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NOTES

THE FOREIGN AGENTS REGISTRATION ACT: HOW OPEN SHOULD THE MARKETPLACE OF IDEAS BE?

*Meese v. Keene*¹

I. THE FOREIGN AGENTS REGISTRATION ACT²

The Foreign Agents Registration Act of 1938³ (FARA) requires an “agent”⁴ disseminating propaganda on the behalf of a “foreign principal”⁵ to file a registration statement with the Attorney General of the United States.⁶ The statement includes the name and address of the agent, the principal on whose behalf he serves, the nature of the agent’s business, a detailed statement of the activities in which he engages, and other similar information.⁷ As originally enacted, this was all the Act required agents of foreign principals to file.

Congress significantly amended the Foreign Agents Registration Act in

1. 481 U.S. 465 (1987).

2. 22 U.S.C. §§ 611-621 (1982).

3. The Foreign Agents Registration Act, ch. 327, 52 Stat. 631 (1938) (codified as amended at 22 U.S.C. §§ 611-621 (1982)).

4. FARA defines an “agent of a foreign principal” as a person who acts in any capacity under the direct or indirect control or supervision of a foreign principal and who directly or indirectly

(i) engages within the United States in political activities for or in the interests of such foreign principal; (ii) acts within the United States as a public relations counsel . . . for or in the interests of such foreign principal; (iii) within the United States solicits . . . loans, money, or other things of value in the interest of such foreign principal; or (iv) . . . represents the interests of such foreign principal before any agency or official of the Government of the United States.

22 U.S.C. § 611(c) (1982).

5. 22 U.S.C. § 611(b) (1982) of FARA defines a foreign principal as including: “(1) the government of a foreign country and a foreign political party; (2) a person outside of the United States . . . and (3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.”

6. 22 U.S.C. § 612(a) (1982).

7. 22 U.S.C. § 612(a)(1-11) (1982).

1942. The most important of these changes was the addition of the filing and labeling requirement in section 614 of the Act. Pursuant to section 614, any agent of a foreign principal disseminating "political propaganda"⁸ within the United States must file a dissemination report⁹ and two copies of such propaganda with the Attorney General within "forty-eight hours after . . . the transmittal thereof."¹⁰ Additionally, this political propaganda cannot be disseminated without being "conspicuously marked at its beginning with . . . [an] accurate statement . . . setting forth the relationship or connection between the person transmitting the political propaganda . . . and such propaganda . . ."¹¹ The labeling requirement also mandates that the agent disclose that he is a registered agent of a foreign principal under FARA, that "his registration statement"¹² is on file and "available for inspection"¹³ at the Department of Justice, and that his registration under FARA in no way indicates approval of the propaganda's contents by the United States Government.¹⁴ Failure to file as prescribed by the Act may result in criminal prosecution.¹⁵

8. The United States Code contains the following definition:

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 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. As used in this subsection the term "disseminating" includes transmitting or causing to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce or offering or causing to be offered in the United States mails.

22 U.S.C. § 611(j) (1982).

9. The dissemination report requires the disclosure of information relating to the nature of the material transmitted as well as the places, times, and scope of the transmittal. Incredibly, a list of the names and addresses of those persons receiving 100 copies or more of such propaganda must also be included in the report. *See Canadian Films and the Foreign Agents Registration Act: Oversight Hearing Before the Subcomm. Civil and Constitutional Rights of the House Comm. of the Judiciary*, 98th Cong., 1st Sess. 76-77 (1983) (statement of Mr. Edwards, and pursuant to his request, adoption of the dissemination report as a part of the record) [hereinafter *Canadian Films and FARA*].

10. 22 U.S.C. § 614(a) (1982).

11. 22 U.S.C. § 614(b) (1982).

12. *Id.*

13. *Id.*

14. *Id.*

15. A violation of the statute could result in a term of imprisonment of up to five years or a fine of up to \$10,000 or both, 22 U.S.C. § 618(a)(2) (1982).

