),

Statutory Considerations:

The Foreign Agents Registration Act (FARA)

Congress first implemented our current disclosure-based system in the 1930s when the world faced the crisis of an ascendant Nazi Germany and its dangerous ideology.¹¹ To “combat the spread of hidden foreign influence through propaganda in American politics,” Congress passed the Foreign Agents Registration Act, which then-President Franklin D. Roosevelt signed into law on June 8, 1938.¹² FARA has undergone three major amendments since its enactment, with the last being in 1995.¹³ There is bipartisan consensus that today, FARA is not working as well as it should.¹⁴ Uncertainty and concerns about selective—and potentially partisan¹⁵—enforcement abound. There can be uncertainty around who qualifies as a “foreign principal” under the statute, who qualifies as a foreign “agent,” and whether any registration exemptions apply to those who otherwise qualify. Thus, there is uncertainty about who needs to register as a foreign agent. These uncertainties can undermine FARA’s goal to make sure that “[d]isclosure of the required information facilitates evaluation by the government and the American people of the activities of such persons in light of their function as foreign agents.”¹⁶

<https://www.heritage.org/the-constitution/report/can-congress-limit-the-ability-china-or-other-foreign-nations-lobby-us>.

¹¹ JACOB R. STRAUS, CONG. RSCH. SERV., R46435, FOREIGN AGENTS REGISTRATION ACT (FARA): BACKGROUND AND ISSUES FOR CONGRESS (2020).

¹² *Id.*

¹³ *Id.*

¹⁴ *Enhancing the Foreign Agents Registration Act of 1938 Before the Subcomm. on the Const., Civ. Rights, and Civ. Lib. of the H. Comm. On the Judiciary*, 117th Cong. (Apr. 5, 2022) (explaining the practical problems with FARA including confusion over who should register and for which activities), available at <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4905>.

¹⁵ See Isaac Stanley-Baker, *DeSantis Spokeswoman Belatedly Registers as Agent of Foreign Politician*, WASH. POST (Jun. 8, 2022, 6:00 AM EDT), <https://www.washingtonpost.com/politics/2022/06/08/christina-pushaw-desantis-foreign-agent-saakashvili/>; Misty Severi, *DeSantis Defends Press Secretary from ‘Smear’ Reporting of Foreign Work*, WASH. EXAM. (Jun. 8, 2022, 6:31 PM), <https://www.washingtonexaminer.com/news/desantis-defends-press-secretary-from-smear-reporting-foreign-work>; Caitlin Oprysko, *Blue Star Amends FARA Paperwork*, POLITICO (May 31, 2022, 5:33 PM EDT), <https://www.politico.com/newsletters/politico-influence/2022/05/31/blue-star-amends-fara-paperwork-00036135>; see also Nick Robinson, “Foreign Agents” in an Interconnected World: FARA and the Weaponization of Transparency, 69 Duke L.J. 1075 (2020), available at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4013&context=dlj>.

¹⁶ *Id.*

The Lobbying Disclosure Act (LDA)

The Lobbying Disclosure Act also plays a role in this area. Congress passed this law in 1995 requiring certain individuals to disclose their lobbying activities. Unlike FARA, which the Justice Department administers, the clerks of the House and the Senate administer the LDA. When Congress passed the LDA, it also passed key amendments to FARA making clear that certain individuals did not have to register under FARA but had to register, if at all, under the less onerous—and less stigmatizing—LDA. This has widely been called the Lobbying Disclosure Act loophole. As a result of this loophole, those who lobby on behalf of foreign companies or foreign individuals, but not directly on behalf of foreign government or foreign political parties, must register under the LDA not FARA. And when a U.S. subsidiary of a foreign-owned company engages in activities on behalf of its foreign-owned parent company, the U.S. subsidiary does not have to register under FARA provided that its activities further the “bona fide commercial, industrial, or financial interest of the U.S. subsidiary.”¹⁷

Some Senators and Representatives have tried to correct these provisions, which allow much activity to go unreported. For instance, in “May 2022, a bipartisan group of U.S. Senators led by Chuck Grassley (R–IA) introduced a draft bill to amend the Lobbying Disclosure Act. The amendment, titled the ‘Disclosing Foreign Influence in Lobbying Act,’ would require disclosures under the 1995 law to include the names and addresses of every foreign government entity or foreign political party that participates in ‘the direction, planning, supervision, or control’ of any of the registrant’s lobbying activities.”¹⁸

