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The Department of Justice Moves into the Movies

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THE DEPARTMENT OF JUSTICE MOVES INTO THE MOVIES

Political turmoil swept the world in the 1930's. One reason for the turmoil was the competing political propaganda of different nations. Reacting to the danger posed by such political propaganda, the United States Congress enacted the Foreign Agents Registration Act of 1938 ("FARA").[1] The purpose of FARA was to protect the American public from the political propaganda of foreign nations. This was to be done by giving the Department of Justice ("DOJ") the power to censor foreign films before they could be disseminated to the American public. This censorship was to take the form of labeling. When the DOJ felt that a foreign film was political propaganda, it had the power to label the film as such. Fortunately, the political turmoil, which existed in the 1930's has come to an end. Thus, the power entrusted to the DOJ has outlived its welcome.

This casenote demonstrates that the label "propaganda," as used by the DOJ, is unconstitutional for two reasons. First, it constitutes compelled speech. Second, this is the type of content based censorship, which is protected by the First Amendment.

Before proceeding to discuss the constitutionality of FARA some of its requirements must be mentioned. FARA requires agents of a foreign principal, transmitting "political propaganda" to the American public, to be registered with the DOJ.[2] Before disseminating any film such agents

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1. 22 U.S.C.A. § 601 (West 1979).

2. 22 U.S.C.A. § 612 (West 1979) provides in part:

(a) No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement and supplements thereto as required by subsection (a) and (b) of this section or unless he is exempt from registration under the provisions of the subchapter . . . .

(1) Registrant's name, principal business address, and all other business addresses in the United States or elsewhere, and all residence addresses, if any;

(2) Status of the registrant; . . .

(3) A comprehensive statement of the nature of registrant's business; a complete list of registrant's employees and a statement of the nature of the work of each; the name and address of every foreign principal for whom the registrant is acting, assuming or purporting to act or has agreed to act; . . .

(4) Copies of each written agreement and the terms and conditions of each oral agreement, including all modifications of such agreements, or, where no contract exists, a full statement of all the circumstances, by reason of which the registrant is an agent of a foreign principal; . . .

(5) The nature and amount of contributions, income, money, or thing of value,

must first register the publication or film with the DOJ.[3] The DOJ then reviews the films to determine whether or not they are propaganda. If the DOJ concludes that they are propaganda it labels the films accordingly. The label "propaganda" must appear at the beginning of every publication or showing and must bear the name of the person(s) supplying the publication or film.[4] In the case of films, a piece of film must be added to the beginning of the films which indicates that the DOJ has labeled this film propaganda.

The constitutionality of FARA was recently challenged in *Meese v. Keene.*[5] Barry Keene, a member of the California State Senate, wished to exhibit three Canadian films which dealt with nuclear war and acid rain, espousing his views on these topics. The films, however, had been labeled political propaganda by the DOJ pursuant to FARA. Due to the public nature of his position, and the importance of his reputation for maintaining that position, Keene did not want to be publicly regarded as

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if any, that the registrant has received within the preceeding sixty days from each such foreign principal, . . . ;

(6) A detailed statement of every activity which the registrant is performing . . . ;

(7) The name, business, and residence addresses, and if an individual, the nationality, of any person other than a foreign principal for whom the registrant is acting, assuming or purporting to act or has agreed to act under such circumstances as require his registration hereunder[.]

Id.

3. 22 U.S.C.A. § 614(a) (West 1979) provides:

Every person within the United States who is an agent of a foreign principal and required to register under the provisions of this subchapter and who transmits . . . in the United States . . . any political propaganda for or in the interests of such foreign principal (i) in the form of prints, or (ii) in any other form which is reasonably adapted to being, . . . disseminated or circulated among two or more persons shall, not later than forty-eight hours after the beginning of the transmittal thereof, file with the Attorney General two copies thereof and a statement, duly signed by or on behalf of such agent, setting forth full information as the places, times, and extent of such transmittal.

Id.