II. FACTS OF THE *Keene* CASE

The National Film Board of Canada (NFBC) has been a registered agent under FARA since 1947.¹⁶ In its report of June 30, 1982, to the Registration Unit of the Department of Justice, the NFBC listed 62 films to be shown for the first time.¹⁷ Of this list, the Department selected five for review.¹⁸ Three of these were then deemed political propaganda under FARA:¹⁹ *If You Love This Planet*, *Acid Rain: Requiem or Recovery*, and *Acid From Heaven*.²⁰ Two of the movies dealt with the issue of acid rain, and the other movie discussed the effects of a nuclear holocaust.²¹

In 1983, Barry Keene, a member of the California State Senate and an attorney, wanted to exhibit the three films.²² He did not, however, want to be branded a purveyor of political propaganda. Such characterization might seriously impair his chances for reelection. Keene thus sought to enjoin the Attorney General from enforcing the labeling provisions of FARA against him.²³ On May 23, 1983, the district court for the Eastern District of California heard Keene's motion for a preliminary injunction and found that the words "political propaganda" had a "distorted" and slanted meaning tending to denigrate material to which they applied.²⁴ The court concluded that attaching the

16. See *Canadian Films and FARA*, *supra* note 9, at 4-5 (1983) (testimony of D. Lowell Jensen, Assistant Attorney General, Criminal Division, Department of Justice); *Keene v. Meese*, 619 F. Supp. 1111, 1115 (D.C. Cal. 1985), *rev'd*, 481 U.S. 465 (1987); Note, *Neutral Propaganda: Three Films "Made in Canada" and the Foreign Agents Registration Act*, 7 COMM/ENT L. J. 435, 445 (1985) [hereinafter *Neutral Propaganda*].

17. *Canadian Films and FARA*, *supra* note 9, at 5.

18. *Id.*

19. *Id.* In his testimony, Mr. D. Lowell Jensen noted that the decision as to whether a film constitutes political propaganda is made by an experienced employee of the Department and is based on an objective test. Simply stated, the "test is . . . political advocacy." In other words, any film directly "promot[ing] or attack[ing] U.S. policy" must comply with FARA. *Id.* at 14.

20. *Id.*

21. *Keene v. Smith*, 569 F. Supp. 1513 (D.C. Cal. 1983), *cert. denied sub nom. Block v. Meese*, 478 U.S. 1021 (1986). Acid rain is caused by the "acidification of atmospheric precipitation by exposure to sulphur dioxide in the air." *Id.* at 1515.

22. The films were to be shown as his personal viewpoint on the issues in question.

23. 107 S. Ct. 1862, 1864 (1987). In *Block v. Smith*, 583 F. Supp. 1298 (D.D.C. 1984), *cert. denied*, 478 U.S. 1021 (1986), Mitchell Block brought suit challenging the same labeling and registration requirements of FARA. Mr. Block's company was to be the only distributor in America of the movie *If You Love This Planet*. Mr. Block averred that the labeling provisions of FARA abridged his first amendment right to freely express and communicate his ideas. The case was dismissed for a lack of standing. Judge Scalia, who did not participate in the *Keene* decision, affirmed the dismissal of the *Block* case in *Block v. Meese*, 793 F.2d 1303 (D.C. Cir. 1984), *cert. denied*, 478 U.S. 1021 (1986).

24. *Keene v. Smith*, 569 F. Supp. 1513, 1520 (D.C. Cal. 1983), *cert. denied sub nom. Block v. Meese*, 478 U.S. 1021 (1986).

propaganda label to these films abridged Keene's first amendment rights in that it impinged upon his ability to freely express his ideas and beliefs.²⁵ The court granted Keene's subsequent motion for permanent injunctive relief.²⁶ Pursuant to 22 U.S.C. section 1252 (1982), which provides for direct appeal to the United States Supreme Court when a Congressional statute is held unconstitutional, the subsequent appeal proceeded to the Supreme Court.²⁷

Justice Stevens, writing for the majority, reversed the district court. He reasoned that, while the term "political propaganda" applied to slanted and misleading speech, it also included a broader range of material; material which was "completely accurate" and deserving of the utmost "attention and the highest respect."²⁸ In addition, Justice Stevens found untenable the district court's conclusion that the labeling of the material as political propaganda inhibited Keene's ability to communicate his ideas and beliefs to others. His rationale was predicated upon three different reasons, which will be developed later.

The purpose of this Note is to analyze the soundness of the majority's reasoning in light of the legislative history of FARA and in light of the judicial development of the first amendment. This analysis leads to the conclusion that the court's assertion that the legislative history of FARA does not establish a link between the word political propaganda and subversive activity is simply incorrect. Similarly, the majority's finding that the words "political propaganda" are commonly understood in a neutral way is rejected. Finally, this Note determines that the dissent employed the proper mode of analysis and that Keene's first amendment rights were indeed abridged by FARA.

