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Heat Not Light: The Foreign Agents Registration Act After *Meese v. Keene*

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Abstract

Part I discusses the Supreme Court's decision in *Keene*. Part II reviews the legislative history of FARA, which shows that Congress fully understood "political propaganda" to be derogatory. Part III discusses the first amendment implications of the Court's decision.

COMMENTS

HEAT NOT LIGHT: THE FOREIGN AGENTS REGISTRATION ACT AFTER *MEESE v. KEENE*

INTRODUCTION

In January 1983, the United States Department of Justice informed the National Film Board of Canada that three documentary films¹ that it had distributed in the United States constituted "political propaganda," as defined in the Foreign Agents Registration Act of 1938 ("FARA" or "the Act").² The Film Board did not dispute the Justice Department's determination; instead, it informed its United States distributors that they would have to assist in complying with the Act by labeling the films as political propaganda and by disclosing information on their dissemination.³ Barry Keene, a lawyer and member of the California State Senate, wanted to show the films to express his political views. He sued the Attorney General on first amendment grounds, alleging that the propaganda label deterred him from showing the films because it officially designated them as biased and distorted.⁴ In *Meese v.*

1. Two of the films, *Acid from Heaven* (National Film Board of Canada) and *Acid Rain: Requiem or Recovery* (National Film Board of Canada), concerned acid rain, described at the time by Canada's Minister of the Environment as "the single greatest irritant to the United States-Canadian relationship from the Canadian point of view." N.Y. Times, Oct. 19, 1982, at 12, col.1 (quoting John Roberts). *Washington Post* columnist Mary McGrory said of *Acid Rain: Requiem or Recovery*: "[a] more tactful, neutral, inoffensive presentation of a fearful problem that is being visited on one country (theirs) by another country (ours) cannot be imagined." Note, *Neutral Propaganda: Three Films "Made in Canada" and the Foreign Agents Registration Act*, 7 COMM/ENT L.J. 435, 436-37 n.13 (1985) (quoting McGrory, *Justice Department's Boos Make Film Subjects Boffo Box Office*, Wash. Post, Mar. 1, 1983, at A3, col. a.).

The third film, *If You Love This Planet* (National Film Board of Canada), featured Dr. Helen Caldicott and concerned the dangers of nuclear war. In 1982 it won the Academy Award as Best Short Documentary. Note, *Neutral Propaganda, supra*, at 436-37 n.13; *Court Voids Use of 'Propaganda' Label*, NEWS MEDIA & L., Spring 1986, at 12.

2. Ch. 327, 52 Stat. 631 (1938) (codified as amended at 22 U.S.C. §§ 611-621 (1982 & Supp. III 1985)).

3. See 22 U.S.C. § 614(a) (disclosure requirements), (b) (labeling requirement) (1982).

4. *Keene v. Smith*, 569 F. Supp. 1513, 1515 (E.D. Cal. 1983). The appellee claimed that if he were to show films that the government had labeled "political propaganda," "his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired." *Id.* at 1515.

Keene,⁵ however, the United States Supreme Court held that the term "political propaganda," as used in FARA, is not pejorative.⁶ The Court thus decided that the label "political propaganda" does not burden speech.⁷

This Comment argues that the government's use of the term "political propaganda" amounts to an unconstitutional inhibition of speech. Part I discusses the Supreme Court's decision in *Keene*. Part II reviews the legislative history of FARA, which shows that Congress fully understood "political propaganda" to be derogatory. Part III discusses the first amendment implications of the Court's decision. This Comment concludes that the Act's worthwhile disclosure aims can be preserved without sacrificing first amendment rights by cleansing the statute of pejorative language.

I. THE KEENE DECISION

The focus of appellee Keene's challenge to FARA was narrow. He did not question the authority of Congress to identify or to label foreign material as foreign. What he did challenge was FARA's use of the term "political propaganda" to describe the material that he wanted to exhibit.

Enacted in 1938, the Foreign Agents Registration Act was designed to be a disclosure statute. Its drafters hoped to cast a "spotlight of pitiless publicity"⁸ on individuals who circulated material prepared outside the United States so that the U.S. public could judge such material accordingly. In this way, the Act was designed to "protect the national defense, internal security, and foreign relations of the United States."⁹

The Act and its accompanying regulations¹⁰ require agents¹¹ of foreign principals¹² who engage in political activi-

5. 619 F. Supp. 1111 (E.D. Cal. 1985), *rev'd*, 107 S. Ct. 1862 (1987).

6. 107 S. Ct. at 1873.

7. *Id.*

8. H.R. REP. No. 1381, 75th Cong., 1st Sess. at 2 (1937) [hereinafter H.R. REP. No. 1381].

9. Ch. 263, 56 Stat. 248-49 (1942) (codified at 22 U.S.C. § 611 note (1982)).

10. 28 C.F.R. §§ 5.100-.801 (1987).

11. The Act defines "agent," in part, as "any person who acts as an agent, representative, employee, or servant" of a foreign principal and who "engages within the United States in political activities for or in the interests of such foreign principal." 22 U.S.C. § 611(c)(1) (1982). In general, certain United States press services are exempt from registration, as are diplomats and their staff, individuals engaged in hu-

ties to file a detailed registration statement with the Department of Justice.¹³ This requirement is imposed on all such agents, whether they represent friendly or unfriendly governments.¹⁴

Since 1942, however, those agents who distribute what the Act defines as "political propaganda" must also file two copies of the material with the Justice Department.¹⁵ "Political propaganda" is defined in FARA as any form of communication that can be adapted to "prevail upon, indoctrinate, convert, induce, or in any other way influence" the U.S. public about the foreign relations of the United States or of a foreign country.¹⁶ The Justice Department generally depends on the agent to judge whether the material is "political propaganda."¹⁷ The Department does, however, employ a full-time reviewer to inspect and judge material distributed by agents.¹⁸

manitarian, religious, scholarly, scientific, or academic pursuits, individuals involved strictly in the commercial activities of a foreign principal, lawyers representing but not lobbying on behalf of foreign principals, and individuals who represent a government whose defense the President deems vital to the interests of the United States. 22 U.S.C. §§ 611(d), 613 (1982).

12. The Act defines "foreign principal," in part, as "a government of a foreign country." *Id.* § 611(b)(1) (1982).

13. 22 U.S.C. § 612 (a)(1)-(3) (1982). The registration statement includes such information as the agent's and the principal's identities and the activities the agent performs on the principal's behalf. *Id.*

14. *United States v. Kelly*, 51 F. Supp. 362, 363 (D.D.C. 1943); *Combating Totalitarian Propaganda: The Method of Exposure*, 10 U. CHI. L. REV. 107, 112 (1943) [hereinafter *Combating Totalitarian Propaganda*]. The National Film Board of Canada, for instance, is an agency of the Canadian government, and has been registered with the Justice Department since 1947. See *Block v. Meese*, 793 F. 2d 1303, 1306 (D.C. Cir.), *cert. denied*, 106 S. Ct. 3335 (1986).

15. Act of April 29, 1942, ch. 263, 4(a) 56 Stat. 248, 255 (codified as amended at 22 U.S.C. § 614(a) (1982)).

16. 22 U.S.C. § 611(j)(1982). The definition also includes material that "advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic." *Id.* § 611(j)(2). See *infra* note 68 and accompanying text.

17. Second Declaration of Joseph E. Clarkson, Chief, Registration Unit, Internal Security Section, Criminal Division, Department of Justice, Joint Appendix at 52, *Meese v. Keene*, 107 S. Ct. 1862 (1987) ("[i]n many, if not in most cases, the registrants themselves determine that the FARA's disclosure and labeling requirements apply to their dissemination of specific films"). For instance, British Information Services, an agency of the British Government, marks everything that leaves its offices as "political propaganda," whether the document concerns the Falkland Islands or the Royal Botanic Gardens at Kew. Telephone interview with Arthur Austin, Information Assistant, British Information Services (Aug. 18, 1987).