4. 22 U.S.C.A. § 614(b) (West 1979) provides in part:

It shall be unlawful for any person within the United States who is an agent of a foreign principal . . . to transmit . . . any political propaganda . . . unless such political propaganda is conspicuously marked at its beginning with, or prefaced or accompanied by, a true and accurate statement, in the language or languages used in such political propaganda, setting forth the relationship or connection between the person transmitting the political propaganda or causing it to be transmitted; that the person transmitting such political propaganda or causing it to be transmitted is registered under this subchapter with the Department of Justice, Washington, District of Columbia, as an agent of a foreign principal; that, as required by this subchapter, his registration statement is available for inspection at and copies of such political propaganda are being filed with the Department of Justice; and that registration of agents of foreign principals required by the subchapter does not indicate approval by the United States government of the contents of their political propaganda.

Id.

5. __ U.S. __, 107 S. Ct. 1862 (1987).

a disseminator of political propaganda.[6] Believing that the government was effectively censoring his speech, Keene brought this action challenging the constitutionality of FARA. If application of the label was found to be unconstitutional, the films would not be required to carry the political propaganda label and could be shown by Keene without risk to his reputation.

Before reaching the substantive issue, the United States District Court for the Eastern District of California first determined that Keene had standing to challenge the constitutionality of FARA due to the risk of damage to his reputation.[7] The court also held that since Keene was complaining of a species of censorship he must have standing.[8] On the substantive issue the court held that the use of the term political propaganda, required by FARA, violated Keene's First Amendment right of freedom of speech and was therefore unconstitutional. The court based its conclusion on a cause and effect relationship. Because the public regards the term political propaganda as synonymous with "officially censured," people like Keene are not afforded access to materials which have been given the label political propaganda due to the risk to their reputation. Non-access is a form of abridged speech. Thus, Keene's First

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6. [A] Gallup public opinion study designed and interpreted by Mervin Field as indicating that a campaign charge of having exhibited films that the United States Justice Department has officially classified as political propaganda would have a seriously adverse effect on the electoral chances of a candidate for the California Legislature.

Brief for Appellee at 16, Meese v. Keene, 107 S. Ct. 1862 (1987).

7. It did so by adopting the reasoning of the Court in Keene v. Smith, 569 F. Supp. 1513 (E.D. Cal. 1983). The three requirements to establish standing are: 1) injury to plaintiff; 2) the injury must be fairly traceable to the defendant; and 3) the injury must be susceptible to judicial remedy.

The first requirement was met because:

[t]here can be little doubt that a film exhibitor, especially in a non-commercial context, is likely and reasonably to be understood as using the film to communicate the exhibitor's own ideas. Thus, a statute which inhibits the exhibitor's ability to exhibit also impinges on the exhibitor's ability to communicate. It is this special impairment on the plaintiff's ability to communicate which constitutes an injury different in kind from that suffered by the public in general.

Keene, 569 F. Supp. at 1518.

The second requirement was also met because "the Act [FARA] characterizes the films that plaintiff wants to exhibit as political propaganda; that such a characterization necessarily denigrates the content of the films and vilifies plaintiff and as a result of such vilification clients and constituents will peremptorily reject the ideas that plaintiff hopes to communicate." *Id.*

Third, "an injunction directed to these defendants will provide plaintiff with the desired relief." *Id.*

8. Keene v. Meese, 619 F. Supp. 1111 (E.D. Cal. 1985). "Censorship . . . consists of present governmental interference with or suppression of expression. Censorship is a regulatory, proscriptive, or compulsory exercise of governmental power, and it is patently absurd to suggest that one whose expression has been censored by the government lacks standing to complain of that censorship." *Id.* at 1118.

Amendment right was violated.[9]

On direct appeal,[10] the Supreme Court agreed that Keene had standing to challenge the constitutionality of FARA since cognizable injury would result to Keene's reputation if he disseminated the films with the political propaganda label.[11] However, the Supreme Court held that the DOJ's use of the term political propaganda, and therefore FARA, was constitutional.

The Supreme Court's holding was based on the legislative definition of the term political propaganda as used in FARA. FARA defines political propaganda to include both misleading advocacy in the popular, pejorative sense and materials that are completely accurate.[12] The Court held that the use of the term political propaganda was neutral and therefore constitutionally permissible.[13]

The Court further reasoned that FARA places no burden on the First Amendment right of freedom of speech since it does not prohibit or restrain Keene from distributing the film. Apparently, the Supreme Court applied a "prior restraint" test of First Amendment constitutionality to this case. Since a "prior restraint" requires the prohibition of dissemination and since the government had not prohibited Keene from distributing the films, the Court concluded that there was no First Amendment violation. To the contrary, the Court held that FARA actually fosters freedom of speech by providing for disclosures which help

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9. *Id.* at 1124-26.