III. THE LEGISLATIVE HISTORY OF FARA

The Foreign Agents Registration Act of 1938 grew out of the investigations of the House Un-American Activities Committee (HUAC).²⁹ Formed in 1934, the HUAC primarily investigated organizations operating in the United States whose purpose was to affect "the internal and external" policies of the United States Government.³⁰ The committee's investigation produced

25. *Id.* at 1522.

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

27. *Meese v. Keene*, 107 S. Ct. 1862, 1865 (1987). This statute provides for a direct appeal to the United States Supreme Court when a statute of Congress is held unconstitutional.

28. *Id.* at 1869.

29. H.R. Rep. No. 1381, 75th Cong., 1st Sess. at 2 (1937) (Mr. Celler, who submitted the report from the Committee on the Judiciary, stated "[t]his bill was introduced as a result of recommendations of the special committee that was appointed in the Seventy-third Congress to investigate un-American activities in the United States." Mr. Celler's report was reproduced verbatim in the corresponding report of the Senate.) See S. Rep. No. 1783, 75th Cong., 3d Sess. (1937).

30. S. Rep. No. 1783, 75th Cong., 3d Sess. at 2 (1937).

“incontrovertible evidence” of persons operating in the United States on behalf of foreign principals for the purpose of fostering “un-American activities” and “inculcating” principles and teachings “aimed toward establishing in the United States a foreign system of government”³¹

In response to such activity, Senator John McCormack introduced the Foreign Agents Registration Act of 1938. The primary purpose of the Act was to require registration by such foreign agents in order to “publicize the nature of subversive or other similar activities” carried on by them.³² Such registration, it was believed, would help inform the American public of those engaged in the spread of propaganda and ideologies alien to our form of government. In sum, Congress believed that the “spotlight of pitiless publicity [would] serve as a deterrent to the spread of pernicious propaganda.”³³

As previously noted, Congress significantly amended FARA in 1942. The amendments required that a disclosure statement be printed on all political propaganda.³⁴ Also, “political propaganda” was defined for the first time,³⁵ and rather broadly, in the amended version of the Act.³⁶ The 1942 amendments were added in response to the vast amount of propaganda which the Axis powers sent into this country during World War II.³⁷ Average Americans received material on anti-semitism and the eventual German victory. This material was not labeled and “appeared as if it were circulated in this country as a bit of American comment.”³⁸ The labeling and disclosure amendments as enacted in 1942 are virtually the same today.

The 1942 amendments contained several other provisions. For instance, Congress enacted changes to prevent the United States from being used as a

31. H.R. Rep. No. 1381, 75th Cong., 1st Sess. at 2 (1937).

32. A plethora of subsequent hearings, reports, and case law supports the connection between the original passage of the act and subversive activities.

33. *Id.* In an excellent Note on this case at the district court level, Anne Dorfman commented that while “committee reports indicate that monitoring subversive activity was unquestionably the focus of the legislation, the word ‘subversive’ did not appear in the final version of the Act.” *Neutral Propaganda*, *supra* note 16, at 439.

34. *Amending Act Requiring Registration of Foreign Agents: Hearings on H.R. 6045 Before Subcomm. No. 4 of the House Comm. on the Judiciary, 77th Cong., 1st Sess. (1941) [hereinafter Amending Act Hearings of 1941].*

35. The term “political propaganda” has been previously defined *supra* note 8.

36. While the term “political propaganda” was not defined in the original Act, the expansive definition given the term in the 1942 amendments provides a basis for the inference that the amount of material thenceforth to be deemed “political propaganda” was somewhat larger than under the original Act. Some credence for this proposition can be found in the statements of Mr. L.M.C. Smith, Chief, Special Defense Unit, Department of Justice, who said that once a person was registered as the agent of a foreign principal under the Act, they wanted to get a “fairly broad coverage of the type of material that they distribute.” *Amending Act Hearings of 1941, supra* note 34, at 18.

37. Mr. L.C.M. Smith submitted a detailed report of the types and contents of political propaganda received by the Axis powers of Germany, Italy, and Japan. *See Amending Act Hearings of 1941, supra* note 34, at 21-24.

