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The Anti-Terrorism Act of 1987 and American Freedoms: A Critical Review

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COMMENTS

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I. INTRODUCTION

Historically, during periods of crisis or perceived threat of societal fragmentation, governments have often restricted or deprived their citizens of basic civil liberties.¹ The United States has not been immune from this practice.² Repressive actions by political authori-

1. This phenomenon has been extensively explored and documented. *See generally*, F. BIDDLE, *THE FEAR OF FREEDOM* (1951); K. BOYLE, *ARTICLE 19: INFORMATION, FREEDOM, AND CENSORSHIP 1-18* (1988); H. COMMAGER, *FREEDOM AND ORDER: A COMMENTARY ON THE AMERICAN POLITICAL SCENE* (1966); M. LEVIN, *POLITICAL HYSTERIA IN AMERICA: THE DEMOCRATIC CAPACITY FOR REPRESSION* (1971); J. SKOLNICK, *THE POLITICS OF PROTEST* (1969). For an analysis of the phenomenon's significance in first amendment jurisprudence, see Blasi, *The Pathological Perspective and the First Amendment*, 85 *COLUM. L. REV.* 449, 450 (1985).

2. Examples are numerous and date to the earliest European colonization of North America. *See* Blasi, *supra* note 1, at 451 n.2. A brief summary includes: the 1637 ouster of Ann Hutchinson from the Massachusetts Bay Colony, E. MORGAN, *THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP 153-54* (1958); the Salem witchcraft trials, J. DEMOS, *ENTERTAINING SATAN: WITCHCRAFT AND THE CULTURE OF EARLY NEW ENGLAND*

ties have occurred in response to myriad situations: severe economic distress, such as depressions or strike waves;³ wars, or foreign policy crises that facilitate war;⁴ and the spread of political philosophies which appear to threaten the dominant ideology.⁵ Efforts to focus the qualms and distrust of a society on a suitable scapegoat have been

(1982); the Alien and Sedition Acts, J. H. SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1966); the furor directed towards Masonites in the early 1800's, A. TYLER, *FREEDOM'S FERMENT: PHASES OF AMERICAN SOCIAL HISTORY TO 1860* 354-58 (1944); the religious repression of Native American Indians, V. DELORIA, JR. & C. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 232-33 (1983); the religious restrictions on Mormon practice during the mid-1800's, L. ARRINGTON & D. BITTON, *THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS* 44-64 (1979); the legal and social discrimination experienced by Catholic immigrants, A. MENENDEZ, JOHN F. KENNEDY: *CATHOLIC AND HUMANIST* 5-30 (1987); the subjugation of anarchists following the Haymarket Riot of 1886, J. GARRATY, *THE NEW COMMONWEALTH* (1968). For an excellent discussion of more recent episodes of repression in United States history, see R. GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO THE PRESENT* (1978); see also J. SKOLNICK, *supra* note 1, at 8-24. It is important to remember that, despite the numerous and chronic incidents of discrimination and political repression in this country's history, there simultaneously exists an equal, if not stronger, tradition of freedom, diversity, and respect for dissent. It is to this nobler American tradition that this Comment appeals.

3. For example, commentators have directly linked the rise of Nazism in Germany during the 1930's to the economic adversity of the times. See J. TOLAND, *ADOLF HITLER* 261-62 (1976). Hitler's popular rhetoric blamed the Jews, Gypsies, Communists, homosexuals and others who were not "Aryan-enough" for Germany's misfortunes and claimed that the purging of these elements served a "higher ideal." R. WOETZEL, *THE PHILOSOPHY OF FREEDOM* 42 (1966).

In the United States during the Great Depression of the 1930's, incidents like the Bonus Army episode and the Red Scare of 1935 demonstrate that depressive economic conditions, when coupled with inflammatory rhetoric and a readily identifiable scapegoat, can produce notable restrictions in civilian liberty. See generally, R. GOLDSTEIN, *supra* note 2, at 195-300 (discussing governmental responses to strikes and worker unrest).

4. One of the most notorious examples of repression during a period of declared war is the internment of Japanese-Americans in concentration camps, documented in cases such as *Korematsu v. United States*, 323 U.S. 214 (1944). Other examples of wartime repression in United States history include the Industrial Workers of the World (IWW) trials following World War I and the attempted prosecution of so-called "native fascists" during World War II. See E. CORWIN, *TOTAL WAR AND THE CONSTITUTION* (1947) (discussing seditious prosecutions in World Wars I and II); see also Blasi, *supra* note 1, at 494 (arguing that wartime radically increases likelihood that people who hold unorthodox views will be punished for their nonconformity).

5. The compelled suicide of Socrates, the crucifixion of Jesus, the oppression directed against Christians and then Gnostics in the early formation of the Catholic Church, the burning at the stake of medieval witches and heretics, the involuntary recantation of Galileo, the attempted persecution of the Jeffersonians, the treatment of Native Americans in the United States, and the modern involvement with totalitarian fascism, socialism and communism all demonstrate that many governments or religious authorities throughout history have responded with vengeance to the expression of beliefs that they viewed as threatening. See R. GOLDSTEIN, *supra* note 1, at x; see also *POLITICAL OPPOSITIONS IN WESTERN DEMOCRACIES* xiii-xiv (R. Dahl ed. 1966) (emphasizing the tendency of governments to respond to internal opposition with violence).

especially effective when directed towards outside threats or foreign "isms."⁶ Suspected Republicans during the late 1700's,⁷ immigrant groups throughout the 1800's,⁸ unions during the late 1800's,⁹ socialists during the early 1900's,¹⁰ Japanese-Americans during the 1940's,¹¹ and Communists during the 1950's¹² are just a few examples

6. Blasi, *supra* note 1, at 495; see also W. EBENSTEIN, *TODAY'S ISMS: COMMUNISM, FASCISM, SOCIALISM, CAPITALISM* 108 (4th ed. 1964) ("The answer of totalitarian dictatorships is to *direct this latent hostility of the people against real or imaginary enemies.*" (emphasis in original)).

7. Act of July 14, 1798, ch. 74, 1 Stat. 596. This is popularly referred to as the Alien and Sedition Act of 1798. The Alien and Sedition Act was used to persecute Jeffersonian Republicans for their political views, instigating a constitutional crisis that the courts have not forgotten. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 273-78 (1964) (controversy over Alien and Sedition Act helped establish the principle that debate on public issues must be uninhibited and allowed to contain vehement attacks on government policies).

8. White, Anglo-Saxon, Protestant Americans (WASPs), organized politically as "Native Americans," sought to protect their political power, influence, and values through legislative and popular restrictions on immigrant groups and activities. See J. SKOLNICK, *supra* note 1, at 13. For example, prohibitions on the use of opium, a drug which was prevalent among Japanese and Chinese immigrants, developed in part as a social control measure to curtail their "alien" activities. See D. COURTWRIGHT, *DARK PARADISE* 78-82 (1982); J. HELMER, *DRUGS AND MINORITY OPPRESSION* (1975). For a discussion of "nativist" riots, mob actions, and lynchings against various immigrant groups, see J. HIGHAM, *STRANGERS IN THE LAND* (1955).

9. S. YELLEN, *AMERICAN LABOR STRUGGLES* (1969) (recounting major periods of turmoil in the history of the U.S. labor movement and the responses of governmental authorities). After the great railroad strike of 1877, for instance, many states passed anti-labor conspiracy laws, and the courts revived the common law doctrine of malicious conspiracy. R. GOLDSTEIN, *supra* note 1, at 32.

10. See, e.g., Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 578-97 (1948). *But cf.* *Colyer v. Skeffington*, 265 F. 17 (D. Mass. 1920) (admonishing presumptive atmosphere of guilt surrounding trials of socialists). Many states passed criminal syndicalism or sedition laws and prosecuted with vengeance suspected socialists, anti-war activists, and others. Z. CHAFEE, *supra*, at 56-65. The passions of war and the fear of sedition can produce odd judicial responses. In one instance, an individual's statement that "[t]he second and third verses of the 'Star Spangled Banner' are nothing but rotten doggerel" was held to be a violation of the Minnesota Espionage Act. *State v. Freerks*, 140 Minn. 349, 350 (1918).

11. *Korematsu v. United States*, 323 U.S. 214 (1944); see also *Ex parte Endo*, 323 U.S. 283 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). During World War II, over 112,000 law-abiding Japanese-Americans were subjected to curfews and later uprooted and forced into "relocation camps," pursuant to a series of Executive Orders issued in response to military authorities' assessment that their presence on the West Coast posed a security risk in the war against Japan. *Korematsu*, 323 U.S. at 236 (Murphy, J., dissenting) (citing Final Report, Japanese Evacuation from the West Coast, 1942, by Lt. Gen. J.L. DeWitt). The Supreme Court held that it was permissible to detain these Japanese-American citizens in accordance with the war powers of the Congress, the military authorities, and the President as Commander-in-Chief. *Id.* at 217. The unspoken assumption in the Japanese relocation was that the racial ties between the Japanese-Americans and Imperial Japan would lead to treason, sabotage, and perfidy. *Id.* at 237-42 (Murphy, J., dissenting). Similiar reasoning was not applied to other "enemy ethnics" like the German-Americans or Italian-Americans. *Id.*

12. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951); *Marshall v. United States*, 176 F.2d 473 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 933 (1950). The depth of intolerance and hysteria which accompanied the McCarthy era is illustrated in a statement by Albert Canwell,

of groups that have been subjected to legislative restrictions on their constitutional freedoms during periods of social unrest.¹³ American citizens who support the political positions of the Palestine Liberation Organization (PLO) can now be said to have joined this dubious list.¹⁴

On December 22, 1987, Congress passed the Anti-Terrorism Act of 1987 (the Act).¹⁵ The Act prohibits American citizens from receiv-

chairman of the state of Washington's Un-American Activities Committee: "If someone insists there is discrimination against Negroes in this country, or that there is inequality of wealth, there is every reason to believe that person is a communist." C. McWILLIAMS, WITCHHUNT 141 (1950). Secondary literature on this important epoch in American history continues to grow. See, e.g., S. KUTLER, THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR (1982) (providing a critical analysis of governmental policies and actions); P. STEINBERG, THE GREAT "RED MENACE": UNITED STATES PROSECUTION OF AMERICAN COMMUNISTS, 1947-1952 (1984) (arguing that the judicial system, unable to maintain objectivity, was swept into the hysteria of the age). For a provocative assessment of FBI activities during this period, see A. THEOHARIS, SPYING ON AMERICANS: POLITICAL SURVEILLANCE FROM HOOVER TO THE HUSTON PLAN (1978).

13. A major theme of this Comment is that freedom of expression and association should be diligently protected, especially in times of social or political crisis. This, however, is neither a novel nor an unexplored assertion. See generally L. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986) (arguing that protection of free expression makes the populace more tolerant in crisis situations); Blasi, *supra* note 1, at 449-50 (1985) (suggesting that the first amendment be applied absolutely "in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically").

14. The author, an American Jew, in no way supports or endorses the views of the PLO. Even a casual reading of this Comment should convey that the issue here is the defense of traditional American political theory and the right to free expression upon which that theory depends. Challenges to the first amendment do not arise where the speech in question is popular and conventional; indeed, the first amendment becomes relevant only where the speech is controversial, factious, and inflammatory.

15. Anti-Terrorism Act of 1987, Pub. L. No. 100-204, Title X, 101 Stat. 1406-07 (codified at 22 U.S.C.A. §§ 5201-5203 (West Supp. 1987)). The Anti-Terrorism Act (the Act) went by several names during its legislative history. Compare Anti-PLO Terrorism Act of 1987, H.R. 2211, 100th Cong., 1st Sess., 133 CONG. REC. E1635 (daily ed. April 29, 1987) with Terrorist Organization Exclusion Act of 1987, H.R. 2587, 100th Cong., 1st Sess., 133 CONG. REC. H4198 (daily ed. June 3, 1987).

By closing the Palestine Information Office and by attempting to close the PLO consulate to the United Nations, the United States joined Chile, Costa Rica, El Salvador, Guatemala, South Africa, and South Korea as the only nations besides Israel which do not in some respect recognize the PLO as the political representative of the Palestinian people. Hitchins, *Minority Report*, THE NATION, Oct. 10, 1987, at 366; see also Kassim, *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis Under International Law*, 9 DEN. J. INT'L L. & POL'Y 1 (1980) (arguing that several juridical bases exist by which the PLO, under international law, can claim to be the legitimate representative of the Palestinian people). For a contrary analysis, see Friedlander, *The PLO and the Rule of Law: A Reply to Dr. Anis Kassim*, 10 DEN. J. INT'L L. & POL'Y 221 (1981) (contending that the terrorist nature of the PLO precludes its official recognition as the legal representative of the Palestinian people).

Terrorism is a fluidly defined concept that eludes any attempt to place it into a helpful analytical context. Perhaps the most cynical view is that its definition and application depends in large part on the relative level of established power that the definer possesses. Too often, "terrorism" fits the rhetorical stance of an occupier when describing a threat posed by a

ing any assistance, funds, or "anything of value except informational materials" from the PLO.¹⁶ Additionally, the Act proscribes the establishment of offices or other facilities to further the interests of the PLO.¹⁷ Acting originally in anticipation of the passage of the Act, and subsequently under its authority, the State Department of the United States permanently closed the Palestine Information Office in Washington, D.C.,¹⁸ and attempted to close the PLO Observer Mission to the United Nations in New York City.¹⁹ Although some might applaud Congress' action as one of closing the PLO's "terrorist outposts on U.S. soil,"²⁰ others are concerned that the Act is danger-

resistance group to continued occupation. Ironically, however, the resister may occasionally adopt the term to describe his own actions. Consider this:

Terrorism is for us a part of the political battle being conducted under the present circumstances, and it has a great part to play: speaking in a clear voice to the whole world, as well as to our wretched brethren outside this land, it proclaims our war against the occupier.

Shammas, *The Morning After*, NEW YORK REVIEW OF BOOKS, Sept. 29, 1988, at 47. Shammas is quoting current Prime Minister of Israel, Yitzhak Shamir, in an article written for the Stern Gang's publication *Hehazeet* (The Front), in 1943.

A more neutral definition describes terrorism as the promotion of violence to achieve or maintain supremacy. See AMERICAN HERITAGE DICTIONARY 1255 (2nd ed. 1985). The inherent vagueness and susceptibility of such a definition to political or other pressures should give pause to those who claim to know a "terrorist" from a "freedom fighter" with absolute certitude. Some go as far as to argue that the definition is purely political. See R. FALK, *REVOLUTIONARIES AND FUNCTIONARIES: THE DUAL FACE OF TERRORISM* (1988) (claiming that the conventional media perception of terrorism is selectively confined to anti-Western political violence, and does not include equally deadly acts of Western counterterrorism). For a general overview of terrorism and the various responses by governments, see *THE TERRORISM READER: A HISTORICAL ANTHOLOGY* (W. Laquer ed. 1980).

16. 22 U.S.C.A. § 5202 (West Supp. 1988).

17. *Id.* Ironically, the Act does not actually proscribe terrorist activities. Such activities are already proscribed by numerous other federal laws and international treaties. See, e.g., 18 U.S.C. §§ 792-799 (1982 & Supp. IV 1986) (espionage); 18 U.S.C.A. § 2331 (West Supp. 1988) (terrorism against United States nationals in foreign countries). The Anti-Terrorism Act does not enlarge or diminish this body of law in any way, in that acts of terrorism by the PLO or anyone else against American citizens would be punished in the exact same manner. For a discussion of possible limitations on the apprehension of terrorists outside the United States' borders, see Rogers, *Prosecuting Terrorists: When Does Apprehension in Violation of International Law Preclude Trial?*, 42 U. MIAMI L. REV. 447 (1987).

18. *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir. 1988), *aff'g* 674 F. Supp. 910 (D.D.C. 1987).

19. *United States v. Palestine Liberation Organization (PLO)*, 695 F. Supp. 1456 (S.D.N.Y. 1988).

20. 133 CONG. REC. E1635 (daily ed. Apr. 29, 1987) (letter from Rep. Kemp to Sec. of State George Shultz calling for greater restrictions on PLO activities in the United States). Significantly, three of the most prominent Jewish organizations in the United States all openly opposed the Act. See *Miami News*, Oct. 18, 1988, at A1, col. 2. The American Jewish Committee, the American Jewish Congress, and the Anti-Defamation League of B'nai B'rith all argued that the Act does not reflect the concerns of the Jewish community and unnecessarily restricts the rights of American citizens to hear *all* views on the Middle East. *Id.* Additionally, these groups were concerned that the Act would deliver to the PLO an unearned

ously restrictive legislation.²¹ By acting to stop American citizens from spreading the PLO's "ideology of hate and violence,"²² Congress has raised a number of troublesome constitutional concerns.

First, the Act involves the three branches of the federal government in areas of decisionmaking which are not within their traditional realms of authority, and for which they are ill-suited.²³ Through the Act Congress has restricted the foreign entities with whom the President may establish diplomatic relations, in derogation of the traditional role of the Executive.²⁴ Additionally, Congress has identified a particular group and subjected that group to legislatively imposed penalties, in derogation of the traditional prerogative of the judiciary.²⁵ Finally, the judiciary has been forced into undertaking a determination of the international responsibilities of the United States in derogation of the traditional role of the political branches of government.²⁶

Second, by making it unlawful for American citizens to effectively promote political interests shared by a foreign organization, the Act imperils two very important first amendment rights: the freedom to engage in political advocacy over important issues of public concern;²⁷ and the freedom to associate with a political organization and with others who share that organization's political views.²⁸ These

propaganda victory. *Id.* Many progressive Jewish leaders and organizations joined in challenging the constitutionality of the Act. See Complaint at 5-17, *Mendelsohn v. Meese*, 695 F. Supp. 1474 (S.D.N.Y. 1988) (No. 88-Civ. 2005 (ELP)).

21. See generally *Opening One Ear to the P.L.O.*, N. Y. Times, July 5, 1988, at A16 (lamenting the loss that the American people have suffered in their right to political information).

22. 133 CONG. REC. E1635 (daily ed. Apr. 29, 1987) (letter from Rep. Kemp to Sec. of State George Shultz).

23. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-16 (1988).

