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The Label "Political Propaganda": Content-Neutral or Semantically Slanted? An Examination of the Foreign Agents Registration Act as Applied in *Meese v. Keene*

I. INTRODUCTION

Barry Keene wanted to show three film documentaries dealing with the subjects of nuclear war and acid rain as a means of communicating his own ideas on the subjects concerned. He wished to exhibit these films purely for the purpose of providing information and not advocacy. The problem was that these three films happened to be made in Canada and Barry Keene happened to be the majority leader of the California state senate. The Foreign Agents Registration Act requires certain foreign films to carry the label "political propaganda." For obvious political reasons, Keene did not want to be publicly regarded as a disseminator of "political propaganda." Yet, his alternative was to not show the films. Keene brought suit, challenging the statutory requirements that certain foreign films must carry this label.

This Note begins by outlining the history of the Foreign Agents Registration Act and the policies behind it. After a brief statement of the case, the opinion of the district court is discussed. The Note then proceeds to analyze the reasoning of the Supreme Court's majority decision. Finally, this Note concludes by illustrating why the dissent's characterization of the word "propaganda" in both its denotation and connotation is more accurate than the majority's, and how the majority erred when it evaluated the public's perception of this word and its possible adverse impact upon materials so labeled. The majority's statement, that the term "propaganda" as defined in the Act has no pejorative connotation, is simply put, not in touch with public perception.

II. HISTORICAL FRAMEWORK

In 1938 Congress enacted the Foreign Agents Registration Act¹

1. The Foreign Agents Registration Act of 1938, ch. 327, 52 Stat. 631 (1938). For addi-

("FARA" or "the Act"). The Act required all agents of foreign principals² to register³ with the Secretary of State. Further, the Act required that all persons registered as agents of foreign principals who disseminate propaganda in the United States must label such material "political propaganda."⁴ The underlying reason for this legislation grew out of mounting concern over the activities of foreign advocates, particularly Nazis, fascists, and communists.⁵ The Act was designed to provide for official and public surveillance of these foreigners' activities.⁶

Four years later, with the United States engaged in World War II, Congress amended and significantly extended the original Act.⁷ The amendment expressly declared the policy and purpose of the Act to be the protection of the "national defense, internal security, and foreign relations of the United States."⁸ In fact, "few foreign agents had [been] registered, and few who failed to register under the original act had been prosecuted."⁹ Essentially, the 1942 amendment was "an attempt to facilitate more effective enforcement of [the Act's] provisions."¹⁰

Most importantly, the revised Act contained a detailed definition of the term "political propaganda,"¹¹ which has since remained unchanged.¹² Also, the amendment authorized the United States Attor-

tional information regarding the history and purpose of the Foreign Agents Registration Act see 1961 U.S. CODE CONG. & ADMIN. NEWS 3218; Pub. L. No. 89-486; 1966 U.S. CODE CONG. & ADMIN. NEWS 2397; Attorney General v. Irish Northern Aid Comm., 346 F. Supp. 1384 (S.D.N.Y.), *aff'd* 465 F.2d 1405 (2d Cir. 1972); U.S. v. Peace Information Center, 97 F. Supp. 255 (D.D.C. 1951).

2. The Act defines "foreign principal" to include the government or political party of a foreign country, a person domiciled abroad, or any foreign business, partnership, association, corporation, or political organization. 22 U.S.C. § 611(b) (1982).

3. 22 U.S.C. § 612(a) (1982) describes the registration statement and its contents. The Act exempts certain categories of "agents" from registration, for example, diplomatic and consular officers. *Id.* § 613. In addition, the Attorney General may provide for exemptions pursuant to 22 U.S.C. § 612(f).

4. *Id.* § 614.

5. H.R. REP. NO. 153, 74th Cong., 1st Sess. 23 (1935).

6. *Id.*

7. The Foreign Agents Registration Act, ch. 263, 56 Stat. 248 (1942) (codified as amended at 22 U.S.C. §§ 611-621 (1982)). See H.R. REP. NO. 1547, 77th Cong., 1st Sess. 4 (1941).

8. FARA, 22 U.S.C. § 611, at 161 (1982).

9. Comment, *Neutral Propaganda: Three Films "Made in Canada" and the Foreign Agents Registration Act*, 7 COMM./ENT. L.J. 435, 440 (1985).