38. *Id.* at 14.

base for propaganda activities in South America.³⁹ Additionally, jurisdictional changes enabled actions to be brought anywhere in the country.⁴⁰ Finally, amendments transferred responsibility for administration of the Act from the State Department to the Department of Justice.⁴¹ These later two changes were enacted to improve enforcement of the Act in light of past enforcement problems.⁴²

The last major revision of the Foreign Agents Registration Act occurred in 1966. In the early 1960's, the Committee on Foreign Relations became concerned about certain nondiplomatic activities carried on by the agents of foreign governments. It subsequently authorized a study of the problem, and as a result of the study, FARA was amended.⁴³

Specifically, the 1966 amendments were aimed at including more people within the purview of the Act. The study by the Committee on Foreign Relations had revealed that the "subversive agent and propagandist of the pre-World War II days" had been supplanted by "the lawyer-lobbyist and public relations counsel whose object [was] not to subvert or overthrow the U.S. Government, but to influence its policies to the satisfaction of the particular client."⁴⁴ Recognizing the potential impact such agents could have through their lobbying efforts or by manipulating public opinion via the mass media, terms such as "political consultant"⁴⁵ and "political activities"⁴⁶ were added to the

39. See Act of April 29, 1942, ch. 263, § 1, 56 Stat. 248, 251 (1942) (codified as amended at 22 U.S.C. §§ 611-621 (1982)).

40. *Id.* at 257.

41. *Id.* at 258.

42. During the course of the hearings, the Hon. Jerry Voorhis, a Representative in Congress from the State of California, testified in support of the change in Administration because "the job of giving publicity to the registrations has been one of the weakest parts of the act so far" and "the Department of Justice is in a better position" to ameliorate the situation. *Amending Act Hearings of 1941, supra* note 34, at 52-53.

43. S. Rep. No. 143, 89th Cong., 1st Sess. 2-4 (1965). See also *Foreign Agents Registration Act Amendments: Hearings on S. 2136 Before the Senate Comm. on Foreign Relations*, 88th Cong., 1st Sess. 9 (1963) (statement of Nicholas B. Katzenbach, Deputy Attorney General).

44. S. Rep. No. 143, 89th Cong., 1st Sess. 4 (1965); see also Note, *Foreign Agents Registration Act: Proposed Amendments*, 40 N.Y.U. L. REV. 310 (1965). The Note observes that the post World War II emergence of the United States as one of the political, social, and economic leaders of the world resulted in an increased amount of activities in the United States by agents on the behalf of foreign principals. Such agents, moreover, were not the subversive propagandists of yesteryear, but rather were the "promoter[s] of a nation's legitimate economic interests." *Id.* at 313. With the agents change in purpose also came a change in methods of achieving their new objectives. Professionals like accountants, public relations men, lawyers, and lobbyists were the new agents of foreign principals.

45. The term "political consultant" means any person who engages in informing or advising any other person with reference to the domestic or foreign policies of the United States or the political or public interests, policies, or relations of a foreign country or of a foreign political party. S. Rep. No. 143, 89th Cong., 1st Sess. 20 (1965).

46. The term "political activities" means:

the dissemination of political propaganda and any other activity which the

Act in order to bring within its reach agents engaging in those activities.⁴⁷ Moreover, additional coverage was sought by revamping and expanding the terms “foreign principal” and “agent of a foreign principal.”⁴⁸ In sum, the 1966 amendments sought to change the focus of the Act from primary emphasis on the subversive agent of old to primary emphasis “on protecting the decision-making process of our Government and the public’s right to know . . . the foreign propaganda to which they are subjected.”⁴⁹

IV. CRITIQUE OF THE MAJORITY OPINION IN *Keene*

In reversing the district court, the majority opinion relied upon three different grounds. First, the court took aim at the district court’s assertion that the term “political propaganda” is understood by the common man to mean semantically slanted language.⁵⁰ The court argued that those with even limited knowledge of the law know that such a term “is a broad neutral one rather than a pejorative one.”⁵¹ Second, the court stated that it owed deference to the particular word choice Congress employed in this statute in that such words were “defined in a neutral and evenhanded manner.”⁵² Finally, the court noted that the labeling of the material did nothing to “place regulated . . . materials beyond the pale of legitimate discourse.”⁵³ Rather, the labeling requirement helps the public to better evaluate such material. Such a disclosure, the court concluded, in no way burdens a person’s first amendment rights.

As its starting point, the majority opinion posits that persons with even a limited knowledge of FARA and its history would know that the definition of political propaganda was a broad one, and one which was intended to be neutral instead of slanted and misleading. After reviewing the legislative history of the Act, however, such an assertion seems patently incorrect. Indeed, the

person engaging therein believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, persuade, or in any other way influence any agency or official of the Government of the United States or any section of the public within the United States with reference to formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party.

