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RODNEY A. SMOLLA*
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Propaganda, Xenophobia, and the First Amendment

THE Academy Award for Best Short Documentary of 1982 was awarded to *If You Love This Planet*, produced by the National Film Board of Canada (NFBC). The film depicted an anti-nuclear weapons speech given at Plattsburg, New York, by Dr. Helen Caldicott, President of the Boston-based Physicians for Social Responsibility. The film used newsreel footage of the dropping of atomic bombs on Japan and clips from World War II Department of Defense propaganda movies, featuring none other than Ronald Reagan. A second film produced by the NFBC, *Acid Rain: Requiem or Recovery?*, also generated critical acclaim in 1982, receiving the award of excellence from the American Society of Foresters. *Acid Rain* documented the extensive environmental damage caused by precipitation containing sulfuric and nitric acids produced from the burning of fossil fuels.

While critical praise brought considerable public attention to these films, the United States Government was unwilling to permit them to be exhibited raw and uncensored. Invoking the heavy bureaucratic machinery of the Foreign Agents Registration Act ("the Act"),[1] the Chief of the Registration Unit of the Internal Security Section of the Criminal Division of the United States Department of Justice (move over, George Orwell!) notified the NFBC that these

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[1] Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 611-21 (1982 & Supp. III 1985).

two movies, along with a third Canadian environmental film, *Acid From Heaven*, had been classified as "political propaganda." The Justice Department's letter informed the NFBC that the label identifying the films as "political propaganda should be . . . placed at the beginning as a (film) leader and projected long enough to permit audiences to read it."[2] The letter further informed the NFBC that pursuant to the Act, the NFBC was required to provide the Department of Justice with the names of all major distributors of the films and with a list of all specific groups and theaters that requested the films for viewing.[3]

In *Meese v. Keene*,[4] the United States Supreme Court held that the compelled labeling of these films as political propaganda and the various registration, filing, and disclosure requirements of the Foreign Agents Registration Act did not violate the first amendment.[5] Two themes dominated the Supreme Court's opinion. First, the Court found that the term "political propaganda" was a neutral label which communicated no negative connotations.[6] Second, the Court found that the labeling was not a suppression of speech but rather a mere act of *governmental* speech that actually enhanced first amendment values by placing more information before the consumer[7] — a sort of "truth in propagandizing" statute.

In a summer filled with other momentous constitutional distractions, *Meese v. Keene* did not dominate the legal spotlight. It was, nevertheless, a first amendment decision of enormous doctrinal and cultural importance, touching upon subjects the Court had rarely addressed in the past. Among those subjects were the constitutional limits (if any) on the power of the United States to monitor and classify incoming speech from the world marketplace of ideas as "propaganda" and further to require that distributors inform the government as to the identity of those groups and theaters that wish

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[2] *See* Caulfield, *U.S. Labels 3 Canadian Films as Propaganda*, Los Angeles Times, Feb. 25, 1983, part 1, at 27, cols. 2-3 (quoting letter from Joseph Clarkson, Chief of the Justice Department's Foreign Agents Registration Unit, to the NFBC (Jan. 19, 1983)).

[3] *Id. See also* 22 U.S.C. § 614 (1982).

[4] 107 S. Ct. 1862 (1987).

[5] For those legal realists counting judicial noses in the five-to-three decision, retired Justice Powell was in the majority. Justice Antonin Scalia did not participate, apparently because he authored a related court of appeals decision which upheld the Act as applied to these films. *See* Block v. Meese, 793 F.2d 1003 (D.C. Cir. 1986). Justice Scalia's analysis in *Block* was virtually identical to Justice Stevens' analysis for the Court in *Keene*, so his vote clearly would have made the *Keene* case a 6-3 decision. Judge Scalia's decision in *Block* was joined by Judge Robert Bork.

[6] *Keene*, 107 S. Ct. at 1872.

[7] *Id.* at 1871.

to exhibit this material. Also addressed was the related power of the United States to "propagandize" on its own behalf by requiring that such speech bear the label "foreign political propaganda" when distributed to American citizens.

This Article examines *Meese v. Keene* in both legal and cultural terms, critiquing the Court's analysis in light of the legislative history of the Foreign Agents Registration Act, the events surrounding the labeling of these films as propaganda, the empirical evidence concerning the Court's assumptions about the meaning of the word "propaganda," and its assumptions about the very nature of the communication process. The Article concludes that the central premise of *Keene* is untenable. Contrary to the Court's labored attempt to cleanse the Foreign Agents Registration Act by declaring the term "political propaganda" neutral, the legislative history of the Act, the present cultural climate, and the empirical evidence concerning the term "propaganda" all overwhelmingly expose the label as a pejorative term selected to negatively influence viewers and perhaps even dissuade them from viewing the film at all.

Further, this Article asserts that *Keene* confuses the right of the United States Government to speak out as a participant in the marketplace of ideas with the right of the government to regulate the ideas of other participants in the market. When the government imposes labeling and disclosure requirements on another's speech, it is no longer a mere participant.

Finally, from a broader perspective, *Meese v. Keene* capitulates to a recurring weakness in American culture, a reflexive xenophobic tendency to paternalistically shelter Americans from "foreign" or "alien" speech. Thus, as part of this reflexive tendency, the Article concludes that the Foreign Agents Registration Act impermissibly regulates speech. The Act is unabashedly aimed at the suppression of foreign speech perceived as undesirable by the government. Moreover, it is predicated on the assumption that in the *world* marketplace of ideas, the cornerstone of all modern first amendment thinking — "that the best test of truth is the power of the thought to get itself accepted in the competition of the market"[8] — does not apply.

[8] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

I

AN EXAMINATION OF THE SUPREME COURT'S OPINION

A. The Interplay Between the Court's Standing Analysis and the Merits of the Case

A litigant's standing to assert a claim should not be confused with whether the litigant has a valid claim on the merits.[9] Barry Keene, a member of the California State Senate, initiated the litigation in *Meese v. Keene*. Keene wanted to exhibit the Canadian films without complying with the statutory labeling and disclosure requirements. The Supreme Court held that Barry Keene had standing to challenge the application of the Foreign Affairs Registration Act to his exhibition of the films.[10] In so holding, the Court was forced to face a number of issues concerning the practical operation of the Act. In weighing those issues, the Court displayed an admirable realism and a pragmatic sensitivity to the working of the communication process. When the Court turned to the merits, however, the realism that had guided its standing determination was suddenly cut adrift, as the Court indulged in assumptions about the Act and the marketplace of ideas inconsistent with the judgments it had necessarily accepted in finding that Barry Keene had standing. *Keene* is thus a rare case in which the Court's standing analysis may properly be invoked to shed light upon and critique its decision on the merits.

The Court's standing analysis was grounded in a distinction between "subjective" and "objective" chills on the exercise of first amendment rights.[11] The Court drew on its 1972 decision in *Laird v. Tatum,*[12] where it denied standing to plaintiffs who alleged that Army intelligence-gathering operations chilled the exercise of their first amendment rights because the Army might, in the future, make unlawful use of its data. The Court stated that if Barry Keene "had merely alleged that the appellation deterred him by exercising a chilling effect on the exercise of his First Amendment rights, he would not have standing to seek its invalidation."[13] Keene *did not*

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[9] *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973).

[10] *Keene*, 107 S. Ct. at 1867-69.

[11] *Id.*

[12] 408 U.S. 1 (1972).

[13] *Keene*, 107 S. Ct. at 1867.

claim that he was unable to receive or exhibit the films at all.[14] He *did* claim that because the films bore the official stamp of the United States as foreign political propaganda, Keene's "personal, political, and professional reputation would suffer and his ability to obtain reelection and to practice his profession would be impaired."[15] This reputational damage, the Court conceded, went beyond "subjective chill" and established "cognizable injury."[16]

While the Court was willing to find that Keene satisfied the "objective chill" requirement, the analysis itself creates a curious asymmetry in the Court's treatment of reputational injury. The subjective/objective distinction adopted by the Court paralleled precisely the traditional common-law rule governing actions for defamation.[17] Mere "subjective" injury—personal humiliation, embarrassment, or emotional distress—was insufficient to support an action for defamation under conventional common-law analysis. Rather, the plaintiff was required to establish "objective" injury to his or her reputation before any recovery was permitted.[18] The Supreme Court held in *Time, Inc. v. Firestone*,[19] however, that nothing in the first amendment prohibited the states from rejecting or modifying the common-law rule. Thus, a "private figure" defamation action involving "issues of public concern" may be predicated on mere subjective emotional injury alone.[20] Furthermore, in defamation cases involving "private figures" and "issues of private concern," the Court has permitted a state to award "presumed damages," a common-law device where no evidence of reputational injury is required to support an award for compensatory damages.[21]

In none of these cases in which plaintiffs claimed *purely subjective*, or even *presumed* injury, was standing even thought of as an

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[14] *Id.*

[15] *Id.* (quoting Keene v. Smith, 569 F. Supp. 1513, 1515 (E.D. Cal. 1983)).