18. *Canadian Films and the Foreign Agents Registration Act: Oversight Hearing Before the*

If the material meets the statutory definition of "political propaganda," the agent must inform the Justice Department of the "places, times, and extent of [its] transmittal."¹⁹ The agent must also make certain that the material is "conspicuously marked at its beginning" with a label that sets forth the agent's and the principal's name and business, the fact that registration statements are available to the public at the Justice Department, and a disclaimer stating that registration of the agent does not indicate approval of the material's contents by the United States government.²⁰ Failure to disclose the necessary information, or wilful disclosure of false information, is a criminal offense.²¹

According to the appellee in *Keene*, "political propaganda" is an inherently derogatory term that unconstitutionally impugned the credibility of his speech and exposed him to polit-

Subcomm. on Civil and Constitutional Rights of the House Judiciary Committee, 98th Cong., 1st Sess. 7 (1983) [hereinafter Canadian Films] (statement of D. Lowell Jensen, Assistant Attorney General, Criminal Division, Department of Justice). According to Mr. Jensen, the reviewer's job "necessarily involves some discretion and expertise, primarily a sensitivity to the leading political themes of the day Review of the films is strictly limited to whether they meet the statutory criteria. The reviewer is not permitted to speculate about the motive or bias of the author; the standard is set forth in the definition. The test, in two words, is political advocacy." Id. The three Canadian films in question are examples of material submitted to and screened by the Justice Department's reviewer and subsequently judged "political propaganda." Keene v. Smith, 569 F. Supp. 1513, 1516 (E.D. Cal. 1983).

19. 22 U.S.C. § 614(a) (1982), 28 C.F.R. § 5.401 (a), (b). The so-called dissemination report also requires the agent to submit to the Justice Department the "[n]ame of station, organization, or theater using" the agent's film, the "[d]ate or dates" shown, and the "[e]stimated attendance." See Form OBD-69 (now CRM-159), Joint Appendix at 17, *Meese v. Keene*, 107 S. Ct. 1862 (1987).

20. 22 U.S.C. § 614 (b) (1982). The standard identification statement reads:

This material is prepared, edited, issued, or circulated by (name and address of registrant) which is registered with the Department of Justice, Washington, D.C., under the Foreign Agents Registration Act as an agent of (name and address of foreign principal). Dissemination reports on this film are filed with the Department of Justice where the required registration statement is available for public inspection. Registration does not indicate approval of the contents of this material by the United States Government.

Appellants' Jurisdictional Statement at 4, *Meese v. Keene*, 107 S. Ct. 1862 (1987). Both registration and dissemination reports are public record. 22 U.S.C. § 616(a) (1982).

FARA's accompanying regulations require an agent who transmits a film containing "political propaganda" to submit "either a film strip showing the label required by section 4(b) of the Act or an affidavit certifying that the required label has been made a part of the film." 28 C.F.R. § 5.400(c) (1987).

21. 22 U.S.C. § 618(a).

ical attack and public censure.²² The Federal District Court of the Eastern District of California agreed, and, in 1983, permanently enjoined the Department of Justice from using the term "political propaganda" in connection with the films.²³

The Supreme Court reversed, concluding that the statute's definition of the term "political propaganda" is "neutral and evenhanded."²⁴ The lower court's holding was based "not on what the statute actually says, requires, or prohibits," stated the Court, "but rather upon a potential misunderstanding of its effect."²⁵ The Court reasoned that the Act neither prohibited the appellee from showing the material, nor prevented him from "combat[ing] any such bias simply by explaining" that the films had *not* been officially censored by the Justice Department.²⁶ In short, it placed "no burden"²⁷ on the appellee's speech. The Court thus distinguished *Lamont v. Postmaster General*,²⁸ in which the Court had struck down as burdensome a postal statute requiring addressees to request mail delivery of "communist political propaganda" sent to them.²⁹ Moreover, the Court reasoned, FARA's "political propaganda" sections succeeded in providing "additional disclosures that would better enable the public to evaluate the import of the propaganda."³⁰ By contrast, the lower court's injunction on the use of the term *withheld* information from the public—specifically, the fact that the United States government had determined the material to be "political propaganda."³¹ This "paternalistic strategy of protecting the public from information" could not

22. Brief of Appellee at 8, *Meese v. Keene*, 107 S. Ct. 1862 (1987).

23. *Keene v. Meese*, 619 F. Supp. 1111 (E. D. Cal. 1983).

24. 107 S. Ct. at 1873. The majority opinion, written by Justice Stevens, was joined by Justices Rehnquist, White, Powell, and O'Connor. Justice Blackmun wrote the dissent, in which Justices Brennan and Marshall joined. Justice Scalia took no part in the consideration or decision of the case, presumably because he had written the circuit court opinion in a similar case, *Block v. Meese*, 793 F. 2d 1303 (D.C. Cir.), *cert. denied*, 106 S. Ct. 3335 (1986); *see infra* note 33 and accompanying text.

25. 107 S. Ct. at 1870.

26. *Id.* at 1871.

27. *Id.*

28. 381 U.S. 301 (1965); *see infra* notes 120-33 and accompanying text.

29. 381 U.S. at 305. The *Keene* Court reasoned that the offending element in *Lamont* was the government's physical detention of the addressee's mail, not the mail's "mere designation as 'communist political propaganda.'" *Meese v. Keene*, 107 S. Ct. at 1871.

30. 107 S. Ct. at 1871.

31. *Id.*

stand, stated the Court.³²

Second, the Court ruled that while the appellee's proof of harm from the application of FARA was sufficient to confer standing,³³ it fell "far short" of proving that the Act "has had the effect of censorship."³⁴

Finally, concluded the Court, its duty is to "construe legislation as it is written, not as it might be read by a layman."³⁵

II. WORDS OF WAR: THE LEGISLATIVE HISTORY

The legislative history makes clear, however, that the legislators who used the "political propaganda" language understood the term to have negative connotations. The Foreign Agents Registration Act was Congress's attempt to control

32. *Id.* The Court relied for this conclusion on *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). In that case, the Court rejected a Virginia statute that prohibited pharmacists from advertising their prices on prescription drugs.

33. 107 S. Ct. at 1867. The plaintiff in a similar case had lost on the issue of standing at the trial-court level because the district court deemed the term "political propaganda" to be "neutral." See *Block v. Smith*, 583 F. Supp. 1288, 1295 (D.D.C. 1984). The Circuit Court reversed on the issue of standing but found for the government on the first amendment issue, claiming that the term "political propaganda" as statutorily defined carried no indication of government disapproval. *Block v. Meese*, 793 F. 2d 1303, 1309, 1312 (D.C. Cir.) (Scalia, J.), *cert. denied*, 106 S. Ct. 3335 (1986).

With respect to the standing of plaintiff Keene, however, the government presented a new argument. The government contended that FARA's labeling requirement—which calls for the material to be "conspicuously marked at its beginning" with the identification statement—applied only to registered agents and not to subsequent distributors, such as the plaintiff Keene. *Keene v. Smith*, 569 F. Supp. 1513, 1515 (E.D. Cal. 1983); see 22 U.S.C. § 614(b). Because the plaintiff was free to remove the label, argued the government, he lacked standing. The lower court had termed the argument regarding removable labels "frankly surprising" in light of the Congressional intent to inform hearers of the origin of material covered by FARA. 569 F. Supp. at 1519 n.2. "[N]o reasonable reader of the statute and regulations could have imagined that the recipient of the material was free to remove the label . . ." *Id.* at 1519. As the lower court recognized, the government's position provided a surefire method for "frustrat[ing] Congressional intent." *Id.* The Supreme Court did not reach the question of whether or not the label is removable because it found for the plaintiff on the issue of standing. See 107 S. Ct. at 1867.