10. 28 U.S.C.A. § 1253 (West 1979) provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Id.

11. Meese v. Keene, 107 S. Ct. 1862, 1866-69 (1987).

12. The statutory definition of the term political propaganda is contained in 22 U.S.C.A. § 611(j) (West 1979) and reads in relevant part:

> The term "political propaganda" includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which 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 or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence.

Id.

13. *Meese,* 107 S. Ct. at 1873 (1987).

the public in evaluating the content of the films.[14] Hence, the use of the term political propaganda could not be unconstitutional.

FARA Was Inapplicable to This Case

Interestingly, the Supreme Court did not need to decide the constitutionality of FARA because FARA could have been deemed to be inapplicable to this case. As noted above, FARA requires that the film be disseminated by or on behalf of a foreign principal. Therefore, in order for FARA to be applicable to the films they must be shown by or on behalf of the Canadian government. It was nowhere contended nor proved that Keene disseminated the films on behalf of the Canadian government. Furthermore, Keene was not an agent of a foreign principal within the definition of FARA. FARA defines an agent of a foreign principal as any person who acts on behalf of or under the direction of a foreign principal.[15] Keene, as mentioned above, is a State Senator. It was never contended nor proved that he had any ties to the Canadian government. It does not appear that he was showing the films under the direction of or on behalf of the Canadian government. Thus, FARA may have been deemed inapplicable in this case. However, because this casenote is an analysis of the Supreme Court's holding, it will hereafter be assumed that FARA was applicable.

The Term Propaganda is Commonly Understood in its Pejorative Sense

Although the Supreme Court may not have been incorrect in stating that the term propaganda could be defined neutrally, its definition was certainly incomplete. Substantial evidence indicates that the term propaganda is more commonly understood in its pejorative sense. In this case, the pejorative sense of that term is demonstrated by the fact that it will deter some people from seeing the films, and others who do see the films

14. "Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda." *Id.* at 1871.

15. The statutory definition of "agents of a foreign principal" is contained in 22 U.S.C.A. § 611(c)(1) (West 1979) and reads in relevant part:

> [A]ny person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request or under the direction, or control of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person—(i) engages within the United States in political activities for or in the interests of such foreign principal.

Id.

will be highly skeptical of their content.[16]

Evidence which demonstrates that the term propaganda is understood in its pejorative sense is abundant. "[T]he name propaganda is applied in modern political language as a term of reproach to secret associations for the spread of opinions and principles which is viewed by most governments with horror and aversion."[17] If the term is regarded by the government with "horror and aversion"[18] then certainly when the government labels a film with that term its message to the public is that the film should be ignored and if not ignored at least highly scrutinized.

Webster's defines propaganda as "any systematic, widespread dissemination or promotion of particular ideas, doctrines, practices, etc. to further ones own cause or to damage an opposing one; ideas, doctrines, or allegations so spread: *now often used disparagingly to connote deception or distortion.*"[19] Information which is perceived as distorted or deceptive is certainly going to be ignored by the public.

Furthermore, even the legislative definition of the term propaganda cannot be labeled neutral. It is difficult to understand how a word which is defined as advocating racial, social, or political disorder is neutral.[20] Furthermore, the intent of Congress in enacting FARA was not to enable the government to express its views on the information being disseminated,[21] but rather to solve the problem of rapidly spreading Nazi propaganda in the 1930's. Congress, since it could not suppress this information, dealt with this problem via the next best thing—compelled speech.

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16. Brief for Amici Curiae at 11, *Meese*, 107 S. Ct. 1862 (1987).

17. OXFORD ENGLISH DICTIONARY 1466 (1971), *quoted in* Keene v. Meese, 619 F. Supp. 1111, 1125 (E.D. Cal. 1985).

18. Because Congress enacted this statute it is evident that it has a strong aversion to the propaganda of other nations.