[16] *Id.*

[17] *See generally* R. SMOLLA, LAW OF DEFAMATION § 9.06[4] (1986).

[18] *See, e.g.*, Little Rock Newspapers, Inc. v. Dodrill, 281 Ark. 25, 660 S.W.2d 933 (1983); Gobin v. Globe Publishing Co., 232 Kan. 1, 649 P.2d 1239 (1982); France v. St. Clare's Hosp. & Health Center, 82 A.D.2d 1, 441 N.Y.S.2d 79 (1981); Salomone v. MacMillan Publishing Co., 77 A.D.2d 501, 429 N.Y.S.2d 441 (1980).

[19] 424 U.S. 448 (1976).

[20] *Id.* at 460.

[21] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985). The *Dun & Bradstreet* litigation began in the Vermont state courts, where federal article III standing rules do not apply; the substantive law decision on presumed damages, however, would apply to any libel case involving private figures and private speech, including a diversity action brought in federal court. *See also* R. SMOLLA, *supra* note 17, § 9.05[2] (presumed damages constitutionally permissible).

issue. Indeed, to disqualify litigants on standing grounds would be foreign to modern standing theory. It would confuse the contours of the substantive law cause of action with the procedural limitations governing constitutional adjudication. A state may choose to create a tort action grounded in psychic injury whether it is labeled invasion of privacy, infliction of emotional distress, or defamation. If a plaintiff brings that action in federal court in a diversity suit, no federal court would dream of dismissing the case for lack of standing, for "injury" in the sense required by the Constitution to confer standing clearly exists.[22] Whether that injury is sufficient to *state a cause of action* is a question of substantive law. The first amendment is part of that substantive law determination; it is brought into the litigation by defendants as a shield or defense, with the hope of placing limits on the plaintiff's state-created cause of action.

Barry Keene, however, used the first amendment as a sword. When the tables are thus turned and the first amendment is implicated not as a defense but as the substantive law giving rise to the plaintiff's claim, surely the *standing* rules ought not change. If subjective injury is sufficient to support standing when the plaintiff is defamed by *Time Magazine*,[23] it ought to be sufficient to support standing when the plaintiff is in effect defamed by the government. Therefore, the *Keene* Court's subjective/objective dichotomy was not truly a proper element of its standing analysis at all but a substantive law determination. In short, it was a judgment on the merits of the first amendment claim that the first amendment provides no shelter against mere subjective injury, at least in the factual context of Keene's lawsuit.

The Court thus forcibly channeled all of Keene's litigation hopes into the assertion that the government's labeling of these films as propaganda caused him objective injury.[24] Even so restricted, however, Keene was able to prevail by establishing an overwhelmingly persuasive record that the government's actions did objectively chill his first amendment rights. He introduced Gallup poll evidence which concluded that the charge of having exhibited political propaganda "would have a seriously adverse effect on a California State Legislature candidate's chances [for election] if this charge were raised during a campaign."[25] The Supreme Court accepted the dis-

[22] U.S. CONST. art. III, § 2; Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

[23] *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976).

[24] Meese v. Keene, 107 S. Ct. 1862, 1867-68 (1987).

[25] *Id.* at 1867 n.7.

trict court's finding that the Foreign Agents Registration Act "puts the plaintiff to the Hobsen's choice of foregoing the use of the three Canadian films for the exposition of his own views or suffering an injury to his reputation."[26] The Court further quoted with approval the assertion that the label "raises the hackles of suspicion on the part of the audience."[27]

The Court noted that Keene theoretically could have blunted this harm by providing viewers with counter information, such as the fact that one of the films had won an Oscar.[28] That information, however, would not diminish Keene's injury. The *Keene* Court cited *Lamont v. Postmaster General*,[29] in which the Court did not question a litigant's standing to challenge a statute requiring the Postmaster General to hold all "communist political propaganda" originating abroad and not release it to the addressee in the absence of a written request to the Post Office. The *Keene* Court emphasized that just as "[t]he necessity of going on the record as requesting this political literature constituted an injury to Lamont in his exercise of First Amendment rights,"[30] Keene would likewise "have to take affirmative steps at each film showing to prevent public formation of an association between 'political propaganda' and his reputation."[31] Moreover, even these measures "would be ineffective among those citizens who shun the film as 'political propaganda.' "[32]

Finally, the Court held that Keene satisfied the standing requirement that his injury be "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[33] The Court easily traced Keene's injury to the actions of the government "because the Department of Justice has placed the legitimate force of its criminal enforcement powers behind the label of 'political propaganda.' "[34]

In sum, even though the Court artificially restricted Keene's standing position by disqualifying all of his "subjective" injury, it

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[26] *Id.* at 1868 (quoting Keene v. Meese, 619 F. Supp. 1111, 1120 (E.D. Cal. 1985)).

[27] *Id.* (quoting Brief for Keene at 15 n.14, *Keene*, 619 F. Supp. 1111).

[28] *Id.*

[29] 381 U.S. 301 (1965).

[30] *Keene*, 107 S. Ct. at 1868.

[31] *Id.*

[32] *Id.* at 1868-69.

[33] *Id.* at 1869 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)). *See also* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

[34] *Keene*, 107 S. Ct. at 1869.

nevertheless found the evidence of "objective" injury persuasive. The Court's standing decision was ultimately grounded on a realistic and candid assessment of how the Foreign Agents Registration Act affected the marketplace of ideas in Keene's case. The Act resulted in objective, observable injury to Keene by diminishing his reputation or by forcing him to take affirmative steps to attempt to minimize that reputational damage. All of this injury, the Court held, was traceable to the official weight of the United States Department of Justice standing behind the opprobrious label.[35]

B. The Court's Analysis on the Merits — Words in Wonderland

When the Court turned from standing to the merits, it abandoned the view that the government's use of the propaganda label should be evaluated in terms of its practical impact on the marketplace of ideas; instead, the Court went out of its way to both avoid reading the legislative history of the Foreign Agents Registration Act and to employ a strained and bizarre analysis of the communication process. The *Keene* Court attempted to sanitize the Act's use of the term "propaganda" by transforming the statute into a neutral and innocuous form of "truth in political advertising" legislation. The Court's analysis is plausible only if American society has become credulous beyond redemption. The government, like Humpty Dumpty, would like to say, "When I use a word, it means just what I choose it to mean — neither more nor less."[36]

The Court employed an extraordinary dichotomy between the meaning of the word "propaganda," as popularly understood by the recipients of the government's speech,[37] and the intended meaning of the word when employed by the government as speaker.[38] "Political propaganda," the Court maintained, has two meanings.[39] Citing the statement in the record from NBC News Correspondent Edwin Newman, the Court conceded: "In popular parlance many people assume that propaganda is a form of slanted, misleading speech that does not merit serious attention and that proceeds from a concern for advancing the narrow interests of the speaker rather

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[35] *Id.*

[36] LEWIS CARROLL, *Through the Looking Glass*, in THE WORKS OF LEWIS CARROLL 174 (R. Green ed. 1965).

[37] The Court's standing analysis had already credited evidence on the record before it that "political propaganda" was a negative term. *See supra* text accompanying notes 13-34.

[38] *Keene*, 107 S. Ct. at 1869, 1872-73.

[39] *Id.* at 1869.

than from a devotion to the truth."[40] In addition to this "narrower, pejorative definition,"[41] the Court maintained that propaganda has a second "broad, neutral" definition that "includes advocacy materials that are completely accurate and merit the closest attention and the highest respect."[42] The Court held that the Foreign Agents Registration Act did not violate the first amendment because the latter statutory definition was neutral.[43]

The Court gave three reasons for its decision. First, unlike the scheme struck down in *Lamont v. Postmaster General*,[44] which also involved propaganda, the Court argued that the Foreign Agents Registration Act involved no "*physical detention* of the materials."[45] Congress "did not prohibit, edit, or restrain the distribution of advocacy materials in an ostensible effort to protect the public from conversion, confusion, or deceit."[46] To the contrary, the Court argued, the Act merely compelled disclosure, providing the "consumer" with *additional* information, thus enhancing first amendment values; "[i]ronically, it is the injunction entered by the District Court that withholds information from the public."[47] The Court condemned the district court's action as the type of protectionist paternalism it had struck down in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[48] which held invalid Virginia's ban on advertising of prescription drug prices by local pharmacists. This condemnation was a remarkable turnaround. The Court made it appear paternalistic *not* to force distributors to include the governmental label "propaganda" on their films.

