

ALERT

DOJ Urges the D.C. Circuit to Permit Retroactive FARA Registrations

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The U.S. Department of Justice (DOJ) recently filed a petition in the U.S. Court of Appeals for the District of Columbia Circuit for a rehearing en banc in the Steve Wynn case, asking the D.C. Circuit to reconsider *U.S. v. McGoff*'s conclusion that the U.S. government cannot compel foreign agents to retroactively register under the Foreign Agent Registration Act (FARA) once their work for a foreign principal has ended. This petition comes in response to a June 2024 ruling by the Appeals Court in the Wynn case, where *McGoff* was deemed binding precedent, thereby significantly hampering DOJ's ability to civilly compel retroactive FARA registrations.

By way of background, in 2022, the DOJ sued casino magnate Steve Wynn in the U.S. District Court for the District of Columbia to register under FARA for his alleged activities on behalf of the People's Republic of China (PRC). According to the original complaint, in 2017 Wynn contacted former President Trump and members of the Trump Administration to convey a request by the PRC to cancel a visa request for a Chinese national who was charged with corruption by the PRC and sought asylum in the United States. It was alleged that Wynn acted at the behest of Chinese officials to further the interests of his casino business in the Macao Special Administrative Region of the PRC. In October 2022, U.S. District Judge James E. Boasberg dismissed the action for failure to state a claim, noting that he was bound by D.C. Circuit precedent (*U.S. v. McGoff*), which interpreted an ambiguous FARA provision to mean that the continuing criminal offense of a FARA violation ends on the date that lobbying activities cease. A three-judge panel of the D.C. Circuit subsequently upheld the dismissal, agreeing that Wynn no longer had an ongoing obligation to register under FARA for his alleged lobbying/political

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activities on behalf of the PRC, giving rise to the instant DOJ petition.

In its petition for rehearing, DOJ noted that “[t]he [Wynn] panel’s decision, combined with *McGoff*’s broad holding, has significant adverse consequences for the government’s ability to enforce the Foreign Agents Registration Act.” DOJ emphasized that “*McGoff* was wrongly decided and creates outsized problems for the government’s efforts to ensure appropriate disclosure of foreign influence in our governing process.” Among other arguments, DOJ noted that *McGoff*’s reasoning was flawed because “[r]ead most naturally,” the language in the statute “directly anticipates, and rejects, the claim that an agent is no longer required to register once the agent has ceased acting as such.” As support for its petition, DOJ also argued that FARA is a critical tool for protecting democracy and that *McGoff*’s errors have broad detrimental effects.

Notably, in the wake of the Wynn decision, there has been an effort by U.S. lawmakers to provide DOJ with explicit legal authority to compel retroactive registrations under FARA. Specifically, in July 2023, a bipartisan group of senators introduced the Retroactive Foreign Agents Registration Act (RFARA); companion legislation was introduced in the House. This legislation would require individuals/entities who fall within the purview of FARA to register as foreign agents even after ceasing to engage in FARA-registerable activity for a foreign principal. However, the bill has shown no signs of movement since its introduction last year.

Please get in touch with the FARA attorney listed on this alert for any questions.

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Maddie Van Aken, a Legislative and Reporting Coordinator at Wiley Rein LLP, contributed to this alert.