34. 107 S. Ct. at 1873. The Court cited a number of foreign films that had been labeled "political propaganda" and released in the United States as proof that FARA does not suppress speech. The titles include: *Berlin Means Business and More* (Berlin Economic Development Corporation); *Hong Kong Style* (Government of Hong Kong); *A Conversation with Golda Meir* (Consulate General of Israel); and *Ballad of a Soldier* (Sovexportfilm). *Id.* at 1872 n.17.

35. *Id.* at 1873.

“pernicious propaganda”³⁶ by disclosing the identity of its authors.

Congress passed the Foreign Agents Registration Act in the uneasy pre-war year of 1938 because it was alarmed by the vast amounts of Nazi propaganda then circulating in the United States.³⁷ One year earlier the House Un-American Activities Committee,³⁸ formed to investigate Nazi and other subversive foreign propaganda,³⁹ had reported “incontrovertible evidence . . . that there are many persons in the United States representing foreign governments or foreign political groups, who are supplied . . . with funds and other materials to foster un-American activities.”⁴⁰ Most of the material distributed by such persons was aimed either at creating racial and religious intolerance in the United States,⁴¹ or at accomplishing “[t]he overthrow by force or violence of [our] republican form of government.”⁴² The tone of the material was “violent, vitriolic, and scurrilous.”⁴³ It was, in short, “vicious and un-American propaganda.”⁴⁴

Worse than the material’s tone, however, was its anonymity. Much of the material either was unidentified in origin, or was distributed under false U.S. credentials, thereby sparing its authors the heightened scrutiny that many recipients in the United States would have applied to foreign material.⁴⁵ The

36. H.R. REP. NO. 1381, *supra* note 8, at 2.

37. Act of June 8, 1938, ch. 327, 52 Stat. 631 (1938). The House committee that recommended passage noted in its report that, “During the past 2 years this country has been flooded with propaganda material . . .” *Investigation of Nazi and Other Propaganda*, H.R. REP. NO. 153, 74th Cong., 1st Sess. 2 (1935) [hereinafter *Nazi Propaganda*] (quoting Committee chairman, Representative John W. McCormack of Massachusetts). The Nazi Party alone had shipped literally “tons of propaganda literature” into the United States as part of its “strenuous efforts . . . to enlist” Americans of German descent. *Id.* at 3. In addition, the committee found evidence of propaganda disseminated by the Third International in Moscow through the American Communist Party. *Id.* at 13.

38. The full name of the committee was the Special Committee on Un-American Activities. H.R. RES. 198, 73rd Cong., 2d Sess., 78 CONG. REC. 13 (1934) [hereinafter H.R. Res. 198].

39. H.R. Res. 198, *supra* note 38, at 13.

40. H.R. REP. NO. 1381, *supra* note 8, at 1-2.

41. *Nazi Propaganda*, *supra* note 37, at 2.

42. *Id.* at 13.

43. *Id.* at 11.

44. *Id.* at 5.

45. *See, e.g., id.* at 5 (Nazi group in United States headed by American citizen “in an effort to give the organization the appearance of being ‘American’ in character”).

House Un-American Activities committee recommended that Congress enact a statute that would publicize subversive activities of such propagandists, "so that the American people may know those who are engaged in this country by foreign agencies to spread doctrines alien to our form of government."⁴⁶ Thus, the Act's basic strategy was not to limit or deter speech but to provide additional information "so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source."⁴⁷ It required merely that agents of foreign principals identify themselves, their principals, and their business arrangements to the federal government, and thus theoretically to the public at large.⁴⁸

Despite the ominous times, the drafters of FARA produced a remarkably sophisticated piece of legislation. For one thing, the statute was free of the heated language that had characterized the Congressional reports and hearings preceding its passage.⁴⁹ For another, while earlier statutes had prohibited dissemination of subversive information,⁵⁰ FARA ex-

During hearings on the bill (H.R. 1591), Representative McCormack was asked whether publicity would be a deterrent to the dissemination of foreign propaganda. He answered: "Yes It would be brought out in the open so that everybody would know what it was being used for" *Hearings on H.R. 1591, Before a Subcomm. of the Comm. on the Judiciary of the House of Representatives, 75th Cong., 1st Sess. (1937) (unpublished), quoted in Combating Totalitarian Propaganda, supra note 14, at 112 n.20.*

46. H.R. REP. NO. 1381, *supra* note 8, at 2.

47. *Viereck v. United States*, 318 U.S. 236, 251 (1943) (Black, J., dissenting on other grounds).

48. Act of June 8, 1938, ch. 327, 52 Stat. 631 (1938). The 1938 Act also set forth exemptions and penalties, similar to those currently in existence. *See id.* § 1(d) (definition of "agent of a foreign principal"), § 5 (penalties), 52 Stat. 631, 632-33; *see also supra* notes 10-13, 21, and accompanying text.

49. *See supra* notes 40-44 and accompanying text.

50. *See, e.g.*, the Federal Espionage Act of 1917, ch. 30, 40 Stat. 217 (codified as amended at 18 U.S.C.A. §§ 793-798, 2388 (West 1976 & Supp. 1987)) (crime, punishable by imprisonment, fine, or death, for disclosure of military secrets); Sedition Act of 1798, ch. 74, § 2, 1 Stat. 596 (crime, punishable by a \$2000 fine and two years in prison, "if a person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress[,] or the President[,] with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States"). The Act, whose constitutionality was never reviewed by the Supreme Court, expired on March 3, 1801. President Jefferson pardoned all those who had been convicted under it. Congress also eventually repaid most of the fines. 1 T. EMERSON, D. HABER, & N. DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 27-28 (4th ed. 1976).

pressly permitted it.⁵¹ Conscious of the first amendment implications of the Act,⁵² FARA's drafters aimed to limit subversive speech not by classifying it as such but by revealing information about its source.⁵³ The Act made no distinction as to the content of material distributed; not only subversive propagandists, but also tourist agents extolling the beauty of the Alps, were required to register.⁵⁴ In theory, the information collected and made public would help those with nothing to hide, while it would rob subversives of secrecy, their most potent weapon. By requiring more, not less, information, FARA was said to "implement[] rather than detract[] from the prized freedoms guaranteed by the First Amendment."⁵⁵

The 1938 law did not work, however. Only three years after its passage, FARA was declared "a dead letter" by Congressional consultants.⁵⁶ Meanwhile, U.S. allies were at war, and Axis propaganda was pouring into the United States at an even greater rate than before the passage of the Act.⁵⁷ Congress debated how best to strengthen "investigation of subversive activities."⁵⁸ Eleven days after Pearl Harbor, the House recom-

51. H.R. REP. NO. 1381, *supra* note 8, at 2 ("[pernicious] propaganda is not prohibited under the proposed bill").

52. *Id.* ("this bill does not in any way impair the right of freedom of speech, or of a free press, or other constitutional rights").

53. *Id.*

54. *Combating Totalitarian Propaganda*, *supra* note 14, at 110. Legislators thus compared FARA to the National Food and Drug Act, which required labeling of foods for health reasons. H.R. REP. NO. 1381, *supra* note 8, at 3.

55. *Viereck v. United States*, 318 U.S. 236, 251 (1943) (Black, J., dissenting on other grounds).

56. 87 CONG. REC. APP. A4417, A4419 (1941). The main problem, according to the Institute of Living Law, was "amazingly inept" administration by the government. The agents' names had never been alphabetized, let alone indexed. *Combating Totalitarian Propaganda*, *supra* note 14, at 115. As a result, the bill was of "no practical importance in exposing the propaganda activities it was designed to expose." 87 CONG. REC. APP. A4417, A4419.