10. *Id.*

11. See *infra* note 33.

12. *Id.*

ney General to label foreign communicative materials, including films, as "political propaganda."¹³ Other amendments provided for the enforcement of the Act.¹⁴

The Foreign Agents Registration Act was again amended in 1966, shifting the focus of the Act.¹⁵ "The original target of foreign agent legislation—the subversive agent and propagandist of pre-World War II days—has been covered by subsequent legislation, notably the Smith Act."¹⁶ As a result, "[t]he place of the old foreign agent has been taken by the lawyer-lobbyist and public relations counsel whose object is not to subvert or overthrow the U.S. Government, but to influence its policies to the satisfaction of his particular client."¹⁷ The 1966 amendment made the Act applicable to "persons" acting for or in the interests of foreign principals¹⁸ whose activities are "political in nature or border on the political."¹⁹ The definition of "political propaganda," put forth in the 1942 amendment, however, remained unchanged despite this shift in purpose and focus.

Recently, FARA's registration requirements²⁰ have been upheld on the ground that the Act protects national security interests.²¹ Yet, neither the disclosure requirements²² nor the section 611(j) definition of "political propaganda"²³ had previously been judicially tested before *Keene*. In 1943, the Act's registration requirement was challenged unsuccessfully in *Viereck v. United States*.²⁴ The Court in *Viereck* stated that FARA's requirements do not chill first amendment rights.²⁵ The Act, they said:

13. 22 U.S.C. § 614 (1982).

14. 22 U.S.C. § 618(a) (1982) provides that "[a]ny person who (1) willfully violates any provision of this subchapter or any regulation thereunder . . . shall, upon conviction thereof be punished by a fine of not more than \$10,000 or by imprisonment for not more than five years, or both" *Id.* Section 618(c) permits the deportation of any alien convicted of violating this act subject to the rules for deportation in §§ 1251-1253 of Title 8. *Id.* § 618(c).

15. Pub. L. No. 89-486, 80 Stat. 244 (1966). The 1966 amendments were intended to "strengthen the basic purposes of the original act." H.R. REP. NO. 1470, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 2397, 2398.

16. FOREIGN AGENTS REGISTRATION ACT AMENDMENTS, S. REP. NO. 143, 89th Cong. 1st Sess. 4 (1965).

17. *Id.*

18. *Id.* at 1.

19. *Id.*

20. *See supra* note 3.

21. *See, e.g.,* Attorney General v. Irish People, Inc., 684 F.2d 928 (D.C. Cir. 1982).

22. 22 U.S.C. § 614 (1982).

23. *Id.* § 611(j).

24. 318 U.S. 236, 247 (1943).

25. *Id.* at 251.

[r]est[s] on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, [and that this] bill is intended to label information of foreign origin so that our hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment.²⁶

Later, during the 1950's and early 1960's, the United States Post Office relied on FARA's expansive definition of "political propaganda" to justify its confiscation of huge amounts of foreign mail under the Espionage Act of 1917.²⁷ Using FARA section 611(j) as a guideline, all mail from Communist countries was routed to a regional screening office. If Customs authorities determined the piece of mail to be "communist political propaganda," the mail was held and the addressee notified. Before the mail could be delivered, the addressee was required to fill out a postcard indicating whether he or she wished to receive the material and/or any similar material in the future.²⁸ In 1965, this policy was declared unconstitutional in *Lamont v. Postmaster General*.²⁹ The *Lamont* Court, however, did not reach the issue of the constitutionality of section 611(j). The Court invalidated the Post Office policy on first amendment grounds, finding that requiring addressees to inform postal authorities that they wished to receive impounded mail unjustifiably limited their freedom of speech.³⁰ Twenty-two years after *Lamont*, Senator Barry Keene sought to exhibit three Canadian films that were considered political propaganda, thus reopening the issue of the constitutionality of FARA's labeling requirements.

III. STATEMENT OF THE CASE

The Foreign Agents Registration Act of 1938³¹ empowers the United States Attorney General to label foreign communicative materials, including films, as "political propaganda."³² The Act includes within its definition of "political propaganda"³³ any communi-

26. *Id.*

27. See Schwartz and Paul, *Foreign Communist Propaganda in the Mails: A Report on Some Problems of Federal Censorship*, 107 UNIV. PA. L. REV. 621, 624-25 (1959).

28. *Lamont v. Postmaster General*, 381 U.S. 301, 303 (1965).

29. *Id.*

30. *Id.* at 307

31. 22 U.S.C. §§ 611-622 (1982).

32. *Id.* § 614(b).