Rep. Mike Gallagher (R–WI) and Sen. Tom Cotton (R–AR) introduced their own bill too, entitled the “Chinese Communist Party Influence Act,” which would essentially require those representing Chinese businesses to register under FARA.¹⁹ Sen. Rubio (R–FL) and Sen. John Cornyn (R–TX) also introduced a similar bill aimed at closing certain FARA registration loopholes.²⁰

None of these proposed bills, though, proposed an outright ban on lobbying by the Chinese Government or those acting on its behalf. If Congress wants to pursue this goal, it must pay careful attention to certain constitutional considerations.

¹⁷ See STRAUS, FOREIGN AGENTS REGISTRATION ACT (FARA), *supra* note 11.

¹⁸ See CUNNINGHAM, WHY STATE LEGISLATURES MUST CONFRONT CHINESE INFILTRATION, *supra* note 4, at 26 (citing Disclosing Foreign Influence in Lobbying Act, S. 4254, 117th Cong., 2d Sess., <https://www.congress.gov/bill/117th-congress/senate-bill/4254/text?format=txt> (accessed July 19, 2022)).

¹⁹ *Id.* (citing Chinese Communist Party Influence Transparency Act, S. 1754, 117th Cong., 1st Sess., https://www.cotton.senate.gov/imo/media/doc/ccp_transparency.pdf (accessed July 19, 2022)).

²⁰ Press Release, Sen. Marco Rubio (R–FL), Rubio, Cornyn Introduce Bill to Prevent Foreign Adversaries from Influencing U.S. Policy (Sept. 21, 2022), <https://www.rubio.senate.gov/public/index.cfm/2022/9/rubio-cornyn-introduce-bill-to-prevent-foreign-adversaries-from-influencing-u-s-policy>

Constitutional Considerations

The Supreme Court has twice upheld FARA over constitutional challenges.²¹ But the relevant constitutional question is slightly different if Congress considers going beyond requiring identification and disclosure by agents of foreign governments and seeks to regulate or limit those agents' activities. Nonetheless, Congress can limit that activity by, for example, requiring that all contacts by agents of foreign governments with federal officials be conducted through the U.S. Department of State. Or Congress could go even further and prohibit such an agent from lobbying altogether.

Congress can constitutionally take these actions because foreign nations and foreign political parties are not in the same legal position as U.S. citizens when it comes to their right to influence governments within the United States. And, in fact, Congress has already exercised that power in an important respect: Foreign citizens (and foreign governments) are banned from contributing to the political campaigns of those running for federal, state, or local office.²² All of this to say that there is no constitutional prohibition against banning lobbying by foreign governments—or even foreign nationals.²³

The same is true of foreign business entities in which a foreign government maintains a controlling interest—though practical problems of proving that controlling interest may arise depending on how the business entity is structured. The tougher situation arises when a U.S. business entity, which is wholly owned by a foreign business entity, which itself may be wholly, or partially, owned by a foreign government, seeks to lobby members of the U.S. government. The Supreme Court has made clear that corporations do possess some constitutional rights.²⁴ But no one would suggest that the Chinese government could simply set up a U.S. shell corporation and lobby to its heart's content. Even if many of the same concerns surrounding lobbying by U.S. citizens apply to U.S. business entities, even U.S. citizens can be prohibited from lobbying on behalf of a foreign government. The same would be true of U.S. business entities, and, if they are

²¹ See *Meese v. United States*, 481 U.S. 465, 477-85 (1987); *Viereck v. United States*, 318 U.S. 236, 241-47 (1943).

²² FOREIGN NATIONALS, FEDERAL ELECTION COMM'N, <https://www.fec.gov/help-candidates-and-committees/foreign-nationals/> (last visited Jun. 8, 2022); see also JACOB D. SHELLY, CONG. RSCH. SERV., LSB 10358, "THINGS OF VALUE" AND THE FOREIGN CONTRIBUTION BAN 1 (Oct. 28, 2019) (stating that "Concerns over foreign interference in domestic affairs date to America's founding when delegates to the constitutional convention feared that the new nation would make a tempting target for European powers willing to pay for influence and compliance . . . In response, the Constitution's drafters tried to inoculate federal leaders and institutions from outside meddling").