Secondly, the Court maintained that Keene's first amendment claim was "contradicted by history."[49] The Court's treatment of the legislative history of the Act was relegated to one footnote[50] in which the Court recited the Act's antiseptic proclamation that its policy and purpose are to require

> public disclosure by persons engaging in propaganda activities and other activities for or on behalf of . . . foreign principals so

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[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* at 1870 n.14, 1873.
[44] 381 U.S. 301 (1965). *See supra* text accompanying note 29.
[45] *Keene*, 107 S. Ct. at 1871 (emphasis added).
[46] *Id.*
[47] *Id.*
[48] 425 U.S. 748 (1976).
[49] *Keene*, 107 S. Ct. at 1872.
[50] *See id.* at 1872 n.16.

> that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.[51]

The Court further quoted a House Report which referred to the "fundamental approach" of the statute as "one not of suppression or of censorship, but of publicity and disclosure."[52] To this high-minded statutory purpose the Court added its conviction that while "[t]here is a risk that a partially informed audience might believe that a film that must be registered with the Department of Justice is suspect,"[53] there "is no evidence that this suspicion—to the degree it exists—has had the effect of Government censorship."[54]

The third reason given by the Court was a more precise recasting of its first argument. Whatever negative connotations the term "political propaganda" may have in the public mind, the Court was required to defer to the term *as Congress defined it* — and Congress had defined it neutrally. "It is axiomatic," the Court argued, "that the statutory definition of the term excludes unstated meanings of that term."[55] Congress' use of the term "propaganda," the Court insisted, had "no pejorative connotation."[56] In a final flourish of strict statutory constructionism, the Court admonished: "As judges it is our duty to construe legislation as it is written, not as it might be read by a layman, or as it might be understood by someone who has not even read it."[57]

II

A CRITIQUE OF THE COURT'S ANALYSIS

A. Stigma in the Mind of the Beholder

The Supreme Court's bottom line in *Keene* may be distilled in the logic that the opprobrium most people attach to the label propaganda is not the government's fault. The government chose a word with a range of meanings, some neutral and some negative. If the public regards the label as stigmatizing, it is by choice. This echoes the reasoning in *Plessy v. Ferguson*,[58] where the Court was willing to

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[51] *Id.* (quoting 22 U.S.C. § 611 note (Policy and Purpose)).
[52] *Id.* (quoting H.R. REP. No. 1547, 77th Cong., 1st Sess. 2 (1941)).
[53] *Id.* at 1873.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] 163 U.S. 537 (1896).

accept at face value the transparent claim that if any stigma attached to separate but equal train accommodations, it was only because blacks chose to treat them that way.[59] "We consider the underlying fallacy of the plaintiff's argument," the Court stated in *Plessy*, "to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority."[60] Contrary to what every American even in 1896 surely knew to be the truth,[61] the Court then pontificated: "If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[62] The issues in *Meese v. Keene* do not, of course, approach *Plessy* in magnitude, but the method of *Plessy's* most infamous sentence is indistinguishable from the method in *Keene* and is no more convincing.

B. The Statutory Language

The core factual premise of the Court's analysis, that Congress intended to use the "neutral version" of the term propaganda, simply does not withstand scrutiny. The Court's assertion that the statutory definition of a term "excludes unstated meanings of that term"[63] is irrelevant, for all the pejorative meanings of propaganda *are* stated in the statutory definition. When examined in its complete context, the cold statutory language does not sustain the sanitized reading of the Supreme Court but seems instead to be aimed quite deliberately at subversive and political speech.[64]

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[59] *Id.* at 551.

[60] *Id.*

[61] Justice John Marshall Harlan's famous dissent in *Plessy* quite simply declared that "[e]very one knows" the real purpose of separate but equal — and, of course, he was right: everyone knew. *See id.* at 557 (Harlan, J., dissenting).

[62] *Id.* at 551.

[63] Meese v. Keene, 107 S. Ct. 1862, 1873 (1987).

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

Justice Stevens' opinion never meaningfully addressed the significance of the many emotively supercharged phrases in this statutory definition. Note that in his opinion for the court of appeals in the *Block* litigation,[65] then-Judge Antonin Scalia *did* quote from what he called the "less savory" elements of the statutory definition.[66] These elements, he said, "to the extent they are not redundant, are of course artificial."[67] Elaborating, he claimed that it "could hardly be contended that classification of speech as 'political propaganda' raises these specific unpleasant images in the public mind."[68] This remarkable statement placed the court in the presumptuous position of selectively ignoring parts of the congressional definition of "political propaganda" on the grounds that the court considered them artificial.

Alternatively, the Supreme Court's analysis of the statutory language was essentially nonexistent. The Court conspicuously failed to mention any of the statute's litany of semantically loaded phrases, such as "prevail upon, indoctrinate, convert, induce" and "promote in the United States racial, religious, or social dissensions."[69] At the very *least*, the plaintiffs' claim that the statute was aimed at subversive political speech was sufficiently legitimate to require a meaningful inquiry beneath the Act's cold language, into the legislative history. Scrutiny of the legislative history would prove embarrassing, however, for it would have uncovered a congressional preoccupation with speech perceived as politically undesirable. The Supreme Court thus disingenuously read the literal statutory language to obviate conducting a thorough examination of the legislative history. In short, it misread the statute so as to avoid the necessity of misreading its history.

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22 U.S.C. § 611(j) (1982).

[65] Block v. Meese, 793 F.2d 1303 (D.C. Cir. 1986). *See also supra* note 5.

[66] The "less savory" ends are promoting " 'racial, religious, or social dissensions,' and communication 'which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence.' "

Id. at 1311 n.2 (quoting 22 U.S.C. § 611(j)).

[67] Block v. Meese, 793 F.2d at 1311 n.2.

[68] *Id.*

[69] 22 U.S.C. § 611(j). *See supra* note 64 and accompanying text.

C. The Legislative History

The *Keene* Court found "unpersuasive, indeed, untenable"[70] the lower court's interpretation of the statute's "political propaganda" language as carrying an "unsavory connotation."[71] The district court found that the statutory scheme constituted "a conscious attempt to place a whole category of materials beyond the pale of legitimate discourse."[72] Although it rejected the lower court's reading of the legislative history of the Foreign Agents Registration Act, which merely consisted of a citation to the Act's policy statement and one House Report, the Supreme Court engaged in no systematic review of that history in its opinion. The Court's failure to explore the legislative history is particularly troubling because the heart of the Court's ultimate first amendment analysis drives a wedge between the word "propaganda," as popularly understood, and the supposedly neutral meaning employed by the statute.

The legislative history, had it been satisfactorily examined, would have exposed the Act as being in a long line of xenophobic excess. Legislation addressing threatening "foreign" or "alien" speech has an ugly history in America, dating as far back as the Alien and Sedition Acts of 1798.[73] The Foreign Agents Registration Act is part of that legacy, and from the very beginning of the congressional concern with propaganda, Congress made little effort to disguise its preoccupation with specific ideological viewpoints. Congressional concern with propaganda grew out of the experiences of World War I and the Espionage and Sedition Acts of 1917 and 1918.[74] The Senate first investigated German propaganda in February 1919. As Communist propaganda became the focus of inquiry in the 1930s,[75] Representative Hamilton Fish rebutted reservations of Senator LaGuardia with the high-minded assurance that "[i]t is not the purpose of this resolution to interfere with any group except

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[70] Meese v. Keene, 107 S. Ct. 1862, 1870 (1987).

[71] *Id.* at 1870 (quoting Keene v. Meese, 619 F. Supp. 1111, 1125 (E.D. Cal. 1985)).

[72] Keene v. Meese, 619 F. Supp. at 1126. The district court also stated, "In the present case, the defendants have proferred no justification compelling or otherwise for the use of the phrase 'political propaganda.' " *Id.* at 1125.

[73] 1 Stat. 570, 596 (1798). *See generally* J. SMITH, FREEDOM'S FETTERS — THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1956).

[74] Espionage Act of June 15, 1917, ch. 30, 40 Stat. 217; Sedition Act of May 16, 1918, ch. 75, 40 Stat. 553.