57. *Amending Act Requiring Registration of Foreign Agents: Hearings on H.R. 6045 Before the Subcomm. of the House Comm. on the Judiciary, 77th Cong., 1st Sess. 29-30* (1941) [hereinafter *Hearings on H.R. 6045*] ("[t]here is an enormous problem here. The problem has grown rather than lessened, since the passage of the act of 1938. . . . And [the propaganda is now] frequently better concealed") (statement of Adolf A. Berle, Assistant Secretary of State).

58. 87 CONG. REC. 10,048 (1941), 88 CONG. REC. 802 (1942). The House passed proposals to include specific references in the definitions of "person" and "agent of a foreign principal" to the Communist Party of the United States, the German-American Bund, and the Kyffhauserbund. 87 CONG. REC. at 10,062 (Dec. 19, 1941). The floor amendments were defeated in conference committee, H.R. REP. NO. 1662, 77th

mended amendments to FARA,⁵⁹ which were passed five months later.⁶⁰

The 1942 amendments added the "political propaganda" sections to the Act.⁶¹ They also required foreign propagandists not only to register but also to submit copies of their "political propaganda" to the Justice Department.⁶² It seems clear that the legislators understood "political propaganda" to be a negative term. The hearings preceding the passage of the 1942 amendments reveal an ongoing if not heightened concern with "colored and twisted"⁶³ materials, "bad political organizations,"⁶⁴ and "totalitarian infiltration."⁶⁵ The legislators responded to this concern by creating a statutory definition that made use of such words as "prevail upon"⁶⁶ and "indoctrinate,"⁶⁷ and that purported to apply to material that "instigates . . . disorder, civil riot, or . . . the use of force or violence."⁶⁸ The drafters of the 1942 amendments defined "polit-

Cong., 2d Sess. (1942), chiefly on the ground that the Act already applied to members of such groups. H.R. REP. NO. 1662, *supra*, at 3. The House then agreed to the conference report. 88 CONG. REC. 806 (Jan. 28, 1942).

59. H.R. REP. NO. 1547, 77th Cong., 1st Sess. (1941) [hereinafter H.R. REP. NO. 1547]. The day before the printing of the report, Representative Springer of Indiana had reminded his colleagues that, "We are in war, and we must prepare to defend ourselves not alone on the ocean but [also] within our borders. This legislation is intended to meet that emergency at this particular moment. . . . Our people will not tolerate any activities which are not wholly and truly American. All un-American activities must cease in our country and all sinister and secretive methods used by all agents of foreign principals must now end. Our thoughts are for our own Nation." 87 CONG. REC. 10,055 (1941).

60. Act of April 29, 1942, ch. 263, 56 Stat. 248.

61. Act of April 29, 1942, ch. 263, §§ 1(j), 4(a)-(b), 56 Stat. 248, 250-51, 255.

62. Act of April 29, 1942, ch. 263, § 4(a)-(b), 56 Stat. 248, 255. For an excellent discussion of all amendments to the Act, see Bello, *Legislative History of the Foreign Agents Registration Act*, in REGISTRATION OF FOREIGN AGENTS: A PRACTICAL AND LEGAL GUIDE 21-28 (1981) [hereinafter *Legislative History*].

63. *Hearings on H.R. 6045, supra* note 57, at 13 (statement of L.M.C. Smith, Chief, Special Defense Unit, Department of Justice).

64. *Id.* at 20 (statement of L.M.C. Smith).

65. *Id.* at 48 (statement of L.M.C. Smith); see also *id.* at 29 (during war "the technique of infiltration, of propaganda, of internal organization in another country" go on) (statement of Adolf A. Berle, Jr., Assistant Secretary of State); *id.* at 52 ("these totalitarian influences" best combated by "informing our people and keeping them continuously informed of who was who and what was what") (statement of Rep. Voorhis of California).

66. 22 U.S.C. § 611(j) (1982).

67. *Id.*

68. *Id.* § 611(j)(2). This subsection, which refers more completely to "the use of force or violence in any other American republic," was added in response to the

ical propaganda" in a "fairly broad"⁶⁹ manner not because they intended it to be neutral, but because they wanted to regulate nearly anything that a registered agent distributed.⁷⁰ The 1942 amendments were designed to be "the most effective method of combating"⁷¹ foreign propaganda, which Congress recognized as "part of the machinery of making war."⁷²

During the 1950s and 1960s the government took full advantage of FARA's broad definition of political propaganda. During that time the Post Office Department and the Customs Bureau engaged in a large-scale program of seizure and de-

recommendations approved at the so-called Pan-American Conference, held at Havana, Cuba, in July 1940. *Hearings on H.R. 6045*, *supra* note 57, at 10, 11. At that conference the United States and twenty central and South American nations drew up plans to protect each other should the war in Europe spread to the American hemisphere. Stowell, *The Habana Conference and Inter-American Cooperation*, 35 AM. J. INT'L L. 123 (1941). One of the signatories' chief concerns was "the subversive action of foreign agents in this hemisphere." Stowell, *supra*, at 124. The signatories agreed to consult together should any of the republics be "menaced" by "pressure, propaganda, threats" or other challenges to "their existing democratic systems." Final Act and Convention, Second Meeting of Ministers of Foreign Affairs of the American Republics, July 21-30, 1940, art. VI, para. 1-2, DEP'T ST. BULL., Aug. 24, 1940, Vol. 3, No. 61, at 127, 132; DEP'T ST. BULL., Aug. 31, 1940, Vol. 3, No. 62, at 178.

69. H.R. REP. No. 1547, *supra* note 59, at 3, 5. The House Report defended the breadth of the definition by explaining that it affected only those who were already required to register. *Id.*

70. *Hearings on H.R. 6045*, *supra* note 57, at 18 ("once they are registered agents and have been compelled to register, then we want to get a fairly broad coverage of the type of material that they distribute") (statement of L.M.C. Smith).

71. H.R. REP. No. 1547, *supra* note 59, at 4. Early prosecutions under FARA are further indications of what sort of activity Congress intended to target. In 1943, for instance, the Department of Justice indicted an ostensibly fraternal association, its subsidiary, and twenty-seven of its members with conspiracy to violate FARA and the Notification Act by concealing the fact that they were large-scale propaganda arms of the Third Reich. *United States v. German-American Vocational League*, 153 F.2d 860 (3d Cir.), *cert. denied*, 328 U.S. 833 (1946); see also *Activities of Nondiplomatic Representatives of Foreign Principals in the United States: Hearings Before the Senate Comm. on Foreign Relations*, 88th Cong., 1st Sess. 69-70 (1963) [hereinafter *Activities of Nondiplomatic Representatives*] (statement by the Department of Justice). Of the nineteen prosecutions brought pursuant to FARA between 1939 and 1945, fourteen concerned German or Soviet agents. *Activities of Nondiplomatic Representatives*, *supra*, at 64-70; see, e.g., *Viereck v. United States*, 318 U.S. 236 (1943) (overturning conviction of an agent of German principal); *United States v. Auhagen*, 39 F. Supp. 590 (D.D.C. 1941) (denying motion regarding taking of deposition of German national in case where fellow German national had been indicted for wilful failure to register).