²³ David Bernstein, *Freedom of Petition*, in HERITAGE GUIDE TO THE CONST. (Matthew Spalding & David F. Forte eds, 2d ed. 2014) (stating that the "Supreme Court first confronted the right to petition and its cognate, the right of assembly, in *United States v. Cruikshank* (1876), declaring that the right was an 'attribute of national citizenship'").

²⁴ See, e.g., Adam Winkler, *The Long History of Corporate Rights*, 98 B.U. L. REV. 64 (2018) (briefly explaining some of those rights and the differing theories about why corporations possess them).

wholly or partially owned by a foreign government, they would likely be deemed to always be lobbying on behalf of the foreign government. Still, it can be tough to determine when U.S. business are lobbying “on behalf” of a foreign entity in the legal sense.

When companies like Nike, Apple, and Coca-Cola opposed the Uygher Forced Labor Prevent Act, were they advancing China’s interests or their own perceived interests? China clearly sought to benefit from these companies opposing this bill. And we know that China implicitly or explicitly puts pressure on companies to support or oppose bills that are in its national interest. So, “[i]n the case of the Uygher act, many of [the companies] were lobbying to protect their supply chains from disruption due to sanctions. More broadly, U.S. companies have lobbied against bills that are tough on China for fear of Chinese retaliation that might hurt their investments or cause them to lose market share in the country.”²⁵ Shame on them for doing so, but from their own immediate self-interested perspectives, it might make sense for them to do so.

Citizens, unlike foreign governments or officials, have the First Amendment right to “petition the Government for a redress of grievances.”²⁶ Because of this, some might argue that this guarantee, combined with the First Amendment’s right to freedom of speech, should allow American lobbyists to press the case of foreign governments and interests. But that’s a specious argument. Of course, American citizens may petition the government for “redress of grievances” no matter the grievance and no matter who benefits from the government’s ultimate action. Maybe a citizen believes we should be providing more humanitarian aid to a certain country. Maybe a citizen believes we should be providing more military aid to a country. Maybe a citizen believes—and wants the government to take action on—a whole host of issues that might benefit a foreign country. That’s fine so long as that American citizen is *not legally acting on behalf of a foreign government as a lobbyist*. Congress can prohibit this latter action.

But certain restrictions on lobbying by American citizens on behalf of American citizens are already codified.²⁷ If some restrictions on that type of lobbying are permissible, then restrictions, or even prohibition, of lobbying on behalf of foreign governments are permissible. This leads to the second point that lobbying on behalf of a foreign government is materially different from lobbying on behalf of an American citizen. The former poses risks to the nation’s security that are not present when someone lobbies on behalf of a state, municipality, or private business. The Constitution itself contains many provisions that make clear that the President and Congress can

²⁵ See CUNNINGHAM, WHY STATE LEGISLATURES MUST CONFRONT CHINESE INFILTRATION, *supra* note 4, at 24.

²⁶ U.S. CONST. amend. I.

²⁷ 18 U.S.C. § 207 (restrictions on lobbying by certain former officials).

treat foreign nations differently than American citizens²⁸ and can also regulate the conduct of the formal and private representatives or agents of foreign governments.²⁹ Acting in their own capacity as citizens, Americans can speak, publish, advocate, or in other ways argue in favor of foreign interests and urge the American government to do so. Acting as an agent or representative of a foreign government, however, is a different matter.³⁰

After all, we are entering a “new cold war” against major adversaries like Communist China.³¹ It is undisputed that China poses a grave threat to the security of the United States, and it routinely seeks to gain an advantage over the United States by engaging in harmful activities such as the ongoing theft of America’s intellectual property.³² Given the basic distinction between foreign governments and citizens, Congress should be able to regulate contacts between foreign governments and American public officials.

If Congress does not want to completely halt lobbying efforts by the Communist Chinese government and party, it could take lesser action such requiring that the State Department be notified of any communications by those lobbying on behalf of foreign governments and allow someone from the State Department to be present at any such in-person or virtual meeting. Congress could also require all such virtual meetings to be

²⁸ For example, the President has the prerogative whether to recognize a foreign nation and may choose or decline to do so as he or she sees fit. *See* *Zivotofsky v. Kerry*, 576 U.S. 1 (2015); U.S. CONST. art. II, § 3 (“[The President] shall receive Ambassadors and other public Ministers . . .”).