33. The statutory definition of "Political Propaganda" is:

cation intended to influence the foreign policies of the United States. The Act further requires that such material be subject to certain registration, filing, and disclosure requirements.³⁴ Once the Attorney General makes such a determination, the material must carry a label which identifies it as political propaganda.³⁵

In the fall of 1982, the Justice Department reviewed the three Canadian films that Barry Keene wanted to exhibit and determined that they constituted "political propaganda" within the meaning of FARA.³⁶ The Justice Department then informed the National Film Board of Canada that these films would have to carry labels identifying them as "political propaganda."³⁷ In March of 1983, State Senator Keene filed suit in the United States District Court for the Eastern District of California, challenging the constitutionality of the labeling and reporting requirements of the Foreign Agents Registration Act.³⁸ Keene alleged that the "political propaganda" label deterred him from showing the films and that the labeling requirement constituted an abridgement of his first amendment right to freedom of speech.³⁹

After finding that Keene, as an exhibitor of the films, had standing to challenge the constitutionality of the Foreign Agents Registration Act,⁴⁰ the district court held that Keene was entitled to a

[A]ny oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the 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.

22 U.S.C. § 611(j) (1982).

34. See *supra* note 3.

35. 22 U.S.C. § 614(b) (1982). Specifically, the Act provides, "The Attorney General . . . may by regulation prescribe the language or languages and the manner and form in which such statement shall be made and require the inclusion of such other information contained in the registration statement identifying such agent of a foreign principal and such political propaganda and its sources as may be appropriate." *Id.*

36. See *Block v. Meese*, 793 F.2d 1303, 1307 (D.C. Cir.), *cert. denied*, 106 S. Ct. 3335 (1986).

37. *Id.* at 1307.

38. *Keene v. Smith*, 569 F. Supp. 1513, 1515 (E.D. Cal. 1983).

39. *Id.*

40. *Id.* at 1519. The district court held that Keene had standing because (1) the statute impinges his ability to communicate as a film exhibitor constituting an injury different in kind from that suffered by the public in general; (2) the injury is fairly traceable to the defendants

preliminary injunction enjoining the labeling of these films as political propaganda.⁴¹ Less than a week later, the same district court granted Keene's request for a permanent injunction against the application of FARA to the three films.⁴² Upon statutory appeal by the Attorney General, the case went directly to the United States Supreme Court.⁴³

Writing for a 5-3 majority, Justice Stevens first discussed the standing issue.⁴⁴ The Supreme Court affirmed the district court decision in part by agreeing that Keene had standing to challenge the Act's use of the term "political propaganda" as violative of the first amendment.⁴⁵ The Court reasoned: (a) Senator Keene had alleged a cognizable injury;⁴⁶ (b) the risk of his injury could fairly be traced to FARA's labelling requirement;⁴⁷ and (c) enjoining the application "political propaganda" label to these films would partially redress the threatened injury.⁴⁸ Since Keene had standing to bring the claim, the Supreme Court went on to address the constitutionality of FARA's labeling requirements.⁴⁹

The Supreme Court articulated the following reasons for reversing the district court's decision as to the labeling requirements and upholding the constitutionality of FARA:

(1) the Act's use of the words "political propaganda" does not abridge freedom of speech in violation of the First Amendment since:

(a) the Act does not prohibit, edit, or restrain the distribution of the materials subject to its provisions, but merely requires the disseminators of such materials to make certain disclosures to the public;

(b) there was no evidence that the public's perceptions about

since it is the defendants' enforcement of the statute which is handicapping plaintiff's ability to communicate his ideas; and (3) the injury is susceptible to judicial remedy, namely the requested injunction. *Id.* at 1517-1518.

41. *Id.* at 1523.

42. *Keene v. Meese*, 619 F. Supp. 1111, 1128 (E.D. Cal. 1985), *rev'd*, 481 U.S. 465 (1987).

43. *Meese v. Keene*, 481 U.S. 465 (1987). 28 U.S.C. § 1252 (1982) provides, "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies; or any officer or employee thereof, as such officer or employee, is a party." *Id.*

44. Justice Scalia took no part in the consideration of the case.

45. *Meese*, 481 U.S. at 472-74.

46. *Id.* at 473.

47. *Id.* at 473-74.

48. *Id.* at 476.