[75] *See* H.R. REP. NO. 2290, 71st Cong., 3d Sess. (1930); M. DIES, MARTIN DIES' STORY 57 (1963).

the communists in the United States."[76]

As the 1930s progressed, Congress became increasingly concerned with the awesome propaganda success of the Nazis in Germany and the exportation of that propaganda into the United States. Under the direction of Representative Samuel Dickstein, the House Immigration Committee in 1933 conducted an inquiry into Nazi propaganda, German organizations, and anti-Semitic activities.[77] In 1934 the House passed a resolution for further investigation of Nazi propaganda and other activities in the United States.[78] After a series of hearings, the House Committee issued reports recommending compulsory registration of foreign agents distributing propaganda in the United States.[79]

After some success and considerable publicity, Representative Dickstein introduced another resolution in January 1937 to investigate all organizations diffusing "un-American propaganda."[80] Even Representative Fish compared this broadly expanded measure, which could be used to punish political criticism from American citizens, to the Alien and Sedition Acts, and the motion was eventually tabled.[81]

A resolution introduced by Representative Martin Dies in April 1937, however, did pass the House. The resolution established the Special Committee on Un-American Activities, with the mandate to investigate "the extent, character, and object of un-American propaganda activities in the United States" and "the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by the Constitution."[82]

These congressional efforts in 1937 eventually resulted in the For-

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[76] W. GOODMAN, THE COMMITTEE: THE EXTRAORDINARY CAREER OF THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES 6 (1968).

[77] *Id.* at 9.

[78] *See* H.R. Res. 198, 73d Cong., 2d Sess., 78 CONG. REC. 13-14 (1934); H.R. REP. NO. 153, 74th Cong., 1st Sess. (1935).

[79] *See* H.R. REP. No. 200, 74th Cong., 1st Sess. (1935); H.R. REP. NO. 153, 74th Cong., 1st Sess. (1935); W. GOODMAN, *supra* note 76, at 10. House Report 153, *supra*, was originally entitled *Investigation of Nazi and Other Propaganda* and "evinced a particular concern with violence and of course with foreign control." Attorney General v. Irish People, Inc., 684 F.2d 928, 938-39 (D.C. Cir. 1982).

[80] *See* W. GOODMAN, *supra* note 76, at 14.

[81] *Id.*

[82] *Id.* at 16 n.5.

eign Agents Registration Act of 1938.[83] Congressional intent with regard to the definition of the critical statutory term "propaganda" is revealed in a 1937 House Report stating that propaganda violates "the democratic basis of our own American institutions of government"[84] and that registration

> will publicize the nature of subversive or other similar activities of such foreign propagandists so that the American people will know those who are engaged in this country by foreign agencies to spread doctrines alien to our democratic form of government, or propaganda for the purpose of influencing American public opinion on a political question.[85]

In perhaps the most revealing statement of congressional purpose, the report continued: "We believe the spotlight of *pitiless publicity* will serve as a deterrent to the spread of *pernicious propaganda*. We feel that our people are entitled to know the sources of any such efforts."[86]

The first Foreign Agents Registration Act, the forerunner of the current statute, was enacted on June 8, 1938.[87] The Japanese attack on Pearl Harbor and America's entry into World War II resulted in amendments to the Act in 1941 and 1942 which further defined "political propaganda," required that materials classified as propaganda be labeled to disclose the source of origin, and required that copies be provided to the Attorney General rather than the Secretary of State.[88] The purported purpose of the amendments was to inform the public and government of the source of the

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[83] 22 U.S.C. §§ 611-21 (as amended).

[84] H.R. REP. No. 1381, 75th Cong., 1st Sess. (1937).

[85] *Id.*

[86] *Id.* (emphasis added). *See also* Keene v. Smith, 569 F. Supp. 1513, 1521 (E.D. Cal. 1983). Justice Blackmun's *Keene* dissent referred to the House Report, stating:

> [T]he legislative history of the Act indicates that Congress fully intended to discourage communications by foreign agents. The Act grew out of the investigations of the House Un-American Activities Committee, formed in 1934 to investigate Nazi propaganda activities in the United States and the dissemination of subversive propaganda controlled by foreign countries attacking the American form of government. The Act mandated disclosure, not direct censorship, but the underlying goal was to control the spread of propaganda by foreign agents. This goal was stated unambiguously by the House Committee on the Judiciary: 'We believe that the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda.'

Meese v. Keene, 107 S. Ct. at 1874 (Blackmun, J., dissenting).

[87] Act of June 8, 1938, ch. 327, 52 Stat. 631 (1938).

[88] Act of April 29, 1942, ch. 263, 56 Stat. 248 (1942). *See also* H.R. REP. No. 1547, 77th Cong., 1st Sess. (1941); *Amending Act Requiring Registration of Foreign Agents: Hearings on H.R. 6045 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 77th Cong., 1st Sess. 17-18 (1941); S. REP. No. 913, 77th Cong., 1st Sess. (1941).

"propaganda."[89]

This antiseptic and self-serving declaration of statutory purpose is misleading, especially when viewed in light of the legislative history. Constitutional considerations aside, such an "informational" purpose does not require the heavy-handed device of labeling the material "political propaganda."

D. The Spurious Requirement of Illicit First Amendment Intent

The dichotomy between the supposedly neutral statutory definition of propaganda and the popular understanding of the term is not only historically untenable, it is also legally unpersuasive. Unlike claims under the equal protection clause, which must be predicated upon discriminatory governmental purpose,[90] first amendment violations are not restricted to actions grounded in impermissible intent.[91] If a statute's practical effect discourages protected speech, it violates the first amendment.[92] First amendment violations may exist without "evidence of an improper censorial motive."[93] Indeed, in a case decided only the week before *Keene*, the Supreme Court explicitly reaffirmed the principle that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment."[94]

The dichotomy employed by the Supreme Court in *Keene* is inconsistent with the traditional legal treatment of the communication process. The best repository of legal tradition in analyzing the relationship between the intent of the speaker, the dictionary meaning of the speech, and the recipient's understanding of the speech is

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[89] Enacted nine days after the Japanese attack on Pearl Harbor, the new legislation proclaimed,

> It is hereby declared to be the policy and purpose of this Act to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities for or on behalf of foreign governments . . . so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in light of their associations and activities.

Act of April 29, 1942, 56 Stat. 249 (1942).

[90] *See, e.g.*, McCleskey v. Kemp, 107 S. Ct. 1756, 1766-67 (1987); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-66 (1977).

[91] *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592 (1983).

[92] Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 107 S. Ct. 616, 626 (1986) (plurality opinion).

[93] Arkansas Writers' Project, Inc. v. Ragland, 107 S. Ct. 1722, 1727 (1987).

[94] *Id.* (quoting *Minneapolis Star*, 460 U.S. at 579-80).

the law of defamation. When language has a range of possible "meanings," some of which are defamatory and some of which are innocent, the traditional rule in the law of defamation is that the words are to be given a "reasonable construction," defined as the manner in which the language would be understood by a reasonable recipient of the communication.[95]

Defamation has always been recipient-oriented, emphasizing the popular usages of language.[96] Defamatory meaning is not to be determined from the naked words but in light of their context.[97] "The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands it was intended to express."[98] The Supreme Court's syllogism turned this rule on its head. The Court argued that although propaganda has some meanings which are neutral and some sinister and although it is popularly used and understood in its pejorative sense, when the government uses the word, it is somehow presumed to be "clean."[99] This is not the way the legal system traditionally views the communication process, nor is it the way communication works in practice. Such a presumption of "cleanliness" also lacks credibility in terms of the legislative history, which unmistakenly portrays the congressional purpose as designed to attack "pernicious propaganda."[100]

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[95] *See* RESTATEMENT (SECOND) OF TORTS § 563 (1976) ("The meaning of a communication is that which the recipient correctly, or mistakenly, but reasonably, understands that it was intended to express."); R. SMOLLA, *supra* note 17, § 4.06[1]. Illinois is the only American jurisdiction that does not follow this "reasonable construction rule." *See* Chapski v. Copley Press, Inc., 92 Ill. 2d 344, 442 N.E.2d 195, 199 (1982). The Supreme Court of Illinois held that a

> written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if, as so construed, the statement may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff it cannot be actionable *per se*.

Id. See generally Malone & Smolla, *The Future of Defamation in Illinois After* Colson v. Steig *and* Chapski v. Copley Press, Inc., 32 DEPAUL L. REV. 219, 274-97 (1983).

[96] R. SMOLLA, *supra* note 17, § 4.02[1]; Franklin & Bussell, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 828 (1984).

[97] *See, e.g.*, Greenbelt Coop. Ass'n v. Bresler, 398 U.S. 6, 13-14 (1970); Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc); Sharon v. Time, Inc., 575 F. Supp. 1162, 1172 (S.D.N.Y. 1983); Thomson v. Cash, 119 N.H. 371, 373-74, 402 A.2d 651, 653 (1979); James v. Gannett Co., 40 N.Y.2d 415, 419, 353 N.E.2d 834, 837-38, 386 N.Y.S.2d 871, 874 (1976); Westby v. Madison Newspapers, Inc., 81 Wis. 2d 1, 3, 259 N.W.2d 691, 693 (1977).