24. See *infra* notes 186-97 and accompanying text.

25. See *infra* notes 198-205 and accompanying text.

26. See *infra* notes 206-12 and accompanying text.

27. U.S. CONST. amend. I. See *infra* notes 213-48 and accompanying text.

28. U.S. CONST. amend. I. See *infra* notes 249-58 and accompanying text. Despite no explicit mention of the word "association" in the Bill of Rights, the Supreme Court has held that a right to freedom of association exists that is inviolable by either federal or state governments. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). Americans have always treasured the right to associate, and in an increasingly diversified world, it is virtually impossible to have a single voice heard without joining that voice with others. See generally Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964) (noting that Americans typically associate with a multitude of groups). Thus freedom of association becomes an integral part of one's exercise of free speech. See A. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1965).

The Supreme Court has fully recognized that the right of association is intimately bound to freedom of speech, and is essential to a free society. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); see also *Cousins v. Wigoda*, 419 U.S. 477 (1974) (right to associate with the political party of one's choice is an integral part of basic constitutional freedom). In reality, a citizen

rights do not disappear simply because the organization with whom the American citizens wish to associate is politically unpopular or based outside the United States.²⁹ By curtailing or prohibiting the freedom to advocate for and associate with the PLO, the Act violates the first amendment of the United States Constitution. Third and finally, by selecting American citizens and others who associate in specified ways with a named organization, and by imposing legislative penalties upon those individuals and the organization, Congress has created a Bill of Attainder which is specifically prohibited by the Constitution.³⁰

This Comment analyzes the constitutional concerns raised by the Act and ultimately recommends its repeal.³¹ In attempting to appear tough on terrorism, Congress has created a symbolic document that does little to stop the actual spread of terrorism, and which threatens instead to disrupt the peaceful discussion of important political topics by American citizens.³² Section II of this Comment examines the leg-

often expresses an opinion through the organizations with which he or she affiliates. See *Runyon v. McCrary*, 427 U.S. 160, 175 (1976) (right to associate for the advancement of beliefs and ideas essential to the effective advocacy of controversial points of view). For an interesting analysis of product-association in the marketplace as a self-defining aspect of contemporary culture, see S. EWEN, *ALL CONSUMING IMAGES: THE POLITICS OF STYLE IN CONTEMPORARY CULTURE* (1988). Ewen argues that our self-image is increasingly defined by images of our external associations, including political associations.

29. The first amendment applies regardless of the relative unpopularity of the group with which an individual wishes to associate. *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974). Freedom of political association, like freedom of speech or of the press, should be stringently buttressed against encroachment, whether based on the antipathy or distaste of the public or government, because "[i]t tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change." *Id.*

30. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto law shall be passed.") States are also prohibited from passing Bills of Attainder. U.S. CONST. art. I, § 10, cl. 1.

When the states ratified the Constitution, Bills of Attainder were clearly defined: they were acts of a legislature that sentenced the accused to death. If the punishment meted out was less than death, the acts were termed bills of pains and penalties. *United States v. Lovett*, 328 U.S. 303 (1946). The constitutional prohibition applies to any legislative act that inflicts punishment on named individuals or easily ascertainable members of a group in a manner that singles them out from others similarly situated without the benefit and safeguards of a judicial trial. *Id.* at 315-16.

31. Rep. George Crockett (D-Mich) has introduced legislation that would repeal the Act. H.R. 4078, 100th Cong., 2d Sess. (1988) (introduced in 134 CONG. REC. H696 (daily ed. March 3, 1988)). Both the Department of Justice and the Department of State appear to support repeal. *PLO*, 695 F. Supp. at 1467 n.25.

32. The problems that the "chilling effect" poses to free speech have been acknowledged and discussed by constitutional scholars representing all viewpoints and ideologies. Compare Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (exploring the impact of the chilling effect on political speech from a government-process perspective) with Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972) (exploring the impact of the chilling effect from an individual-development perspective). For

islative history and relevant language of the Act. Section III then examines cases that interpret the Act or are otherwise linked to it and discovers that, in combination, these interpretations work to defeat the effective advocacy of pro-Palestinian views within the United States. In addition, Section IV examines the constitutional implications of the Act and suggests that it cannot withstand constitutional scrutiny. Finally, Section V concludes that the Act has little usefulness other than to further the political fortunes of its sponsors at the expense of restricting the free expression of politically unpopular views.³³

II. THE ANTI-TERRORISM ACT OF 1987

Congress added the Act to the Foreign Relations Authorization Act for fiscal years 1988-89, without committee hearings and with only minimal debate.³⁴ It is divided into four operative sections. Section 1002 of the Act contains Congress' findings concerning the terrorist nature of the PLO and its determination that the PLO and its affiliates are a terrorist organization.³⁵ Section 1003 of the Act states:

It shall be unlawful, if the purpose be to further the interests of the

an economic analysis of the "costs" of the "chilling effect," see Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U.L. REV. 1, 47 (1986).

33. Virtually all newspapers and journals that have discussed the Anti-Terrorism Act have noted and commented that this has been the clear effect of the legislation. See, e.g., *Opening One Ear to the P.L.O.*, N. Y. Times, July 5, 1988, at A16; Jacoby, *Is Uncle Sam Outlaw? Bending the Global Rules*, NEWSWEEK, Mar. 28, 1988, at 61; *Nobody's Talking*, THE NATION, Jan. 9, 1988, at 4; *Meese Expected to Order PLO to Shut U.N. Mission*, Wall Street Journal, Feb. 11, 1988, at 45; *Notebook*, NEW REPUBLIC, Jan. 4, 1988, at 9; Greenberger, *Bill Requiring Closure of PLO's Washington, U.N. Offices May Be Propaganda Blow to U.S.*, Wall Street Journal, Dec. 24, 1987, at 28, col. 1.

34. The Act was added to an omnibus foreign relations spending bill, on the floor of the Senate on October 8, 1987. See 133 CONG. REC. S13,855 (daily ed. Oct. 8, 1987). At the time, several senators noted the need to explore the constitutional issues raised by the Act in more depth, including Senator Bingaman, who stated: "We need to further explore the issues raised by this amendment. It is an amendment that has not had any hearings, has not been considered in committee, and one that raises very serious issues of constitutional rights . . ." Representative Kemp first introduced the Act in the House of Representatives on April 27, 1987, citing his failed attempts to have the State Department close the "terrorist outposts on U.S. soil." 133 Cong. Rec. E1635 (daily ed. Apr. 29, 1987). It received vigorous support from both conservatives and liberals alike. Consider this exchange by then-presidential candidate Senator Robert Dole (R-Kan.) and Senator Edward Kennedy (D-Mass.):

[Senator Dole:] Ted, will you join me in sending a bipartisan message to the P.L.O.? There's just no room in this land for international terrorists.

[Senator Kennedy:] Right on, Bob. If the Reagan Administration won't take away their welcome mat, Congress will.

(Hitchens, *Minority Report*, THE NATION, Oct. 10, 1987, at 366.)

35. 22 U.S.C.A. § 5201(a) (West Supp. 1988). Congress found, among other things, that: (1) terrorism in the Middle East accounts for 60% of all international terrorism; (2) the PLO was directly responsible for the death of dozens of American citizens, including Leon

Palestine Liberation Organization or any of its constituent groups

- ...
- (1) to receive anything of value except informational material from the PLO . . . or agents thereof;
 - (2) to expend funds from the PLO . . . ; or
 - (3) to establish or maintain an office, headquarters, premises or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the [PLO].³⁶

In addition, Section 1004 of the Act empowers the Attorney General to take all necessary steps to effectuate the Act, making no attempt to limit the Executive's choice of actions in reaching this end.³⁷ Finally, Section 1005 provides that the President may terminate the provisions of the Act by certifying to the President Pro Tempore of the Senate and the Speaker of the House that the PLO no longer practices or supports terrorism.³⁸

III. CASES INVOLVING OR TESTING THE CONSTITUTIONALITY OF THE ANTI-TERRORISM ACT

A. *Setting the Stage*

The first case relating to the Act, *Palestine Information Office v. Shultz*,³⁹ did not arise under the Act itself, but rather in reaction to its pending passage. Then-Secretary of State George Shultz, apparently worried about the constitutional and international law ramifications of the pending legislation, sought to placate its sponsors by closing the Palestine Information Office in Washington, D.C.⁴⁰

Klinghoffer, a passenger aboard the Achille Lauro in 1985; and (3) the PLO is dedicated to the armed liberation of Palestine. *Id.*

36. 22 U.S.C.A. § 5202 (West Supp. 1988). In addition to being the pivotal provision of the ATA, it is the most troubling section in respect to the first amendment rights of free speech and association.

37. 22 U.S.C.A. § 5203 (West Supp. 1988). Attorney General Edwin Meese implemented the Act by ordering the closing of the PLO's observer mission to the United Nations. *United States v. Palestine Liberation Office*, 695 F. Supp. 1456, 1460 (S.D.N.Y. 1988). This was done despite prior opposition from the State Department, see 133 Cong. Rec. E1635 (daily ed. Apr. 29, 1987) (letter from Sec. of State Shultz to Rep. Kemp arguing that the closure would violate international law), and an overwhelming show of unanimity in opposition to the closing by the United Nations General Assembly. *Report of the Committee on Relations with the Host Country*, G.A. Res. 229, U.N. Doc. A/Res/42/229 (1988). See also UN CHRONICLE, June 1988, at 36 (vote 143 to 1, Israel in opposition, U.S. abstaining).

38. 22 U.S.C.A. § 5204 (West Supp. 1988).

39. 674 F. Supp. 910 (D.D.C. 1987), *aff'd*, 853 F.2d 932 (D.C. Cir. 1988).

40. This has been widely recognized as the primary motivation behind the closing of the Palestine Information Office. Greenberger, *Bill Requiring Closure of PLO's Washington Office May be Propaganda Blow to U.S.*, Wall Street Journal, Dec. 24, 1987, at 28, col. 1. Shultz' reversal on the constitutionality of the Information Office closing is remarkable. In his reply to

1. *PALESTINE INFORMATION OFFICE V. SHULTZ*

The Palestine Information Office had operated peacefully and with little notice in Washington, D.C., since its establishment in 1978.⁴¹ The Information Office was staffed by its director, Hasan Abdel Rahman, a United States citizen, and eight employees, who were either United States citizens or legal permanent aliens.⁴² The office disseminated information and arranged lectures and seminars in order to make known the views of the Palestinian people inside of the United States.⁴³ Although the Information Office did not have any diplomatic status, both it and its director were registered under the Foreign Agents Registration Act (FARA)⁴⁴ as agents of the PLO.⁴⁵ As required by FARA, the Information Office regularly filed registra-

a letter from Representative Kemp calling for greater restrictions on the activities of the PLO, Shultz wrote:

[S]o long as [the Palestine Information Office] regularly files reports with the Department of Justice on its activities as an agent of a foreign organization, complies with all other relevant U.S. laws, and is staffed by Americans or legal resident aliens, it is entitled to operate under the protection provided by the First Amendment of the Constitution.

133 CONG. REC. E1635 (daily ed. Apr. 29, 1987). Shultz' animosity towards the Act continues. He has recently been quoted as describing the Act as "one of the dumber things Congress has done lately." Binnis, *Judge Rules PLO Mission Can Stay*, NAT'L L. GUILD NOTES, Sept./Oct. 1988, at 10.

41. Palestine Information Office, 674 F. Supp. at 914. The \$350,000 annual budget of the Information Office was paid for by the Palestine National Fund, which was identified as the finance department of the PLO. *Id.* This fund is controlled by a Board of Directors appointed by the Palestine National Council, which plaintiffs claim functions as a Parliament for Palestinians. Brief of Plaintiffs-Appellants, at 8, n.4, *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir. 1988) (No. 87-5398).

42. *Palestine Information Office v. Shultz*, 853 F.2d 932, 935 (D.C. Cir. 1988).

43. *Id.* at 935. Writers sympathetic to the Palestinian cause note the difficulty in bringing their views to the attention of the American public. See N. CHOMSKY, *THE FATEFUL TRIANGLE: THE UNITED STATES, ISRAEL, AND THE PALESTINIANS* 39-80 (1983) (contending that the U.S. has adopted a "rejectionist" view that the rights of the Palestinian people are less in value than the rights of the Israeli people); A. COCKBURN, *CORRUPTIONS OF EMPIRE* (1987) (citing the lack of balanced coverage in the mainstream media about the Middle East); M. PARENTI, *INVENTING REALITY: POLITICS AND THE MASS MEDIA* (1986) (claiming that the mass media largely follows governmental and corporate interpretations of foreign events). For a discussion of the difficulties facing both Israelis and Palestinians who wish to engage in a peaceful dialogue, see D. GROSSMAN, *THE YELLOW WIND* (H. Watzman trans. 1988).

44. Foreign Agents Registration Act, 22 U.S.C. §§ 611-621 (1982 & Supp. IV 1986).

45. Palestine Information Office, 674 F. Supp. at 914. The FARA requires all persons or groups employed in the United States by a foreign principal for the purpose of disseminating propaganda to register with the Secretary of State. 22 U.S.C. § 611-21. A "foreign principal" is defined in the FARA as the government of a foreign country, or any foreign organization, business, association, corporation, or partnership. 22 U.S.C. § 611(b). Because the FARA also requires that certain materials be labeled political propaganda, it has been criticized for exerting a "chilling effect" on the exercise of free speech. See Note, *The "Political Propaganda" Label Under FARA: Abridgement of Free Speech or Legitimate Regulation?*, 41 U. MIAMI L. REV. 591 (1987).

tion statements with the Department of Justice, and described itself in its most recent statement as an organization dedicated to "bring[ing] the views of the Palestinian people . . . to the attention of the American people."⁴⁶ Mr. Rahman, in his capacity as director of the Information Office, arranged meetings, attended academic conferences, and responded to written and oral inquiries from groups and individuals concerned about Palestinian issues.⁴⁷

On September 15, 1987, the State Department informed the Information Office that it had been "designated" a foreign mission and would have to shut down its operation within thirty days.⁴⁸ The shut-down was ordered despite the fact that the Information Office had never been accused of any unlawful conduct at any point in its operating history.⁴⁹ The State Department ordered the Information Office closed under the authority of the Foreign Missions Act (FMA),⁵⁰ which confers on the State Department the power to regulate "foreign missions" within the United States.⁵¹ In response, the Information Office sought an injunction and a declaratory judgment in the district court to block the closing,⁵² arguing that the State Department had exceeded its authority under the FMA, and that the decision to close the office violated the first amendment rights of freedom of speech and freedom of association of the Information Office and its staff.⁵³

Adopting a narrow scope of review, the United States District Court for the District of Columbia concerned itself only with the Secretary of State's discretion under the FMA, and not ostensibly with

46. Brief of Plaintiffs-Appellants at 6, *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir. 1988) (No. 87-5398).

47. *Id.*

48. *Palestine Information Office*, 853 F.2d at 935.

49. *See id.* at 946 (Silberman, J., concurring). Judge Silberman noted that the Information Office engaged in no behavior other than the dissemination of information. *Id.*

50. *Palestine Information Office*, 674 F. Supp. at 935. *See* 22 U.S.C. § 4301(c) (1982 & Supp. IV 1986) (Foreign Missions Act).

51. 22 U.S.C. § 4301(c). The FMA defines a "foreign mission" as:

[A]ny mission to or agency or entity in the United States which is involved in the diplomatic, consular, or other activities of, or which is substantially owned or effectively controlled by— (A) a foreign government, or (B) an organization . . . representing a territory or political entity which has been granted diplomatic or other official privileges and immunities under the laws of the United States or which engages in some aspect of the conduct of the international affairs of such territory or political entity.

22 U.S.C. § 4302(a)(4) (Supp. IV 1986).

52. *Palestine Information Office*, 674 F. Supp. at 915.

53. *Id.* The district court found unpersuasive plaintiff's argument that the Information Office had never received nor sought any diplomatic status, nor engaged in any diplomatic activity. *Id.* at 916.

the substantive elements of his decision.⁵⁴ From the outset the court noted that, through the FMA, Congress empowered the Secretary of State with broad authority to regulate foreign missions in the United States.⁵⁵ In addition, the court noted the all-inclusive nature of the FMA in respect to the entities it regulated.⁵⁶ Under the FMA, a "foreign mission" is "any mission . . . agency or entity" that is involved in the "diplomatic, consular, or other activities of, or which is substantially owned or effectively controlled" by a foreign government or political organization representing a territory that has been granted diplomatic or other official privileges in the United States.⁵⁷ In holding that the Information Office constituted an "entity" for purposes of the FMA, the district court relied on the "other activities" that the Information Office performed for the benefit of the PLO.⁵⁸ Specifically, the court described these "other activities" as "the political activities and political propaganda" that the Information Office engaged in, and concluded that these activities were sufficient to trigger the State Department's authority under the FMA.⁵⁹

The district court, however, paid only cursory attention to the first amendment claims of the Information Office and its staff.⁶⁰ It dismissed any attempt by the Information Office or amici to characterize the State Department's actions as regulating political advocacy, ruling that the closure order "merely prohibits the [Information Office] from operating as a 'foreign mission' of the PLO."⁶¹ Accepting for purposes of argument that the Information Office and its staff had demonstrated some impingement of their first amendment rights, the district court applied a balancing test, weighing the plaintiffs' first amendment rights against the government's countervailing interests.⁶² This balancing test, first enunciated in *United States v.*

54. *Id.* at 916.

55. *Id.*

56. *Id.* at 917.

57. 22 U.S.C. § 4302(a)(4) (Supp. IV 1986).

58. *Palestine Information Office*, 674 F.Supp. at 917. The district court acted in spite of the fact that no previous case existed in which the FMA was applied against United States citizens whose activities were otherwise regulated under the FARA.

59. *Id.* at 917. Plaintiffs argued that "other activities" had never been previously interpreted by the State Department as simple political advocacy. Reply Brief of Plaintiffs-Appellants, at 1, *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir. 1988) (No. 87-5398). They also argued that the legislative history of the FMA never intended such a broad definition of the term. *Id.*

60. *Id.* at 918. The court found the FMA to be content-neutral on its face and to be "no burden" on free expression. *Id.* at 918-19. The court concluded that while the issues raised by the plaintiffs were serious, their assertion in this case was "utterly meritless." *Id.* at 920.

