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Mendelsohn v. Meese: the Impact of the Constitution on the Anti-Terrorism Act of 1987

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MENDELSOHN v. MEESE: THE IMPACT OF THE CONSTITUTION ON THE ANTI-TERRORISM ACT OF 1987

I. INTRODUCTION

In *Mendelsohn v. Meese*[1] the United States District Court for the Southern District of New York upheld the Anti-terrorism Act of 1987.[2] The plaintiffs[3] had sought a declaratory judgment that the Anti-terrorism Act violated their First Amendment rights of free speech and association. Further, the plaintiffs alleged that the Anti-terrorism Act

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1. Although originally published at 690 F. Supp. 1226, the case was subsequently withdrawn and republished at 695 F. Supp. 1474 (S.D.N.Y. 1988).

2. Title 22, United States Code (Foreign Relations), Chapter 61-Anti-Terrorism [hereinafter "the Act"].

3. The plaintiffs originally consisted of sixty-five United States citizens and organizations. All but four of the plaintiffs claimed the Anti-terrorism Act abridged their "listening" rights under the First Amendment. 695 F. Supp. at 1472. The court dismissed their claims on the ground that they lacked sufficient standing. *Id.* at 1478. Two of the four remaining plaintiffs, Ibrahim Abu-Lughod and Victor A. Ajlouny, asserted that the Anti-terrorism Act forecloses their right to solicit and receive funds from the Palestine Liberation Organization for the dissemination and exchange of information. *Id.* at 1476-77.

The third plaintiff, Nubar Hovsepian, sought to establish, at the request of the Palestine Liberation Organization, an office within the United States to gather and disseminate information on the Organization and the Palestine people. *Id.* at 1477. Such an office, established at the "behest or direction of" the Palestine Liberation Organization to "further" their "interests" is prohibited by §5202(3) of the Anti-terrorism Act.

The fourth plaintiff, Riyad H. Mansour, is the Deputy Permanent Observer of the Palestine Liberation Organization's Mission to the United Nations, 695 F. Supp. at 1477, and a party to United States v. Palestine Liberation Organization, 695 F. Supp. 1456 (S.D.N.Y. 1988), in which the court held that the Anti-terrorism Act does not apply to the Organization's Mission to the United Nations. 695 F. Supp. at 1471.

was unconstitutional as a bill of attainder.[4] The court, by narrowly interpreting the Anti-terrorism Act, held that the Act may permissibly halt the operations of the Palestine Liberation Organization ("PLO") in the United States. The court, however, narrowed the application of the Act by further holding that it did not prohibit the establishment of a PLO informational office as long as the organization did not supply any money to, or assume control of, the office within the United States.[5]

In so holding, the court followed the teachings of *United States v. O'Brien*[6] and found the Act to be a valid exercise of the federal government's foreign affairs powers.[7] By finding a rational basis underlying the Act and a substantial and important government interest unrelated to the suppression of speech, the court was able to uphold the Act with the support of well settled precedent.[8]

This note suggests that the holding in *Mendelsohn* was at once logical and flawed. While the court properly deferred to the judgment of the executive and legislative branches on matters of foreign policy and national security; it refused to fully enforce the restrictions of the Act and thereby left open an access that Congress clearly intended to close. That access, the plaintiff's office, would provide the PLO a means by which it could operate within the United States and reach the audience it desires.

II. THE ANTI-TERRORISM ACT OF 1987

Congress designed the Act to prevent the PLO and its affiliates from benefiting through operations established within the United States.[9] The Southern District recognized that the Anti-terrorism Act

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4. 695 F. Supp. at 1476.

5. *Id.* at 1490.

6. 391 U.S. 367 (1968).

7. 695 F. Supp. at 1483-84.

8. *Id.* at 1483-85.

9. 22 U.S.C. §5202 states the prohibitions regarding the Palestine Liberation Organization as follows:

> It shall be unlawful, if the purpose be to further the interests of the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof, on or after [March 21, 1988] — (1) to receive anything of value except informational material from the Palestine Liberation Organization or any of its constituent groups, any successor thereto, or any agents thereof; or (2) to expend any funds from the Palestine Liberation Organization or any of its constituent groups, any successor thereto, or any agents thereof; or (3) notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises or other facilities or establishments within the juris-

does not purport to "prohibit, edit or restrain advocacy" on its face; however, the court also noted that this case implicated important First Amendment interests by peripherally offending "our profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."[10]