49. *Id.* at 477.

the word "propaganda" actually had any adverse impact on the distribution of those materials subject to the statutory scheme; and (2) the use of the term "propaganda" in the Act has no pejorative connotation, and the term as defined in the Act includes materials that are accurate and deserving of attention and respect.⁵⁰

Justices Blackmun, Brennan, and Marshall dissented in part, maintaining that the Foreign Agents Registration Act's designation of "political propaganda" violates the first amendment, since it burdens political discourse without serving any government interest.⁵¹ The dissent agreed that Keene had standing to challenge the constitutionality of the Act.⁵²

IV. THE DISTRICT COURT'S REASONING

Barry Keene sought to exhibit three films from Canada entitled: *If You Love This Planet*, *Acid Rain: Requiem or Recovery*, and *Acid From Heaven*.⁵³ The first film discussed the devastating effects of nuclear holocaust on earth and society, while the latter two films address the problem of the acidification of atmospheric precipitation by exposure to sulfur dioxide in the air, commonly known as acid rain.⁵⁴ Keene alleged that he was "deterred from exhibiting the films by a statutory characterization of the films as 'political propaganda.'" ⁵⁵ In short, the gravamen of Keene's asserted injury was that "if he were to exhibit these films while they bore such characterization, his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired."⁵⁶

At trial, the government argued that FARA's definition of the term "political propaganda" was neutral and without any pejorative or denigrating connotation.⁵⁷ In contrast, Keene presented expert tes-

50. *Id.*

51. *Id.* at 495.

52. *Id.* at 485.

53. *Keene v. Smith*, 569 F. Supp. 1513, 1515 (E.D. Cal. 1983). The films are documentaries about environmental pollution and potential nuclear holocaust. *If You Love This Planet* was awarded an Academy Award as Best Short Documentary of 1982. Washington Post columnist Mary McGrory said of *Acid Rain: Requiem or Recovery* that "[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." McGrory, *Justice Department's Boos Make Film Subjects Boffo Box Office*, Wash. Post, Mar. 1, 1983, at A3, col. 5.

54. *Keene*, 569 F. Supp. at 1515.

55. *Id.* See also *supra* note 33.

56. *Keene*, 569 F. Supp. at 1515.

57. *Id.* at 1520.

timony to establish the common meaning of "propaganda."⁵⁸ Professor Leonard Doob, Sterling Professor Emeritus of Psychology at Yale University, testified that the government's designation of the films as "political propaganda" was pejorative and denigrating to the material.⁵⁹ Further, Edwin Newman, head of the Usage Panel of the American Heritage Dictionary,⁶⁰ declared that calling something "propaganda" was tantamount to saying it was not worth considering and that such communication was put forward in an attempt to mislead.⁶¹

The district court found Keene's production of expert testimony persuasive, stating that the phrase "political propaganda," as officials of the Justice Department applied it, abridged freedom of speech.⁶² The court defined "political propaganda" as half-truths, distortions, and omissions.⁶³ They proposed that "to characterize political ideas as 'propaganda' is to denigrate those ideas."⁶⁴

The lower court also looked to the legislative history of the Foreign Agents Registration Act.⁶⁵ The court tentatively concluded that Congress intended to denigrate the labeled materials by using the term "political propaganda."⁶⁶ In a later related case on motion to alter the judgment, the same court found that this term was not only "semantically slanted,"⁶⁷ but also that it had already acquired its "unsavory connotation" when Congress enacted the Foreign Agents Registration Act in 1938.⁶⁸ Further, the court also concluded that Congress had enacted portions of the Act "in order to suppress or restrict that which it found abhorrent."⁶⁹ According to the district court, Congress understood and intended the label "political propaganda" as a term of opprobrium by which it intended to discourage or

58. Note, *The "Political Propaganda" Label Under FARA: Abridgement of Free Speech or Legitimate Regulation?*, 41 U. MIAMI L. REV. 591, 618-19 (1987) (citing Brief for Appellee at 23, *Keene v. Meese*, 106 S. Ct. 1632 (1986) (No. 85-1180)).

59. *Id.* at 619.

60. *Id.*

61. *Id.*

62. See *Keene v. Smith*, 569 F. Supp. 1513, 1520 (E.D. Cal. 1983).

63. *Id.*

64. *Id.*

65. *Id.* at 1521.

66. *Id.*

67. *Keene v. Meese*, 619 F. Supp. 1111, 1121 (E.D. Cal. 1985), *rev'd* 481 U.S. 465 (1987) (quoting W & M. MORRIS, *HARPER DICTIONARY OF CONTEMPORARY USAGE* 501 (1975)).