[98] RESTATEMENT (SECOND) OF TORTS § 563 (1977).

[99] *See* Meese v. Keene, 107 S. Ct. 1862, 1869-73 (1987).

[100] *See* H.R. REP. NO. 1381, 75th Cong., 1st Sess. (1937). *See supra* text accompanying notes 75-89.

E. The Court's Failure to Perceive Content Discrimination Inherent in the Act

The Supreme Court's effort to neutralize the term "political propaganda" ignores the heavy presumption against content-based speech regulation.[101] "[A]bove 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."[102] The Court's misperception of the content-based discrimination issue is illustrated by both the practical operation of the Foreign Agents Registration Act and the events surrounding the *Keene* litigation.

1. Applying the Act

For the Act to work at all, the term "political propaganda" must have *some* meaning. A Department of Justice official, "Chief of the Registration Unit of the Internal Security Section of the Criminal Division," examines material and decides what is and what is not "political propaganda."[103] Only a content-sensitive inquiry will tell the governmental classifier whether the speech is propaganda or nonpropaganda.[104]

Such governmental scrutiny of content, however, is "entirely incompatible" with the first amendment.[105] The statutory scheme thus does not qualify for the lower level of first amendment scrutiny applicable to truly content-neutral regulation, which merely dictates the time, place, or manner of dissemination.[106] The fundamental irony of the Supreme Court's position was that as the Court labored to neutralize the term "propaganda" by equating it with "advocacy," it increasingly left itself open to criticism that an alternative label, such as "advocacy," would have accomplished the con-

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[101] *See, e.g.*, Arkansas Writers' Project, Inc. v. Ragland, 107 S. Ct. 1722, 1727-28 (1987); Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984); FCC v. League of Women Voters, 468 U.S. 364, 383-84 (1984); Carey v. Brown, 447 U.S. 455, 462-63 (1980); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

[102] *Mosley*, 408 U.S. at 95 (1972).

[103] *See Keene*, 107 S. Ct. at 864 n.1.

[104] FCC v. League of Women Voters, 468 U.S. 364, 383 (1984) (enforcement of Public Broadcasting Amendments Act forbidding noncommercial, educational radio stations, receiving funds from the corporation for Public Broadcasting, from engaging in editorializing that would require "enforcement authorities [to] necessarily examine the content of the message that is conveyed").

[105] Arkansas Writers' Project, Inc. v. Ragland, 107 S. Ct. 1722, 1728 (1987).

[106] *See, e.g.*, United States v. Grace, 461 U.S. 171, 177 (1983); Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983).

gressional purpose equally well without the opprobrium popularly associated with the term "propaganda."

2. *Response to the Application of the Act*

To appreciate how badly the Court misperceived the content-based discrimination issue, it is useful to examine in some detail the events that surrounded the Canadian film litigation. Those events vividly depict the intrusive impact on the free operation of the marketplace of ideas of a governmental decision to label speech as propaganda. None of the players in the *Keene* litigation perceived the labeling as neutral — not the Canadians, not environmental groups, not American film critics or editorial writers, and, if they were candid, not the decisionmakers within the Justice Department itself.

In early July 1982, the NFBC submitted a list of sixty-two films which it had distributed in the United States from January 1, 1982, until June 30, 1982, to the Department of Justice, as required by the Act. In September 1982, the Department of Justice requested review copies of five of those sixty-two films. On January 13, 1983, the Justice Department, as previously described,[107] ordered that the three NFBC films implicated in the *Keene* litigation be labeled political propaganda and invoked the Act's other disclosure requirements.[108]

When press accounts of the action appeared in late February 1983, the public reaction was immediate and negative. Mitchell Block, president of the Direct Cinema Company, the sole United States distributor of *If You Love This Planet*, called the decision "scary" and "chilling."[109] William Litwack, head of distribution for NFBC, said it was "regrettable, insulting, and shameful."[110] The New York office of the American Civil Liberties Union called the action "blatantly unconstitutional" and pledged to bring suit on behalf of the distributors, as it eventually did.[111]

The Department of Justice tried to minimize the significance of the decision. Spokesman John Russell denied that it was "a move to edit or stifle" the National Film Board of Canada, stating that "he was told the action was 'not unique' " but conceded that he had

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[107] *See supra* text accompanying notes 1-3.

[108] *See* Caulfield, *supra* note 2, at 27, col. 3.

[109] Peterson, *U.S. Labels Three Films Propaganda*, The Washington Post, Feb. 25, 1983, at A6, col. 1.

[110] Caulfield, *supra* note 2, at 27, col. 3.

[111] Peterson, *Canada Asks State Department to Reverse Decision on Three Films*, The Washington Post, Feb. 26, 1983, at A2, col. 2.

"never heard of its being done before."[112] Another Justice Department official explained that of the hundreds of foreign films reported to the Department annually, only about twenty-five are requested for review, and only about half of those are determined by the Department to be political propaganda.[113] That determination is based on "common sense."[114] Subsequently, a Justice Department press release described the move to label the Canadian films political propaganda as a "routine" decision "made solely by career attorneys" who may or may not "[possess] any special qualifications to judge the propaganda content of films, writings or other materials."[115]

The Department's initial response failed to quell criticism of the labeling decision, and the Department later elaborated its position in a letter to selected members of Congress and the news media. "Contrary to the uninformed hysteria which has developed in some quarters," the letter claimed, "the Justice Department is not censoring any film in this country. Nor is it trying to curtail the dissemination of any movie."[116] Rather, the Department analogized its labeling decision to truth in packaging laws.[117] Also, in an effort to disclaim the uniqueness of the decision on the three Canadian films, the Department identified twenty-three other films that had been classified as foreign political propaganda during the Reagan Administration. These films included *Crisis in Rain*, another film by the NFBC, one film from West Germany, three films from South Korea, four from South Africa, six from Japan, and eight from Israel.[118] While all of these films had been distributed by countries

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[112] Peterson, *supra* note 109, at A1, col. 1.

[113] McFadden, *3 Canadian Films Called 'Propaganda' by U.S.*, The New York Times, Feb. 25, 1983, at C4, col. 5.

[114] Peterson, *supra* note 111, at A2, col. 4. The official went on to state that the Department of Justice reviews "the material to determine the purpose of the dissemination and what audience was being sought." *Id.*

[115] *Id.*

[116] Molotsky, *U.S. Identifies 23 Films Labeled as Propaganda*, The New York Times, Mar. 5, 1983, at 14, col. 6.

[117] *Id.* at 14, col. 6. The letter maintained that the

> purpose of the label is to notify viewers that the material is being disseminated by a foreign government. It does not comment on the positions adopted by the film. The label is disclosure, not unlike the disclosures that are required on almost all political advertisements or commercials, or on packages sold in supermarkets complying with 'truth in packaging' laws. . . .

Id.

[118] *Id.* at col. 5. Among the Israeli films classified as political propaganda was *A Conversation with Golda Meir*. When informed that this film had been among those classified as foreign political propaganda, Ehud Gol, Counselor for Information at the

which the Reagan Administration considered to be allied with the national interest, the Department later added *Ballad of a Soldier*, distributed by Sovexportfilm, a registered agent of the Soviet Union.[119]

The Canadian government asked for a clarification or reversal of the Justice Department decision[120] to no avail.[121] A spokesperson for the Canadian Film Board, underscoring the potential chilling effect of the decision, noted that Canada had withdrawn a 1974 film from United States distribution when the Nixon Administration had classified it as political propaganda.[122]

Acid Rain: Requiem of Recovery? had been circulated in the United States for nine months without the required label when the Justice Department decision first appeared in the press. Environmental groups were outspoken in their reaction to the decision, noting that it would create a chilling effect on debate over acid rain and that it may have been a conscious effort to "retard" public understanding of the issue.[123] Editorial opinion in the national press was

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Israeli Consulate General in New York, called the decision "a joke." Molotsky, *supra* note 116, at 14, col. 5. Canadian government officials, however, were clearly not amused, describing the Department's decision as "a throwback to the McCarthy era," Peterson, *supra* note 111, at A1, col. 1, and "bizarre and petty," *U.S. Denounced for Labeling 3 Canadian Films as 'Propaganda'*, Chicago Tribune, Feb. 26, 1983, at 1-2 (quoting Canadian Environmental Minister, John Roberts). "It sounds like something you would expect from the Soviet Union, not the United States," said the Canadian Environmental Minister. "The action is an extraordinary interference with freedom of speech." *Id.* Canadian Ambassador Allen Gotlieb said, "[T]his is a democracy, and their laws are their laws. . . . But we don't understand how films of that sort, which are after all produced in an equally democratic country, can be viewed as political propaganda. We just don't understand it." *Id.* at 1.