The plaintiffs argued that the Anti-terrorism Act is a legislative encroachment upon executive authority to conduct foreign affairs. The court, however, found it unnecessary to explore that argument after finding no case striking down federal legislation as an encroachment of the executive's authority to conduct foreign affairs.[11] The court also found this argument to be inappropriate in light of the fact that Congress and the president acted together in promulgating the Anti-terrorism Act; consequently no interbranch impasse resulted.[12] After considering evidence of the many terrorist acts committed by the PLO around the world, as well as the stated intent of Congress, the court found that for purposes of First Amendment analysis, the passage of the Anti-terrorism Act was within the constitutional power of Congress.[13] Finally, the court recognized the need for the judicial branch to defer to the coordinate branches in matters of foreign policy that involve our national interest.[14]

III. THE FIRST AMENDMENT

Although the plaintiffs were not restrained from speaking out in favor of the PLO, or from using their own money in doing so, they alleged that the Act prohibited them from receiving any money from the Organization and thus burdened their ability to speak. The Government argued, however, that since the plaintiffs would be acting at the behest of, and receiving money from the PLO, they would be in fact agents of a foreign entity with no claim of constitutional rights.[15] The freedoms of speech and association are essential to effective political advocacy and the court found that the Anti-terrorism Act infringed upon both interests with regard to the Palestine Liberation

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diction of the United States at the behest or direction of, or with funds provided by the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or agents thereof.

10. 695 F. Supp. at 1479, *quoting* New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

11. *Id.* at 1483.

12. *Id.* at 1484.

13. *Id.*

14. *Id.* at 1484-1485.

15. *Id.* at 1480.

Organization.

The court relied on *Goldwater v. Carter*[16] in recognizing the strength of combined executive and legislative action in the field of foreign affairs against the invocation of constitutional rights.[17] The court noted that it "would make no sense to allow American citizens to invoke their constitutional rights in an effort to act as official representatives of foreign powers upon which the political branches have placed limits. Doing so would severely hamper the ability of the political branches to conduct foreign affairs."[18] Such a theory, however, only disposed of the claims of one of the plaintiffs.[19] The other three plaintiffs denied acting in any official capacity with respect to the PLO.[20]

In analyzing the First Amendment claims, the court refused to apply the "most exacting scrutiny" used most recently in *Boos v. Barry*[21] but rather applied the somewhat more deferential inquiry of *United States v. O'Brien*.[22] In *Boos*, the Supreme Court explained the "most exacting scrutiny" test as requiring the government to show that "the regulation is necessary to serve a compelling [government] interest and that it is narrowly drawn to achieve that end."[23] The *O'Brien* standard, however, requires only an important or substantial governmental interest unrelated to the suppression of speech.[24] The reason for the court's application of a more relaxed scrutiny lies in the purpose of the Anti-terrorism Act which does not specifically punish advocacy of the doctrines of the PLO.[25] The Act is instead aimed at hampering the opera-

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16. 444 U.S. 996, 997-98 (1979).

17. 695 F. Supp. at 1480.

18. *Id.* at 1481.

19. The court barred only Mansour's First Amendment claims because he was the only plaintiff acting as an official of the Palestine Liberation Organization. *Id.* at 1481-82.

20. The court determined that the government's argument that the other three plaintiffs were agents of the Palestine Liberation Organization did not preclude the application of the First Amendment to the Anti-terrorism Act, but it would affect the court's analysis of their First Amendment claims. *Id.*

21. 108 S. Ct. 1157 (1988). "Our cases indicate that as a content-based restriction on political speech in a public forum [the statute] must be subjected to the most exacting scrutiny." 108 S. Ct. at 1164.

22. 695 F. Supp. at 1482.

23. 108 S. Ct. at 1164, *quoting*, Perry Education Association v. Perry Local Educators Association, 460 U.S. 37, 45 (1983). Accord Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, 107 S. Ct. 2568, 2571 (1987); Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 800 (1985); United States v. Grace, 461 U.S. 171, 177 (1983).

24. 391 U.S. at 377.

25. 22 U.S.C. §5202.

tions of the PLO within the United States. According to [Supreme Court precedent] significant consideration must be given to the fact that the Anti-terrorism Act is not directed at speech itself.[26] The court determined that the Act's "mens rea requirement, that the actor have the purpose of furthering the interests of the [Palestine Liberation Organization], does not make it a content based restriction on speech."[27] Since the Act is not a content- based restriction directed at speech, the court refused to subject it to the "most exacting" standard of *Boos v. Barry*.[28]

The court then turned to the *O'Brien*[29] test and held that the Act does not violate First Amendment rights and that the Act can permissibly restrict the transfer of funds from the PLO to the plaintiffs.[30] Although the plaintiffs' ability to speak is affected, that effect is merely incidental and outweighed by the substantial governmental interest in effectively dealing with a terrorist organization.