68. *Id.*

69. *Id.* at 1124.

suppress speech.⁷⁰

The court held that a first amendment abridgment occurs whenever there is suppression or a substantial interference with speech.⁷¹ Consequently, the court noted that the stigmatization that results from labeling the three films rendered them unavailable to Keene as vehicles for communicating his own views on the matter and thereby abridged his first amendment right to freedom of speech.⁷² The district court then went on to declare sections 611(j) and 614(a),(b) and (c) of FARA unconstitutional as violations of the first amendment and severable from the remainder of the Act.⁷³ The court enjoined the Attorney General from imposing the requirements of these sections on the three films.⁷⁴ The Justice Department then took the case on direct appeal to the United States Supreme Court pursuant to section 1252 of title 28 of the United States Code, which allows direct appeals from decisions invalidating Acts of Congress.⁷⁵

V. THE SUPREME COURT'S REASONING

Justice Stevens, writing for the majority, began his analysis of the first amendment issue by distinguishing between two different meanings of the term "political propaganda."⁷⁶ The first meaning, attributed to "popular parlance,"⁷⁷ suggests that people assume "'propaganda' is a form of slanted, misleading speech that does not merit serious attention."⁷⁸ Such speech "proceeds from a concern for advancing the narrow interests of the speaker rather than from a devotion to the truth."⁷⁹ The Court acknowledged that the term "political propaganda" as defined in the Act⁸⁰ includes "misleading advocacy of this kind."⁸¹ The second meaning the court ascribed to the term "political propaganda" involves advocacy materials that are "completely accurate and merit the closest attention and the highest

70. *Id.*

71. *Id.*

72. *Id.* at 1123-24.

73. *Id.* at 1128.

74. *Id.*

75. *See supra* note 43.

76. *Meese v. Keene*, 481 U.S. 465, 477 (1987).

77. *Id.*

78. *Id.*

79. *Id.*

80. 22 U.S.C. § 611 (1982).

81. *Meese*, 481 U.S. at 477.

respect.”⁸² The majority cited standard reference works in support of both definitions.⁸³

The majority opinion discredited the district court’s reasoning and claimed that the district court did not look to the statute’s actual requirements but rather relied on a possible misunderstanding by the public of the statutory scheme of the Act. The Supreme Court assumed that the district court used only the first definition above of propaganda to reach its conclusion.⁸⁴ The whole line of reasoning advanced by the district court regarding the connotation and public perception of the term “political propaganda” was thus rejected in summary fashion by the Supreme Court as unpersuasive and misconstrued.

The Court stated that unlike other cases where the Supreme Court has invalidated statutes as interfering with a party’s first amendment rights,⁸⁵ the statute here “does not pose any obstacle to [Keene’s] access to the material he wish[ed] to exhibit. Congress did not prohibit, edit, or restrain the distribution of advocacy materials in an ostensible effort to protect the public from conversion, confusion, or deceit.”⁸⁶ Rather, the Court noted, “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.”⁸⁷

The Court further added that FARA does not stop Keene from explaining to his audience that the films they are about to view have not been officially censured.⁸⁸ FARA allows the “[d]isseminators of propaganda [to go] beyond the disclosures required by statute and

82. *Id.*

83. *Id.* at 478.

84. See, e.g., WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 942 (1983) (“ideas, facts, or allegations spread deliberately to further one’s cause or to damage an opposing cause”); FUNK AND WAGNALLS STANDARD COLLEGE DICTIONARY 1080 (1973) (“now often used in a disparaging sense, as of a body of distortions and half-truths”).

85. See *Lamont v. Postmaster General*, 381 U.S. 301 (1964) (statute permitting detention of mail considered communist political propaganda violates addressee’s exercise of first amendment rights); *Stanley v. Georgia*, 394 U.S. 557 (1969) (criminal statute providing punishment for mere private possession of obscene material is unconstitutional); *Blount v. Rizzi*, 400 U.S. 410 (1971) (statute permitting detention of allegedly obscene mail was unconstitutional censorship); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (statute banning pharmacists from advertising prices of prescription drugs violates consumers rights to free speech).

86. *Meese v. Keene*, 481 U.S. 465, 480 (1987).