61. *Id.* at 918.

62. *Id.* at 918-19. The court seemed to reject the suggestion that there was even a minimal impact on the plaintiffs' right to freedom of expression as a result of the Department's action,

O'Brien,⁶³ is applied when a strong and compelling governmental interest allegedly conflicts with an asserted constitutional right.⁶⁴ Under the *O'Brien* balancing test, a court will uphold an incidental restriction on speech if 1) the regulation is within the government's constitutional power; 2) a substantial governmental interest unrelated to the suppression of speech is furthered; 3) the furtherance of this interest results in only an incidental restriction on freedom of speech; and 4) the incidental restriction is no greater than essential to further the governmental interest.⁶⁵

Applying the balancing test, the district court held the State Department's action to be within the foreign affairs power of the Executive and found the governmental interest in furthering the foreign policy goals of the United States to be compelling.⁶⁶ Specifically, the district court found that this interest overrode any incidental restriction on the first amendment rights of the plaintiffs.⁶⁷ Accordingly, the court then granted summary judgment to the United States.⁶⁸

Unfortunately, the district court's decision leaves unanswered many questions that still linger, even after appellate review and in light of the subsequent passage of the Anti-Terrorism Act. For instance, the court wrote that the plaintiffs were "in no way prevent[ed] . . . from debating political issues."⁶⁹ Yet, without further guidance from the court on how to structure his activities in order to avoid application of the FMA, how is Mr. Rahman to open an office without facing its imminent closure? If Mr. Rahman still retains his full first amendment rights as an individual, a denial of his ability to rent an office and work with others who share his political views is unavoidably an impingement on his right to political expression. Sig-

stating: "[t]here is no burden on protected expression as a result of the designation [of the Information Office as a foreign mission]." *Id.* at 918.

63. 391 U.S. 367 (1968).

64. *Palestine Information Office*, 674 F. Supp. at 918.

65. *O'Brien*, 391 U.S. at 377.

66. *Palestine Information Office*, 674 F. Supp. at 919. The district court stated that "[t]he Secretary determined that the order was necessary to further the foreign policy interests of the United States, and thus was archetypically designed to promote a compelling governmental interest." *Id.* This is typical of the minimal inquiry into the motive of the statute under the *O'Brien* rationale. The court was satisfied that so long as the Act was within the power of the legislature, it was therefore constitutional regardless of the actual motive. See generally L. TRIBE, *supra* note 21, § 12-7 at 824 (courts under *O'Brien* are reluctant to examine motive, yet motive is routinely examined in numerous other constitutional contexts). Professor John Hart Ely has described the search for legislative motive as "charades . . . inevitably unconvincing." J. ELY, *DEMOCRACY AND DISTRUST* 126 (1978).

67. *Palestine Information Office*, 674 F. Supp. at 919.

68. *Id.* at 920.

69. *Id.* at 919.

nificantly, Mr. Rahman argued that he did not "seek or receive regular instructions from the PLO on how to perform [his] job or run the office."⁷⁰ Additionally, the League of Arab States, of which the PLO is only a single member, paid his salary.⁷¹ Therefore, other nations, not the PLO, principally paid his fees.⁷² Thus, rather than rely upon the language of the FMA that confers authority on the State Department to regulate entities that are substantially owned or controlled by foreign governments or organizations, the district court explicitly relied upon the "other activities" language of FMA in upholding the closure.⁷³ These other activities specifically consisted of "the political activities and political propaganda" in which the office was engaged.⁷⁴ In light of the fact that the State Department invoked its authority merely on the basis of this expressive activity, it seems anomalous for the district court to have ignored the obvious impact that sustaining the closure would have on the plaintiff's future political activity.

2. *PALESTINE INFORMATION OFFICE V. SHULTZ* (APPELLATE)

The Information Office and its staff appealed the district court's decision to the United States Court of Appeals for the District of Columbia, renewing their arguments that the decision to close the Information Office exceeded the authority of the State Department under the FMA, and that the decision of the district court was fundamentally inconsistent with the first amendment.⁷⁵ The D.C. Circuit

70. *Palestine Information Office*, 853 F.2d at 935.

71. Brief of Plaintiffs-Appellants at 8 n.4, *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir. 1988) (No. 87-5398).

72. *Id.*

73. *Palestine Information Office*, 674 F. Supp. at 917.

74. *Id.*

75. *Palestine Information Office*, 853 F.2d at 938-39. The Information Office also made a due process claim under the fifth amendment, arguing that the FMA is too vague for citizens to understand when it may apply, and that the Information Office and the citizens who comprise it suffered a deprivation of constitutionally protected rights without adequate notice or hearing. *Id.* at 943-44. The D.C. Circuit dismissed the vagueness claim by holding that the ordinary requirements of legislative specificity are lessened in the foreign affairs context, and that the FMA is less vague than other statutes that have been judged constitutional. *Id.* at 944.

The D.C. Circuit, however, failed to differentiate foreign policy actions that involve only foreign governments or entities, and their agents, and those that constrict the rights of American citizens. When rights of Americans within the United States are threatened by executive action, the statute must be sufficiently clear and unambiguous. See *United States v. United States District Court*, 407 U.S. 297, 313-14 (1972); cf. *Abourezk v. Reagan*, 785 F.2d 1043, 1056 (D.C. Cir. 1986), *aff'd* 108 S. Ct. 252 (1987) (per curiam) (stating that criteria for State Department operation must be sufficient for the courts to monitor executive action).

"Substantial control," as defined by the D.C. Circuit in *Palestine Information Office*, is not limited to official representation by the foreign government or entity. This broadens the inquiry in future cases arising under the FMA to include potential indicia of control, such as

upheld the district court ruling, conducting a textual analysis of the FMA similar to the one conducted by the district court. However, the D.C. Circuit departed in part from the district court's application of the FMA and explored in more depth the constitutional claims involved.⁷⁶

Noting that the FMA operated in the subtle realm where foreign policy matters "brush up" against rights of free speech and free expression,⁷⁷ the court commented on how truly difficult cases could some day arise under the FMA.⁷⁸ The court then refused, however, to characterize *Palestine Information Office* as such a case.⁷⁹ Departing from the district court's application of the FMA, the D.C. Circuit

oral assertions made in telephone conversations, statements in letters, expressions of affiliation in ideas or outlook made in public forums, and a whole host of other subjective factors not susceptible of objective measurement. This is in addition to the test employed by the district court, that the Information Office engaged in "other activities," which was never repudiated by the D.C. Circuit. *Palestine Information Office*, 674 F. Supp. at 917-18. Minimum standards of specificity demand language that conveys "sufficiently definite warning as to proscribed conduct when measured by common understanding and practices." *Jordan v. DeGeorge*, 341 U.S. 223, 231-32 (1951).

The district court dismissed the plaintiffs' procedural due process claim simply by holding that "foreign missions" have no due process rights. *Palestine Information Office*, 674 F. Supp. at 919. But this holding begs the question: specifically, whether the State Department incorrectly characterized the Information Office as a "foreign mission," and whether the Information Office may contest a designation made under the Foreign Missions Act. Challenges to statutes based on vagueness rest ultimately on the procedural due process requirement of adequate notice. G. GUNTHER, *CONSTITUTIONAL LAW* 1156 (11th ed. 1985).

76. *Palestine Information Office*, 853 F.2d at 939-44.

77. *Id.* at 935. The court gives no other instances where the "realm" of foreign policy, free speech, and free expression "brush up" against each other. The court could have suggested the regrettable internment of American citizens of Japanese descent in *Korematsu v. United States*, 323 U.S. 214 (1944), where the deprivation of freedoms in pursuit of foreign policy goals was both explicit and unfortunate. *Korematsu* shares several parallels with the present case. Both were decisions made by the Executive in a time of "crisis," both singled out for penalties a particular politically disfavored group, and both were upheld by decisions that relied on a technical analysis of the power that was exercised rather than a substantive analysis of the rights which were affected. Tribe has described *Korematsu* as an example of "the nefarious impact that war and racism can have on institutional integrity and cultural health." L. TRIBE, *supra* note 23, § 16-6, at 1452.

78. *Palestine Information Office*, 853 F.2d at 935. The court noted that "truly difficult" cases might arise under the FMA where "a domestic organization that arguably did not belong in that category" is nonetheless placed in the category of a "foreign mission." *Id.* Thus the D.C. Circuit envisioned some limits on the discretion of the State Department, but failed to state at what point the State Department would exceed its discretion. Rather, the court relied heavily on § 4302(b), which states that "[d]eterminations with respect to the meaning and applicability of the terms used [in the Act] shall be committed to the discretion of the Secretary." 22 U.S.C. § 4302(b). Reliance on § 4302(b) ignores the point that it is the courts which must decide when the Executive and Congress have exceeded their constitutional authority. To say that Congress has delegated to the State Department broad interpretive authority ignores the obvious truth that Congress cannot delegate authority to engage in actions that are unconstitutional.

79. *Palestine Information Office*, 853 F.2d at 935.

found a sufficient basis for the State Department's determination that the Information Office was a "foreign mission," substantially owned or controlled by the PLO, stressing that the Information Office was largely funded by the PLO and that its director regularly met with leaders from that organization.⁸⁰ The court deferred to the authority granted to the State Department when making its actual determination, stressing that the State Department was acting under the combined power of both the executive and legislative branches.⁸¹ Accordingly, the court found the designation of the Information Office as an "entity" to be sound given the State Department's discretion and the expansive meaning of the term "entity," and refused to be constrained by legislative history over its intended use that suggested otherwise.⁸² Addressing the impact the FMA would have on

80. *Id.* at 935. The plaintiffs admitted receiving funds from the Palestine National Fund. *Id.* They sought to distinguish funding from ownership, however, by arguing that the Information Office was free to use the funds in any manner it saw fit. Likening the relationship between the PLO and the Information Office to a grantor-grantee relationship, plaintiffs argued that a grantor is not usually considered to own the organization that it funds. Brief of Plaintiffs-Appellants at 24 n.12, *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir. 1988) (No. 87-5398).

Plaintiffs also sought to discount the director's regular meetings with the PLO. *Id.* Conceding that as an "agent" of the PLO Rahman discussed Palestinian issues with representatives of the PLO on a regular basis, plaintiffs nonetheless argued that Rahman did not seek or receive instructions from the PLO on how to perform his job or run the office. *Id.* According to the plaintiffs, the PLO did not approve Rahman's speeches or speaking schedule. Nor did the PLO dictate whom he could or should hire to work in the office. *Id.*

81. *Palestine Information Office*, 853 F.2d at 937. The court is referring to Justice Jackson's famous description of executive power in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); see also *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

82. *Palestine Information Office*, 853 F.2d at 937-38. Plaintiffs argued that the term "entity," added to the Act by amendment in 1986, only referred to "commercial entities." *Id.* at 937. The court held that this conflicted with the "plain meaning" of the statute, and adopted the principle of statutory construction that words are ordinarily to be given their "plain meaning." *Id.* Unfortunately, the meaning of "entity" is anything but plain. One dictionary defines an entity as "being, existence; esp: independent, separate, or self contained existence." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 758 (1981). Although the Information Office is certainly an "entity" under this definition, arguably so is a person, a dog, or a Thanksgiving turkey. Under the FMA, an "entity" that is engaged in "other activities" or "substantially controlled" by a foreign government or principle could be designated a foreign mission and ordered to close. 22 U.S.C. § 4302(a)(4). When the district court held that "entity" is an "all-inclusive" term, it adopted a standard that is both vague and overbroad, especially in light of the strong first amendment interests involved. *Palestine Information Office*, 674 F. Supp. at 910. In *United States v. Cohen*, 255 U.S. 81 (1921), the Court established that a statute must be definite enough for persons to whom it is addressed to know the relevant standard of conduct and address themselves accordingly. *Id.* at 89. A statute which reaches into protected activities may be given a saving construction, but only where a precise category of protected conduct can be clearly stated to fall outside the newly reconstructed statute. In giving a statute effect, the courts will not rewrite or pervert its purpose. *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964). In holding

the individuals involved, the court stated that "[t]he mere fact that an office is staffed in part by American citizens and that it does not call itself a foreign mission does not remove it from the State Department's reach under the [FMA]."⁸³

The Information Office and its staff also renewed their contention that their right to associate with the PLO, their right to free speech, and their right to receive information had been abridged.⁸⁴ Although the court was more solicitous of the plaintiff's first amendment claims, it ultimately agreed with the district court that no protected right of the plaintiffs had been violated, since the closure only prevented the individual appellants from speaking as a foreign mission of the PLO.⁸⁵

In conducting its first amendment analysis, the court first noted that both speech and nonspeech elements were involved, calling for the application of the *O'Brien* test.⁸⁶ The court, however, never clearly stated what the nonspeech elements of the plaintiff's conduct

unconstitutional a state department restriction on the issuance of passports to travel abroad in *Aptheker*, the Supreme Court wrote:

[A]n attempt to "construe" the statute [at issue] and probe its recesses for some core of constitutionality would inject an element of vagueness into the statute's scope and application; the plain words would thus become uncertain in meaning only if courts proceeded on a case-by-case basis to separate out constitutional from unconstitutional areas of coverage. This course would not be proper, or desirable, in dealing with a restriction which so severely curtails personal liberty.

The FMA, as well as the *Palestine Information Office* cases, provide little guidance on the circumstances under which a political advocate or advocacy group with ties or sympathies to foreign organizations can be ordered to cease operations. The statute can thus be a very dangerous tool if applied against real or perceived political enemies by a malevolent Executive, with no corresponding checks placed upon its execution by the courts. Justice Powell explained the vagueness doctrine's special relevance in the first amendment context as requir[ing] legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement." Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts.

Smith v. Goguen, 415 U.S. 566, 572-73 (1974) (footnotes and citations omitted); see also *United States v. Reese*, 92 U.S. 214, 221 (1876) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully retained, and who should be set at large.").

83. *Palestine Information Office*, 853 F.2d at 939. This is the key step taken by the *Palestine Information Office* court which the *PLO* and *Mendelsohn* court refused to take.

84. *Id.*

85. *Id.*

86. *Id.* (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). The district court asserted that the *O'Brien* test applies "[i]n situations where a strong and compelling governmental interest allegedly conflicts with an asserted constitutional right." *Palestine Information Office*, 674 F. Supp. at 918. The *O'Brien* test, however, should apply if speech is incidental to conduct, and as the district court noted, the Information Office was closed simply because it

were, although it concluded that the representation of a foreign entity is "conduct" within the meaning of *O'Brien*.⁸⁷ Effectively, the court's decision guarantees that no "entity" declared by the State Department to be a foreign mission will ever receive the full protections of the first amendment. Rather, an *O'Brien* balancing test will be applied, regardless of whether that "entity" actually engages in "conduct," or does nothing more than write articles for academic journals. The court also applied the *O'Brien* test because it held that the FMA was not a content-based restriction on free speech.⁸⁸ In analyzing the FMA apart from its application in the particular case, however, the court ignores the potential application of the FMA in a content-based manner by the State Department.

Without addressing the potential for content-based application of the FMA, the court upheld the closure, finding that all four parts to the *O'Brien* test had been met.⁸⁹ First, the court held that the closure of a foreign mission by the executive branch—pursuant to an express congressional grant of authority—was clearly within the broad foreign policy power of the national government.⁹⁰ Yet, in holding that the government possessed the power to close foreign missions, the court ignored precisely the issue that the plaintiffs were contending—specifically, whether the Information Office was a "foreign mission." To state that the government has the constitutional power to close a "foreign mission" does not answer whether the government may close the Information Office as it was constituted. Second, the court held that the State Department's action furthered an important governmental interest.⁹¹ The court held that this compelling interest was the closure of foreign missions that the United States does not recog-

acted as a political advocate on behalf of the PLO. See *Arcara v. Cloud Books*, 478 U.S. 697, 703-04 (1968).

87. *Palestine Information Office*, 853 F.2d at 939.

88. *Id.*

89. *Id.* at 940. The FMA is ambiguous, however, because it fails to clarify exactly what actions will trigger its application. Because it is "assume[d] that man is free to steer between lawful and unlawful conduct, laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The Information Office had no way of knowing whether the FMA would be applied to it, and it was without guidelines on how to structure its conduct so as to avoid the Act's future application. Brief of Plaintiffs-Appellants at 39, *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir. 1988) (No. 87-5398). When first amendment freedoms are involved, the courts must insure that "explicit standards exist for those who apply them." *Id.* at 108. *Accord* *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 498 (1982); *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974).

90. *Palestine Information Office*, 853 F.2d at 940.

91. *Id.*

nize.⁹² Third, the court held that the interest in closing foreign missions hostile to our interests is unrelated to the suppression of free expression.⁹³ This was deemed so despite the fact that the State Department had won in the district court because the principle activity of the Information Office, political advocacy, was the basis for finding that the Office was a foreign mission.⁹⁴ Fourth and finally, the court found the restriction on free speech to be narrowly tailored to least burden the first amendment.⁹⁵

The court briefly discussed the Information Office's right of association claim.⁹⁶ Appellants may freely associate with other Americans who share their views, the court asserted, they just may not do so as a mission representing the PLO.⁹⁷ On whether appellants may continue to associate with the PLO, the court stated that they may do so as long as they not act as the organization's foreign mission.⁹⁸

92. *Id.*

93. *Id.*

94. *Palestine Information Office*, 674 F. Supp. 910, 917 (D.D.C. 1987).

95. *Palestine Information Office*, 853 F.2d at 940.

96. *Id.* at 940-41. The court held that Rahman may associate with those he had previously associated with and promote the same exact political ends as before. *Id.* But it is by no means plain how Rahman may do this without again running the risk of closure under the FMA. The D.C. Circuit's opinion provided little guidance in this area, dispensing quickly with Rahman's right to associate with other individuals. *Id.* at 940-42. The Information Office was designated a "foreign mission" by the district court precisely because of its "other activities"—namely political advocacy. *Palestine Information Office*, 674 F. Supp. at 917. It seems evident that should Rahman and others establish an office to promote the political views of the PLO, it would be labeled a "foreign mission" and ordered to close as well. Even if one adopts the D.C. Circuit's test of "substantial control," it is unclear what amount of funding by sympathetic foreign organizations is permitted, and how many communications with foreign leaders are allowed before an office can escape being declared "substantially controlled" by a foreign principal.