²⁹ Many of the Framers were lawyers or engaged in business, and anyone engaged in either activity would have been familiar with the principles governing the authority and responsibilities of agents. *See* Gary Lawson, *A Private-Law Framework for Subdelegation*, in *THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT* 130-44 (Peter J. Wallison & John Yoo eds., 2022).

³⁰ Of course, many of the same difficult issues present in FARA may be present here too. Would someone lobbying on behalf for a foreign corporation wholly owned by a foreign government be prohibited? Partially owned? What about a wholly owned American subsidiary corporation? We need not resolve these difficult issues here.

³¹ Hal Brands & John Lewis Gaddis, *The New Cold War: America, China, and the Echoes of History*, FOREIGN AFFAIRS (Nov./Dec. 2021), <https://www.foreignaffairs.com/articles/usa/2021-10-19/new-cold-war>.

³² *See, e.g.*, DENNIS C. BLAIR & JOHN M. HUNTSMAN, JR., *THE REPORT OF THE COMMISSION ON THE THEFT OF AMERICAN INTELLECTUAL PROPERTY* (2013) (“The scale of international theft of American intellectual property (IP) is unprecedented—hundreds of billions of dollars per year, on the order of the size of U.S. exports to Asia. . . . China has been the principal focus of U.S. intellectual property rights (IPR) policy for many years. . . . China is the world’s largest source of IP theft.”); FBI News, Remarks of FBI Director Christopher Wray at the Hudson Inst., *The Threat Posed by the Chinese Government and the Chinese Communist Party to the Economic and National Security of the United States*, July 7, 2020, <https://www.fbi.gov/news/speeches/the-threat-posed-by-the-chinese-government-and-the-chinese-communist-party-to-the-economic-and-national-security-of-the-united-states> (“The greatest long-term threat to our nation’s information and intellectual property, and to our economic vitality, is the counterintelligence and economic espionage threat from China. It’s a threat to our economic security—and by extension, to our national security.”).

recorded and submitted to the State Department, enabling the federal government to ensure that no such contacts go unnoticed and unobserved. The ability to do this is an important feature of the federal government’s authority over foreign policy, though again, unlike an outright prohibition, this might run into many of the same administrative problems that currently plague FARA enforcement.³³

Conclusion

Some foreign nations are not allies of the United States, nor are they merely economic rivals. They wish us ill and work to see that happen. As former U.S. Ambassador-at-Large for International Religious Freedom Sam Brownback has said, the Chinese government is “the primary enabler of human rights abuses around the world.”³⁴ Not only is the Chinese government itself “doing a genocide in Western China of the Uyghers [who] are dominantly Muslims . . .,” China is also exporting its virtual police-state technologies that targets specifically religious communities³⁵

As my colleagues and I have said: “It is time for a public debate on the question of whether Congress should close off attempts by the agents of such governments to influence our nation’s public officials. The Constitution does not stand in the way, and there is a good case to be made that we should take this step.”³⁶ Such a step likely will not—and cannot—solve every avenue that foreign governments may use in their attempts to influence our governmental actors here in the U.S., but it’s a concrete first step that deserves debate and discussion.

³³ As a policy matter too, an outright prohibition might be preferable. *See, e.g.*, Kevin Roberts, Interview on China in Focus, NTD TV (Feb. 2022), <https://www.youtube.com/watch?v=yo3f5BE5uQ4> (stating that “What must be done, number one, is to make sure that lobbyists in Washington, D.C., who are lobbying directly or indirectly on behalf of the Chinese communists cannot do that. We have to disallow that. . . .”).

³⁴ SCOTUS 101, *Texas Fights the Feds, Again*, The Heritage Foundation, at 26:00 (Interview with Amb. Sam Brownback begins) (Dec. 2, 2022), <https://shows.acast.com/scotus101/episodes/texas-fights-the-feds-again>.

³⁵ *Id.*

³⁶ ZACK SMITH, THOMAS JIPPING, & PAUL J. LARKIN, CAN CONGRESS LIMIT THE ABILITY OF CHINA (OR OTHER FOREIGN NATIONS) TO LOBBY U.S. OFFICIALS? STATUTORY AND CONSTITUTIONAL CONSIDERATIONS, *supra* note 10.