87. *Id.*

88. *Id.* at 480-81.

add any further information they think germane to the public's viewing of the materials."⁸⁹ Thus, the Court concluded that Keene may temper any prejudice arising from the label "political propaganda" by explaining to the viewers that "Canada's interest in the consequences of nuclear war and acid rain do not necessarily undermine the integrity or the persuasiveness of its advocacy."⁹⁰

The Court took this line of reasoning one step further by suggesting that it is ironic that it is the district court's injunction that withholds information from the public.⁹¹ The suppressed information is that these films fall within the category of materials that Congress has determined to be "political propaganda."

The Court cited *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*⁹² where it held:

[t]hat people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers from its misuse if it is freely available, that the First Amendment makes for us.⁹³

The contention that the public cannot receive too much information is the point here. Whereas the district court assumed the labeling would inhibit freedom of speech, the Supreme Court advocates letting the public know that the films have been designated "political propaganda" and then allow them to make their own informed decision.⁹⁴

The Court also invoked a historical analysis to support its holding. The statutory definition of "political propaganda" has remained the same for over four decades. The Court noted, "[w]e should presume that the people who have a sufficient understanding of the law to know that the term 'political propaganda' is used to describe the regulated category also know that the definition is a broad, neutral one rather than a pejorative one."⁹⁵ Relying on this long history, the Court deduced "that if the fear of misunderstanding had actually interfered with the exhibition of a significant number of foreign-made

89. *Id.* at 481. 22 U.S.C. § 612(a) (1982) sets forth the required contents for the registration statement. This section does not preclude the inclusion of additional information.

90. *Meese*, 481 U.S. at 482.

91. *Id.*

92. 425 U.S. 748 (1976).

93. *Id.* at 770.

94. *Meese*, 481 U.S. at 483.

95. *Id.*

films, that effect would be disclosed in the record.”⁹⁶ The Court acknowledged that, “[a]lthough the unrebutted predictions about the potentially adverse consequences of exhibiting these films are sufficient to support [Keene’s] standing, they fall far short of proving that the public’s perceptions about the word “propaganda” have actually had any adverse impact on the distribution of foreign advocacy materials subject to the statutory scheme.”⁹⁷ In other words, as the colloquialism suggests, “if it ain’t broke, don’t fix it.”

The majority finally relied on considerations of comity. The Court paid homage to the deference they normally owe to the legislature’s power to define the terms that it uses in legislation.⁹⁸ The Court characterized this particular choice of language by the legislature as one that no constitutional provision prohibits the Congress from making.⁹⁹ The Court rejected the district court’s assertions that Congress used the term “political propaganda” in an improper manner or that the term has a pejorative connotation.¹⁰⁰ The Court stated that “[a]s judges it is our duty to construe legislation as it is written, not as it might be read as a layman, or as it might be understood by someone who has not even read it.”¹⁰¹ The Court maintained that “[i]f the term ‘political propaganda’ is construed consistently with the neutral definition contained in the text of the statute itself, [then any] constitutional concerns voiced by the district court [would] completely disappear.”¹⁰²

VI. ANALYSIS

The crux of the majority opinion is that the term “political propaganda” is content neutral and without negative connotation.¹⁰³ This opinion fails to be persuasive for three reasons: 1) The Court reached its conclusion by limiting its examination to the statutory definition of “political propaganda” and dismissed the realities of public reaction to the term; 2) The Court concluded that FARA does not amount to a direct restriction of free speech, but failed to recognize that indirect

96. *Id.* at 483-84.

97. *Id.* at 484.

98. *Id.*

99. *Id.*

100. *Id.* at 479-80.

101. *Id.* at 484-85. *See also* *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). The Court remarked that “[i]t is axiomatic that the statutory definition of the term excludes unstated meanings of that term.” (citing *Colautti*, 439 U.S. at 392).

102. *Meese v. Keene*, 481 U.S. 482, 485 (1987).

103. *See supra* text accompanying notes 76-83.

discouragements are fully capable of a coercive effect on speech; and 3) The Court failed to explore alternative possibilities that might achieve the same results without the damaging effects of the term "political propaganda."