97. *Id.* The district court has embraced two contradictory notions: First, the court has informed the individuals that comprise the Information Office that they may continue to advocate their political views as they have done in the past. *Palestine Information Office*, 674 F. Supp. at 918. Conversely, the court has informed these individuals that their previous political activity justifies the government's closure order. *Id.* at 917. See Brief of Plaintiffs-Appellants at 40, *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir. 1988) (No. 87-5398). This circular reasoning deprives the first amendment of the breathing space it needs to survive. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

98. *Palestine Information Office*, 853 F.2d at 941. The court has effectively converted the FMA into a standardless licensing scheme which the government could apply to virtually any United States citizen that acted as a foreign agent. Theoretically, there is nothing that prevents a public relations firm that does work for a foreign government from being closed for the same reasons that the State Department closed the Information Office. Brief of Plaintiffs-Appellants at 41, *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir.1988) (No. 87-5398). The Supreme Court has condemned discretionary licensing schemes that impinge on first amendment rights on many occasions. See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969); *Niemotko v. Maryland*, 340 U.S. 268, 271-72 (1951); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938). Given that the Information Office engaged primarily in political speech, the closure can be seen as a crude but effective form of prior restraint.

The D.C. Circuit's expansive reading of the FMA and the court's concomitant technical analysis of the constitutional issues raised pre-
saged a conflict with the method of analysis used in the cases arising
under the Anti-Terrorism Act itself.

B. *The Anti-Terrorism Act Cases*

Two cases, both decided by the same court on the same day, sought to test the constitutionality of the Anti-Terrorism Act. In *United States v. PLO*,⁹⁹ the United States District Court for the Southern District of New York held that the Act could not be construed to close the PLO's observer mission in New York City.¹⁰⁰ In *Mendelsohn v. Meese*,¹⁰¹ the same court held that the Act does not abridge the PLO's first amendment rights to free speech and association, and that the Anti-Terrorism Act does not operate as a Bill of Attainder on American citizens who support the political views of the PLO.¹⁰²

1. *UNITED STATES V. PLO*

In *PLO*, the question before the court was whether the Act overrode the Headquarters Agreement,¹⁰³ under which the United Nations established its headquarters in New York City.¹⁰⁴ The United States sought a permanent injunction to close the PLO's United Nations mission, arguing that the Act superseded any previous treaty or agreement.¹⁰⁵ The PLO¹⁰⁶ argued that Section 21 of the

99. 695 F. Supp. 1456 (S.D.N.Y. 1988).

100. *Id.* at 1464.

101. *Id.* at 1474.

102. *Id.* at 1490.

103. 61 Stat. 756, T.I.A.S. No. 1676, 11 U.N.T.S. 11. The United Nations invited the PLO to establish an Observer Mission in 1974. G.A. Res. 3237, 29 U.N. GAOR Supp. at 31 (No. 108), U.N. Doc. A/9631 (1974).

104. *PLO*, 695 F. Supp. at 1458.

105. *Id.* at 1460.

106. The mission's representatives were also defendants in their individual capacity. *Id.* at 1460. The four individual defendants besides the PLO were: the Permanent Observer of the PLO to the United Nations, Zuhdi Labib Terzi; the Deputy Permanent Observer of the PLO to the United Nations, Riyad H. Mansour, who is also a United States citizen; the Alternate Permanent Observer of the PLO to the United Nations, Nasser Al-Kidwa; and a mission administrator, Veronica Kanaan Pugh.

At oral argument, United States Attorney Rudolf Giuliani argued that Congress intended to close down all offices operated by the PLO in the United States, stating that the legislative history is replete with statements that the purpose of the Act was to shut down the Observer Mission. *New York Law Journal*, June 9, 1988, at 1, col. 4 (discussing the arguments made by the attorneys before the court). This may have led the court to admonish Congress for failing to include explicitly the PLO observer mission if their intent was to do so. *PLO*, 695 F. Supp. at 1468-69.

Headquarters Agreement mandated that any dispute between the United States and the United Nations be referred to a special multinational tribunal,¹⁰⁷ and that closure of the observer mission would violate the Headquarters Agreement given that this was not contemplated by Congress nor required by the statute.¹⁰⁸

The district court first dispensed with the alleged United Nations arbitration obligation, stressing that the international nature of the dispute distinguished this agreement from other traditional agreements to arbitrate.¹⁰⁹ Expressing reluctance to involve itself in matters of international policy,¹¹⁰ the district court held that the question of whether the dispute should properly have been submitted to the multinational tribunal was a question better left to the political branches of government and therefore was outside the scope of judicial review.¹¹¹ As to whether Section 21 deprived United States courts from subject matter jurisdiction over disputes of this kind, the district court emphatically held that it did not.¹¹² First, the dispute was not between the United States and the United Nations per se; therefore on its face Section 21 was inapplicable.¹¹³ Second, the courts are under a constitutionally mandated duty to decide "what the law is."¹¹⁴ Any interpretation of the Act must fall to United States courts, since the district court could not direct the United

107. *Id.* at 1461. Essentially, the defendants and amici (including the United Nations) were urging the court to defer to an advisory opinion of the International Court of Justice. *Id.* (citing *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 1988 I.C.J. 12 (April 26, 1988) (U.N. v. U.S.)). The International Court of Justice interpreted Section 21 to require that any dispute concerning the application of the Headquarters Agreement in respect to the Act shall be referred to a special arbitral tribunal. In essence, this would leave the decision of whether the Act superseded the Headquarters Agreement to the tribunal. *Id.* at 1461-62. The court held that directing the United States to an international arbitral tribunal would exceed the scope of the court's Article III powers. *Id.* at 1462. Resolution of arbitration is a political question and not a question appropriate for the courts. *Id.* at 1463. Additionally, treating the Headquarters Agreement as a rule of decision would require the courts to refrain from undertaking their constitutionally-mandated function to decide what the law is. *Id.* at 1464.

108. *Id.* at 1461. Former U.S. Attorney General Ramsey Clark argued this point before the court, concentrating on the intent of Congress not to violate any international law when drafting the Act. *New York Law Journal*, June 9, 1988 at 1, col. 4.

109. *PLO*, 695 F. Supp. at 1462.

110. *Id.* The court wrote that in matters of international policy, courts generally may not participate because "[t]hese questions do not lend themselves to resolution by adjudication under our jurisprudence." *Id.*

111. *Id.* at 1463. The court therefore addressed whether the "political question" doctrine precluded adjudication. See *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 229-30 (1986); *Baker v. Carr*, 369 U.S. 186, 211-13 (1962).

112. *PLO*, 695 F. Supp. at 1462.

113. *Id.*

114. *Id.* This is the flip-side to the court's separation of powers argument: a branch may not refuse to exercise its own power once delegated. *Id.* at 1464 (citing *Marbury v. Madison*, 5

States to submit to arbitration without exceeding the powers granted it under article III of the Constitution.¹¹⁵ The district court therefore held that the political question doctrine was inapplicable and did not prevent the court from interpreting both the Headquarters Agreement and the Act.¹¹⁶

The district court next examined whether the Act superseded the Headquarters Agreement.¹¹⁷ It started by noting that both are the "supreme law of the land" and that the Constitution provides no order of precedence among them.¹¹⁸ The district court reviewed the legislative history of the Act and failed to find any clear evidence that Congress intended the Act to supersede the Headquarters Agreement.¹¹⁹ The only way to reconcile the two, the district court con-

U.S. (1 Cranch) 137, 177 (1803) ("It is, emphatically, the province and duty of the judicial department, to say what the law is.").

115. *PLO*, 695 F. Supp. at 1462.

116. In *Japan Whaling*, the plaintiffs sought a writ of mandamus to compel the Secretary of Commerce to impose sanctions against Japan for exceeding the limits for whale hunting set by the International Whaling Commission. 478 U.S. at 223. Under federal statutory law, the Secretary was required to certify Japan for sanctions if Japan's whaling practices violated the International Convention for the Regulation of Whaling. *Id.* at 225-26. Rather than certify Japan for sanctions, the Secretary of Commerce negotiated an executive agreement under which Japan agreed to interim limits on hunting with an eventual elimination of all commercial whaling by 1988. *Id.* at 227-28. Several conservation groups brought suit contending that the Secretary's actions conflicted with the duties imposed by the statutes. *Id.* at 228. The Supreme Court rejected the argument of the Japanese petitioners that the Secretary's actions were not subject to judicial review under the political question doctrine. *Id.* at 229. The Court held that the political question doctrine does not prevent interpretation of a federal statute concerning the Executive's duties under the statute simply because the interpretation touches upon the Executive's relations with foreign governments. *Id.* at 230.

It is not clear how this conclusion can be reconciled with the district court's refusal to decide whether the United States was required to submit the dispute to the jurisdiction of an international arbitral tribunal. *PLO*, 695 F. Supp. at 1462. Arguably, the question presented was simply one of statutory interpretation concerning the judiciary's duty under the statute. The court expressed a decided animosity towards any doctrine which functioned as a "rule of decision" in derogation of United States court's constitutionally mandated duty to decide "what the law is." *Id.* at 1463-64. The political question doctrine itself, however, always functions as a rule of decision because it decides the case through refusal to hear its merits. Similarly, a court is only constitutionally mandated to decide a case when it is not a political question. *Cf. Japan Whaling*, 478 U.S. at 230; *Baker*, 368 U.S. at 210-11; *Marbury*, 5 U.S. (1 Cranch) at 170-71.

117. The court seemed puzzled by the Act, describing it as having "a unique nature," and noting that it was "unable to find any comparable statute in the long history of Congressional enactments." *PLO*, 695 F. Supp. at 1460.

118. *Id.* at 1464.

119. *Id.* at 1465, 1471. Under traditional statutory construction, when a statute and a treaty are in conflict both are to be given effect, if practicable. *See Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). But when a treaty is irreconcilable with a later statute, the treaty may be given effect only if Congress has not expressed a clear intent to supersede the treaty by the enactment of the statute. *See, e.g., Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968) (holding that Congress had no intent to supersede

cluded, was to hold the Act inapplicable to the PLO observer mission.¹²⁰ The district court determined that the Headquarters Agreement required the United States to permit the United Nations to invite whomever it wished as observers, and that the United States must respect that decision by not impeding the transit of these observers in the normal course of United Nations activity.¹²¹ As a result of this interpretation of the Headquarters Agreement, the United States was obligated to refrain from interfering with the observer mission to the United Nations.¹²² The district court admonished Congress for failing to specify clearly whether the Act was meant to include the United Nations mission¹²³ and admitted that courts must sometimes go to great lengths to avoid domestic statutes from conflicting with any prior international treaties or agreements.¹²⁴ Thus, the court was willing to go beyond the "plain wording" of the Act and attempted to truly determine the principal motivations of Congress. This contrasts strongly with the refusal of the courts in *Palestine Information Office*

treaty); cf. *The Chinese Exclusion Case*, 130 U.S. 581, 599-602 (1889) (finding a clear intent to abrogate existing treaty).

Unfortunately, the government's argument for the abrogation of the Headquarters Agreement neglected to address whether abrogation would be useful, desirable, or in the best interests of the United States as a matter of policy. Although many commentators have argued that the United Nations has outlived its utility to the United States, the pressure that the Anti-Terrorism Act placed on the United Nations to move its headquarters was not among the reasons put forth by the Congressmen who ultimately voted for the Act. For an editorial condemning the political machinations behind the Act, see Notebook, *THE NEW REPUBLIC*, Jan. 4, 1988, stating:

For our part, we wouldn't mind if the U.N. would remove itself from New York to Ouagadougou, taking with it the entire gasbag Philharmonic of which the PLO is only one player. But if the U.N. is to stay in New York, it's got to be allowed to accredit whom it wants.

Id. at 9.

120. *PLO*, 695 F. Supp. at 1468, 1471.

121. *Id.* at 1465. This results both from the language of the Agreement and from the United States' uninterrupted performance, for forty years, of refraining from impeding the functions of observer missions to the United Nations. *Id.* at 1465-66.

122. *Id.* at 1468.

123. *Id.* at 1468-69. The court concluded that Congress was forewarned of the possibility of the Act's application to the PLO Observer Mission and of its potential conflict with the Headquarters Agreement, but specifically neglected to include mention of either the Mission or the Headquarters Agreement within the Act itself. *Id.* at 1469-70. The court noted that "[s]uch an inclusion would have left no doubt as to Congress' intent on a matter which had been raised repeatedly with respect to this act, and its absence here reflects equivocation and avoidance, leaving the court without clear interpretive guidance in the language of the Act." *Id.* at 1468. For the court's discussion of congressional debate concerning the meaning of the Act, see *id.* at 1469-71.

124. *Id.* at 1468 (citing *Chew Heong v. United States*, 112 U.S. 536, 560-61 (1884) (Field, J., dissenting)). The court used the "notwithstanding clause" in connection with the lack of an unequivocal intent to exclude the Mission from congressional regulation. *Id.*

to examine any of the underlying motives that might have led to the FMA or the decision to close the Information Office pursuant to it.

Although concluding that the Anti-Terrorism Act was inapplicable to the United Nations observer mission, the district court at the same time held that the statute is "a valid enactment of general application."¹²⁵ Furthermore, the district court stated that the statute is "a wide gauged restriction of PLO activity within the United States and, depending on the nature of its enforcement, could effectively curtail any PLO activities in the United States aside from the mission to the United Nations."¹²⁶

2. *MENDELSON V. MEESE*

In *Mendelsohn v. Meese*,¹²⁷ numerous United States citizens and organizations challenged the constitutionality of the Act.¹²⁸ The United States District Court for the Southern District of New York granted standing to some¹²⁹ and held that the "listening" rights of the others were amply addressed by those who had standing.¹³⁰

The *Mendelsohn* court was faced with two causes of action. The first challenged the application of the Act to the United Nations-related activities of the Deputy Permanent Observer to the Permanent Observer Mission in New York.¹³¹ The second challenged the application of the Act to the curtailment or prohibition of debate, dialogue, and the exchange of information between citizens of the United States.¹³² At issue was whether the Act, as applied, violated the first amendment and the Bill of Attainder clause of the Constitution.¹³³

The three plaintiffs granted standing were all "speaking" plaintiffs—United States citizens who had alleged a commitment from the PLO to pay for travel expenses to speak at colleges and other public

125. *Id.* at 1471.

126. *Id.*

127. 695 F. Supp. 1474 (S.D.N.Y. 1988).

128. *Id.* at 1476-77. In *Mendelsohn*, a collection of sixty-five citizens and groups sued as plaintiffs. Complaint, *Mendelsohn v. Meese*, 695 F. Supp. 1474 (S.D.N.Y. 1988) (No. 88- Civ. 2005 (ELP)). They included: law professors and academicians from Georgetown, Yale, Princeton, Duke, Harvard, and Columbia; religious leaders, including a substantial number of rabbis; prominent individuals, such as journalist Studs Terkel and television personality Edward Asner; and a large contingent of public interest organizations, such as the Middle East Peace Network, Jewish Committee for an Israeli-Palestinian Peace, International Jewish Peace Union, and the American Civil Liberties Union. *Id.*

129. *PLO*, 695 F. Supp. at 1477-78.

130. *Id.* at 1479.

131. *Id.* at 1476.

132. *Id.*

133. *Id.*

forums about the Middle East.¹³⁴ Ibrahim Abu-Lughod, a United States citizen and Chairman of the Political Science Department at Northwestern University, had been asked to speak at various locations throughout the United States and explain the political positions of the PLO.¹³⁵ Nubar Hosvepian, also a United States citizen, sought at the request of the PLO to open an office, with non-PLO private funds, which would arrange speakers, forums, and distribute materials on the subject of the Palestinian people.¹³⁶ Hosvepian had sworn that "this office will not be authorized to present official views and positions of the PLO, to speak on behalf of the PLO or to represent the PLO."¹³⁷ Nonetheless, the court noted "[Hosvepian's] proposed office comes within the literal prohibitions of the [Act]—he will establish it 'at the behest of' the PLO and with the purpose of 'furthering the interests of' the PLO."¹³⁸ The third plaintiff was Riyad H. Mansour, a United States citizen and Deputy Permanent Observer at the PLO mission.¹³⁹ The interests of these three plaintiffs, the court wrote, were sufficient to establish "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute."¹⁴⁰ The court refused standing to the sixty-two other "listening" plaintiffs, ruling that their interest in dialogue and debate with the "speaking" plaintiffs is an interest "common to all United States citizens."¹⁴¹ The court recognized that, in some situations, "listening" plaintiffs may assert first amendment interests sufficient for standing.¹⁴² In this instance, however, the court reasoned that the benefits which would accrue to the "listening" plaintiffs must be considered in order to review the first amendment claims of the "speaking" plaintiffs.¹⁴³ To the court, the issues raised by the "listening" plaintiffs were unnecessary, since they were the same as those issues raised by the "speaking" plaintiffs.¹⁴⁴ These plaintiffs had claimed that their rights to freedom of speech, press, and association had been denied through their inability to speak, listen to, and interact with the "speaking" plaintiffs.¹⁴⁵ Thus, their claims were similar

134. *Id.* at 1476-77.

135. *Id.* at 1476.

136. *Id.* at 1477.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* (quoting *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1977)).

141. *Id.* at 1478.

142. *Id.* at 1479.

143. *Id.*

144. *Id.*

145. *Id.* at 1478-79.

to those made by Harvard Law School in *Harvard Law School Forum v. Shultz*.¹⁴⁶

In *Harvard*, the Department of State had refused to grant the PLO's Permanent Observer Zehdi Labib Terzi—a defendant in the PLO case—a travel waiver which would permit him to appear at a debate on the Middle East at Harvard University.¹⁴⁷ The State Department acted pursuant to 8 U.S.C. § 1182(d), which allows excludable aliens to be denied access to travel within the United States.¹⁴⁸ The reason proffered by the State Department was precisely the one forwarded in *PLO*: to deny the PLO the benefits of operating within the United States.¹⁴⁹ In *Harvard*, the United States District Court for the District of Massachusetts found this to be a superficial governmental interest, which disguised the true content-based suppression of protected political discussion.¹⁵⁰

The district court in *Mendelsohn* first rejected the government's argument that no first amendment interests were implicated by its actions to close the PLO mission.¹⁵¹ The court found that the exchange of ideas concerning political issues relating to the PLO was necessarily less robust because of the Act.¹⁵² On its face, the Act permits persons to speak however they wish regarding the PLO.¹⁵³ The court found, however, that citizens are prohibited from using PLO

146. 633 F. Supp. 525 (D. Mass. 1986), *vacated without opinion*, 852 F.2d 563 (1st Cir. 1986).