[119] *See* Meese v. Keene, 107 S. Ct. 1862, 1872 n.17 (1987) (citing Second Declaration of Joseph E. Clarkson, Exhibit B, App. 60-63).

[120] Peterson, *supra* note 111, at A2, col. 1.

[121] Mr. D. Lowell Jensen, Assistant Attorney General and head of the Criminal Justice Department of the Department of Justice, asked for copies of the films in response to the Canadian government's request, reviewed them over the weekend, and upheld the decision which classified them as propaganda. *See* McGrory, *Justice Department's Boos Make Film Subjects Boffo Box Office*, The Washington Post, Mar. 1, 1983, at A3, col. 2.

[122] Caulfield, *supra* note 2, at 27, cols. 4-5. The spokesperson for the NFBC was Ms. Sally Bochner; the film involved was *That Hoodlum Gang*, which examined Canadian government response to political protest.

[123] For example, Robert Rose, head of the National Clean Air Coalition, stated that "[t]he chilling effect is obvious" and called the Justice Department "film police," predicting that "the effect will be to deny American voters one of the few opportunities to learn about acid rain and make an informed judgment." McFadden, *supra* note 113, at C4, col. 4. According to Rose,

> [t]he Reagan Administration has a conscious policy to retard public understanding of acid rain and the need to control acid rain. If this is part of that

also uniformly adverse to the Justice Department action against the Canadian films, particularly in reference to *Acid Rain: Requiem or Recovery?*[124] *The New York Times*, for example, stated that the Justice Department classification was more than a neutral procedural action; "[i]t's official action to debase the films."[125] Moreover, the *Times*' Anthony Lewis editorialized that labeling the films propaganda "reflect[ed] a general and dangerous characteristic of the Reagan Administration: a fear of open debate and information, a fear of freedom."[126]

Congressional reaction was equally negative. Senator Edward Kennedy called the propaganda classification an "inexcusable action."[127] Representative Jim Leach, in a speech before the House of Representatives, said the Justice Department had committed an "egregious insult" to Canadians and Americans, and he urged President Reagan and Attorney General William French Smith

> to reverse this childish decision without delay. It may be too extreme to label this minor league act of censorship a harbinger of McCarthyism, but it sends a chilling message to those Americans deeply concerned about environmental issues in general and about the ultimate environmental issue — the survival of the planet.[128]

The timing of the Justice Department's action placed the State Department in an embarrassing position. Earlier in the week of the decision, Secretary of State George Schultz announced "Project Democracy," an $85 million overseas publication and information campaign which included $850,000 for a magazine entitled *Communications Impact* to "champion free communications."[129]

> policy, it goes to the heart of a fundamental American value — the right of the people to know about the issues which affect their lives.

Id.

[124] Mary McGrory wrote that *Acid Rain* was a "tactful, neutral, inoffensive presentation" and that the narration was in a "totally unemotional voice." McGrory, *supra* note 121, at A3, col. 5. McGrory maintained that the

> Justice Department wizards figured out that President Reagan's principal political problems are the scandal at EPA and the nuclear freeze movement, and reasoned from that that the thing to do was to keep quiet about them. So they have said that it is un-American to be against nuclear war and acid rain.

Id.

[125] *Film Ruckus, in Slow Motion*, The New York Times, Mar. 6, 1983, at 18E, col. 2.

[126] Lewis, *Afraid of Freedom*, The New York Times, Mar. 3, 1983, at A27, col. 1.

[127] Peterson, *supra* note 111, at A2, col. 3.

[128] *U.S. Denounced for Labeling 3 Canadian Films as 'Propaganda'*, Chicago Tribune, Feb. 26, 1983, at 2.

[129] Oberdorfer, *Lawmakers Voice Skepticism on U.S. 'Project Democracy'*, The Washington Post, Feb. 24, 1983, at A1, col. 1, A26, col. 1.

When asked about the Justice Department's recent action against the Canadian films, Schultz said, "Obviously we must stand always for the principles of freedom of expression. But where that leads you in this particular case, I'm not ready to say."[130] Charles Wick, Director of the United States Information Agency, however, was more candid, stating that he did not think the propaganda determination was a "credible decision," and he urged Congress to change the law.[131]

The State Department further exacerbated the controversy, however, by denying a visa to the widow of Salvador Allende. Ms. Allende had been invited by the Catholic archdiocese of San Francisco, Stanford University, and the Northern California Ecumenical Council to speak on human rights issues, but the State Department determined that her speeches would be "prejudicial to U.S. interests" because she was active in the World Peace Council.[132] Representative Fortney H. (Pete) Stark, Jr., responded, "This is the damndest thing I've ever heard. Last week we were afraid of Canadians and this week we're afraid of widows. I'm beginning to believe that the Reagan administration thinks it cannot survive criticism or free discussion of important issues."[133]

3. *The Impact on Free Speech*

These events graphically reveal the bankruptcy of the Supreme Court's refusal to recognize the propaganda label as content-based infringement of free speech. Indeed, the statute's concern with

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[130] Peterson, *supra* note 111, at A2, col. 2.

[131] *Film Ruckus, in Slow Motion*, *supra* note 125, at 18E, col. 2.

[132] Tyler, *U.S. Denies Allende Widow Visa for Speech*, The Washington Post, Mar. 4, 1983, at A24, col. 3.

[133] *Id.* Ironically, the Justice Department's labeling of the films skewed the marketplace of ideas in ways not contemplated by the Department, bringing more attention to the films than they might otherwise have received and galvanizing support for their environmental messages. The film *Acid Rain: Requiem or Recovery?* was shown on Capitol Hill, at League of Women Voter's meetings, and in public schools. Peterson, *supra* note 109, at A6, col. 1. All three films were viewed by the Senate Environment and Public Works Committee in the Dirksen Office Building; Senator Kennedy announced plans to show it to his colleagues at the next meeting of the Senate Judiciary Committee; and Representative Edward J. Markey made arrangements to have the films shown on the congressional close-circuit system which has monitors in all member's offices. Peterson, *supra* note 111, at A2, cols. 2-3. Certainly attendance was increased by the action. The Biograph Theatre in Georgetown scheduled four special showings of *If You Love This Planet*, and each showing played to a full house. Since the required label was not attached to the copy shown by the Biograph, the warning was read before each showing and posted at the concession stand. Molotsky, *supra* note 116, at 14, col. 6.

political propaganda focuses on that part of the speech spectrum that has always been regarded as the core of first amendment protection, that is, speech concerned with political and social controversies.[134] One of the most important first amendment doctrines ever developed to safeguard free political expression is that statutes may not grant wide administrative discretion to officials charged with implementing them precisely because of the fear that, consciously or unconsciously, political bias will affect the official's decision.[135] Yet, the events surrounding the labeling portray a senior Justice Department official in an ideologically zealous administration taking films on acid rain and nuclear war home over the weekend to confirm through his "common sense" that they satisfy the definition of "political propaganda."[136]

The Supreme Court's approach to the Foreign Agents Registration Act disregarded one of the central tenants of statutory construction in the first amendment context. When statutes implicate speech interests on the basis of content, such statutes must be precisely tailored to effectuate a compelling congressional purpose so as to avoid the first amendment proscription against overly broad regulation.[137] Even when a statutory purpose is legitimate, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved,"[138] and thus the regulation must be drawn with "narrow specificity."[139] By allowing Department of Justice officials wide discretion to determine what is or is not propaganda, the Supreme Court ignored this fundamental canon, giving the government almost carte blanche ability to regulate foreign speech based on its content.

F. An Empirical Critique

To assess the plausibility of the Court's assumptions about the term "propaganda," the authors undertook an empirical experiment. To measure the popular connotations of the term, the authors prepared and administered a semantic differential questionnaire which used a seven-point Likert Scale to measure twenty-five perceptive dimensions of the word "propaganda." The

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[134] *See, e.g.*, Brown v. Hartlage, 456 U.S. 45, 52-53 (1982); Buckley v. Valeo, 424 U.S. 1, 14 (1976).

[135] *See, e.g.*, Kunz v. New York, 340 U.S. 290, 293 (1951).

[136] *See supra* note 121 and accompanying text.

[137] *See* Cantwell v. Connecticut, 310 U.S. 296, 305, 306-07 (1940).