A. Public Reaction to the Term "Political Propaganda"

The Court limited its examination of "propaganda" to the statutory definition even though Senator Keene never argued that his speech was deterred by this statutory definition. He argued instead that his speech was deterred by the common perception that material classified as political propaganda is unreliable and not to be trusted.¹⁰⁴

In his dissent, Justice Blackmun maintained that the majority has asked and answered the wrong question.¹⁰⁵ The dissent noted that "[e]ven if the statutory definition is neutral, it is the common understanding of the Government's action that determines the effect on discourse protected by the First Amendment."¹⁰⁶ Blackmun then addressed what he considered to be the correct question, the common reaction to the term "propaganda." Citing the same experts the district court relied upon,¹⁰⁷ the dissent concluded that designating something "propaganda" denigrates the material.¹⁰⁸

The dissent next looked to precedent to support their proposition that the majority should have inquired beyond merely the statutory definition of the word "propaganda."¹⁰⁹ For example, in *FEC v. Massachusetts Citizens for Life, Inc.*,¹¹⁰ the Supreme Court looked beyond the statutory definition to find a first amendment violation. That case involved a nonprofit, nonstock corporation, formed to promote "pro-life" causes. The corporation financed a newsletter urging readers to vote "pro-life" in an upcoming primary election. The newsletter carried pictures and profiles of the candidates, including their position on "pro-life" issues, but disclaimed any endorsement of particular candidates. The Federal Election Commission (FEC) tried to prohibit the publication of this newsletter by invoking the Federal Election Cam-

104. *Meese*, 481 U.S. at 490 (Blackmun, J., dissenting).

105. *Id.* at 489.

106. *Id.*

107. *Id.* at 490. See also text accompanying *supra* notes 58-60.

108. *Meese*, 481 U.S. at 490.

109. The Court cited, for example, *American Communications Assn. v. Douds*, 339 U.S. 382, 402 (1950); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Gibson v. Florida Legislative Investigation Comm.*, 459 U.S. 87, 100 (1982).

110. 479 U.S. 238, 107 S. Ct. 619, 93 L. Ed. 2d 539 (1986).

paign Act.¹¹¹ Specifically, the FEC relied on section 441(b) of the Act which bars corporations from using treasury funds to make expenditures in connection with any election to public office.¹¹² The Supreme Court found that even though section 441(b) "does not remove all opportunities for . . . spending by organizations such as the [appellee] the avenue it leaves open is more burdensome than the one it forecloses."¹¹³ The Court concluded "[t]he fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities."¹¹⁴

Applying the principles elucidated in the above case to the instant case, the practical effect of FARA is the discouragement of free speech and is therefore an infringement on first amendment activities. Yet, the majority in *Keene* was unwilling to look beyond the statutory definition of political propaganda, and examine its practical effects. The practical effects were that Keene did not want to be known as a disseminator of "political propaganda" so he was precluded from communicating his own ideas by showing the films. The avenue left open (not showing the films) was more burdensome than the one it foreclosed (the ideas expressed in the film not being identified with foreign filmmakers).

*Lamont v. Postmaster General*¹¹⁵ is another case in which the Supreme Court looked past a statutory definition of specific language in its First Amendment analysis. In *Lamont*, the statute in question permitted the postmaster to detain mail classified as "communist propaganda" and authorized delivery of such mail only upon the addressee's request.¹¹⁶ The same "neutral" definition of "political propaganda" in FARA which was at issue in *Lamont* is at issue in *Meese v. Keene*. Yet, in *Lamont*, the Court found that the need to request delivery of mail classified as "communist political propaganda" was almost certain to have a deterrent effect upon first amendment rights.¹¹⁷ The Court stated that "any addressee is likely to feel some inhibition in sending for literature which federal officials have con-

111. *Id.* See 2 U.S.C. § 441(b) (1982).

112. *Massachusetts Citizens*, 93 L. Ed. 2d at 546.

113. *Id.* at 555.

114. *Id.*

115. 381 U.S. 301 (1965).

116. *Id.* at 303.

117. *Id.* at 307.

demned as 'communist political propaganda'."¹¹⁸ If, as in *Lamont*, the Court in *Keene* had ventured beyond the statutory definition of political propaganda and examined the deterrent effect upon debate of FARA's censorship requirements, it would have found that the same inhibitions are present for a state senator wishing to exhibit films labeled "political propaganda."

As pointed out by Justice Blackmun's dissent in *Keene*, the Supreme Court has recognized previously that the actual effect of a statute may warrant an independent determination of a statute's constitutionality.¹¹⁹ Yet, in *Keene*, the Court was willing to overlook the unchallenged testimony of experts testifying as to the connotation of the word "propaganda."¹²⁰ "Designating something 'political propaganda' is to assert that it communicates hidden or deceitful ideas; that concealed interests are involved; that unfair or insidious methods or [sic] being employed; that its dissemination is systematic and organized in some way."¹²¹ This is the connotation of the same word the Supreme Court majority opinion concluded is "content neutral." By focusing solely on the statutory definition of political propaganda, the majority ended up overlooking the views of these uncontested experts.