72. *Hearings on H.R. 6045*, *supra* note 57, at 29 (statement of Adolf A. Berle, Jr.). Said one Congressman: "Propaganda [is] one of the most powerful weapons on earth. In very recent years its tremendous influence has come to be more and more clearly recognized." 87 CONG. REC. 10,051 (Dec. 19, 1941) (statement of Rep. McLaughlin).

struction of publications mailed from foreign, and particularly Soviet-bloc, nations.⁷³ Such foreign material—whether political tract or chess manual—fit within the broad standard of "political propaganda" that Congress had adopted in 1942.⁷⁴

That FARA, originally a disclosure statute, could be used to *prevent* dissemination was even then considered "at sharp variance with the statutory language and purpose" by one commentator.⁷⁵ President John F. Kennedy tried to put an end to the program in early 1961,⁷⁶ but the following year Congress essentially reinstated it.⁷⁷ Not until 1965 did the Supreme Court strike down the mail program on first amendment grounds.⁷⁸

The following year FARA was amended in the hope of changing its focus from propagandists to lobbyists.⁷⁹ The Senate report recommending passage of the amendments stated

73. Note, *Government Exclusion of Foreign Political Propaganda*, 68 HARV. L. REV. 1393 (1955). The material detained ranged from copies of *Pravda* and *Izvestia* to a shipment of Lenin's *The State and the Revolution*, ordered by Brown University for a history course. *Id.* at 1393, 1394 n.10. In one instance a non-Russian-speaking Customs Department employee in St. Paul, Minnesota, was handed a Russian-English dictionary and told to search a warehouse full of detained material for "Communist propaganda." See Schwartz & Paul, *Foreign Communist Propaganda in the Mails: A Report on Some Problems of Federal Censorship*, 107 U. PA. L. REV. 621, 626 (1959), citing *Hearings Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 82d Cong., 1st Sess. 230 (1951).

Authority to proceed with the program was based on a 1940 opinion of the Attorney General regarding the combined effect of FARA and the Espionage Act of 1917. Note, *supra*, at 1395.

74. Schwartz & Paul, *supra* note 73, at 633. *Chess for Beginners* was one of the detained titles. *Id.*

75. Note, *supra* note 73, at 1401.

76. Schwartz, *The Mail Must Not Go Through—Propaganda and Pornography*, 11 UCLA L. REV. 805, 805 & n.1, 806 (1964). On March 17, 1961, the White House Press Secretary announced that the President, after consulting with the Secretary of State, the Secretary of the Treasury, the Postmaster General, and the Attorney General, had ordered mail confiscation to stop immediately, because it served "no useful intelligence function." *Id.*

77. Postal Service and Federal Employees Salary Act of 1962, Pub. L. No. 87-793, § 305, 76 Stat. 832, 840 (adding 39 U.S.C. § 4008 (1962)), *found unconstitutional* by *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

78. *Lamont*, 381 U.S. 301 (1965).

79. Pub. L. No. 89-486, 80 Stat. 244 (1966). Congress passed a number of statutes after 1938 that dealt more directly with subversives than did FARA. See, e.g., ch. 897, 54 Stat. 1201 (1940), (the "Voorhis Anti-Propaganda Act"); Subversive Activities Control Act of 1950, ch. 1024, §§ 1-32, 64 Stat. 987 (current version codified in scattered sections of 8 U.S.C., 18 U.S.C., 22 U.S.C., and 50 U.S.C.); Communist Con-

that FARA had "through the years been too narrowly enforced with the emphasis placed on subversive or potentially subversive agents."⁸⁰ Nevertheless, by retaining the outdated "political propaganda" language, the 1966 amendments did little to rid the Act of its stigmatizing effect.⁸¹ A 1977 report prepared for the Senate Foreign Relations Committee stated that the language and administration of FARA were "vestiges of the law's antecedents."⁸² Furthermore, these vestiges were "play[ing] hob with its effective operation."⁸³ The association of the Act with subversives "ha[d] stigmatized the registration process" and thus made voluntary compliance by registrants difficult to ensure.⁸⁴ The study recognized that merely complying with the Act left registrants with the feeling that they were "making admissions with criminal or subversive overtones."⁸⁵

trol Act of 1954, ch. 886, § 2, 68 Stat. 775, 775-76 (current version codified at 50 U.S.C. §§ 782, 784, 785, 790-793, 841-844 (1982 & Supp. III 1985)).

In addition, Congress was concerned about the problem of United States lawyers who represented foreign interests but failed to disclose this fact to the representatives and senators whom they lobbied—a new twist on the old, anonymous Nazi propaganda problem that had originally prompted the passage of FARA. *Hearings Before the Senate Comm. on Finance on H.R. 12154, Sugar Act Amendments of 1962*, 87th Cong., 2d Sess. 357-58 (1962); see also Note, *Regulating Nondiplomatic Activities of Representatives of Foreign Governments in the United States*, 31 GEO. WASH. L. REV. 977 (1963); Note, *Disclosure Under the Foreign Agents Registration Act of 1938, as Amended*, 14 W. RES. L. REV. 579 (1963). Foreign interests preferred to use U.S. nationals rather than their own diplomats because they believed—correctly—that increased familiarity with the political system would yield better results. See Berman & Heineman, *Lobbying by Foreign Governments on the Sugar Act Amendments of 1962*, 28 LAW & CONTEMP. PROBS. 416, 419 (1963).

80. S. REP. NO. 875, 88th Cong., 2d Sess. 5 (1964).

81. AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE, 95TH CONG., 1ST SESS., THE FOREIGN AGENTS REGISTRATION ACT 14 (Senate Foreign Relations Comm. Print 1977) [hereinafter C.R.S. REPORT].

82. C.R.S. REPORT, *supra* note 81, at 13.

83. *Id.*

84. *Id.* Enforcement of FARA has remained spotty at best. A 1980 General Accounting Office report noted that the number of agents registered represented only "the tip of the iceberg;" that awareness of FARA among officials in the Departments of State, Commerce, the International Trade Commission, the Securities and Exchange Commission, the Office of the United States Trade Representative, and the military services "was limited or non-existent." UNITED STATES GENERAL ACCOUNTING OFFICE, IMPROVEMENTS NEEDED IN THE ADMINISTRATION OF FOREIGN AGENT REGISTRATION, Enclosure I, 1-6 (1980) [hereinafter GAO REPORT]. In addition, only fifty-one percent of registrants were reporting the required information adequately. *Id.* at 3. There was no information on whether the public found the files satisfactory. *Id.* at 4.

85. C.R.S. REPORT, *supra* note 81, at 14.

III. THE FIRST AMENDMENT ARGUMENTS

Like other courts considering the *Keene* question, the Supreme Court cited reputable dictionaries and experts as proof that the word "propaganda" has both neutral and pejorative definitions.⁸⁶ The Court agreed that many people understand the word to bear negative connotations;⁸⁷ indeed, the Court has itself used the word to disparage.⁸⁸

The real issue was not, however, an exercise in semantics. Film is a form of speech protected by the first amendment.⁸⁹ The appellee demonstrated that a government act threatened to cause him harm.⁹⁰ At issue was the tension between the appellee's freedom of speech and the interests, if any, of the United States in labeling material "political propaganda." Traditionally, the government must prove⁹¹ that any restrictions it places on the content of speech serve compelling government interests.⁹² Furthermore, these restrictions must be narrowly

86. See *Meese v. Keene*, 107 S. Ct. 1862, 1869-70 nn.10,11 (1987); see also *Block v. Meese*, 793 F.2d 1303, 1311 (D.C. Cir. 1986); *Keene v. Meese*, 619 F. Supp. 1111, 1121-22 (E.D. Cal. 1985). The California court recognized, however, that "these dictionary meanings have little if anything to do with the use of the word 'propaganda' in ordinary speech." 619 F. Supp. at 1122.

87. See 107 S. Ct. at 1869. The Court recognized the public perception when it decided in favor of the plaintiff on the issue of standing. The Court agreed that exhibiting films classified as "political propaganda" would "substantially harm [Keene's] chances for reelection and would adversely affect his reputation in the community." *Id.* at 1868. Thus, the Court found itself in the anomalous position of recognizing injury caused by the term on the one hand, but refusing to remedy it on the other, claiming the injury was due not to the statute but to the public's misperception of the statute. *Id.* at 1870.