The court further held, however, that the Act should not be construed to prohibit the establishment of the proposed informational office.[31] Though one plaintiff averred that he will not be acting as an official of the PLO, he stated that the organization had requested that he establish such an office and that he does wish to further their interests.[32] The court refused to read the Act as prohibiting such action and found instead that such an interpretation would violate the requirement that statutory restrictions be no greater than essential.[33] This limited interpretation of the Act was supported, in the court's view, by the legislative history.[34] The court found that the informational office would

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26. Statutes that punish "mere advocacy" and forbid "assembly with others merely to advocate the described type of action . . . [fall] within the condemnation of the First and Fourteenth Amendments." Bradenberg v. Ohio, 395 U.S. 444, 449 (1969).

27. 695 F. Supp. at 1482.

28. *Id.* at 1483.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1486.

33. *Id.*

34. *Id.* The court referred to statements made by Senator Grassley concerning the intent to prohibit a principal agency relationship from forming between the Palestine Liberation Organization and American citizens. 133 Cong. Rec. S 13,854 (daily ed. October 8, 1987). Additionally, the court considered statements by Representative Burton and Senator Bingaman. Rep. Burton's statements concerned the prohibition of paid agents of the Palestine Liberation Organization operating an official office on United States soil. 133 Cong. Rec. H 8,790 (daily ed. October 20, 1987). Senator Bingaman's statements were aimed at defeating the Anti-terrorism Act. 133 Cong. Rec. S 13,852-

not violate the provisions of the Anti-terrorism Act as long as the plaintiff did not accept funds from, or act in an official capacity with respect to, the PLO.[35]

IV. THE BILL OF ATTAINDER CLAIM

The plaintiffs also claimed that the Anti-terrorism Act violated the Constitution's prohibition against bills of attainder.[36] The court weighed this claim against the purpose underlying the Act:

> [It] reflects a sense of outrage entertained by a wide segment of the American people and their elected officials concerning the crimes of foreign terrorists. On its face, it is an accusatory document penalizing PLO employees by closing their offices and effectively terminating their activities in the United States. Having been effectively singled out by Congress, they are left without any right of reply or appeal, without right to confront their accusers or submit evidence in an adversarial proceeding. They are terrorists by statutory implication but without the slightest proof of their involvement in terrorism. In short, they are subjected to penalties without the panoply of protective shields vouchsafed even to criminal aliens by the federal courts in criminal trials.[37]

The court acknowledged that such circumstances present a classic bill of attainder.[38] This Act, however, involves an exercise of the Government's foreign affairs powers[39] and it was critical that the court recognized the PLO as a foreign entity standing outside the structure of our constitutional system.[40]

By specifically exempting the PLO's Observer Mission and its personnel at the United Nations, the court was able to uphold the Anti-terrorism Act against both the First Amendment and the Bill of Attainder attacks.[41] As the court concluded, "Congress may force an

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13,853 (daily ed. October 8, 1982).

35. 695 F. Supp. at 1486.

36. *Id.* "No Bill of Attainder or ex post facto law shall be passed." United States Constitution, article 1, §9, cl. 3.

37. *Id.* at 1487-1488.

38. *Id.* at 1488.

39. *Id.* at 1489.

40. *Id.* at 1481, quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 330 (1934).

41. *Id.* at 1476. The court followed its holding in United States v. Palestine Liberation Organization, 695 F. Supp. 1456 (S.D.N.Y. 1988).

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."[42]

V. ANALYSIS

Mendelsohn clarifies Congress' power to pass laws directed at specific foreign entities and at the actions of American citizens in support thereof, and in this sense the Anti-terrorism Act is a unique statute.[43] It does, however, present the important issue of the tenuous balance between the freedoms of American citizens and the necessarily strict policy of the United States Government in dealing with adverse foreign entities.

A. The Effect of a Narrow Interpretation of the Anti-terrorism Act

The court stated in its conclusion that the Anti-terrorism Act must be interpreted narrowly in order for it to survive constitutional scrutiny.[44] Certainly, a narrow interpretation avoids the problems of judicial legislation that arise when courts broadly interpret statutes to include that which Congress may not have intended; it also avoids an intended congressional reach that would unintentionally do violence to settled constitutional principles. In this case, however, the narrow interpretation has resulted in potentially contradictory results.