19. WEBSTER'S, NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, 1188 (1972) (emphasis added).

20. It may be that "the definition of the phrase political propaganda contained in FARA partakes neither of the usual, negative, sense of the words nor of any of the possible dictionary meanings." Keene v. Meese, 619 F. Supp. 1111, 1122 (E.D. Cal. 1985).

21. [T]his case no more involves an "expression of views" than the Pure Food and Drug Act is the mere expression by Congress that dangerous drugs and impure foods are a menace to public health. Like the latter Act, the FARA was enacted to solve a problem Congress had identified. . . . As the record demonstrates, FARA was enacted to suppress pernicious doctrine; Congress chose as its method the classification and labeling scheme at issue here.

Brief for Appellee at 32-33, Meese v. Keene, 107 S. Ct. 1862 (1987).

THE POLITICAL PROPAGANDA LABEL AS REQUIRED BY FARA CONSTITUTES COMPELLED SPEECH AND IS THEREFORE UNCONSTITUTIONAL

As discussed above, the DOJ has the power to label as political propaganda any publication or film of a foreign principal. The central issue in *Meese* was whether the DOJ was constitutionally permitted to label the films "political propaganda." Encompassed in that issue was whether the federal government has a right to review the films of foreign agents and affix to them a label with which the disseminator of the film, who may be an American, may disagree. In other words, may the federal government compel speech?[22] By failing to recognize this issue the Court has, for the first time, established precedent which answers that question in the affirmative.

Undoubtedly, the next question is whether the DOJ should have the power to label these films propaganda, assuming they truly are. For two reasons this concern is irrelevant. First, by requiring that this judgment be made by the DOJ rather than by the viewers of the film it seems that Congress has little, if any, confidence in the intellect of the American public. Second, and more importantly, the fact that it may be propaganda does not make it any less unconstitutional to allow the federal government to compel speech. The disseminator of the film is still being compelled to say that which he would not otherwise say. As the discussion below illustrates, this is a violation of the First Amendment right to free speech.

In 1943, the Court held that the First Amendment protection of freedom of speech includes both the right to speak and the right to refrain from speaking.[23] In *West Virginia Board of Education v. Barnette,*[24] the Court held the compulsory flag salute unconstitutional. It determined that "[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own

22. Although this note only discusses the manner in which the government may not compel speech, there are circumstances in which it may do just that. One example of such a circumstance is the requirement that food and drugs be correctly labeled with the ingredients. This type of compelled speech is distinguishable from the type involved here. Food and drugs require labeling so that the public as consumers will be protected from harmful substances. Most lay-persons are unable to tell what the ingredients in a particular product are. However, the public has the intellect necessary to determine whether or not a particular piece of information is propaganda. Furthermore, if this were a case where FARA was applicable and involved a non-citizen foreign agent the government would be permitted to compel the disseminators of the films to use the label.

23. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1942).

24. *Id.*

mind, left it open to public authorities to compel him to utter what is not in his mind."[25] The Bill of Rights did not, of course, leave such a gap.

Keene, by showing these films, is speaking his mind. He is communicating a message with which he agrees. However, when the propaganda label is affixed to these films he is compelled to utter not only what is not in his mind but also something with which he disagrees.

The question of whether an individual must exhibit an idea with which he disagrees is not new to the Supreme Court. In *Wooley v. Maynard,*[26] the Court held unconstitutional a state statute which required its citizens to bear the state motto on their license plates. In so holding, the Court stated that:

> Here as in *Barnette* we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In so doing, the State invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from *all* official control.[27]

Furthermore, when one espouses a point of view, not only is there no obligation to express counter-arguments, but it would be unconstitutional to require such expression.[28]

As in *Wooley,* and notwithstanding the legislative definition of the term propaganda, Keene is required to label his ideas with a term with which he disagrees. Aside from the injury to his reputation, Keene will be required, in essence, to express counter-arguments. As indicated

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25. *Id.* at 634.

26. Wooley v. Maynard, 430 U.S. 705 (1977).

27. *Id.* at 715.