As the lower court noted, "[i]t may be beyond the power of Congress to determine, for example, that all materials addressing public policy issues and originating from foreign sources shall hereinafter be called 'poison' or 'obscenity.' There are words that cannot be stripped [of] their nuance." *Keene v. Smith*, 569 F. Supp. 1513, 1522 (E.D. Cal. 1983).

88. See, e.g., *Lehman v. Shaker Heights*, 418 U.S. 298, 304 (1974) (upholding municipal ban on political advertisements in city rapid-transit cars because riders "would be subjected to the blare of political propaganda"). The Justice Department has acknowledged that the *Keene* controversy stemmed "from the pejorative connotation of the phrase 'political propaganda' . . . in the public mind." Statement of D. Lowell Jensen, Assistant Attorney General, Criminal Division, Department of Justice, *Canadian Films*, *supra* note 18, at 7.

89. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

90. 107 S. Ct. at 1867.

91. *Elrod v. Burns*, 427 U.S. 347, 362 (1976).

92. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980);

tailored⁹³ to meet those interests. The Court will carefully scrutinize⁹⁴ the government's argument.

A. *Balance of Interests*

Speech concerning public affairs has long been considered more than self-expression; it is the essence of self-government.⁹⁵ Thus, the government must examine the interests served by any restriction it places on the content of speech.⁹⁶

1. The Government's Interest

The Court did not articulate which, if any, compelling

First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978); NAACP v. Button, 371 U.S. 415, 438-39 (1963); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).

The "compelling government interest" test is only one of many standards applied in first amendment cases. Government action that restricts merely the time, place, or manner of speech need only be reasonable. Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (upholding restriction on "loud and raucous" sound trucks on public streets). At the other end of the spectrum is the test devised for prior restraint of publication in *New York Times v. United States*, 403 U.S. 713, 730 (1971) (prior restraint prohibited unless direct, immediate, and irreparable harm to the nation or its people would result) (Stewart, J., concurring). A host of standards applies in different contexts along the first amendment spectrum. See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968) (incidental restriction on speech upheld if it furthers important or substantial government interests unrelated to suppression of free speech and is no greater than necessary); *Buckley v. Valeo*, 424 U.S. 1; 25 (1976) (per curiam) (restriction on freedom of association sustainable only on showing of "sufficiently important interest"); *NAACP v. Alabama*, 357 U.S. 449, 463 (1958) ("sufficient" interest required to justify restriction on freedom of association); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 596 (1982) (right of access to criminal trials overridden by "compelling" government interest); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577, 581 (1980) (right of access absent overriding interest articulated in findings); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) (content of speech regulable if there is a "clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent").

93. *Globe Newspaper*, 457 U.S. at 596; *Buckley*, 424 U.S. at 25 ("means closely drawn to avoid unnecessary abridgment of associational freedoms"); *Button*, 371 U.S. at 438 ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms") (citation omitted); see also *Lamont v. Postmaster Gen.*, 381 U.S. 301, 310 (1965) (Brennan, J., concurring) ("[i]n the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose").

94. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley*, 424 U.S. at 64-65.

95. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1965); see also Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965) (political foundations of the first amendment).

96. *Bellotti*, 435 U.S. at 786.

government interest justified its perpetuation of the term "political propaganda."⁹⁷ FARA's "political propaganda" sections could conceivably have been based on the grounds of national security.⁹⁸ The Court has traditionally been reluctant to question Congressional power in this sphere.⁹⁹ Indeed, the Court has stated that matters concerning the conduct of foreign relations, the war power, and the maintenance of a republican form of government are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."¹⁰⁰ Because of this judicial deference, the Court has in the context of foreign affairs relaxed the standard usually applied in domestic cases.¹⁰¹ FARA itself, for instance, has proven exceptionally durable in the face of challenges to its general constitutionality¹⁰² and to its registra-

97. *Meese v. Keene*, 107 S. Ct. 1862, 1878 (1987) (Blackmun, J., dissenting).

98. See *supra* note 9 and accompanying text (FARA intended to "protect the national defense, internal security, and foreign relations of the United States").

99. See *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961):

Means for effective resistance against foreign incursion—whether in the form of organizations which function . . . as "agents" of a foreign power, or in the form of organizations which . . . make themselves the instruments of a foreign power—may not be denied to the national legislature. . . .

. . . But where the problems of accomodating [competing and urgently demanding values] . . . the legislative judgment as to how that [external] threat may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would . . . have chosen other methods.

Id. at 95-96 (footnote omitted); see also *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915) (upholding statute depriving a woman of her U.S. citizenship upon her marriage to an alien because the Court "should hesitate long before limiting or embarrassing [the] powers [of the political branches]").

100. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (footnote omitted).

101. See, e.g., *Harisiades*, 342 U.S. at 588-90, 596-98; see also *Narenji v. Civiletti*, 617 F.2d 745, 748 (D.C. Cir. 1979) (requiring only a "rational basis" for classifications among aliens since foreign policy considerations may be involved), *cert. denied*, 446 U.S. 957 (1980); Close, *FARA: A Constitutional Perspective*, in *THE REGISTRATION OF FOREIGN AGENTS IN THE UNITED STATES: A PRACTICAL AND LEGAL GUIDE* 273, 275-78, 284 (1981) (courts defer to Congressional opinion where foreign policy is involved); cf. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) ("any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution").

102. *United States v. Peace Information Center*, 97 F. Supp. 255 (D.D.C. 1951). *Peace Information*, the first case explicitly to affirm the constitutionality of the Act, held that authority for FARA could be found in two bases of Congressional power: first, its enumerated power to regulate internal affairs and its implied power to carry out those enumerated powers; and second, in Congress's inherent power over external

tion,¹⁰³ disclosure,¹⁰⁴ and labeling¹⁰⁵ requirements. It has withstood charges of selective prosecution.¹⁰⁶ Now its statutory definition of "political propaganda" has been upheld as well.¹⁰⁷

Foundation in the national-security power need not, however, end the inquiry. The Court has often recognized that "all governmental power—even the war power, the power to maintain national security, or the power to conduct foreign affairs—is limited by the Bill of Rights."¹⁰⁸ When individual freedoms

relations. *Id.* The *Peace Information* court was relying on *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), which had held that the power of the federal government in external affairs was inherent and pre-Constitutional, having passed from Great Britain to the United States at the moment of independence. *Curtiss-Wright*, 299 U.S. at 316-18; see also *Viereck v. United States*, 318 U.S. 236, 251 (1943) ("[FARA] implements rather than detracts from the prized freedoms guaranteed by the First Amendment") (Black, J., dissenting on other grounds); *Attorney Gen. v. Irish N. Aid Comm.*, 530 F. Supp. 241, 253 (S.D.N.Y. 1981), *aff'd on other grounds*, 668 F.2d 159 (2d Cir. 1982); *Attorney Gen. v. Irish N. Aid Comm.*, 346 F. Supp. 1384, 1390 (S.D.N.Y.), *aff'd without opinion*, 465 F.2d 1405 (2d Cir.), *cert. denied*, 409 U.S. 1080 (1972).

103. See *Peace Information*, 97 F. Supp. at 255.

104. See *Attorney Gen. v. Irish N. Aid Comm.*, 346 F. Supp. 1384 (S.D.N.Y.), *aff'd*, 465 F.2d 1405 (2d Cir.), *cert. denied*, 409 U.S. 1080 (1972).