The court properly applied settled First Amendment law in upholding the restrictive provisions of the Act.[45] As was noted in *Connick v. Myers*,[46] "the explanation for the Constitution's special concern with threats to the rights of citizens to participate in political affairs is no mystery."[47] Indeed, the basis of our democratic form of government is a strong commitment to the active and vocal involvement of all citizens in the political affairs of the nation. The gravamen of the instant plaintiffs' First Amendment complaint was outlined in *Myer v. Grant*, in which the Supreme Court held that government obstruction of the right to solicit and expend funds for political purposes

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42. *Id.* at 1490.

43. United States v. Palestine Liberation Organization, 695 F. Supp. at 1460.

44. 695 F. Supp. at 1490.

45. *Id.* at 1479. Specifically, the court relied on New York Times v. Sullivan, 376 U.S. 254 (1964); Buckley v. Valeo, 424 U.S. 1 (1976); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) and Connick v. Myers, 461 U.S. 138 (1983), among others, in its First Amendment analysis.

46. 461 U.S. 138 (1983).

47. *Id.* at 145.

> restricts political expression in two ways: First, it limits the number of voices who will convey [the] message and the hours that [those seeking to exercise these rights] can speak and, therefore, limits the size of the audience they can reach. Second, it . . . limit[s] their ability to make the matter the focus of a statewide discussion.[48]

The *Meyer* court concluded that those facing restrictions must have alternative means of communication.

The *Mendelsohn* court recognized this problem and reiterated the rule of *Meyer v. Grant* concerning the availability of other means for disseminating the plaintiffs' information.[49] Had the court accepted the government's argument that all of the plaintiffs were agents of the PLO, its discussion of the First Amendment difficulties presented by the Anti-terrorism Act would have been unnecessary in light of the court's recognition that foreign entities stand outside of our constitutional structure.[50] The difficulty arises, however, when the plaintiffs are American citizens advocating the interests of a foreign entity. The Supreme Court stated in *Communist Party of the United States v. Subversive Activity Control Board* that although

> the means for effective resistance against foreign incursion . . . may not be denied to the national legislature . . . congressional power in this sphere, as in all spheres, is limited by the First Amendment. Individual liberties fundamental to American institutions are not to be destroyed under the pretext of preserving those institutions, even from the gravest external dangers.[51]

"Incursions" must be read in its broadest sense in order to encompass both physical and vocal activity.

For a free and open society to survive, however, few if any rights can be absolute and unyielding.[52] The government must, of necessity,

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48. 108 S. Ct. 1886, 1892 (1988).

49. 695 F. Supp. at 1480. In Meyer v. Grant, the United States Supreme Court stated that the fact that a statute allows for other means to be employed to "disseminate their ideas does not take their speech . . . outside the bounds of First Amendment protection" if the statute "restricts access to the most effective, fundamental and perhaps economic avenue of political discourse, direct one-on-one communication. That it leaves open more burdensome avenues of communication does not relieve its burden on First Amendment expression." 108 S. Ct. at 1893.

50. 695 F. Supp. at 1488-1489.

51. 367 U.S. 1, 95-96 (1961).

52. "Speech is not an absolute, above and beyond control by the legislature. . ." Dennis v. United States, 341 U.S. 494, 508 (1951).

be able to engage in conduct that may infringe, incidentally, upon the rights of some for the protection of all. Otherwise, individuals with absolute and unchecked freedom would be able to destroy the Constitution while claiming strict adherence to the principles it embodies. Thus, the *Mendelsohn* court allowed such incidental effects on the plaintiffs' free speech and association rights and found authority to do so in *United States v. O'Brien*.[53] In *O'Brien*, the Supreme Court opined that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[54] In *Mendelsohn*, the purpose of preventing a terrorist organization from benefiting through operations established within the United States was found to be a sufficiently important governmental interest to justify incidental burdens on the plaintiffs' free speech and association interests.[55] The court remarked that the prohibitions relating to spending and receiving money from the PLO are essential to achieving Congress' goal in enacting the statute.[56] Therefore, the court was justified, if not bound by precedent, in upholding those provisions of the Anti-terrorist Act.

In *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, the Supreme Court stated: "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[57] It was this sentiment, together with the consideration that any statutory restriction should be as narrowly tailored as possible, that motivated the *Mendelsohn* court to allow one of the plaintiffs to establish the proposed informational office requested of him by the PLO.[58] Prohibiting the existence of the office would, in the court's view, prohibit the plaintiff, not the PLO from operating within the United

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53. 695 F. Supp. at 1485.

54. 391 U.S. at 376. The *O'Brien* court further stated that:

> A government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and, if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

55. 695 F. Supp. at 1485.