147. *Id.* at 526.

148. *Id.*

149. *Id.* at 527.

150. *Id.* at 529-31.

151. *Mendelsohn*, 695 F. Supp. at 1479. The government argued that, on its face, the Act did not prohibit, edit, or restrain speech or advocacy. *Id.* at 1479. See *Meese v. Keene*, 481 U.S. 465, 478 (1987) (Foreign Agents Registration Act, on its face, prohibits no speech or advocacy). This is hardly the appropriate standard by which to judge a statute that allegedly restricts free speech. By prohibiting the disbursement of PLO funds to American citizens who wish to promote Palestinian views peacefully, the Act denies an entire side, and only that side, of a volatile political conflict from fully expressing its political positions. Israeli groups may, by comparison, spend as much as desired to spread their own political messages inside the United States. See generally *Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530, 537 (1980) (The first amendment is hostile to content-based regulations which prohibit the public discussion of an entire topic.).

152. *Mendelsohn*, 695 F. Supp. at 1479. For instance, two of the plaintiffs were American professors who wished to travel within the United States to discuss the Palestinian problem and who were denied the ability to receive reimbursement of their travel expenses from the PLO for their efforts. *Id.* at 1486. The limitation on these professors' rights to solicit and expend funds require a first amendment analysis, which the court provided—albeit an imperfect one. *Id.* at 1479-86. See *Meyer v. Grant*, 108 S. Ct. 1886, 1889-95 (1988) (First amendment rights are implicated when the government obstructs the right to solicit and expend funds for the payment of petition circulators.).

153. For the text of the Act, see *supra* text accompanying note 36.

funds to travel and make their views known, as well as prohibited from establishing an office at the request of the PLO.¹⁵⁴ The district court further held that the PLO lies outside the structure of the constitutional system and is therefore not entitled to any rights that the Constitution confers.¹⁵⁵ In addition, the district court concluded that American citizens may not invoke the PLO's rights because to do so would severely intrude on the ability of the political branches to conduct foreign affairs.¹⁵⁶ The court reasoned that this would ensnare the judiciary in virtually all foreign policy actions that the United States might take, and bring before the courts a myriad number of cases with which the courts are unprepared and by their nature not designed to resolve.¹⁵⁷ Thus American citizens who act as official rep-

154. *Mendelsohn*, 695 F. Supp. at 1480.

155. *Id.* at 1480-81. This linchpin of the *Mendelsohn* court's first amendment analysis is questionable. In fact, the Supreme Court has never directly addressed the question of what rights, if any, the Constitution confers upon foreign states. See Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 490, 518 (1987); see also L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972) (discussing the application of the Constitution to foreign affairs). Although the state of law in this area is complex and not completely settled, the courts appear to distinguish between foreign states per se and American citizens or aliens who represent foreign states in the United States. Damrosch, *supra*, at 527-28 & n.180. As the *Mendelsohn* court mentioned, there are strong policy reasons for maintaining such a distinction, though not necessarily when the rights of American citizens are also involved. *Mendelsohn*, 695 F. Supp. at 1481.

156. *Mendelsohn*, 695 F. Supp. at 1490.

157. Courts are thought to be better suited to the disposition of questions of law rather than policy. The conduct of foreign affairs is considered an archetypical example of policymaking, not susceptible to the application of antecedent legal principles. See generally L. HENKIN, *supra* note 92 (arguing that questions in the foreign relations arena are inherently political).

The distinction between law and policy has been under continual attack since the early 1900's as a transparent notion which disguises the policymaking function of the courts. In the late 1920's, the movement known as Legal Realism first developed its critique of the classical view of the law as the simple application of objective, logical rules. See, e.g., J. FRANK, *LAW AND THE MODERN MIND* 42 (1936); O.W. HOLMES, *THE COMMON LAW* (1923); Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). Legal realists concentrated on the need to provide factual proof and empirical data as a substitute for abstract legal verbalisms, which, in the realist's view, only serve as a pretext for decisions actually motivated by subjective forces. See generally E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 159-78 (1973) (arguing that legal realists' rejection of a static, rational-absolutist notion of law as an ideal tracked the concurrent rejection of an absolute reality in science, math, art, and the humanities); Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987) (sketching out developments in Legal Realism and Critical Legal Studies as reflective of historical changes in epistemology).

Critical Legal Studies (CLS) attempts to follow the critique made by Legal Realists on the law/policy distinction, but picks up the analysis after the extensive discouragement with the ability of "the facts" to provide a determinative and useful explanation of the law. Williams, *supra*, at 444. For an example of "realist" discouragement, see R.M. HUTCHINS, *NO FRIENDLY VOICE* 43-48 (1936). CLS has forcefully challenged the notion that the law is anything but policy. See, e.g., Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987); Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229 (1981);

representatives of the PLO cannot invoke the Constitution to assert claims on behalf of the PLO.¹⁵⁸

Although the district court easily disposed of the Deputy Permanent Observer's claim as a representative of the PLO, there still remained the claims of the three "speaking" plaintiffs who denied that they were acting in any official capacity for the PLO.¹⁵⁹ The district court explicitly refused to cross the line between an official representative of the PLO and those "agents," who are "dominated" or "controlled" by the PLO.¹⁶⁰ Instead, by maintaining this distinction, the district court was able to preserve their constitutional claims. This is in direct contradiction to the analysis employed by the court in *Palestine Information Office*.

Klare, *Labor Law as Ideology: Towards a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450 (1981).

158. *Mendelsohn*, 695 F. Supp. at 1481.

159. See *supra* note 134 and accompanying text.

160. *Mendelsohn*, 695 F. Supp. at 1481 (citing *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 95-96 (1961)). The usage of terms such as "dominated" and "controlled" in reference to associations with or representations of foreign entities is reminiscent of language used during the "Red Scare" which engulfed the nation during the late 1940's and 1950's. Consider, for example, this finding of fact from the Emergency Detention Act of 1950:

The organizations so established and utilized in various countries, [by the Communist dictatorship], acting under such control, direction, and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such Communist organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide movement and promote the objectives of such movement by conspiratorial and coercive tactics, and especially by the use of espionage and sabotage, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

Emergency Detention Act of 1950, Pub. L. No. 831, title II, § 101(6), 64 Stat. 1019-20.

It is often the case that enemies of the state are alleged to be so powerful that they "control," "dominate," or "order" their followers. Thus followers of the Ayatollah Khomeini or Muammar Kadhafi are "fanatics" who are crazy and have lost all hold of reality. Similar constructs and rhetoric prevailed in respect to the American Indians and their tribal leaders during settlement of the West in the 1800's, the Japanese and Emperor Hirohito during World War II, and drug users and the substances they abuse today. The subtext in such categorizations is that no rational and free thinker could ever conclude that these groups or activities were worthwhile in themselves, and allegiance to them must necessarily be the result of mind control or some extra-rational, perhaps primitive or charismatic attraction. For a recent example, consider the media portrayal of supporters of the Reverend Jesse Jackson, who are continually presented as overly passionate, frenzied, and enthusiastic to the point of mania. See, e.g., *Taking Jackson Seriously*, TIME, Apr. 11, 1988, at 14 (The Jackson campaign unleashed "primordial Democratic passions."). See generally E. HERMAN & N. CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* (1988); M. PARENTI, *supra* note 43; J. SKOLNICK, *supra* note 1, at 332-34.

The district court utilized the distinction in first amendment jurisprudence between content-based restrictions on political speech and incidental restrictions on speech not aimed at the particular content or subject.¹⁶¹ Content-based restrictions are subject to strict judicial scrutiny, while incidental restrictions are subject to more deferential review.¹⁶² The court refused to find that the Act constituted a content-based restriction on free speech.¹⁶³ Instead, the district court held that the Act is merely an incidental restriction on speech and therefore properly reviewed under the deferential test enunciated in *O'Brien*.¹⁶⁴ The legitimate governmental interest promoted by the Act, the district court reasoned, is the tactical and strategic advantage gained over the PLO by denying them the benefits of operating in the United States.¹⁶⁵ The court stressed that this is a substantial and important governmental interest, unrelated to the suppression of speech.¹⁶⁶ The court refused to consider other possible motivations for the Act, stating that when Congress has exercised a legitimate power, examination of the alleged ulterior speech-suppressing motives becomes immaterial.¹⁶⁷ The incidental effect on the suppression of free speech, while "arguably lamentable,"¹⁶⁸ was nonetheless permissible. Moreover, the court concluded that the prohibitions related to the spending and receiving of the PLO's money were needed to effectuate Congress' objective of denying the PLO benefits from operation inside the United States.¹⁶⁹ Consequently, citizens

161. *Mendelsohn*, 695 F. Supp. at 1482.

162. *Id.*

163. *Id.* A content-based restriction on speech is one that seeks to restrict a particular message or the substantive content of speech. This is distinguished from restrictions that are not related to the content of the speech, but which merely have the incidental effect of restricting information. L. TRIBE, *supra* note 23, at §§ 12-2 through 12-18, at 789-944. Content-based restrictions are subject to strict judicial review, while restrictions related to matters other than content receive a more deferential inquiry. See *Boos v. Barry*, 108 S. Ct. 1157, 1164 (1988) (content based restrictions are "subjected to the most exacting scrutiny"). Compare *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (strict scrutiny for content-based regulations) with *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (lower level of scrutiny for content-neutral regulations). For an analysis of this distinction as it applies to the Act, see *infra* Section IV(B)(1).

164. *Mendelsohn*, 695 F. Supp. at 1482 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)).

165. *Id.* at 1485. Under the *O'Brien* test, Congress' actual purpose in enacting the statute is irrelevant to whether the statute is constitutional, so long as a legitimate governmental interest exists. *Id.* See *O'Brien*, 391 U.S. at 382-85. This is so regardless of whether Congress actually relied on the governmental interest asserted. See, e.g., *National Ass'n of Letter Carriers*, 413 U.S. at 556-57; *Street v. New York*, 394 U.S. 576 (1969).

166. *Mendelsohn*, 695 F. Supp. at 1485-86.

167. *Id.* at 1485.

168. *Id.* at 1485-86.

169. *Id.* at 1486.

who wish to speak about the Middle East and obtain reimbursement for their travel expenses from the PLO may not be permitted to do so.¹⁷⁰

With respect to Nubar Hovsepian, the American citizen who wished to set up an information office, the district court concluded that the Act must be read very narrowly.¹⁷¹ Because Hovsepian had stated that he would in no way be acting as an official of the PLO, the district court reasoned that if the Act were to shut the proposed office down, it would be curtailing *his* operations in the United States, not the PLO's.¹⁷² The district court was concerned over a broad interpretation of certain ambiguous language in the Act that states one must be acting at the "behest" or "direction" of the PLO to fall under the statute's provisions.¹⁷³ Concluding that only official representatives of the PLO are barred from asserting the protections of the Constitution,¹⁷⁴ the district court recognized that if the Act was read too broadly, it would severely restrict first amendment interests.¹⁷⁵ Instead, the court chose to read the Act narrowly.¹⁷⁶ Only Mansour's first amendment claims were barred, given that he was the only plaintiff to act as an official of the PLO.¹⁷⁷ The district court cited remarks of congressional supporters of the Act who distinguished between contact with the PLO and a "principal agency relationship between the PLO and American citizens."¹⁷⁸ Absent clear congressional intent to subject all American citizens who speak with the PLO to the Act, the district court concluded that the Act must be narrowly con-

170. It is possible, of course, that Congress was genuinely concerned that money, ostensibly provided by the PLO for reimbursement purposes, might actually be used to sponsor terrorist activities within the United States. Although this may well have been a legitimate congressional fear, it was never expressed during floor debate, nor was it addressed by the parties or amici in *Mendelsohn*.

171. *Mendelsohn*, 695 F. Supp. at 1486.

172. *Id.*

173. *Id.*

174. *Id.* at 1481.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* (quoting from 133 CONG. REC. S13,854 (daily ed. Oct. 8, 1987) (remarks of Senator Grassley)). By determining congressional intent, the court thus engaged in precisely the kind of inquiry that it expressly refused to engage in when examining whether the Act was content-neutral. This selective examination is representative of the theoretical muddle in which the court was mired as it sought to uphold the Act while downplaying the motivations that led to its enactment.

The court bolstered this narrow reading of the Act by mentioning its specific exemption for informational materials. *Id.* at 1486. If the PLO may not spend money to distribute these materials, however, then this exception is of little practical importance. Once an effective method of distribution is established, as in *Palestine Information Office*, it will be closed under the FMA.

strued to allay the problematic limitations on speech that would otherwise ensue.¹⁷⁹

The district court addressed the argument by the plaintiffs that the Act is a Bill of Attainder by first reviewing the history of Bill of Attainders in the colonial era.¹⁸⁰ The district court found that the Act would be a classic Bill of Attainder but for the fact that the PLO, according to the court, stands outside of the Constitution.¹⁸¹ The district court again read the Act restrictively as a curb on the PLO itself, and not on the PLO's mission and the mission's personnel.¹⁸² By so doing, the district court held that the Act is not a Bill of Attainder subject to constitutional restraints.¹⁸³

The district court's narrow reading of the Act to preserve its constitutionality stands in stark contrast to the D.C. Circuit's broad interpretation of the FMA in *Palestine Information Office*. Examining the constitutional issues raised by the Act and the apparent inconsistencies between the analysis in *PLO* and *Mendelsohn* and the analysis in *Palestine Information Office* will reveal the depth of the constitutional concerns involved.

179. *Id.* at 1486. For support, the court cited *Edward J. Debartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 108 S. Ct. 1392 (1988), in which the Supreme Court stated that in construing statutes, a reasonable construction is preferred to one which would be unconstitutional, unless that construction would be plainly contrary to the intent of Congress. *Id.* at 1397.

180. *Mendelsohn*, 695 F. Supp. at 1487-88.

181. *Id.* at 1488-89.

182. *Id.* This indicated to the court that the Act was an exercise of the foreign affairs powers of the executive, rather than the legislative powers of Congress which are the appropriate focus of prohibitions on Bills of Attainder. Yet the prohibition on Bills of Attainder is designed to effectuate all of the separation of powers doctrine, and an intrusion of the executive on the judiciary is just as violative of separation of powers as is an intrusion by the legislature.

Moreover, there are Supreme Court decisions that support a theory that the Executive is also restricted from acting in a manner similar to a Bill of Attainder. *See, e.g., Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (plurality). In *McGrath*, the Attorney General, acting pursuant to an executive order and without notice or hearing, designated three organizations as Communist for use in a Loyalty Review Board hearing. *Id.* at 125 (opinion of Burton, J.). The Board hearings were conducted by the government to identify disloyal government employees. *Id.* The Supreme Court, unable to agree on an opinion, nonetheless found that the organizations had standing to assert that they were not, in fact, Communist. *Id.* at 140-42. In his concurrence, Justice Black said that, although the classic Bill of Attainder was a condemnation by the legislature upon its own investigation, he could not "believe that the authors of the Constitution, who outlawed the bill of attainder, inadvertently endowed the executive with power to engage in the same tyrannical practices that had made the bill such an odious institution." *Id.* at 144 (Black, J., concurring).

The *Mendelsohn* court's reasoning is particularly unpersuasive when one recognizes that the Act is an act of Congress, implemented—as are all statutes—by the Executive. The reasoning is more appropriate, although equally unconvincing, when applied to the *Palestine Information Office* case, in which executive power is at issue.

183. *Mendelsohn*, 695 F. Supp. at 1489.

IV. CONSTITUTIONAL CONCERNS OF THE ANTI-TERRORISM ACT

A. *Separation of Powers*

The separation of powers doctrine, by disbursing governmental power among different branches, can be defined as an attempt to prohibit the accumulation of governmental power by any single person or group of persons. In the federal system, powers are divided among the judicial, legislative, and executive branches.¹⁸⁴ Several of the arguments over the Anti-Terrorism Act and the separation of powers doctrine presented in this Section of the Comment are contradictory and mutually exclusive. They are raised to demonstrate that, no matter how one conceives of the role and functions of the individual branches of government, the Act is likely nonetheless to threaten or encroach upon one of these conceptions.

1. CONGRESSIONAL INTRUSION ON EXECUTIVE POWERS

Ever since *United States v. Curtiss-Wright Export Corp.*,¹⁸⁵ the courts have recognized that the President has a unique and special role in foreign affairs.¹⁸⁶ The Act threatens this special role by limiting those foreign governments with whom the President may maintain contact and conduct diplomatic relations. For instance, the Act would prevent the President from inviting the PLO to open a diplomatic consulate within the United States. President Reagan noted this constitutional infirmity but signed the Act anyway, deciding there was no conflict at that time between the Executive and Congress on establishing diplomatic relations with the PLO.¹⁸⁷ Yet the dynamics of unrest in the Middle East may one day result in subsequent Presi-

184. See *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

185. 299 U.S. 304 (1936).