Id. at 20.

47. The clear focus of the 1966 amendments was to protect the decision making process of the United States government from the influence of those employed by foreign principals. The committee report indicates that the decision making process referred to is that which occurs in the executive and legislative branches — those branches in which policies are made. The judiciary was not included therein because the “courts do not make policy . . . but only interpret and apply existing policy”
Id. at 7-9.

48. S. Rep. No. 143, 89th Cong., 1st Sess. 1 (1965).

49. *Id.* at 5.

50. 107 S. Ct. 1862, 1872 (1987).

51. *Id.*

52. *Id.* at 1873.

53. *Id.* at 1870.

overriding reason for the Act in the first place was to control the dissemination of political propaganda — material deemed to be inimical to our interests and designed to *subvert* the United States Government.⁵⁴ Simply put, the legislative branch has always associated FARA with subversive activity. Subsequent amendments to the Act and the hearings and reports attendant thereto reconfirm that the purpose of the Act was to regulate such material.

Even more interesting is the fact that the United States Supreme Court as well as the lower federal courts have explicitly recognized the relationship between FARA's passage and subversive activity. In *Viereck v. United States*,⁵⁵ Justice Stone, writing for a majority of the Supreme Court, stated that "[t]he general purpose of the legislation was to identify agents of foreign principals who might engage in *subversive* acts or in spreading foreign propaganda, and to require them to make public record of the nature of their employment."⁵⁶ Similar statements about the Act's legislative history also are found in numerous lower court decisions.⁵⁷ For instance, in *United States v. Peace Information Center*,⁵⁸ the United States District Court for the District of Columbia found that FARA was specifically enacted for the purpose of shedding light on the subversive activities of foreign propagandists.⁵⁹ Thus, neither legislative history nor case law support the majority's assertion.

Granted, the amendments to FARA in 1966 increased the number of persons to whom the Act applied, and often such persons were engaged in acts which were perfectly legitimate and not in any sense subversive.⁶⁰ Yet despite this shift in focus, the Act is still seen in a negative way. In a report on FARA, the American Law Division, Congressional Research Service stated that

the Act was framed in the context of subversive activities rather than lobbying and has been generally perceived in that light. . . . The Act continues to be widely regarded as such despite the intent of Congress in 1966 to shift its focus in the direction of protecting the integrity of governmental process.⁶¹

In light of the above discussion, it is difficult to understand how Justice Stevens concluded that those with even limited knowledge of the law would

54. See *supra* notes 29-33.

55. 318 U.S. 236 (1943).

56. *Id.* at 241 (emphasis added).

57. See, e.g., *United States v. Peace Information Center*, 97 F. Supp. 255 (D.D.C. 1951); *United States v. Kelly*, 51 F. Supp. 362 (D.D.C. 1943); *United States v. Auhagen*, 39 F. Supp. 590 (D.D.C. 1941).

58. 97 F. Supp. 255 (D.D.C. 1951).

59. *Id.* at 259.

60. Note, *Foreign Agents Registration Act: Proposed Amendments*, 40 N.Y.U. L. REV. 311, 314 (1965) (noting that many foreign agents represent the perfectly legitimate interests of foreign principals and that in 1963 one-sixth of all registrations under FARA were for government information centers).

61. *The American Law Division, Congressional Research Service, Report to the Comm. on Foreign Relations on The Foreign Agents Registration Act*, 95th Cong., 1st Sess. (Comm. Print 1977).

necessarily conclude that the words applied in a neutral way. On the contrary, the correct conclusion should be that the words do, in fact, attach to material which is somehow misleading and not in our best interests. But even assuming that Justice Stevens is correct in the above assertion, it is, for many of the same reasons, difficult to accept his second argument that the common man does not comprehend the word "propaganda" in a pejorative sense.