105. See *Attorney Gen. v. Irish N. Aid Comm.*, 530 F. Supp. 241 (S.D.N.Y. 1981), *aff'd*, 668 F.2d 159 (2d Cir. 1982).

106. See *Attorney Gen. v. Irish N. Aid Comm.*, 530 F. Supp. 241 (S.D.N.Y. 1981), *aff'd*, 668 F.2d 159 (2d Cir. 1982); *Attorney Gen. v. The Irish People, Inc.*, 502 F. Supp. 63 (D.D.C. 1980), *rev'd*, 684 F.2d 928 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1172 (1983). The *Irish People* circuit court stated that, "It is clear that Congress intended to allow the Attorney General to be motivated in part by foreign policy, international political, and national security considerations [in enforcing FARA]. . . . A showing that the Attorney General acted in such a way is not a showing of improper motive at all." *Irish People*, 684 F.2d at 934. One of the concurring judges added that she could not agree that "FARA enforcement may permissibly be focused on one side (i.e., the side currently supported by the Administration) of foreign policy controversies that may be the subject of debate among Americans In this context, . . . issues of constitutionally improper motivation surface disturbingly. . . . [S]ome unevenness was built into [FARA]. . . . But that unevenness may not permissibly be expanded through prosecutorial discretion to discredit views currently in disfavor while withholding the 'spotlight of pitiless publicity' from views our government . . . prefer[s] be presented to the American public in a more palatable form." *Id.* at 956 (Wald, J., concurring) (emphasis removed).

107. *Meese v. Keene*, 107 S. Ct. 1862 (1987).

108. *Kleindienst v. Mandel*, 408 U.S. 753, 782-83 (1972) (Marshall, J., dissenting) (citing *United States v. Robel*, 389 U.S. 258 (1967) (statute making it a criminal offense for employee of defense facility to be member of Communist Party struck down despite Government's claim that statute was based in "war power"); *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) (even though restriction of travel to Cuba upheld because individual constitutional rights were overridden by the "weightiest consider-

are at stake, the Court must consider the government's claims "in light of the individual freedoms."¹⁰⁹ Even if national security interests were implicated by the showing of the three Canadian films, a point as to which there was no evidence, the Court was still obligated to consider the interests of the appellee.

2. The Right to Speak

In *Keene* the Court reasoned that the "political propaganda" language was not unconstitutional because it did not rise to the level of censorship.¹¹⁰ This rationale is an unnecessarily restrictive view of the guarantees of the first amendment, however. The Court has held that "constitutional violations may arise from the deterrent, or 'chilling' effect of government regulations that fall short of a direct prohibition against the exercise of first amendment rights."¹¹¹ In *Bantam Books, Inc. v. Sullivan*,¹¹² for instance, the Court struck down a state law authorizing a state commission to designate certain books sold in the state as morally "objectionable." Although the commission was limited to "informal sanctions," the Court found that such sanctions "may sufficiently inhibit the circulation of publications to warrant injunctive relief."¹¹³ Similarly, in 1964 the Court struck down a loyalty oath required as a condition of employment by a government agency because those "sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe.

ations of national security," the Court rejected assumption "that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice"); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (struck down denial of passports to American members of the Communist Party because of claimed threats to national security); *Schneider v. Rusk*, 377 U.S. 163 (1964) (statutory inequality between naturalized and native-born citizens allegedly based on foreign relations power struck down). See also *New York Times v. United States*, 403 U.S. 713 (1971) (action by executive branch to enjoin publication of newspaper on grounds of national security cannot stand unless direct, immediate, and irreparable harm to the nation or its people would result).

109. *Kleindienst*, 408 U.S. at 783.

110. 107 S. Ct. at 1873.

111. See *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (citing *Baird v. State Bar*, 401 U.S. 1 (1971)); *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967); *American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950).

112. 372 U.S. 58 (1963).

113. *Id.* at 67.

Free speech may not be so inhibited.”¹¹⁴

In *Keene* the restriction on speech was no less inhibiting. As the Court recognized, the Act presented the appellee with the choice of exercising his freedom of speech or incurring the public's suspicion.¹¹⁵ By stating that the statutory language is constitutional because it did not go so far as to censor the plaintiff's speech,¹¹⁶ the Court has erected an artificially high standard for first amendment complaints. In the past, the Court has recognized that government action may be unconstitutional “even though it has only an indirect effect on the exercise of First Amendment rights.”¹¹⁷

3. Access: The Right to Receive

The Court has referred in a number of contexts to a first amendment right to receive information and ideas.¹¹⁸ This right extends to material originating from outside the United States.¹¹⁹ The Court has struck down statutes that placed unjustifiable burdens on the right to receive, even when the stat-

114. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (oaths that state requires certain public employees to take, swearing, *inter alia*, that they are not “subversive person[s]” violates first amendment). In another context, the Court struck down as violative of the equal protection clause of the fourteenth amendment a state statute requiring the race of candidates to be indicated on the ballot. *Anderson v. Martin*, 375 U.S. 399, 402 (1964). This statute provided an unconstitutional vehicle for racial bias, held the Court. *Id.* at 402.

115. 107 S. Ct. at 1869.

116. *Id.* at 1873.

117. See *Laird v. Tatum*, 408 U.S. 1, 12-13 (1972).

118. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577, 581 (1980) (press has right of access to places traditionally open to the public absent overriding interest articulated in findings); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (“the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences” is “paramount”); see also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (state scheme barring pharmacists from advertising prices to public struck down); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (private possession of obscene material protected); *Thomas v. Collins*, 323 U.S. 516, 534 (1945) (statute requiring labor organizers to register as a condition of soliciting membership in unions struck down because it interfered with organizers' right to speak and workers' right to hear what they had to say); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (municipal ordinance prohibiting individuals from distributing unsolicited religious literature door-to-door struck down).

119. See *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965); see also *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978) (“[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source”).

utes implicated matters of foreign affairs. The case most closely on point is *Lamont v. Postmaster General*.¹²⁰

In this landmark 1965 case, the Supreme Court for the first time premised its rejection of Congressional legislation on first amendment grounds.¹²¹ The plaintiff was notified in July 1963 by the Post Office that it would not deliver his copy of the *Peking Review #12* unless he wrote and requested delivery.¹²² The Post Office based its action on a statute¹²³ that permitted it to detain and destroy all "communist political propaganda."¹²⁴ The Supreme Court found that the affirmative obligation by the addressee to request receipt of his mail violated his fundamental first amendment right to receive ideas.¹²⁵ The Court also objected to the "deterrent effect"¹²⁶ of the government's designation of the material as "communist political propaganda." Public officials "might think they would invite disaster if they read what the Federal Government says contains the seeds of treason," stated the Court.¹²⁷

Much of the rationale of both the majority and concurring opinions in *Lamont* could have been applied to *Keene*. First, the *Lamont* Court was not concerned with the foreign-affairs implications of the postal regulation. Second, *Lamont* stands for the

120. 381 U.S. 301 (1965).

121. *The Supreme Court, 1964 Term, Detention of Mail Deemed "Communist Propaganda,"* 79 HARV. L. REV. 154, 154 (1965). See also *Recent Cases, Constitutional Law—Rights of Addressees to Receive "Communist Political Propaganda" Protected Under First Amendment*, 18 VAND. L. REV. 2043-45 (1965); Case Note, *Constitutional Law—Freedom of Speech—Right to Receive Mail Unimpeded by Government Interference—Lamont v. Postmaster General*, 381 U.S. 301 (1965), 15 AM. U. L. REV. 114 (1965); *Recent Decisions, Constitutional Law—Postal Restriction of Communist Propaganda Deemed Invalid*, 40 ST. JOHN'S L. REV. 274 (1965).

122. 381 U.S. at 304.