186. In *Curtiss-Wright*, the Court recognized the Executive's role as the primary figure in the nation's foreign affairs. *Id.* at 319. The Court also concluded that participation by the other branches in the conduct of foreign relations is "significantly limited . . . [because in] this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." *Id.*

187. Statement by President Reagan upon signing H.R. 1777, 23 WEEKLY COMP. PRES. DOC. 1547-48 (Dec. 28, 1987). Because the Act was part of the Foreign Relations Authorization Act, President Reagan would have had to veto the entire bill in order to veto the Act. Faced with this dilemma, he demurred: "I am signing the Act, therefore, only because I have no intention of establishing diplomatic relations with the PLO, as a consequence of which no actual constitutional conflict is created by this provision." *Id.* at 48. Such a statement, however, misunderstands the separation of powers doctrine, which cannot be violated simply with the empowered branch's consent. See *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (holding the legislative veto provisions of the Immigration Act unconstitutional despite presidential acquiescence). Without such a limitation on delegation, accumulation of power by one branch could be achieved simply through political compromise, negotiation, or even intimidation.

dents considering actions that President Reagan did not. The recent decision by the United States to establish "contact" with the PLO demonstrates the changing character of Middle East diplomacy and highlights the potential obstruction by the Act of traditional executive functions.¹⁸⁸ The necessity of maintaining a flexible response and the need to explore all options in the Middle East places the Act at odds with the quick and decisive exercise of executive power. The explicit constitutional grant to receive ambassadors,¹⁸⁹ as well as all the powers attached to the President when acting in the realm of foreign affairs, is inhibited by restricting the President's choices in the foreign arena.¹⁹⁰

Although it is clear that Congress has power to regulate foreign affairs, the source and scope of that power remains unclear.¹⁹¹ Many of the most significant cases to test the extent of executive power in the realm of foreign affairs resulted from a potential delegation prob-

188. Some have argued that Congress should assume only a general role in the conduct of foreign policy, in part because Congress can be overly responsive to public pressure and opinion. See Moore, *Do We Have an Imperial Congress?* 43 U. MIAMI L. REV. 139, 149 (1988). One commentator has remarked:

In my opinion, Congress oversteps its role when it undertakes to dictate the specific terms of international relations. This is a power granted specifically to the executive branch, which is equipped to acquire the information necessary for foreign policy creation In other words, Congress ignores its role as a check on the President and assumes a leadership role akin to negotiating a treaty—an activity clearly forbidden to Congress—when it dictates specific conditions for relations between foreign entities.

Cooper, Hatch, Rostow, Tigar, *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 202-03 (1988) (remarks of Senator Orrin Hatch (R-Utah), made during a symposium on the meaning of executive power). Senator Hatch used these arguments to question the wisdom of the so-called Boland Amendments, which placed various restrictions on governmental aid to the Nicaraguan resistance. *Id.* An outspoken and virulent opponent of the Boland Amendment restrictions, Senator Hatch apparently did not extend this reasoning to the Anti-Terrorism Act, as he voted for its passage. 133 CONG. REC. S13,875 (daily ed. Oct. 8, 1987). It is possible, however, that he was simply faced with the same dilemma facing President Reagan: to vote down the Act would have meant voting down the entire Foreign Relations Authorization Act. See *supra* note 187.

189. U.S. CONST. art. II, § 3.

190. While the President's power in the realm of foreign affairs is extensive and far-reaching, it is not boundless. When the foreign affairs power is invoked in the domestic setting, the President's authority is significantly more constrained. See *supra* note 81.

191. See *Perez v. Brownell*, 356 U.S. 44 (1958). The Supreme Court, in sustaining a statutory provision on loss of citizenship, stated: "Although there is in the Constitution no specific power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation." *Id.* at 57. See also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (Congress has broad power, under Necessary and Proper clause, to enact legislation in the foreign affairs arena.). This, however, should not affect the exclusive presidential power to recognize foreign governments. See generally L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972).

lem between Congress and the Executive.¹⁹² The Act, however, involves a restriction on executive power that cannot be said to derive from a delegation by Congress, and instead has its source in the Constitution.¹⁹³ Although no case has yet struck down federal legislation as encroaching on the executive's authority to conduct foreign affairs,¹⁹⁴ there is no principled way to distinguish the separation of powers concerns raised by such legislation from other, more frequent separation of powers litigation.¹⁹⁵ No court is willing to define and divide the shared powers of Congress and the President in the foreign affairs arena; however, no court in this instance need to: the power to determine the recognition policies of the United States—at least in its traditional, uncontroverted form—has generally been acknowledged to reside in the Executive, and that power is properly immune from congressional interference.¹⁹⁶ Thus, the Act impermissibly prevents

192. See, e.g., *Regan v. Wald*, 468 U.S. 222 (1984) (Congress authorized presidential restrictions on travel to Cuba); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (holding that limits on the delegation of powers are less restrictive in the foreign affairs context than in the domestic arena). But see *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976) (permitting broad delegation of authority to President with respect to oil imports).

193. U.S. CONST. art. II, § 3 (Presidential duties include, among others, to "receive Ambassadors and other public ministers.").

194. *Mendelsohn*, 695 F. Supp. at 1483.

195. In fact, many recent acts of legislation are claimed to encroach on executive power in the realm of foreign affairs. See, e.g., War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (codified as amended at 50 U.S.C. §§ 1541-1548 (1982 & Supp. IV 1986)).

196. Courts have been reluctant to define the exact limits of the President's recognition power, avoiding the issue based on grounds of justiciability, standing, or the political question doctrine. An example of this reluctance is found in a case arising from President Carter's termination of a mutual defense treaty with Taiwan as part of his administration's recognition of the mainland government of China. *Goldwater v. Carter*, 444 U.S. 996 (1979). As a result of the treaty termination, several Senators filed an action claiming that the Senate's constitutional role in the making of treaties had been abridged. *Goldwater v. Carter*, 617 F.2d 697, 700-01, *vacated and remanded with instructions to dismiss*, 444 U.S. 996 (1979). Reaching the merits of the case, the United States Court of Appeals for the District of Columbia held that the President had the power to terminate treaties without the approval of Congress. *Id.* at 709. The Supreme Court summarily reversed. *Goldwater*, 444 U.S. at 996.

In a concurring opinion—in which Chief Justice Burger, and Justices Stewart and Stevens joined—Justice Rehnquist wrote:

I am of the opinion that the basic question presented by the petitioners in this case is "political" and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President.

Id. at 1002.

Dissenting from the summary reversal, Justice Brennan wrote:

In stating that this case presents a nonjusticiable "political question," Mr. Justice Rehnquist, in my view, profoundly misapprehends the political-question principle as it applies to matters of foreign relations. Properly understood, the political-question doctrine restrains courts from reviewing an exercise of foreign

the President from carrying out his constitutionally assigned duties.¹⁹⁷

2. CONGRESSIONAL INTRUSION ON THE JUDICIARY

As the *Mendelsohn* court stated, the Act would constitute a classic Bill of Attainder but for the fact that the PLO stands outside the protection of the Constitution.¹⁹⁸ A recognized purpose of the constitutional prohibition on Bills of Attainder is to maintain the separate powers of the federal government.¹⁹⁹ An enactment that singles out for punishment a particular person or group of persons usurps and degrades the judicial role in a scheme of separation of powers.²⁰⁰ This concern is not mitigated by the court's constitutional positioning of the PLO, since the court's role in either instance merely would be to lend its authority to the Attorney General's "identification of defendants already prejudged and penalized by the statute."²⁰¹ The process by which individuals are subjected to punishment is inherently judicial, and Bills of Attainder act as little more than trial by legislature, without the attendant safeguards of a judicial proceeding.²⁰²

policy judgment by the coordinate political branch to which authority to make that judgment has been "constitutional[ly] commit[ted]." But the doctrine does not pertain when a court is faced with the *antecedent* question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power. The issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.

Id. at 1006-07 (citations omitted) (emphasis in original). Reaching the merits of the case, Justice Brennan concluded that the "Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes," and that the abrogation of the treaty "was a necessary incident to Executive recognition of the Peking Government." *Id.* at 1007.

197. Justice Jackson enunciated a less expansive interpretation of the President's power in foreign affairs in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring) (the *Steel Seizure* case). Employing his now-familiar designation of the three categories in which the President's power may fluctuate, in recognizing the PLO, the Executive would be acting against the express will of Congress—as embodied in the Anti-Terrorism Act—and therefore in the category where his power would be at its lowest ebb. This analysis is undercut, however, when there is a specific grant of power to the President by the Constitution such as the power to receive ambassadors. U.S. CONST. art. II, § 3. In response, it could be argued that representatives of the PLO are not ambassadors in the strict sense since they do not represent any single geographic area or internationally recognized government.

198. *Mendelsohn*, 695 F. Supp. at 1488-89.

199. *Id.* at 1488.

200. "[T]he Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature." *United States v. Brown*, 381 U.S. 437, 442 (1964); see also *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425 (1977).

201. *Mendelsohn*, 695 F. Supp. at 1489.

202. This "trial by legislature" is antithetical to the Supreme Court's recent trend of

Because the legislature is more susceptible to public clamor and interest-group pressure than the judiciary, the separation of powers function of a Bill of Attainder is crucial when the group singled out is politically unpopular. The political unpopularity of the group, coupled with congressional desire to enact popular legislation, prevents the legislative body from impartially weighing the evidence, and the procedural safeguards that operate in judicial proceedings are endangered or lost. When groups selected by the legislature for special burdens are relatively small and politically unpopular, it is easier for the legislature to act against them than if a broad spectrum of interest groups are affected. These smaller groups serve as effective scapegoats for the frustrations of a majority, particularly if the groups are marginal and expendable to the economy.²⁰³ Action taken against "scapegoat" groups permit the level of esteem of congressmen to rise in the eyes of the majority at the expense of a politically powerless minority.

The "findings" of the Act constitute a shorthand way of substituting membership in a political organization for the undesirable characteristics of some of its members, which are properly the subject of congressional action. As the Court wrote forcefully in *United*

adopting the view of an inflexible, strictly separated division of power among the branches. In *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983), the Court adopted a formalist interpretation of separation of powers, holding that action legislative in character must meet the "single, finely wrought and exhaustively considered procedure" of Article I. *Id.* at 951. The Court, by making an initial determination as to which of the three branches the action in question belongs, thus decides whether the separation of powers doctrine has been violated. The Act, as the *Mendelsohn* court noted, inflicts "punishment upon the PLO, its members and affiliates with only a pro forma judicial inquiry Congress has left almost nothing for the federal courts to do but lend their authority to the injunction sought by the Attorney General." *Mendelsohn*, 695 F. Supp. at 1454-55. Regardless of whether the court believes the PLO is outside the protection of the Constitution, the Act could not survive this formal approach. The "escape" of one branch from the confines of its formal prison has the same constitutional ramifications, regardless of the extra-constitutional reason for its flight. See *Bowsher v. Synar*, 478 U.S. 714 (1986); *Chadha*, 462 U.S. at 952-54 (Powell, J., dissenting); *Northern Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Justice Powell, in *Chadha*, argued that Congress' action not only affronts the Constitution's "general allocation of power, but also . . . the Bill of Attainder Clause," which represents "the Framers' concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power." *Chadha*, 462 U.S. at 962.

203. This rationale has been offered to explain why, during World War II, Japanese-Americans living on the west coast were placed in detention camps while Japanese-Americans living in Hawaii were not. The argument is that those who lived on the west coast were relatively few and unnecessary to the economy, while those who lived in Hawaii were numerous and essential to the economic well-being of the region. See G. PERRETT, *DAYS OF SADNESS, YEARS OF TRIUMPH* 233 (1973). A similar argument posits that McCarthyism destructed in part because it appeared to threaten the effectiveness of the Armed Forces. *Id.* at 399-401; see also R. GOLDSTEIN, *supra* note 2, at 570-72.

States v. Brown.²⁰⁴ "In a number of decisions, this Court has pointed out the fallacy of the suggestion that membership in the Communist Party, or any other political organization, can be regarded as an alternative, but equivalent, expression for a list of undesirable characteristics."²⁰⁵ By punishing those who wish to exercise their rights of free speech and association via the promotion of views shared by the PLO, Congress has obtruded the judicial process of determining which members or associates of the PLO actually exhibit terrorist behavior.

3. JUDICIAL INTRUSION ON THE POLITICAL BRANCHES OF GOVERNMENT

In *Palestine Information Office*, both the district court and the D.C. Circuit expressed reluctance to examine executive decisions in the realm of foreign affairs.²⁰⁶ Nevertheless, the courts were forced to examine the propriety of the State Department's actions due to the clear first amendment interests involved. The District Court for the Southern District of New York, in both *PLO* and *Mendelsohn*, also expressed its unwillingness to invade the traditional foreign affairs power of the Executive. Nonetheless, it found itself entrenched in questions better left to the political branches.²⁰⁷

204. 381 U.S. 437 (1965).

205. *Id.* at 455.

206. *Palestine Information Office v. Shultz*, 674 F. Supp. 910, 916 (D.D.C. 1988); *Palestine Information Office v. Shultz*, 853 F.2d 932, 937 (D.C. Cir. 1988). In *Palestine Information Office*, the D.C. Circuit noted that the Executive acted pursuant to explicit congressional authorization, and thus its actions were "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Palestine Information Office*, 853 F.2d at 937 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (the *Steel Seizure* case). This, however, states the conclusion while bypassing the inquiry. The precise question before the court is whether the Executive exceeded its statutory authority, and whether the action of closing an information office located in the United States actually is an appropriate exercise of the foreign affairs power. That the court so willingly concedes both indicates an extreme deference to the Executive. President Truman based his actions in the *Steel Seizure* case on a claim of power similar to that asserted in *Palestine Information Office*, arguing that the seizure of domestic steel mills was an appropriate action under the general powers of the Executive. *Youngstown*, 343 U.S. at 582. The Court made a searching inquiry, questioning and ultimately rejecting the claim. *Id.* at 585-89. Absent coordinated congressional action or a state of national emergency, the Court refused to rest on the traditional deference accorded the Executive when in the realm of foreign affairs. *Id.* at 587; see also *Kent v. Dulles*, 357 U.S. 116 (1958) (holding that the Secretary of State was without congressional authority to deny passports to members of the Communist Party). *But see* *Regan v. Wald*, 468 U.S. 222 (1984) (Court finds congressional authorization for the Reagan administration's ban on travel to Cuba).

207. The political question doctrine has been justified as a recognition that certain disputes lie outside the law's ability to formulate antecedent principles which are appropriate for judicial application. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 208-16 (1972). In *PLO*, the court was asked to decide the sensitive question of whether the United States should submit to the jurisdiction of the International Court of Justice. This question, however,

The judiciary is not the appropriate forum for the resolution of complex international political disputes, especially when the conflicts revolve around the precise body designed to resolve such disputes: the United Nations. By deciding the international obligations of the United States, the judiciary reluctantly interprets an ambiguous statute, while the lawmakers remain unaccountable for the result.²⁰⁸ Although this may be the purpose behind much vague legislation, it produces the effect of removing from the public its democratic control over the actions of elected officials. The judiciary is left to take the blame for whatever the Act is ultimately interpreted to mean, while Congress safely escapes any resulting political fallout.

Several of the criteria for a nonjusticiable political question, as established by *Baker v. Carr*,²⁰⁹ also appear applicable to the Act. The decision regarding whether the United States should submit to international arbitration, for example, appears to involve "an initial policy determination of a kind clearly for nonjudicial discretion."²¹⁰ Furthermore, the involvement of the judiciary in a possible dispute between the Executive and Congress over the appropriate relationship of the United States towards the PLO raises the "potentiality of embarrassment from multifarious pronouncements by various departments on one question."²¹¹ The Act thus blurs the traditional distinctions between the various branches of government, and creates a liberating effect on the normal boundaries of the Executive, Congress, and the judiciary. As Professor Nowak has stated:

Federalism and the separation of powers issues, at least when they relate to foreign affairs, should be considered political questions because the interaction of the President and Congress gives our country needed flexibility in foreign affairs and allows us to arrive

is one whose resolution is controlled more by the realities of international politics than the dictates of international law. The continued viability of the United States as the "host" country for the United Nations is similarly a product of global politics. *Cf.* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 430 (1964) (concluding in the "act of state" context that "[i]t is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations"). *But cf.* *Baker v. Carr*, 369 U.S. 186, 211 (1962) (stating that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance").

208. By remaining vague as to the exact meaning and intended scope of a statute, congressmen can later disclaim politically unpopular constructions given to that statute by the courts. *See* A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

209. 369 U.S. 186 (1962).

210. *Id.* at 217; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, comment h (1986) (Action relating to treaties that are not self-executing should only be taken by the executive or legislative branches.).

211. *Baker*, 369 U.S. at 1860.

at practical accommodations that best serve our national interests. There is no indication in the text of the Constitution or its amendments that the judiciary is authorized to create a fixed, "legal" delineation of the roles of the President and Congress in foreign affairs.²¹²

B. *The First Amendment*

1. FREEDOM OF SPEECH

The recent court decisions concerning the Act reveal two conflicting approaches to the first amendment rights involved. The first approach consists of a minimal inquiry into whether any first amendment freedoms have been abridged.²¹³ The second approach, on the other hand, displays a more sensitive and searching inquiry into the Act's potential for first amendment infringement.²¹⁴ These contradictory approaches become evident when one compares the *Palestine Information Office* and *Mendelsohn* cases, and ultimately produce an uncomfortable catch-22 that would likely ensnare American citizens who hope effectively to espouse opposition views concerning the Middle East.

Mendelsohn reveals the court's awareness that strong first amendment rights are involved. This is evidenced by the court's distinction between American citizens who are official representatives of the PLO and all other American citizens. While the court held that an American citizen acting as an official representative of the PLO cannot invoke the Constitution to protect his speech,²¹⁵ the court treated the three "speaking" plaintiffs as American citizens who are entitled to all the protections of the Constitution. The court simply refused to recognize the government's assertions that an American citizen is "dominated," "controlled," or an agent of a foreign power persuasive to dislodge the first amendment right that the particular citizen possesses.²¹⁶

212. Koh, Nowak, Rees & Sofaer, *The Treaty Power*, 43 U. MIAMI L. REV. 101, 120 (1988). *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987) is a recent example of a court's refusal to delineate the precise foreign affair powers of Congress and the Executive. In *Lowry*, 110 members of Congress sought a court declaration that would require the President, in accordance with the War Powers Resolution, to submit a report concerning the use of Armed Forces in the Persian Gulf. *Id.* at 334. The plaintiffs argued that the reporting requirements of the War Powers Resolution had been triggered by United States naval escort operations and an attack on an Iranian Navy ship laying mines in the Gulf. *Id.* The court refused jurisdiction under the political question doctrine and the constraints of equitable discretion. *Id.* at 341.

213. *Palestine Information Office v. Shultz*, 853 F.2d 932, 939-42 (D.C. Cir. 1988).