As Justice Blackmun's dissent points out, Keene presented uncontroverted evidence "of an expert in the study of propaganda" which stated that "to call something propaganda is to assert that it communicates hidden or deceitful ideas . . . [and] that unfair or insidious methods are being employed. . . ."⁶² Other authorities on propaganda corroborate the evidence submitted by Keene's expert. For instance, John Whitton and Arthur Larson in their book *Propaganda, Towards Disarmament in the War of Words*, state that "[t]he word 'propaganda' itself has gradually come to acquire a tainted and unpleasant connotation. It suggests that someone is trying to put one over on you."⁶³ A host of other sources supporting Keene's position on this point are listed in the district court's findings of fact.⁶⁴ Based on this evidence, Justice Blackmun was justified in saying that "it strains credulity" for the court to conclude that the term "propaganda" is understood in a neutral manner.⁶⁵

Assuming, then, that Justice Stevens was incorrect in the two of his three arguments examined so far, it follows that purveyors of "political propaganda"

62. 107 S. Ct. 1862, 1876 (1987) (citing the "declaration of Leonard W. Doob, Sterling Professor Emeritus of Psychology at Yale University . . .").

63. J. WHITTON & A. LARSON, PROPAGANDA, TOWARDS DISARMAMENT IN THE WAR OF WORDS 9 (1964).

64. The following list is a sampling of the authorities the district court cited in concluding that propaganda as ordinarily used is a "word of reproach." W. & M. MORRIS, HARPER DICTIONARY OF CONTEMPORARY USAGE 501 (1975) (stating that the word "propaganda" is a "semantically slanted word"); WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1138 (2d college ed. 1970) (defines "propaganda" as "ideas, doctrines, or allegations so spread; now often used disparagingly to connote deception and distortion"); FUNK & WAGNALLS STANDARD COLLEGE DICTIONARY 1080 (1973) (stating "[p]ropaganda is now often used in a disparaging sense, as of a body of distortions and half-truths calculated to bias one's judgement or opinions").

In his brief for the Supreme Court, Barry Keene noted:

The first dictionary definition to refer to the disrepute in which political propaganda was held can be found in BRANDE, DICTIONARY OF SCIENCE, LITERATURE, AND ART (1842): "the name *propaganda* is applied in modern political language as a term of reproach to secret associations for the spread of opinions and principles which are viewed by most governments with horror and aversion." (Emphasis in original).

Appellee's Brief at 23. Barry Keene also asserted that the government itself realized the term was not neutral, and in support of that proposition noted that "Deputy Attorney General Schmults" referring to FARA in a letter had stated that he would "support the use of a more neutral term like political 'advocacy' or 'information' to denominate information that must be labelled." *Id.*

65. 107 S. Ct. 1862, 1876 (1987).

suffer the stigmatizing effect of those words. In the instant case, Keene put on evidence which indisputably showed that his chance for reelection would be imperiled if it were known that he was considered a purveyor of political propaganda.⁶⁶ Consequently, persons disseminating such information are viewed as attempting to spread false doctrines and ideologies which are somehow harmful to the recipients of such propaganda. The question thus becomes whether or not the forced disclosure and hence stigmatization of one disseminating such information is a burden which is contrary to the strictures of the first amendment.

V. THE FIRST AMENDMENT

The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech."⁶⁷ Certain restraints, however, have been allowed on one's freedom of speech where there is a compelling state interest for doing so. In this case, the government contends that the labeling of material as emanating from a foreign source is clearly within Congress' legislative power.⁶⁸ Keene does not challenge this contention, but rather he asserts that Congress' word choice in carrying out their intention impinges on his ability to communicate his ideas and thoughts. The majority opinion never reached this question because they never found the phrase "political propaganda" to be understood in a negative way. Assuming, however, that "political propaganda" does have a negative meaning ascribed to it, does the disclosure requirement then act as an indirect restraint on speech? Whether a disclosure statement such as the one in issue can abridge a person's first amendment rights is apparently a novel question.

The government argued, and did so persuasively, that under the "marketplace of ideas theory"⁶⁹ of the first amendment, a disclosure requirement like

66. Barry Keene put on uncontroverted evidence which showed that he would be irreparably harmed by the attachment of the term "political propaganda" to the films he wished to exhibit. First, Mr. Keene had a poll conducted which showed that "49.1% of the public would be less inclined to vote" for a political candidate exhibiting films deemed to be "political propaganda." *Meese v. Keene*, 107 S. Ct. 1862, 1867 & n.7 (1987). Mervin Field, the person who designed the survey, reconfirmed the validity of the survey and results, and concluded a political candidate would definitely suffer adverse consequences from showing such films. *Id.*

67. U.S. CONST. amend. I.

68. The argument that Congress may require the labeling of material from foreign sources under FARA has previously been upheld. *See, e.g., Attorney General v. Irish N. Aid Comm.*, 346 F. Supp. 1384, 1390 (S.D.N.Y. 1972) (stating "[t]he Act is founded upon the indisputable power of the Government to conduct its foreign relations and to provide for the national defense and so falls within the inherent regulatory power of Congress").