123. The Postal Service and Federal Employees Salary Act of 1962 § 305, 76 Stat. 840 (1962) (codified at 39 U.S.C. § 4008(b) (Supp. IV 1962)), provided in part: Mail matter, except sealed letters, which originates . . . in a foreign country and which is determined by the Secretary of the Treasury . . . to be "communist political propaganda," shall be detained by the Postmaster General upon its arrival for delivery in the United States . . . and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request.

The statute was struck down in *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

124. See 39 U.S.C. § 4008(b) (Supp. IV 1962), referring to 22 U.S.C. § 611(j) ("communist political propaganda" defined according to FARA).

125. 381 U.S. at 307, 308.

126. *Id.* at 307.

127. *Id.*

broad principle that even if a statute is “not intended to control the content of speech, [and] only incidentally limit[s] its unfettered exercise,”¹²⁸ it is nevertheless unconstitutional.¹²⁹ Any recipient would “feel some inhibition in sending for literature which federal officials have condemned as ‘communist political propaganda,’ ”¹³⁰ stated the Court. The fact that the intrusion on first amendment rights was “only a minor one” was irrelevant.¹³¹

The question posed by *Lamont* was remarkably similar to that of *Keene*. But in *Lamont* the Court was willing to state the obvious: “communist political propaganda” is a derogatory term, and the government’s use of such a term deters speech.¹³² In *Lamont* the Court recognized that “inhibition as well as prohibition ” of free speech can be unconstitutional.¹³³

B. *Narrowly Tailored Language*

Finally, the Court sustained the “political propaganda” term despite the fact that not even the government cared for it. The Department of Justice has not merely been willing to dispose of the term,¹³⁴ it is on record as supporting “the use of a more neutral term [than ‘political propaganda’] to denominate information that must be labeled.”¹³⁵

Given the fact that the government did not cite any reason—compelling or otherwise—for upholding “political propaganda,” and given the fact that the government has in the past supported efforts to abandon FARA’s outdated language, the Court surely failed to apply exacting scrutiny to the gov-

128. *Id.* at 308.

129. *Id.*

130. *Id.* at 307.

131. *Id.*

132. *Id.* at 307.

133. *Id.* at 309.

134. *Canadian Films*, *supra* note 18, at 7 (statement of Assistant Attorney General D. Lowell Jensen before a House subcommittee that when considering whether foreign material fits the FARA definition, the Justice Department’s “test, in two words, is political advocacy”). Thus, the Department has already retired the pejorative language of FARA in favor of an ostensibly neutral standard.

135. Letter of Deputy Attorney General Edward C. Schmults to Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, of the House Committee on the Judiciary, Aug. 8, 1983 [hereinafter Schmults Letter]. Appellee’s Motion to Affirm, *Meese v. Keene*, 107 S. Ct. 1862 (1987) at Appendix A.

ernment's restriction on speech. Instead, the Court's decision permits the U.S. government to burden free speech gratuitously with the weight of a hostile label. That agents of both friendly and unfriendly nations must bear this burden is no answer to the constitutional objections; it merely proves that the Department of Justice disparages the speech of friend and foe alike. It is the ability of government to impose its classification on speech that is truly paternalistic, for it shows little faith in the ability of hearers to judge for themselves.

C. Congressional Action

There are, of course, legitimate ways to inform the public of the foreign origin of material. Ten years ago a Congressional report recommended that the best way "to accomplish the removal of [the] stigma" surrounding registration under FARA was to alter the "language used in the current statute."¹³⁶ The report recommended replacing "propaganda" with "promotional material."¹³⁷ This language change would "eliminate pejorative connotations," stated the report.¹³⁸ The report noted that the Department of Justice was itself aware that the terms deterred compliance among agents¹³⁹ by casting "the mere representation of foreign clients in an unfavorable light."¹⁴⁰ Moreover, the report stated, the stigma associated with being a foreign agent "is a significant obstacle to voluntary compliance today, a fact which jeopardizes the ability of the [Justice Department] to gain proper disclosure."¹⁴¹ In 1983 Deputy Attorney General Edward C. Schmults informed a House subcommittee that the Justice Department was ready to replace "political propaganda" with "a more neutral term like political 'advocacy' or 'information.'" ¹⁴²

Possibly because recent prosecution under FARA has

136. C.R.S. REPORT, *supra* note 81, at 13. The two other recommendations were to adjust the provisions of the law to separate the concepts of lobbying and propagandizing with subversive intent; and to reassign the administration of the Act to another division of the Justice Department. *Id.*

137. *Id.* at 14.

138. *Id.* at 13-14.

139. C.R.S. REPORT, *supra* note 81, at 13-14.

140. *Id.* at 14.

141. *Id.*

142. Schmults Letter, *supra* note 135.

been sporadic,¹⁴³ Congress has yet to enact any of the changes recommended by the Congressional report or by Deputy Attorney General Schmults.¹⁴⁴ Four bills proposed in the past ten years have also languished.¹⁴⁵ Thus FARA, the product of legislatures facing world war, retains its pejorative language and sensibility. The "spotlight of pitiless publicity" envisioned in 1938 succeeds now in shedding heat but not light on the activities of agents of foreign principals.

The Supreme Court held more than forty years ago that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."¹⁴⁶ Providing that all material of foreign origin indicate its source is salutary consumer protection. But permitting the federal government to disparage such material in the guise of disclosing information to the public is an affront to the first amendment. That the U.S. Supreme Court needlessly upheld such disparagement is frustrating. Congress should once again

143. See GAO REPORT, *supra* note 84, at 7-8. One of the more notable FARA incidents of recent date concerned Billy Carter, who refused to register as an agent of the Libyan government even though he had accepted \$220,000 in payments for various errands performed on that government's behalf. Carter was ultimately forced to register. Safire, *Igor and Billy*, N.Y. Times, June 26, 1980, at A19, col. 5; N.Y. Times, July 16, 1980, at A20, col. 1.

144. Senator George McGovern proposed amendments to FARA, based on the C.R.S. REPORT, in 1977. See S. 2045, 95th Cong., 1st Sess. (1977). The bill was referred to the Senate Foreign Relations Committee, but hearings were never held, and no further action was taken. Mehlman, *FARA—Some Proposals for Reform*, in THE REGISTRATION OF FOREIGN AGENTS IN THE UNITED STATES: A PRACTICAL AND LEGAL GUIDE, 323 n.24 (1981).

145. Senator McGovern's bill, see *supra* note 144, would have renamed FARA the Federal Registration of Foreign Lobbying and Propaganda Act. It would have left most of the Act, including the "political propaganda" sections, intact, while stepping up enforcement provisions. S. 2045, 95th Cong., 1st Sess. 2, 28-33 (1977). In 1983 Representative Robert W. Kastenmeier, chairman of the House Subcommittee on Courts, Civil Rights, and the Administration of Justice, introduced legislation to strike the "political propaganda" sections from FARA. H.R. 1969, 98th Cong., 1st Sess. (1983). He reintroduced similar legislation in 1985. H.R. 3957, 99th Cong., 1st Sess. (1985). Representatives Barney Frank and Howard Berman co-sponsored legislation to change "political propaganda" to "advocacy material." H.R. 3827, 99th Cong., 1st Sess. (1985). The latter bill would also have renamed FARA the Free Trade in Ideas Judiciary Amendments of 1985. None of these bills has been adopted.

146. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (striking down state statute requiring schoolchildren to salute the flag and pledge allegiance to it).

amend FARA, this time to remove its outdated, negative language.

CONCLUSION

As a disclosure statute, FARA is as valid today as when it was passed nearly fifty years ago. Attribution of source is the key to the credibility of communication, for only by considering the speaker can the hearer judge the speech. The decision in *Meese v. Keene* is not a step in the direction of free and informed judgment, however. It is a retreat from the achievement of the original Foreign Agents Registration Act, which was produced in times more feverish than our own.

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