B. Indirect Restrictions On Speech Can Be Violative

The majority also concluded that FARA does not directly burden protected expression since it did not pose any obstacle to Keene's access to the materials he wished to exhibit.¹²² But the Court has recognized that indirect discouragements are fully capable of a coercive effect on speech.¹²³

In *Lamont v. Postmaster General*,¹²⁴ the Court stated that "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government."¹²⁵ In other

118. *Id.*

119. *Meese v. Keene*, 481 U.S. 465, 491 (1987) (Blackmun, J., dissenting).

120. See *supra* notes 58-60 and accompanying text. Nowhere in the *Keene* majority opinion is the testimony of the experts discussed.

121. *Meese*, 481 U.S. at 490 (Blackmun, J., dissenting) (quoting Declaration of Leonard W. Doob). See also *Seasongood v. Commissioner of Internal Revenue*, 227 F.2d 907, 911 (6th Cir. 1955) (the term "propaganda" as applied in modern political language connotes selfish or ulterior purposes and distortion of the facts).

122. 481 U.S. at 473.

123. See *American Communications Assn. v. Douds*, 339 U.S. 382, 402 (1950); *Freedman v. Maryland*, 380 U.S. 51, 59 (1965); *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

124. 381 U.S. 301 (1965).

125. *Id.* at 309.

words, something short of a total prohibition (e.g. indirect discouragement) can amount to an abridgement of speech. In *Bantam Books, Inc. v. Sullivan*,¹²⁶ a Rhode Island statute authorized a Commission to designate morally objectionable material.¹²⁷ The Commission was empowered to review materials and then notify a distributor that certain books or magazines had been declared objectionable for sale to youths under eighteen years of age.¹²⁸ Such notices requested the distributor's "cooperation" and advised that copies of the lists of objectionable publications were given to local police departments and that it was the Commission's duty to recommend prosecution of purveyors of obscenity.¹²⁹ Although the Supreme Court held that the Commission did not regulate or suppress obscenity, the Court still struck down the statute since, through informal sanctions, the Commission was able to suppress objectionable materials.¹³⁰ The Court proclaimed, "[w]e are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief."¹³¹ Thus, the fact that FARA does not directly prohibit or restrain the exhibition of the three Canadian films does not remove the possibility that in some informal manner FARA is restraining the freedom of expression guaranteed by the first amendment. Informal censorship through the Act's labeling requirements can in and of itself be a violation of the first amendment.

C. *Alternatives to the Label "Political Propaganda"*

The majority opinion discussed no alternative remedies or possibilities. The stated purpose of the Act is the protection of the national defense, internal security, and foreign relations of the United States.¹³² But, is this purpose only capable of being achieved through using the label "political propaganda?" Why wouldn't the label "This film expresses the views of the Canadian Government only" achieve the same purpose? The label "Made in Canada" would seem to achieve the same goal. Disclaimers are found at the end of United States movies and television editorials, yet, the word "propaganda" is

126. 372 U.S. 58 (1963).

127. *Id.* at 59-60.

128. *Id.* at 58.

129. *Id.*

130. *Id.* at 67.

131. *Id.*

132. Foreign Agents Registration Act, ch. 263, 56 Stat. 248 (1942).

not needed. If, as the majority of the Supreme Court contends, the term "political propaganda" is truly content neutral, then replacing it with one of the above suggestions would avoid the entire dispute. The Court neither discussed nor contemplated the idea that other "content neutral" terms could be the solution here.

VII. CONCLUSION

FARA violates the first amendment because of the deterrent effect caused by labeling a film "political propaganda." This term has a negative and pejorative connotation and results in the loss of freedom of speech guaranteed by our Constitution. If the majority of the Supreme Court had inquired into the true connotation of the term, instead of limiting itself to only the statutory definition, then they would have realized that FARA, specifically section 611(j), is abridging first amendment rights to freedom of speech. The majority also overlooked the possibility that although FARA may not constitute a direct restriction of free speech, indirect discouragements are fully capable of coercive effects on speech, thereby violating the first amendment. Finally, the Court failed to consider any alternatives that might achieve the same results without the damaging effects of the term "political propaganda." Simply put, the majority erred in concluding that the term "political propaganda" is "content neutral." The common perception of this term is anything but neutral, and for this reason the dissent was correct in concluding that the labeling requirements of the Foreign Agents Registration Act are unconstitutional.

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