[138] Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[139] NAACP v. Button, 371 U.S. 415, 433 (1963).

subjects consisted of 125 undergraduate students at the University of Arkansas who voluntarily participated in the study. The subjects ranged in age from 18 to 38, attended high school in twenty-two different states, and represented thirty different academic majors. Sixty-seven (53.6%) of the subjects were female, and fifty-eight (46.4%) were male. The results of this portion of the study are displayed below in Table One.

Table One

DESCRIPTOR 1/7	MEAN	STANDARD DEVIATION
Passive/Active	5.34	1.357
Weak/Strong	5.33	1.349
Un-American/American	4.45	1.692
Illegal/Legal	4.30	1.514
Illogical/Logical	4.26	1.373
Unbelievable/Believable	4.23	1.607
Irrational/Rational	4.07	1.302
Ignorant/Informed	4.01	1.329
Communist/Capitalist	3.77	1.602
Hidden/Obvious	3.72	1.522
Subversive/Patriotic	3.68	1.406
Wrong/Right	3.60	1.150
Harmful/Helpful	3.60	1.231
False/True	3.55	1.286
Bad/Good	3.54	1.235
Undesirable/Desirable	3.53	1.423
Degrading/Inspirational	3.50	1.354
Confusing/Clear	3.49	1.377
Unfair/Fair	3.36	1.334
Unjust/Just	3.32	1.168
Boring/Interesting	3.22	1.349
Dishonest/Honest	3.05	1.190
Impure/Pure	2.98	1.055
Emotional/Factual	2.90	1.505
Biased/Balanced	2.51	1.463

As shown in Table One, the term "propaganda" is not generally perceived as a neutral word. Since a scale of 4.00 represented a neutral point between semantic poles, the dotted line above indicates the point in which attributed meaning shifted from the term on the right to the term on the left in the selected word pairs. The subjects in this study thus reported their perceptions of propaganda to connotatively include eight positive terms and seventeen negative

terms. The positive connotations included indications that the word "propaganda" was thought to be active, strong, American, legal, logical, believable, rational, and informed. The negative connotations of the term included perceptions that propaganda was associated with the adjectives Communist, hidden, subversive, wrong, harmful, false, bad, undesirable, degrading, confusing, unfair, unjust, boring, dishonest, impure, emotional, and biased. While this data suggests that members of the public assign numerous connotative properties to the word "propaganda," the more numerous adverse assumptions suggest that the term does have a generally negative meaning for the public, a confirmation of the "cultural evidence" portrayed in the events surrounding the *Keene* litigation.

III

THE SUBLIMINAL MESSAGE OF *MEESE V. KEENE*: YOUR "PROPAGANDA" IS OUR "INFORMATION"

A. The United States as Propagandist

When the Court's position in *Keene* is replayed, it is possible to discern an argument that is stated largely between the lines. The Court essentially saw the propaganda label not as a governmental restriction on the speech of private citizens but as an exercise by the government of its *own* right to free speech. To fully appreciate the importance of this theme in the Supreme Court's opinion, one should read it in conjunction with the opinion of Antonin Scalia in the District of Columbia Court of Appeals, in the parallel litigation over the three films initiated in Washington, D.C., by Mitchell Block.[140]

Perhaps aware of the transparent weaknesses in the Court's attempt to neutralize the term "propaganda" in *Block*, Judge Scalia's defense of the Act essentially threw in the towel on neutrality. "We know of no case in which the first amendment has been held to be implicated by governmental action consisting of no more than governmental criticism of the speech's content."[141] According to Antonin Scalia, the government is not required to remain mute; it may enter the political arena and take stands on controversial issues.[142] The classification and labeling of these films as propaganda

[140] Block v. Meese, 793 F.2d 1303 (D.C. Cir. 1986), *see supra* note 5. In the context of his *Block* opinion, Justice Scalia is referred to in the text as "Judge."

[141] *Id.* at 1313.

[142] *Id.*

in his view did not constitute regulation of speech but mere participation by the government as an independent speaker. The "uninhibited marketplace of ideas," Judge Scalia argued, is not "one in which the government's wares cannot be advertised."[143]

The Supreme Court in *Keene* made the same argument, in slightly different terminology, by claiming that the Act actually enhances first amendment values by giving the public more information about the films.[144] As previously discussed, the Supreme Court went so far as to state that it was the lower court's injunction against the operation of the Act which suppressed speech by censoring the message that the films were propaganda.[145] This was an implicit restatement of Judge Scalia's argument, for the only speech that the injunction *could* have suppressed was the *government's* speech. The Act was thus made to appear, not as censorship, but as a device for adding one more voice to the market, that of the United States government.

This is a complete shift in argumentative tack. The claim is that the government has the power to propagandize on its own behalf and that it may effectuate its own propaganda efforts by forcing other speakers to label their speech as propaganda. The *Block* court's statement that it could find no cases restricting governmental speech, of course, by no means resolves the question. As Professors Nowak and Rotunda observed, the absence of case law on government propaganda "may be considered a strength rather than a weakness of the democratic system, for there has not been a clear need for the Court to establish precise limits on propaganda efforts by government agencies in the United States."[146] Although there have been sporadic court rulings limiting governmental speech[147] and scholarly commentary arguing that limits do exist,[148] the area

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[143] *Id.*

[144] Meese v. Keene, 107 S. Ct. 1862, 1871-72 (1987).

[145] *Id.* at 1871. *See supra* text accompanying notes 46-48.

[146] J. NOWAK, R. ROTUNDA & N. YOUNG, CONSTITUTIONAL LAW, § 16.11, at 849 (1986) [hereinafter cited as NOWAK & YOUNG].

[147] *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364 (1984) (government may not restrict broadcast speech on publicly financed television and radio station); Anderson v. City of Boston, 376 Mass. 178, 380 N.E.2d 628 (1978) (public funds may not be used to influence result of proposed referendum).

[148] *See, e.g.*, NOWAK & YOUNG, *supra* note 146, § 16.11; Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979); Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 LAW & CONTEMP. PROBS. 530, 531-536 (1966); Ziegler, *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C.L. REV. 578, 600-04 (1980).

remains largely uncharted.

B. The United States as Speech Regulator

The distinction between the government as regulator and the government as participant is recognized in constitutional law. In commerce clause analysis, for example, it is an established rule that a state may not regulate commerce so as to prohibit goods manufactured within the state from being sold outside the state.[149] If the state owns the factory and manufactures the goods as part of a state-owned business, however, the state is not treated as a market regulator but as a market participant, and in that capacity, it may refuse to sell the goods to out-of-state buyers.[150] By analogy, the same distinction might apply in the speech context: the government enjoys greater latitude as a participant in the speech market than as a regulator of that market.

The analogy to the commerce clause cases may seem far-fetched, but the comparison is apt. States are exempted from normal commerce clause restrictions when they act as market participants because, as mere participants, they do not impede private trade in the national marketplace.[151]

The instant that a state begins to exert influences on the market that reach beyond whatever force it naturally commands as a competitor, however, the Court has stripped it of its commerce clause immunity.[152] In the marketplace, participants exert reciprocal restraints on each other through pressures created by competitive pricing, quality differences, advertising, or consumer loyalties. However, when the state affects the behavior of actors in the market in ways that no other buyer or seller may, the natural reciprocity of the free market no longer exists. In essence, the state requires conduct of other actors in the market that those actors have no power to require of the state. When a state ceases to merely deal for its own account and begins to police the deals of others, it acts as a regulator and is thus subject to the limitations of the commerce clause.

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[149] *See, e.g.*, H.P. Hood & Sons v. DuMond, 336 U.S. 525, 535 (1949).

[150] Reeves, Inc. v. Stake, 447 U.S. 429, 439 (1980).

[151] *Id.* at 437. Further, "[t]here is no constitutional plan to limit the ability of the states themselves to operate freely in the free market." *Id.*

[152] *See, e.g.*, South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 97-98 (1984). In *South-Central*, the State of Alaska attempted to contractually require purchasers of state timber to use in-state processors. The Court invalidated such a restriction of post-purchase activity of the purchaser. *Id.*

The touchstone of the regulator/participant dichotomy is whether the government is merely behaving with the powers of a private actor or whether it is exercising functions only within the capacity or authority of the government.[153] Anyone may criticize a film; anyone may label a film "political propaganda." If George Schultz or Edwin Meese had criticized these films in an official governmental press release, or in a public speech, or in an article printed in the *New York Times*, then the government would be acting in a manner largely indistinguishable from any other participant in the marketplace of ideas. Although it is not inconceivable that such "participatory" activity might at some point raise first amendment objections (an issue impossible to confidently resolve in the absence of case law), such speech arguably is less constitutionally restricted than outright regulation.