214. *Mendelsohn v. Meese*, 695 F. Supp. 1474, 1479-86 (S.D.N.Y. 1988).

215. *Id.* at 1480.

216. *Id.* at 1481.

By contrast, the court in *Palestine Information Office* was willing to determine that political advocacy on behalf of a foreign principal is sufficient to trigger the FMA, regardless of the official status of that citizen or group.²¹⁷ By designating the Information Office a foreign mission, the State Department was able to restrict the constitutional rights that the Information Office and its staff would otherwise enjoy. This form of decision by designation is inappropriate in constitutional jurisprudence.²¹⁸ *Palestine Information Office* thus "crossed the line" that *Mendelsohn* refused to, and as a result an office that promotes views shared by the PLO can escape prosecution under the Anti-Terrorism Act but become susceptible to closure under the FMA.²¹⁹ This creates a "chilling effect" on political advocacy which is undesirable in a democratic state that treasures a free market place of ideas.²²⁰

The D.C. Circuit in *Palestine Information Office*, having found no content-based restriction on free speech, interpreted the FMA under the *O'Brien* test for incidental restrictions on first amendment freedoms.²²¹ The court refused to apply the stringent scrutiny required of a content-based restriction on political speech, stating that the FMA, on its face, does not single out for punishment advocacy of the PLO's doctrines.²²² Yet it is not to be expected that the government would openly declare the content-based nature of the statutory restrictions. Indeed, it is not unusual for the government to assert an interest unrelated to the restriction on speech.²²³ The duty of a court,

217. See *supra* notes 56-59 and accompanying text.

218. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (resolution of constitutional controversies is more than "semantic cataloguing").

219. Because the FMA is applied to *all* foreign missions, its potential for oppressive application is even greater than that under the Anti-Terrorism Act. Every information office claimed by the executive department to represent a foreign principal is now subject to closure, as well as every domestic organization which hopes to advocate views shared by foreign principals.

220. A major function of the first amendment is to facilitate the free discussion of governmental and public affairs. See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1978); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1976). A free trade in ideas permits all points of view to have the opportunity for expression, producing a better informed and more capable citizenry, and ultimately a more accountable government. See *Cohen v. California*, 403 U.S. 15, 24 (1971) (Free expression preserves the individual dignity and choice upon which the political system rests.).

221. See *supra* note 86-95 and accompanying text.

222. *Palestine Information Office v. Shultz*, 853 F.2d 932, 939-40 (D.C. Cir. 1988). On occasions, the Supreme Court has applied somewhat stricter scrutiny to content-neutral regulations. See *Buckley v. Valeo*, 424 U.S. 1 (1976) (invalidating federal election spending limitations, despite application to all candidates); *Mills v. Alabama*, 384 U.S. 214 (1966) (overturning state law that prohibited election-day campaigning despite apparent neutrality).

223. See *J. ELY, DEMOCRACY AND DISTRUST* 128-29 (1980). Ely notes that only in very

if the alternative to an examination of motive is an automatic finding of constitutionality, is to pierce the guise of neutrality and closely scrutinize the government's asserted noncontent-related justifications.²²⁴ The district court in *Mendelsohn* refused to do so beyond accepting the government's claim that the purpose of the Act is to deny the PLO the benefits of operating in the United States. This was done despite numerous assertions on the floor of Congress that the Anti-Terrorism Act is designed to do far more than that.²²⁵

In *Police Dep't of the City of Chicago v. Mosley*,²²⁶ the Supreme Court stated that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."²²⁷ By making it unlawful to receive or expend any PLO funds, the Anti-Terrorism Act limits the free expression of those who require outside funding to

rare circumstances will the government openly assert the content-based nature of a regulation. *Id.* at 231-32.

224. See *Washington v. Davis*, 426 U.S. 229, 244 n.11 (1976). The difficulties in determining the correct motivation for a legislative body's actions have been discussed at great length elsewhere. See Bork, *supra* note 32; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1212-23 (1970); Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 105 (1978). Professor Tribe contends that the relevant inquiry is whether the legislature was substantially motivated by an improper purpose. L. TRIBE, *supra* note 23, § 12-6, at 825 (1988). But this reduces the content distinction to a mere formality. See M. REDISH, *FREEDOM OF EXPRESSION* 107-08 (1984). The best way to avoid indirect but actual suppression of information is to closely scrutinize *all* content-neutral regulations. This would better focus the inquiry to an examination of the compelling interest as alleged by the government and avoid the inherent problems of apprehending legislative intent. See *id.* at 125. This approach still suffers from the problems inherent in any ad hoc balancing test, but it more fully serves the values of free expression. For an explicit example of motive review in free speech jurisprudence, see *Grosjean v. American Press Co.*, 297 U.S. 233, 251 (1936) (state tax on newspapers invalid because real purpose was to restrict speech).

225. See, e.g., 133 CONG. REC. E2249 (daily ed. June 4, 1987) (statement of Rep. Gallegly). Rep. Gallegly vehemently argued that "it is ludicrous to allow the PLO free reign to spread their ideology of hate and violence" and asserted that the Act would help to prevent United States citizens from terrorist attack. *Id.* Further, he stated that the Act would close both the PLO Observer Mission in New York as well as the Palestine Information Office in Washington, D.C. Ironically, the Information Office was closed under the Foreign Missions Act and the Act was held inapplicable to the Observer Mission. See also 133 CONG. REC. H4047 (daily ed. May 28, 1987) (statement of Rep. Herger) (discussing need to stop the distribution of PLO propaganda in the United States); 133 CONG. REC. S12,854 (daily ed. Oct. 8, 1987) (statement of Sen. Grassley) ("I think we ought to think twice before extending the first amendment right to foreign entities using our soil . . . to carry out acts of terrorism or even preach that.")

226. 408 U.S. 92 (1972).

227. *Id.* at 95; see also *Mills v. Alabama*, 384 U.S. 214, 218 (Major purpose of first amendment is to protect the free discussion of governmental affairs.). Unpopular political speech is often disturbing or offensive to those who are exposed to it, but it must be accepted as a given that first amendment analysis should not turn on how offensive or disturbing a court or legislature finds the particular political expression to be. M. REDISH, *supra* note 224, at 60.

carry on their educational efforts.²²⁸ This ultimately dilutes all of our rights, as ideas not fully explained can never be fully judged. The free discussion of governmental affairs should be no less protected because the listeners' and debaters' first amendment rights are asserted.²²⁹ While the Act permits the receipt of informational material from the PLO, the best "informational material" is often the vigorous face-to-face debate of an important political issue by conflicting and differing voices.²³⁰ As the Supreme Court stated in *Jones v. Opelika*,²³¹ "[t]o proscribe the dissemination of doctrines or arguments which do not transgress military or moral limits is to destroy the principal bases of democracy—knowledge and discussion."²³² Senator Jesse Helms, who filed a vigorous amicus brief strongly supporting the closure of the Palestine Information Office, ironically may have said it best when he opposed the government's effort to close the Rhodesian Information Office in 1977:

[I]t is the American people who will be the losers, not the Rhodesians. It will be the American people who will lack the full and free debate that is guaranteed by the Constitution. It will be the American people who will have denied to them information that is

228. Such a restriction would appear to contradict the Supreme Court's most recent cases that define the extent and limits of legislative power to regulate the financing of political campaigns. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-83 (1978) (extending to corporations the first amendment right to expend funds in advocacy of political causes); *Buckley v. Valeo*, 424 U.S. 1, 39-59 (1976) (holding unconstitutional the expenditure provisions of the Federal Election Campaign Act of 1971). These cases support a broad individual, associational right to spend large sums of money in the pursuit of political ends. A. COX, *FREEDOM OF EXPRESSION* 68 (1981). See also *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943) (state may not impose a charge for the enjoyment of first amendment guarantees).

229. *Kleindienst v. Mandel*, 408 U.S. 753, 762-65 (1972).

230. The "marketplace of ideas" theory was originally derived from the writings of John Stuart Mill. See J.S. MILL, *On Liberty*, in *A SELECTION OF HIS WORKS* 21-71 (J. Robson ed. 1966); see also *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Mill posited that the free competition among ideas strengthens truth and exposes falsity, and that a vigilant struggle to defend one's convictions guards against both falsehood and fanaticism. J.S. MILL, *supra*, at 60. But see R. WOLFF, *THE POVERTY OF LIBERALISM* 193 (1968) (free society is itself a social value). The "marketplace of ideas" concept, when used to defend free speech, has been severely attacked. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 276-77 (1977); M. REDISH, *supra* note 224, at 46; Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964, 974-81 (1978). This is because it appears to suffer from internal contradiction: truth is its ultimate goal, yet truth can never be fully attained. M. REDISH, *supra* note 224, at 46; see also I. BERLIN, *FOUR ESSAYS ON LIBERTY* 187 (1977). The marketplace must exist forever because no single, definitive truth can ever emerge. The attainment of truth, however, cannot be the only value that free speech serves; if so, arguments that are patently false would deserve no free speech protection. See M. REDISH, *supra* note 224, at 47.

231. 316 U.S. 584 (1942).

232. *Id.* at 594.

rightfully theirs.²³³

The *Mendelsohn* court read the Act's prohibition on the establishment of offices at the behest, direction, or with funds provided by the PLO narrowly, recognizing the serious first amendment problems that otherwise might have resulted.²³⁴ Yet the court in *Palestine Information Office* read the FMA's provisions broadly, extending its reach beyond those American citizens who officially represent the PLO in the United States.²³⁵ By so doing, the *Palestine Information Office* court implicates those same interests that forced the *Mendelsohn* court to narrowly construe the Anti-Terrorism Act.

If the Act is not a content-based restriction on political advocacy, neither is it an *O'Brien* mix of speech and conduct. The only "conduct" involved is the receipt of funds from the PLO to support American citizens who wish to express fully their political views. As the Supreme Court stated in *Buckley v. Valeo*,²³⁶ "[t]he First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."²³⁷ In the case of the *Palestine Information Office*, the only "conduct" involved was political advocacy on the PLO's behalf.²³⁸ All speech, by necessity, involves an element of conduct. Writing involves the transference of ideas to the written page; publishing that page involves numerous physical acts such as purchasing suitable equipment, supplies etc.; distribution of the finished product involves even greater action. The safeguards of the first amendment are reduced when strict scrutiny applies to only rarefied or extraordinary cases.²³⁹

233. 123 CONG. REC. 19,499 (1977) (daily ed. June 16, 1977).

234. *Mendlesohn*, 695 F. Supp. at 1479-86.

235. Adherence to a "control" test, without proof of official affiliation to the group or individual said to be "in control," has disturbing implications for all United States citizens who associate in some limited sense with unpopular or disfavored organizations. See *supra* note 160.

236. 424 U.S. 1 (1976).

237. *Id.* at 49.

238. *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir. 1988). Congress expressly indicated its desire to stop the spread of the PLO's "ideology of hate and violence." See 133 CONG. REC. E2249 (daily ed. June 4, 1987) (statement of Rep. Gallegly). But the government may not restrict expression simply by asserting the undesirability of permitting particular ideas to enter the realm of discussion or awareness. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976) (invalidating statute, which prohibited advertisements by pharmacists, in order to further state interest of maintaining professional standards, when state goal of statute was achieved through keeping people in ignorance).

239. Justice Black, who rejected a "balancing" approach to first amendment freedoms, vigorously asserted:

I do not subscribe to [the "balancing" of constitutionally guaranteed rights with

Even when employing a less demanding form of judicial review, as stipulated in *O'Brien*, the Act does not satisfy this minimal balancing test.²⁴⁰ Congress drafted the Act far too broadly, making no distinction between American citizens who are officials of the PLO in the United States, and those who simply wish to hear the views of the PLO or express them to others. Furthermore, it is impossible to distinguish which views are those of the PLO, which views are those of some of its individual members, which views are those of some who occasionally support only several of the PLO's positions, which views are those of Palestinians sympathetic to the PLO, which views are

countervailing state interests] for I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be [done] . . . [I]t certainly cannot be denied that the very object of adopting the First Amendment, as well as the other provisions of the Bill of Rights, was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to "balance" the Bill of Rights out of existence.

Konigsberg v. State Bar of California, 366 U.S. 36, 61 (1961) (Black, J., dissenting). For a further elaboration of Black's "absolute" approach to the first amendment, see H. BLACK, *A CONSTITUTIONAL FAITH* (1968); Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960). Some have argued that the controversy between Justice Black and Justice Harlan in *Konigsberg* (and other cases) over "absolutes" versus "balancing" has been overstated. See, e.g., Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 U.C.L.A. L. REV. 428 (1967).

240. The factors chosen by the courts to weigh in the Anti-Terrorism Act cases demonstrate the subjective nature of the *O'Brien* inquiry. In *Mendelsohn*, the court weighed the governmental interest in denying the PLO the benefits of operating in the United States against the right of the professors to receive funding for their speaking tours. *Mendelsohn v. Meese*, 695 F. Supp. 1474, 1485-86 (S.D.N.Y. 1988). Yet instead the courts could have weighed the government's interest against any number of other competing values, including the right to speak or associate with organizations of one's choice. The balance could then have been struck quite differently, or struck differently using the exact same interests weighed by the courts.

Given that the professors in *Mendelsohn* have sworn that they are unable, without PLO reimbursement of their travel expenses, to attend various meetings throughout the United States and explain the positions and views of the PLO, it is relevant to consider Justice Harlan's concurrence in *O'Brien*:

I wish to make explicit my understanding that [the Court's criteria do] not foreclose consideration of First Amendment claims in those rare instances when an "incidental" restriction upon expression, imposed by a regulation which furthers an "important or substantial" governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a "speaker" from reaching a significant audience with whom he could not otherwise lawfully communicate.

United States v. O'Brien, 391 U.S. 367, 388-89 (1968) (Harlan, J., concurring). Since the effective exercise of free speech in today's world requires, at a minimum, substantial monetary funding, the Act—when viewed in conjunction with the *Palestine Information Office* cases—shields a significant audience from exposure to the political views of the PLO or those who share its viewpoint.

those of Jews in the region who share some of the PLO's views, and so on. One cannot copyright a point of view. Nor should the degree of first amendment protection afforded that point of view be made dependent upon the funding source that enabled that point of view to be heard. As the Supreme Court stated, in the context of affirming corporate speech, "[t]he constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression The identity of the speaker is not decisive in determining whether speech is protected."²⁴¹ It is a peculiar notion that links financial remuneration to the expression of a particular viewpoint, as if all can be known of a person's identity by simply looking at his tax returns.

The distinction between content-based and content-neutral regulations is dubious for three reasons. First, it assumes that a content-neutral regulation will affect with equal force different groups or different points of view. Second, it assumes that the goals and values served by free expression are necessarily threatened more seriously by governmental regulations that aim at content than those that do not. Third, it assumes that one can always conceptually differentiate those regulations that aim at content and those that do not.²⁴² The Act demonstrates the danger of accepting these three assumptions. Symbolic speech, or speech that involves nonspeech elements, should not be abridged simply by categorical placement and the assertion of defense, national security, or other social interests.²⁴³

A disturbing aspect of the courts' reliance on the distinction between content-based and content-neutral regulations is that, regardless of the categorization, the sum total of communications is reduced.²⁴⁴ If the purpose of the first amendment is to inform decisionmaking and therefore produce better voters, then content-neutral regulations should logically be as suspect as content-based regulations.²⁴⁵ Regardless of the government's intent when it acted against

241. *Pacific Gas & Elec. v. California Pub. Util. Comm.*, 475 U.S. 1, 8 (1986) (plurality) (quoting *First National Bank v. Bellotti*, 435 U.S. 765, 776 (1978)).

242. For an excellent discussion of these assumptions, see M. REDISH, *supra* note 224, at 87-126.

243. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 314-15 (1984) (Marshall, J., with Brennan, J., dissenting) (categorical placement limits appropriate level of analysis); see also *Spence v. Washington*, 418 U.S. 405 (1974) (freedom of expression cannot be limited to a useless definition for purposes of abridgement).

244. M. REDISH, *supra* note 224, at 102.

245. The "checking" theory of the first amendment, which posits that free speech is designed to "check" government functioning, is equally threatened by a deferential approach to content-neutral regulations. See Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521. Since content-neutral regulations also deprive those who listen of potential criticism of the government, the checking function, to a certain extent, must

the Palestine Information Office, the end result was closure of the Office and the forced sale of its telephones, typewriters, computers, photocopy machines, pens, and all other communicative tools in its possession.²⁴⁶ The necessary consequence, despite professed allegiance to the principles of free speech, is a significant decrease in the dissemination of information and a concomitant loss in the ability of voters to judge the propriety of governmental action. Content-neutral regulations thus deserve greater scrutiny than they have received from the courts.²⁴⁷ Regulation of an expression for reasons other than its content is no less an interference with expression.²⁴⁸

2. FREEDOM OF ASSOCIATION

In the *Palestine Information Office* case, as well as the cases arising under the Act, it is now clear that Americans may no longer associate freely with the PLO.²⁴⁹ The right to associate is a penumbral right, not specifically mentioned in the Constitution, but vital to securing other explicitly guaranteed rights.²⁵⁰ As the Supreme Court has noted, effective advocacy of controversial views is indisputably enhanced by group association.²⁵¹ Yet it has become virtually impossible to associate with the PLO without possible censure under either the Act or the FMA. This is regardless of whether one endorses the terrorist activities of the PLO or even if one actively works within the PLO to end such terrorist activities. Associational freedom takes on a

be necessarily undermined. See Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); see also BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 344 (1978) (arguing that political speech cannot be deprived even incidentally).

246. *Palestine Information Office v. Shultz*, 853 F.2d 932, 945 (D.C. Cir. 1988) (Silberman, J., dissenting) (listing goods and services of Office which must be discontinued and disposed of by State Department order).

247. See *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 545-46 (1963) (Courts must conduct searching inquiry before rights of free speech and association are infringed.).

248. M. REDISH, *supra* note 224, at 104.

249. None of the courts interpreting either the FMA or the Anti-Terrorism Act identified which contacts specifically trigger application of the statutes. Before the government may restrict the rights of Americans who wish to associate with an allegedly criminal organization, the government must establish a specific intent to further those illegal aims. *Healy v. James*, 408 U.S. 169, 186 (1972). Absent evidence of such intent, the Act's effort to limit the first amendment right to freely associate because of terrorist activities abroad is an overly sweeping approach that is constitutionally suspect. *E.g.*, *Aptheker v. Secretary of State*, 378 U.S. 500, 512-13 (1964); *NAACP v. Buttons*, 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.").