28. The Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). In *Miami Herald Publishing Co.,* Florida's "right to reply" statute was challenged. The statute required all publications which published commentary against a political candidate, to give that candidate the right to reply in that publication. The Supreme Court, in a unanimous decision, held that the statute violated the First Amendment guarantee of a free press. It held that the content of a newspaper was to be left to the discretion of its editors and that "[t]he power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers." *Id.* at 739. *See also* Pacific Gas and Elec. Co. v. Public Utils. Comm'n of Cal., 475 U.S. 1 (1986), where the Supreme Court held that the California Public Utilities Commission could not require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagreed. "Just as the state is not free to tell a newspaper in advance what it can print and what it cannot . . . the state is not free either to restrict appellant's speech to certain topics or views or to force appellant to respond to views that others may hold." *Id.* at 7.

above, this violates established precedent.[29]

It may be true that Keene does not have to express such counter-arguments because he can remove the label affixed to the films by the DOJ. However:

> [i]t is not a matter of simply peeling a pasted label off the surface of a book. The regulations require the label to be "made a part of the film" . . . Appellee [Keene] is not a commercial or professional film exhibitor, and there is no reason to assume that removing a label that has been made a part of the film is something he can do without any effort, expense, or delay.[30]

Although Keene could take the labels off and take the appropriate steps to make sure the public does not regard him as the disseminator of political propaganda it will take considerable time and expense. Because such time and expense will be incurred he may be dissuaded from showing them. Again his speech will have been abridged and the First Amendment violated. This very proposition was expounded by the Supreme Court in *Federal Election Commission v. Massachussetts Citizens For Life,*[31] where it was held that if a statute burdens one's freedom of speech by requiring such expenditures it is unconstitutional.

In summary, the Supreme Court reached a conclusion contrary to the law in this area. First, there is substantial evidence that the definition of the term propaganda is pejorative. Second, the label propaganda constitutes compelled speech and its use by the DOJ is therefore unconstitutional. Furthermore, the government is regulating speech based on

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29. The fact that the cases discussed in this casenote involved state rather than federal statutes which compelled speech is not a factor which weakens the arguments made above. Indeed, the fact that the states are not allowed to compel their citizens to convey ideas which they do not believe in is even more reason to restrict the federal government from having the power to do so.

30. Brief for Appellee at 12, Meese v. Keene, 107 S. Ct. 1862 (1987).

31. Federal Election Comm'n v. Massachusetts Citizens for Life, __ U.S. __, 107 S. Ct. 616 (1986). In this case § 316 of the Federal Election Campaign Act, 2 U.S.C. § 441(b) (1983) was challenged. That section prohibited corporations from using treasury funds to make an expenditure in connection with any election. In holding § 441 unconstitutional, the Court stated:

> It is not unreasonable to suppose that, as in this case, an incorporated group of like-minded persons might seek donations to support the dissemination of their political ideas, and their occasional endorsement of political candidates, by means of garage sales, bake sales, and raffles. Such persons might well be turned away by the prospect of complying with all the requirements imposed by the Act. Faced with the need to assume more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports, and to monitor garage sales lest nonmembers take a fancy to the merchandise on display, it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it.

Federal Election Comm'n, 107 S. Ct. at 626.

content. As will be demonstrated below, this type of content based regulation is constitutionally impermissible.

THE FIRST AMENDMENT GUARDS AGAINST THIS TYPE OF CONTENT BASED REGULATION

FARA requires the DOJ to determine whether the content of the information sought to be disseminated is propaganda. Therefore, the DOJ has the power to distinguish "propaganda" from "non-propaganda" and to regulate the dissemination of foreign made films all on the basis of their content. The First Amendment guards against this type of content based regulation.

The case most often cited for the proposition that the government cannot restrict speech on the basis of content is *Police Dept. v. Mosley.*[32] In *Mosley,* the Supreme Court held an ordinance unconstitutional because it made an impermissible distinction between labor picketing and other types of peaceful picketing. The problem with the ordinance was that it distinguished picketing on the basis of content. In so holding the Court stated "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[33] This is precisely what the DOJ has the power to do pursuant to FARA. Foreign films are reviewed and scrutinized on the basis of their message and subject matter.

The term propaganda selectively suppresses other points of view.[34] The federal government's opinion is highly regarded by the American public. Therefore, when it labels certain information as propaganda it is virtually impossible for an individual advancing that information as his/her own view to overcome that label. This would not be true if a more neutral term was used.[35] It is not the objective of this casenote to deny that the government has a right or interest in advocating its view. Nor is it being suggested that the government should not do so. It is simply being argued that the term propaganda, used by the government in this

32. Police Dept. v. Mosley, 408 U.S. 92 (1972).

33. *Id.* at 95.

34. Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favorable or more controversial views. And it may not select which issues are worth discussing or debating in public facilities.

Id. at 96.

35. If a more neutral term was used by the government the person(s) exhibiting the film would be able to present his/her views without being shunned as the government's adversary. Not only is this not a violation of the disseminator's First Amendment right but it enhances the market place of ideas and free flow of information.

context, weighs heavily on the public's mind and thereby selectively suppresses other points of view in violation of the First Amendment right to free speech.

One remedy for this constitutional violation is to abandon the requirement that the label appear with every showing of the film. The government could, for example, mail out pamphlets which indicate its point of view regarding the film. Alternatively, it could publish periodicals which discuss its views on particular films. In so doing the compelled speech violation would be cured, as would the content-based regulation problems. The government would then be expressing its view, not via compelled speech, or any other constitutional violation, but by way of the free market of ideas. Furthermore, a term more neutral than propaganda should be used so that other points of view are not selectively suppressed.

Although recently it appears that the Supreme Court is moving away from its views expressed in *Mosley,* a close reading of subsequent opinions reveals that this is not the case. The case most often cited to support the proposition that the Court no longer adheres to the broad definition of content neutrality laid out in *Mosely* is *Young v. American Mini Theaters.*[36] However, *Young* has neither explicitly nor implicitly overruled *Mosely. Young* does nothing more than uphold an ordinance which restricts the location of adult theaters. Although this restriction was based on the content of the films shown in these theaters there was no restriction placed on their exhibition.

For two reasons this decision does not affect the holding of *Mosely.* First, the decision in *Young* is based on three important qualifications. Those qualifications are: (1) protection of pornography is a less vital interest than protection of the free dissemination of ideas of social and political significance; (2) the particular ordinance was susceptible to a narrow construction; and (3) although adult films had to be exhibited in commercially licensed theaters, that was true of all motion pictures.[37]

Second, although the ordinance depended on the content of the communication this did not:

> contradict the underlying reason for the rule which is generally described as a prohibition of regulation based on the content of protected communication. The essence of that rule is the need for absolute neutrality by the government; its regulation of communication may not be effected by sympathy or hostility

36. Young v. American Mini Theaters, 427 U.S. 50 (1976).

37. *Id.* at 61.

for the point of view being expressed by the communicator.[38] Thus, the most favorable interpretation of this case would allow the DOJ to look at the content of a foreign film to determine its origin and to require the disseminator to reveal such information as the place it was made and on whose behalf it is being shown but *not* to label the film propaganda. Similarly, under *Young,* it may not label the film with a favorable term. It must remain absolutely neutral as to the film's content.

Commentators have argued that "the principle of content neutrality is too broad and inflexible to achieve sensitive accommodations among [other] competing interests."[39] Those competing interests include the right to "privacy and community." There is no doubt about the fact that what some people consider appropriate speech, others will find unacceptable or even repulsive. That, however, is simply one of the ramifications of freedom of speech. Furthermore, it is a necessary evil, for it is virtually impossible to eliminate only speech which we *all* find offensive. What is offensive to some is not so to others.

Furthermore, there are a series of questions which must be dealt with before freedom of speech can be abridged to exclude the offensive material. First, who decides whether the speech is offensive? A majority, minority, or plurality? How will it be decided? By vote or some sort of legislative body? How offensive must it be to deserve eradication? Where is the line between offensive and artistic? Who will decide where that line is? More specifically, should rape or child molestation cases not be televised or talked about because they are offensive? Since there is virtually no end to this line of questioning caution should be taken when placing limits on speech based on its content.

Another consequence of freedom of speech bears mention. If there is speech with which we disagree we will simply not listen to it, or having listened to it we will disregard it. The conclusion, therefore, is that people have the freedom to decide for themselves what to listen to and what to believe, or what they find offensive and what they find to be propaganda and not worthy of belief. The freedom and authority to make that decision should not be readily delegated.

THE LABELING REQUIREMENT CONSTITUTES CENSORSHIP

It has been argued that "the principle [content neutrality], if taken

38. *Id.* at 67.

