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## FIVE LESSONS FROM THE FIRST ROUND OF DOJ'S FARA CASE AGAINST PROMINENT DC ATTORNEY

by Gregory A. Brower

Earlier this week, well known Washington, D.C. lawyer Gregory Craig received a split decision on a pre-trial motion to dismiss an indictment alleging he violated the Foreign Agent Registration Act ("FARA")<sup>1</sup> in the context of his work for the government of Ukraine. U.S. District Court Judge Amy Berman Jackson dismissed one of two counts against Craig, giving him a partial and mostly inconsequential victory, while deciding that DOJ's case could nevertheless go to trial on the main count in the indictment. In describing the underlying facts and the applicable law, Judge Jackson's decision suggests several do's and don'ts when it comes to the sometimes murky world of practicing at the intersection of law and politics in our nation's capital.

The FARA statute essentially requires that anyone engaged in political or public-relations activities in the U.S. on behalf of a "foreign power" register with DOJ to disclose said relationship. FARA defines "public-relations" activity as including "directly or indirectly informing, advising, or in any way representing a principal in any public relations matter pertaining to political or public interests, policies, or relations." It is this public-relations part of the statute that is at issue in DOJ's prosecution of Craig. Count One of the indictment alleges that Craig engaged in a scheme to knowingly and falsely conceal material facts about his public-relations activities on behalf of Ukraine in his communications with DOJ in violation of 18 U.S.C § 1001(a)(1). Count Two of the indictment alleged that Craig also violated FARA itself by omitting certain material facts in a letter to DOJ. It was this second count that Judge Jackson dismissed, finding the language of the FARA statute to be ambiguous as to the meaning of the phrase "filed with or furnishing to the Attorney General under the provisions of" in the statute. Applying the "rule of lenity," the judge dismissed Count Two, preserving Count One for trial.

This case is essentially about Craig's alleged intentional avoidance of the registration requirements of the FARA statute. According to the indictment, Craig, although aware of FARA's requirements, nevertheless misled his now former law firm and DOJ about the true nature and scope of his work for Ukraine in an effort to convince them both that registration was not required. Craig and his former firm were retained by Ukraine to conduct an independent inquiry into whether its prosecution of former Prime Minister Yulia Tymoshenko was fair in accordance with Western standards of justice and to prepare a report with the their findings. That engagement, alone, would not necessarily implicate FARA. However, DOJ has alleged that Craig went beyond merely preparing

<sup>1</sup> 22 U.S.C. § 611, et seq.

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a report, and was also personally involved in a public-relations campaign to improve Ukraine's public image internationally and in the U.S. It is alleged that Craig knew this activity would require registration under FARA and because, for a variety of reasons, he did not want to register, he misled both his firm and DOJ about the true nature of his public-relations activities. Craig has contested these allegations, pleading not guilty and vigorously litigating this case. A trial on the remaining § 1001 count is scheduled to start on Monday, August 12, 2019 in Washington, D.C.

The alleged facts underlying the indictment present a fascinating example of just how careful practitioners in this area of the law, and their firms, need to be in navigating FARA's registration requirements. A few important lessons emerge from the details of this case, at least as they are alleged in the indictment, including:

**1. Don't hide the true size and source of fees.** According to Judge Jackson's recent decision, Craig was aware of FARA's requirements, even telling one of his partners in an email, "I don't want to register...under FARA." Among the reasons why he apparently did not want to register was that registration would have required the disclosure of the fact that a private Ukrainian citizen had paid more than \$4 million for the underlying work on the commissioned report. Instead, Craig allegedly prepared and signed an engagement letter that falsely stated the total fee to be approximately \$12,000. Beyond raising obvious ethical questions, this fact likely raised suspicions within DOJ.

**2. Get competent legal advice on what FARA does and does not require, and follow it.** Although Craig knew enough to seek FARA advice within his firm, and did so, he allegedly chose to ignore it. The record indicates that one firm partner with FARA experience opined to Craig that "if we were to perform public relations work aimed at the U.S....then we would be obligated to register under FARA." Another partner weighed in with "I think our engagement should not include PR advice....it will create a FARA problem." Despite that good advice, Craig nevertheless misled his colleagues about the true scope and nature of his work so as to convince them that registration was not required.

**3. Do not backdate documents or create false invoices.** When the media began to question the \$12,000 fee for the report, Craig allegedly worked with others to create a backdated letter and false invoice to make it appear that the Ukrainian Ministry of Justice paid \$1,250,000 for the work. In fact, this invoice falsely stated both the source and amount of the payment. This fact also must have caused DOJ to believe that something was fishy about Craig's representations concerning the true scope and nature of his work.

**4. If you manage a law firm and you receive a letter from the FARA unit at DOJ about one of your partners' activities on behalf of a foreign power, don't let that partner respond to the letter.** According to Judge Jackson's order, that's exactly what happened. The FARA unit wrote to the firm's Managing Director stating that "[i]t has come to our attention...that your firm may be engaged in activities on behalf of the [Ukraine], which may require registration pursuant to [FARA]." According to the indictment, it was Craig who responded for the firm and made no reference to his contacts with the media on behalf of the client. When DOJ followed up with more questions, Craig allegedly disclaimed any contacts with the media. These representations notwithstanding, DOJ informed Craig and the firm that their activities nevertheless required registration. Despite DOJ's position, Craig persisted in convincing the firm's general counsel that the firm should not register, allegedly misleading him as to the true facts. After a meeting with DOJ, the FARA unit relented and revised its conclusion that Craig and the firm needed to register. However, according to the

indictment, this revised conclusion was based on false and misleading statements by Craig at said meeting.

**5. Don't discuss nuanced legal and ethical issues via email.** When it comes to preliminary communications about weighty legal or ethical matters, step away from the keyboard, pick up the phone or walk down the hall, and have a good old-fashioned live oral communication about it. This seems obvious in light of the now many indictments that have been based largely on email evidence, but as this case reveals, it cannot be said often enough.

The bottom line is this: although Craig hasn't been convicted of anything yet, his apparent attempt at playing fast and loose with FARA's requirements has resulted in a criminal indictment for him, and an embarrassing and expensive problem for his former firm.<sup>2</sup> DOJ has made it very clear recently that it means business when it comes to FARA enforcement. Indeed, Assistant Attorney General John Demers, head of DOJ's National Security Division where the FARA unit resides, recently confirmed a shift from seeing FARA as primarily an administrative statute to using it as an enforcement tool. Lawyers and law firms would be well-advised to take note of this case and the lessons it offers.

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<sup>2</sup> Craig's former firm avoided criminal charges by forfeiting its \$4.6 million in fees from the work as part of a settlement with DOJ.