In administering the Foreign Agents Registration Act's requirements, however, the government is plainly not operating as a pure participant but as a regulator. The government functions in a manner foreclosed to other participants: *it imposes classification, labeling, and disclosure requirements directly upon the speech of other participants.* No other movie producer, distributor, or exhibitor has any corresponding power to label other competing speech. Woody Allen has no power to impose labels or disclosure lists on the films of Steven Speilberg. Conversely, the *Keene* decision may so empower the government. When the movie *Missing* was released, for example, the State Department issued a "white paper" condemning the premise of the film, which was critical of United States action in Chile.[154] Taken to its logical conclusion, Congress, in applying *Keene*, could empower the State Department to order the label "propaganda" attached to all copies of *Missing*. When the government imposes requirements such as those of the Foreign Agents Registration Act, it is acting as only a market regulator can act, and, notwithstanding the *Keene* and *Block* opinions, when it acts in that capacity, it is regulating the marketplace of ideas.

When seen in these terms, compelled propaganda labeling is incompatible tension with the principle established in *Miami Herald Publishing Co. v. Tornillo*,[155] where the Court struck down Flor-

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[153] *See South-Central*, 467 U.S. at 97 (1984) (The Court indicated that a state may only place burdens on a market in which it is participating.). The burdens in the *South-Central* context, however, were clearly competitive, not regulatory.

[154] *See* R. SMOLLA, SUING THE PRESS, 138-59 (1986).

[155] 418 U.S. 241 (1974). The *Miami Herald* principle does not apply in the context of broadcast journalism but only because of the special problem of spectrum scarcity and

ida's compulsory "right-of-reply" statute which granted political candidates a right to equal space in order to respond to criticism. The *Miami Herald* could not be forced to print a candidate's reply, the Supreme Court held, for that would place the government in the impermissible position of dictating the content of the newspaper, an unconstitutional encroachment on editorial prerogative.[156] The Court found the forced carriage of another's message by a private speaker repugnant to first amendment values; the speaker (the *Miami Herald*) had a right to print its message unvarnished by governmental requirements of "balance."[157]

Likewise, more recently in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,[158] the Court declared that compelling a privately owned utility to provide access for third-party speech with which it disagreed would violate the company's first amendment rights. According to Justice Powell, an order mandating consumer group advocacy access to the company's billing envelopes would force the company to "alter [its] speech to conform with an agenda they do not set."[159] A forced response to the third-party speech, to prevent the assumption that they agreed with the message they were forced to distribute, would be antithetical to the free and uninhibited discussion which the first amendment seeks to foster.[160] Moreover, the courts have consistently upheld the first amendment rights of privately owned media to exclude even paid editorial advertising by third parties in both broadcast[161] and print media.[162] The Justice Department's arguments and the courts' decisions in *Block* and *Meese* ignored this line of reasoning and seemingly reversed these principles when the government sought compulsory third-party access for its speech, thus altering the agenda and transforming the dialogue to a trialogue.

Indeed, the only analogous first amendment precedent for permitting the government to force private speakers to carry messages against their will exists in the commercial advertising context. For instance, the lender may be forced to disclose finance rates or the

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the public trustee status of broadcast licensees. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 (1969).

156 *Miami Herald Publishing Co.*, 418 U.S. at 258.

157 *See id.*

158 475 U.S. 1 (1986).

159 *Id.* at 9.

160 *Id.* at 15-16.

161 Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

162 Chicago Joint Bd., Amalgamated Clothing Workers of America v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

cigarette manufacturer forced to carry a health warning because of the substantially lower first amendment protection accorded to commercial speech.[163] Government may paternalistically require truth in advertising because regulation of speech proposing commercial transactions may be inextricably intertwined with regulation of the commercial transaction itself.[164] Indeed, the government may attempt to influence commercial conduct obliquely by choosing to regulate speech about commercial transactions, even when it leaves the underlying commercial activity unregulated.[165]

The Foreign Agents Registration Act proceeds under precisely this "truth in advertising" model by imposing labels on speech while not directly restricting distribution or exhibition. The Act, however, imposes its requirements on *political* speech rather than on *commercial* speech; it is not a truth in *advertising* statute but a truth in *politicking* statute. Therefore, since no diminished first amendment commercial speech standards pertain to the Act and since it is not sustainable under the conscientious application of those standards that do pertain, the Act impermissibly regulates speech.

CONCLUSION: OF XENOPHOBIA, DOUBLESPEAK, AND DOUBLE STANDARDS

The almost brazen duplicity inherent in the Court's insistence that "propaganda" is a neutral term is highlighted by the scrupulous avoidance of the "P-word" by those various agencies of the United States which have historically been charged with implementing America's own propaganda efforts. In 1917, for example, President Wilson by Executive Order created the "Committee on Public Information," also known as the Creel Committee, to conduct American propaganda efforts.[166] Creel specifically chose the term "information" and avoided the word "propaganda" because

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[163] *See, e.g.*, Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 340 (1986); Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 562-63 (1980). The statement that commercial speech is the only analogous precedent for not following the *Miami Herald* principle excludes, of course, the special rules applicable to broadcasters. *See supra* note 155 and accompanying text.

[164] *See Central Hudson Gas & Elec. Corp.*, 447 U.S. at 462.

[165] To satisfy the special first amendment standard for commercial speech, the government's interest must be "substantial," the restrictions must "directly advance" that interest, and the restrictions must be "no more extensive than necessary to serve that interest." *Posadas de Puerto Rico Assocs.*, 478 U.S. at 340.

[166] *See generally* G. CREEL, HOW WE ADVERTISED AMERICA (1920).

"that word, in German hands, had come to be associated with deceit and deception."[167] Likewise, during the administration of Franklin Roosevelt, when the Foreign Agents Registration Act was in its incipiency, the "Office of Facts and Figures" was created. In 1942, Roosevelt appointed William J. Donovan "Coordinator of Information," created the "Office of War Information," and established the "United States Information Service."[168] Thus, at the same historical moment when the United States government enacted its legislation concerning foreign "propaganda," it established its own concentrated effort to propagate "information." The word choice was clearly deliberate, for history and experience had already made the term "propaganda" a term of opprobrium. As one analyst wrote,

> in the twenties and thirties it was customarily used in a disparaging sense, equating, in the eyes of cynics, the methods and merits of the Allied and the German sides in World War I. It was in that war that propaganda lost its former religious meaning and acquired a sudden new importance as 'psychological warfare.'[169]

The pattern continued during the Cold War that began in the 1950s, leading to the establishment of the "United States Information Agency."[170] In a 1953 letter to President Eisenhower from USIA Director Theodore C. Streibert, the new Director said the Agency would be "avoiding a propagandistic tone" and would instead "concentrate on objective, factual news reporting and appropriate commentaries."[171] As an historian of United States propaganda efforts noted,

> [w]e call this our 'information program'; others call it propaganda. That label, in this century, has become widely distasteful. Most Americans identify it with Hitler's 'big lie,' [and] Soviet speeches in the United Nations . . . . To propagandize means in many minds to lie, to exaggerate, to manipulate, to subvert. So the U.S. Government employs a euphemism.[172]

In the summer of 1987 the nation watched the skill of governmental euphemism raised to high art in the Iran/Contra Hearings.

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[167] T. SORENSEN, THE WORD WAR: THE STORY OF AMERICAN PROPAGANDA 6 (1968).

[168] *Id.* at 9-10.

[169] L. BOGART, PREMISES FOR PROPAGANDA: THE UNITED STATES INFORMATION AGENCY'S OPERATING ASSUMPTIONS IN THE COLD WAR xviii (1976).

[170] For background on the creation of the USIA, see J. HENDERSON, THE UNITED STATES INFORMATION AGENCY 52-53 (1969).

[171] T. SORENSEN, *supra* note 167, at 50.

[172] *Id.* at 3.

Keene v. Meese was an unhappy endorsement of one of the central tragic habits of mind that contributed to the Iran/Contra scandal: the theory that the American people cannot be told the real truth about foreign events, that they need the government to subtract and add to that truth for the higher cause of national security. As with the Iran/Contra affair, however, not everyone was fooled. If a member of the public tried to inform himself of the Supreme Court's decision by reference to the *United States Supreme Court Digest*, he would find the alphabetical listing for "propaganda," which reads: "PROPAGANDA see Sedition and Subversive Activities." That entry states:

> SEDITION AND SUBVERSIVE ACTIVITIES Scope of Topic: This topic covers the offense of inciting discontent or resistance against the government, and cases arising under statutes directed against various subversive and antisocial activities affecting the national security; including sabotage, and requirements as to the registration and reports of agents of foreign principals.[173]

There is a certain ironic (and honest) justice in that entry.

[173] 12A UNITED STATES SUPREME COURT DIGEST, LAWYER'S EDITION 77 (1987).