39. Note, *Content Regulation and the Dimensions of Free Expression,* 96 HARV.L.REV. 1854, 1858 (1983).

literally, would preclude legal restriction of defamation, incitement, invasion of privacy, false advertising, and other types of expression that are currently subject to content based regulation."[40] However, as long ago as 1931 the Supreme Court explained the distinction between prior restraints (i.e. censorship) and subsequent punishment as it pertained to freedom of the press and generally to all of the First Amendment freedoms.

In *Near v. Minnesota,*[41] plaintiff brought an action challenging the constitutionality of a Minnesota statute which required plaintiff to get the approval of the courts before publishing criticisms of local officials. The Supreme Court held that the statute imposed an unconstitutional restraint upon publication stating that "the main purpose of such constitutional provisions [First Amendment] is to prevent all such previous restraints upon publications . . . and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."[42] Therefore, the concern about legal restrictions on improper publications misses the point.

Before proceeding any further, it should be noted that the fact that a "prior restraint" has traditionally meant a complete ban on the information to be disseminated is of no consequence. The label propaganda has the same effect as a ban. Because of the label, the disseminator will not show the films for fear that his/her reputation will be effected. It is true that the government here did not ban Keene from showing the films, but by labeling them propaganda they effectively accomplished the same purpose.

The propaganda label is a previous restraint placed by the DOJ on publication. Before anyone is allowed to disseminate a foreign film the DOJ will have reviewed and labeled it based on its content. If the label is "propaganda," the DOJ will have successfully placed a prior restraint on the film.

Let us suppose that a "propaganda" label was not placed upon a foreign film, the exhibition of which created riots due to false or incomplete information. Obviously, the disseminator of the film would not be allowed to escape punishment. The definite threat of punishment alone is enough to deter most people from disseminating meritless information. Undoubtedly, there will be those who will not be deterred by the threat of punishment. However, the freedom of speech granted to the majority should not be restricted due to its misuse by a minority.

40. *Id.* at 1858.
41. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1930).
42. *Id.* at 714.

DOES THE FEDERAL GOVERNMENT HAVE A COMPELLING REASON FOR MAINTAINING THE "PROPAGANDA" LABEL?

If the government has a compelling reason for maintaining the label propaganda it must be permitted to do so. The reasons for the label may be ascertained from the intent of Congress in enacting the statute.

In the 1930's there was tremendous concern about propaganda on behalf of Nazi Germany and the Soviet Union carried out in the United States. A special committee, generally known as the House Un-American Activities Committee ("HUAC"), was formed to investigate: "(1) the extent, character, and object of Nazi propaganda activities in the United States; (2) the dissemination within the United States of subversive propaganda controlled by foreign countries, attacking the American form of government, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."[43] One counter-measure for dealing with the propaganda was FARA. In other words, by labeling the information disseminated by these groups as propaganda Congress knew that the American public would ignore it. That is precisely why its application to a case such as *Keene* is unconstitutional. Congress has a legitimate purpose and right to protect the democratic process by counteracting the propaganda of other nations regarding their own political systems. Congress, however, should not have the right to curb the speech of American citizens who are in no way connected or acting on behalf of a foreign power.

As stated above, this does not imply that Congress has no right to express its views regarding the films. It is only being suggested that the use of FARA in this case was not only unnecessary but inappropriate. To the extent that Congress wishes to inform the public that it does not agree with the content of the film it has a right to do so, like any other entity. It should not, however, have the right to compel the disseminator of the films to say that which he/she would not otherwise say or to apply content based censorship to avoid the dissemination of the information.

Because the government does not have a sufficient interest to overcome the constitutional violations, FARA must be unconstitutional.

CONCLUSION

In conclusion, it must be stressed that FARA is not unconstitutional when it is applied to agents of a foreign principal who are not American citizens. The problem arises only when FARA is applied to cases which

43. H.R. RES. 198, 73RD CONG., 2D SESS., 78 CONG. REC. 13 (1934), *quoted in* Brief for Appellee at 33, Meese v. Keene, 107 S. Ct. 1862 (1987).

involve American citizens who are not agents of a foreign principal and who are merely espousing their own points of view through a foreign film. When applied to the latter group FARA is a violation of the First Amendment because it is a form of censorship and because it compels speech.

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