250. See *NAACP v. Alabama*, 357 U.S. 449, 465 (1958) (first amendment protects political association); *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973) (freedom to associate includes freedom to associate with political party of one's choice).

251. *NAACP*, 357 U.S. at 465.

special significance in times of social crisis, acting as a source of affiliation for some or a source of anger for others.²⁵² Such periods typically involve a search for the root of such societal fragmentation; scapegoats, and unpopular organizations, often provide an easy and identifiable target.²⁵³

Freedom of association should not be conditioned on whether an American citizen seeks association with a foreign principal or organization.²⁵⁴ Foreign policy cannot act as a talisman by which its simple invocation begins and ends all constitutional analysis.²⁵⁵ It is particularly unfortunate when the government conducts its foreign policy by denying the American public the information it needs to assess that policy.²⁵⁶ Associations often serve several functions, both political and social.²⁵⁷ In this instance, the Act has created a guilt by association in affiliation with the PLO.²⁵⁸ If freedom of association is to have real meaning, American citizens must be free to promote peacefully their organizations' objectives, regardless of disapproval by lawmakers or by portions of the lawmaker's constituency. The combined effect of the FMA and the Act ensures that the objectives of the PLO are never effectively promoted by American citizens.

252. See Blasi, *supra* note 243, at 495-500. Blasi argues for the adoption of extremely protective, absolute judicial standards for safeguarding freedom of association in times of social crisis. *Id.* at 498.

253. *Id.* at 495.

254. See *Lamont v. Postmaster General*, 381 U.S. 301 (1965). An indispensable aspect of a citizen's right of free speech should be the choice of those on whose behalf one will speak. The decision to speak on behalf of another is necessarily a manifestation of the speaker's own expressive and associational rights. Brief of Amici Curiae at 21, *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir. 1988) (No. 87-5398). See generally J. SKOLNICK, *THE POLITICS OF PROTEST* (1969) (discussing relationship between political association and participation).

255. See *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1515 (D.C. Cir. 1984) (en banc), *vacated and remanded*, 471 U.S. 1113 (1985).

256. Brief of Plaintiffs-Appellants at 38, *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir. 1988) (No. 87-5398); cf. *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (per curiam) (Black, J., concurring).

257. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends").

258. In *Palestine Information Office*, the D.C. Circuit wrote that the Supreme Court has upheld limitations on free association conducted for an illegitimate purpose. *Palestine Information Office v. Shultz*, 853 F.2d 932, 941 (D.C. Cir. 1988). See, e.g., *Norwood v. Harrison*, 413 U.S. 455, 470 (1973) (Private discrimination, although characterized as a form of freedom of association, has never been granted constitutional protection.). The Supreme Court, however, has regularly held that the individual must have a specific knowledge and intent to further those illegal aims. See, e.g., *Scales v. United States* 367 U.S. 203, 228-30 (1961). No intent to engage in criminal activity was ever asserted against any of the citizens prosecuted under the Act.

C. *The Anti-Terrorism Act as a Bill of Attainder*

The *Mendelsohn* court conceded that the Act is, in form, a "classic Bill of Attainder."²⁵⁹ The generally recognized elements of a Bill of Attainder are as follows: 1) nonjudicial punishments; 2) lack of a judicial trial; and 3) specific identification of the group or individual affected.²⁶⁰ The *Mendelsohn* court refused to strike down the Act, despite its agreement that, in ordinary circumstances, the Act would satisfy the elements of a Bill of Attainder. The principal reason given was that the court had already found the PLO to be outside the constitutional structure and hence not entitled to the protection of the laws of the United States.²⁶¹ The court explained that the Act is an exercise of the foreign affairs powers of the Congress directed to the PLO as a foreign entity, and "Congress may force an American citizen to choose between the full panoply of protections offered by the Constitution and voluntarily taking on an official role in the operations of a foreign power."²⁶² The authority cited by the court in support of this proposition, however, is unpersuasive.²⁶³ None have taken so broad a step as to prevent the Constitution from protecting an American citizen merely because he or she has chosen to associate in an official capacity with a foreign principal. If the Act is a "classic Bill of Attainder," should not the Constitution protect the American citizens who fall under the provisions of the Act? The precedent set here could have wide implications. Thousands of American citizens engage in political advocacy on behalf of foreign principals, and hundreds of thousands belong to political associations not necessarily based in the United States.²⁶⁴ To say that American citizens are pro-

259. *Mendelsohn v. Meese*, 695 F. Supp. 1474, 1488 (1988).

260. See *United States v. Lovett*, 328 U.S. 303, 315 (1946). An integral component of a Bill of Attainder is that the legislature declares a specific group guilty without a judicial trial and its attendant procedural safeguards. *Id.* In the case of the Act, Americans who support the PLO's political positions are prejudged without an actual determination of each individual's support of terrorism.

261. *Mendelsohn*, 695 F. Supp. at 1489.

262. *Id.* at 1490.

263. The court cites article I, section 9 of the Constitution, which prohibits United States citizens from accepting titles from foreign governments without congressional consent, and *Vance v. Terrazas*, 444 U.S. 252, 263 (1980) ("statutorily defined voluntary act of expatriation, accompanied by intent to relinquish citizenship sufficient to terminate citizenship"). American citizens, however, need not go so far as to accept a foreign crown nor express an intent to relinquish citizenship simply by virtue of associating with a foreign principal. That a court would base the loss of constitutional rights on precedent as marginal as this is alarming.

264. *ENCYCLOPEDIA OF ASSOCIATIONS: INTERNATIONAL ORGANIZATIONS* 627 (K. Koek 23d ed. 1989). See generally K. BOYLE, *supra* note 1. Boyle details the sometimes subtle and sometimes blatant practices in over fifty countries of controlling the circulation of information and ideas. By limiting political association to domestic organizations, the United States effectively restricts participation in the global exchange of information.

ted by the Constitution until such time as they seek to associate with unpopular foreign organizations is to create only formal protections that disappear with effective exercise. By merely fixing the primary focus of a Bill of Attainder to groups located outside of the United States, American citizens who belong to those groups become subject to congressionally imposed penalties without the benefits of judicial intervention.²⁶⁵ Thus, Amnesty International,²⁶⁶ The Committee in Solidarity with the People of El Salvador (CISPES),²⁶⁷ and even the Catholic Church²⁶⁸ become appropriate targets for legislatively imposed disabilities. The erosion of the Constitution in this manner should be of concern to all Americans, and the myopic concentration on the particular group involved in these cases should not blind the courts to the overarching principle involved.

In *Cummings v. Missouri*,²⁶⁹ the Supreme Court indicated that Bills of Attainder are most likely to arise "in times of rebellion, or . . . of violent political excitements; periods, in which all nations are most liable . . . to forget their duties, and to trample upon the rights and liberties of others."²⁷⁰ This has undoubtedly been the case. As the *Mendelsohn* court noted, the laws struck down as violating the Bill of

265. Restrictive actions by public officials, in times of crisis, usually have widespread public support and therefore cannot be redressed simply through the jury system. See A. HISS, *IN THE COURT OF PUBLIC OPINION* 286 (1957). It is the courts, as a counter-majoritarian institution, that must guard against mob rule and tyranny of the majority. Unfortunately, during the two great threats to free speech in the twentieth century—the "Red Scare" following World War I and the period of virulent anti-Communism personified by Senator Joseph McCarthy—the courts failed to uphold basic first amendment values. Judicial constructions during these periods of the Espionage Act of 1917 and the Smith Act, respectively, produce prudent skepticism that the judiciary can withstand future times of national hysteria. See Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1352 (doubting efficacy of first amendment tests during future outbreaks of widespread hostility to dissenters). Future acts of terrorism, conducted within the United States, can produce the turbulence necessary for highly restrictive judicial interpretations of the Anti-Terrorism Act.

266. Amnesty International, which monitors human rights violations and works to free prisoners of conscience, is a world-wide organization based in London. *ENCYCLOPEDIA OF ASSOCIATIONS: INTERNATIONAL ORGANIZATIONS* 627 (23d ed. K. Koek, ed. 1989).

267. This is not as unusual as it might initially appear, given the FBI's recent revelations of its investigation of domestic groups such as CISPES who are opposed to the Reagan administration's Latin American policies. See *N.Y. Times*, Jan. 28, 1988, at A1, col. 3.

268. It was not too long ago that people questioned whether John F. Kennedy's catholic beliefs precluded him from occupying the White House. See A. MENENDEZ, *JOHN F. KENNEDY: CATHOLIC AND HUMANIST* 31-44 (1987). Religious opposition to Kennedy often focused upon his alleged "control" and "domination" by the Roman Catholic Church. *Id.* at 33. For a historical analysis of early anti-Catholic persecution in the United States, see A. TYLER, *FREEDOM'S FERMENT* 365-95 (1944).

269. 71 U.S. (4 Wall.) 277 (1867).

270. *Id.* at 323 (quoting J. STORY, *COMMENTARIES ON THE CONSTITUTION* § 1344, at 217 (5th ed. 1891)).

Attainder clause all arose "either at times of national crisis or when the attention of Congress was drawn by public clamor to problems of widespread interest."²⁷¹ The fear of world-wide terrorism has caused great public unrest and fosters the social climate within which Bills of Attainder are most likely to thrive.²⁷² Future acts of terrorism within the United States can be the catalyst for judicial interpretations of the Anti-Terrorism Act far more expansive than the narrow application rendered by the *Mendelsohn* court.

V. CONCLUSION

The potential cost of the Anti-Terrorism Act should be weighed against its relative benefits. Yet little benefit has been shown as a result of the Act's passage. It is unlikely that the Act would have applied to the Palestine Information Office given the restrictive reading of it by the *Mendelsohn* court.²⁷³ In addition, the Act was held inapplicable to the PLO observer mission at the United Nations in New York, due to the preeminence of the existing Headquarters Agreement.²⁷⁴ The professors who wish to travel and speak at colleges and public forums about the Middle East, and who wish to be reimbursed for their travel expenses by the PLO, must now seek funding elsewhere. While the Congressmen who passed the Act spoke of fighting terrorism,²⁷⁵ the district court recognized the legitimate interest of the United States in passing the Act as preventing the PLO

271. *Mendelsohn*, 695 F. Supp. at 1487.

272. See Clarizio, *Will Anti-Terrorism become the McCarthyism of the 1980s?*, A.B.A. JOURNAL, Jan. 1, 1986, at 38. Clarizio notes that the desire to punish terrorists should not supersede our respect for the law. *Id.* at 40. As former American Bar Association President William Falsgraf has argued, the United States cannot alter its system of law and the fundamental precepts that underlie it in order to fight terrorism, for "[i]f we do, the terrorists have won." *Id.*

The Supreme Court has long understood the need to safeguard rights guaranteed by the Constitution during periods of crisis or war, even if it has failed at times to act upon on this understanding. As far back as 1866, the Court recognized:

[I]f society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.

Ex Parte Milligan, 71 U.S. (4 Wall.) 2, 124 (1866).

273. See *supra* notes 127-83 and accompanying text.

274. *PLO*, 695 F. Supp. at 1468-70.

275. See, e.g., 133 CONG. REC. S13,854 (daily ed. Oct. 8, 1987) (statement of Sen. Lautenberg) ("there is a real fear that these offices in Washington and New York might be used as bases for terror"); 133 CONG. REC. E1635 (daily ed. April 29, 1987) (statement of Rep. Kemp) ("terrorist bases").

from receiving the benefits of operating in the United States.²⁷⁶ The PLO, however, continued to maintain its United Nations mission undisturbed by the Act, and the affiliated Washington office was closed under another statute entirely.²⁷⁷ Thus the main political goal of the Act, fighting terrorism, has been eviscerated by the court while little has actually changed in the way PLO operations are conducted in the United States.

What has changed, as the *New York Times* wrote in an editorial condemning the Act, is the "right of the American people to hear a public debate enriched by the views of even the most quarrelsome sources."²⁷⁸ United States citizens who attempt to associate or establish an office with other Americans that support the political message of the PLO now risk persecution under the Act or closure under the FMA. There is little, in fact, that limits the State Department from designating a person as an "entity" for purposes of the FMA and ordering his personal office or facilities to cease operation.²⁷⁹

Silencing opposition views hurts all of us. Americans may no longer fully hear and judge for themselves the views of the PLO. This is debilitating to a democracy that prides itself and premises its legitimacy upon the ability of all Americans to vigorously engage in political expression. If our democracy is to flourish it must have criticism and dissent, for without criticism our government grows static, and without dissent its abuses go unrecognized. A government willing to limit the expression of views on an issue of public importance to those views that the government supports, unfortunately, displays an insecurity over the correctness of the government's own views.²⁸⁰ This creates the unwarranted suspicion that views disfavored by the government have more merit to them than they may actually contain. In the end, a propaganda victory is needlessly achieved by the PLO,²⁸¹ while the laws' only discernible effect is to threaten the Constitution and the values supposedly protected by it.

276. *Mendlesohn*, 695 F. Supp. at 1484.

277. *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir. 1988), *aff'g* 674 F. Supp. 910 (D.D.C. 1987) (FMA).

278. See *N.Y. Times*, *supra* note 21.

279. Brief of Amici Curiae at 20-21, *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir. 1988) (No. 87-5398).

280. As Henry Steele Commager noted, in the context of condemning fixed tests of government loyalty: "The effort is itself a confession of fear, a declaration of insolvency. Those who are sure of themselves do not need reassurance, and those who have confidence in the strength and the virtue of America do not need to fear either criticism or competition." Commager, *Who Is Loyal to America?*, HARPER'S, Sept. 1947, at 196.

281. See, e.g., Greenberger, *Bill Requiring Closure of PLO's Washington, U.N. Offices May Be Propaganda Blow to U.S.*, *Wall St. J.*, Dec. 24, 1987, at 28, col. 1.

Democratic theory is premised on the independent and open discussion of *all* ideas, regardless of their repugnancy or dislike to some portions of the population. Deprived of the opportunity to judge for themselves the merits in all points of view, American citizens cannot challenge fundamental assumptions that may be mistaken. They may not question widely believed half-truths and may fail to seek new solutions to previously unsolvable dilemmas. These solutions are then found elsewhere, where one may vigorously explore, accept, or reject working solutions free from disapprobation or sanction.²⁸² In medieval Italy, for example, religious authorities forbade Galileo from spreading his theory that the sun and not the earth was the center of the solar system.²⁸³ Scientific progress then shifted to other countries.²⁸⁴ Furthermore, it is no coincidence that increased stress and anxiety resulting from war or the threat of war is often related to the subjugation of unpopular domestic groups.²⁸⁵ As a government

282. See R. GOLDSTEIN, *supra* note 2. As John Stuart Mill reasoned:

First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility.

Secondly, though the silenced opinion be in error, it may, and very commonly does, contain a portion of the truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.

Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct

J.S. MILL, *supra* note 230, at 68-69.

283. S. HAWKING, *A BRIEF HISTORY OF TIME* 179 (1988).

284. See S. ARONOWITZ, *SCIENCE AS POWER: DISCOURSE AND IDEOLOGY IN MODERN SOCIETY* (1988) (challenging claim of science to be independent of the influence of social or historical conditions); see also R. GOLDSTEIN, *supra* note 2, at ix; T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962). Kuhn argues that changes in science are accompanied by severe persecution of those who challenge the accepted paradigm.

285. A regrettable example is the Alien and Sedition crisis of 1798, in which the Federalist administration used the threat of war with France to repress opposition Republicans. In a letter to Thomas Jefferson, written at the height of the constitutional crisis, James Madison wrote: "Perhaps it is a universal truth that the loss of liberty at home is to be charged to the provisions against dangers, real or pretended, from abroad." J. MADISON, *COLLECTED LETTERS OF JAMES MADISON* (1894), reprinted in H.H. RANSON, *CAN AMERICAN DEMOCRACY SURVIVE THE COLD WAR* xviii (1963). Professor Leonard Levy persuasively argues that the Jeffersonians, once in power, were not considerably more broad-minded to their political critics than the Federalists had been. See L. LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* (1963). For an illuminating discussion of how the path to war is often accompanied by jingoistic rhetoric, repressive assaults on the right of dissent, and a public atmosphere of intolerance, see 1 T. EMERSON & D. HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 254-338 (2d ed. 1958).

moves closer to totalitarianism, the percentage of social activities defined as violating basic political laws will increase.²⁸⁶ With prescience, Francis Biddle warned Americans in 1951 about their rising intolerance towards suspected Communists:

We should not be deceived by the repeated and usually perfervid salutes to the theory of free speech. They continue undiminished. But the test of reality is found in practice. There lies the new direction. That practice should so strikingly differ from preaching is one of those queer contradictions that foreigners find so difficult to understand, perhaps commoner in this land of ideals than in emotionally tougher and older countries. The constant asseverations of our devotion to freedom of speech, often set forth in preambles to the imposition of control procedures, suggest an uneasy awareness that something of our old faith has slipped. We are ashamed, and consequently a little louder in reciting a creed we hesitate to enforce.²⁸⁷

The Anti-Terrorism Act reflects Congress' inability to deal effectively with international terrorism, and the resulting restrictions on the domestic rights of American citizens cannot be accepted by a free society. To recognize that international terrorism is a real and dangerous threat should not mean we must also accept, without argument or reasoning, incantations of the voice of fear, anxiety, or political opportunism. If democracy is to be preserved, ideas and the freedoms that encourage them must be protected from the reach or control of central authority.

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286. R. ROSE, *GOVERNING WITHOUT CONSENSUS* 29 (1972). Rose notes that relatively innocuous activities, such as abstract painting or flag waving, can become the subject of governmental restraints when a political regime perceives itself as threatened. *Id.* For a Supreme Court decision striking down such a restraint, see *Stromberg v. California*, 283 U.S. 359, 369-70 (1931) (holding that state prohibition on display of red flag as symbol of opposition to organized government curtailed free political discussion).

287. F. BIDDLE, *supra* note 1, at 7.