69. The "marketplace of ideas theory" was first enunciated by Justice Holmes in his dissent in *Abrams v. United States*, 250 U.S. 616 (1919). He explained that "the best test of truth is the power of the thought to get itself accepted in the competition of https://michelandiplat.com/issn/0046-1634/iss4/1988/0101.html which their wishes safely can be

that required by FARA enhances one's understanding of information in the marketplace. It thus aids a person in assessing the weight to be given such information and thereby helps him in coming to a decision with regards to it.⁷⁰ Succinctly, such a disclosure statement enhances the efficient operation of the marketplace.

But, a better view of the marketplace theory would be to take account of the fact that disclosure statements may do more harm than good if they inhibit people from bringing information to the marketplace in the first instance.

As Justice Blackmun recognized, "the practical effect" of the labeling requirement at issue was to indirectly restrain Keene's speech.⁷¹ Lack of direct censorship or direct restraint on speech "does not determine the free speech question."⁷² Indirect restraints on free speech are just as capable of running afoul of the first amendment as are direct restraints.⁷³ In *Lamont v. Postmaster General*,⁷⁴ Corliss Lamont brought an action contesting the constitutionality of a statute which required the Postmaster General to withhold from delivery any "communist political propaganda."⁷⁵ Upon detention of such material, the addressee was notified that the material was being held by the Postmaster General and that upon his request the propaganda would be sent to him.⁷⁶ Justice Douglas, writing for a majority of the Supreme Court, found that the fact that the addressee had to request in writing that his mail be delivered abridged his first amendment rights. Justice Douglas stated that such a requirement was "almost certain to have a deterrent effect" on communication.⁷⁷ Similarly, Justice Brennan, in a concurring opinion, stated that "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government."⁷⁸

It is exactly this deterrent, this inhibitory and chilling effect, which is in question in this case. The disclosure requirement in issue will most certainly have a chilling effect on first amendment rights if a person knows he will be stigmatized for exercising that right. In similar cases in which lists of names were sought to be disclosed, the Supreme Court has held that the potential chilling effect of first amendment rights caused by such disclosure rendered

carried out." *Id.* at 630.

70. *Meese v. Keene*, 107 S. Ct. 1862, 1871 (1987).

71. *Id.* at 1876 (Blackmun, J., dissenting).

72. *Id.*

73. *American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950) (stating that "[u]nder some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions, or taxes").

74. 381 U.S. 301 (1965).

75. *Id.* at 302. The definition of "communist political propaganda" was the same as that given "political propaganda" under FARA. *See supra* note 8.

76. *Id.* at 303.

77. *Id.* at 307.

78. *Id.* at 309.

such requests unconstitutional.⁷⁹ As the dissent aptly noted, the disclosure requirement in this case went beyond a mere neutral statement of the source of the material and "place[d] the power of the Federal Government . . . behind an appellation *designed* to reduce the effectiveness of the speech in the eyes of the public."⁸⁰

Striking the term "political propaganda" from the labeling requirement would not inhibit the government from attaining its goal of disclosing the source of foreign material. Ample alternatives exist for material to be identified as coming from a foreign principal so long as they do so in a neutral way. One commentator has suggested simply requiring the films in question to state "Made in Canada."⁸¹ Other commentators have suggested the label "political advocacy material" be used.⁸² Whether or not Congress will attempt to employ a more neutral term in light of the challenge by Barry Keene remains to be seen.

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79. See *NAACP v. Button*, 371 U.S. 415 (1963).

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

81. *Neutral Propaganda*, *supra* note 16, at 465.

82. See *supra* note 63 and accompanying text; see also *The American Law Division, Congressional Research Service, Report to the Comm. of Foreign Relations on The Foreign Agents Registration Act*, 95th Cong., 1st Sess. (Comm. Print 1977). In its report, The American Law Division suggested that Congress might wish to consider three alternatives to rid the term "political propaganda" of its stigma:

(1) alteration of language used in the current statute; (2) adjustment of the provisions of the law to separate the concepts of lobbying from the idea of propagandizing with subversive intent; and (3) changing the organizational structure within the Justice Department of those officers assigned the tasks of administering both the Foreign Agents Registration Act and current antisubversive statutes to reflect this separate focus.