56. *Id.* at 1485-1486.

57. 108 S. Ct. 1392, 1397 (1988).

58. 695 F. Supp. at 1486.

States.[59] This view, however, may have the undesirable effect of undercutting the force of the holding.

The *Mendelsohn* case is quite different from previous cases dealing with government infringement on First Amendment interests.[60] In *Dennis v. United States,* the Supreme Court was confronted with individuals seeking to promote Communism and classified speech as either advocacy, which is always protected, and incitement which may permissibly be proscribed if the objective is incitement to violence or the violent overthrow of the government.[61] *Mendelsohn,* however, is significant in that it raises the issue of a further division of speech, within the class of advocacy, concerning citizen speech and agent speech. The Anti-terrorism Act expressly prohibits the establishment of an office or base by the PLO, "or any of its constituent groups, any successors to any of those or any agents thereof."[62]

By allowing the plaintiff to establish an informational office, the court created the administrative problem of ensuring that money used by the plaintiffs is not provided by the PLO. Furthermore, the holding requires future judicial determinations concerning the status of the plaintiffs as either American citizens with a personal interest in supporting the PLO or as agents representing the Organization within the United States. The court should have been wary of starting down such a path.

The clear intent of the statute was circumvented when the PLO contacted and motivated the plaintiff, who acknowledged his support for and desire to further the interests of the PLO, to establish a base within the United States. Although a specific finding of control was not made, such a finding is unnecessary in light of these circumstances that clearly indicate the plaintiff's willingness to subject himself to the direction of the PLO. By such action, the plaintiff had crossed the line and had indeed become an agent of the PLO. The *Mendelsohn* court should have recognized the importance of such a finding. The Supreme Court stated in *Dennis* that, "we think it well serves to indicate to those who would advocate constitutionally prohibited conduct that there is a

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59. *Id.*

60. *See* Schenck v. United States, 249 U.S. 47 (1919).

61. In *Dennis,* the plaintiffs were found guilty of violating sections 2 and 3 of the Smith Act which made it unlawful to advocate the overthrowing or destroying of any government in the United States by force or violence or to conspire or attempt to commit such acts vocally or through written or printed matter. The plaintiffs conspired to organize the Communist Party of the United States and unsuccessfully challenged the constitutionality of the Act. 341 U.S. at 496-497.

62. 22 U.S.C. §5202(3).

line beyond which they may not go."[63] Such a line is difficult to draw but nonetheless necessitated by the implications of allowing foreign agents to engage in proscribed conduct within the United States. Certainly, the plaintiff remains free to personally advocate the doctrines of the PLO; a freedom guaranteed by the First Amendment. As a foreign agent, however, the plaintiff stands in the shoes of the PLO and should have been subjected to the provisions of the Act and prohibited from establishing the office.

The *Mendelsohn* opinion suggests that although the plaintiff can effectively subject himself to the direction of the PLO and circumvent the Anti-terrorism Act with impunity, the plaintiff is not to be considered an agent of the PLO. In its desire to avoid a finding of agency and allow the plaintiff to establish the facility, the court ignored the very important fact that the plaintiff did not seek to establish the facility independently as an American citizen. Rather, the PLO desired a facility within the United States and effectively gave the plaintiff his marching orders by motivating him to open such a facility. By consenting to act under such direction, whether formal or implicit, the plaintiff voluntarily assumed the status of an agent of the PLO and should have been treated as such for purposes of the Act.

Finally, the office gives the Organization a foothold in the United States from which it can disseminate its information, gain influence and thus benefit from its office in the United States. Such a result runs contrary to the stated purpose of the Anti-terrorism Act.[64] Indeed, such a result may very well be indistinguishable from allowing officials of the Palestine Liberation Organization to establish and maintain the office themselves.[65]

The court noted that if it were to find that the Act prohibited the proposed office, it would have to read the Act in the broadest possible

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63. 341 U.S. at 516.

64. "Therefore, the Congress determines that the Palestine Liberation Organization and its affiliates are a terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States." 22 U.S.C. §5201(b).

65. The court seemed to place a great deal of weight on the fact that the Plaintiff [Hovsepian] was not receiving any money from the Palestine Liberation Organization for the purpose of establishing the proposed office. 695 F. Supp. at 1486. The statute, however, prohibits the establishment of such an office "at the behest or direction of" the Palestine Liberation Organization, regardless of whether any funds have been transferred. Receiving money from the Organization to establish the office, was also prohibited but was listed as an additional provision indicating that Congress intended to prohibit both forms of action. 22 U.S.C. §5202(3).

manner.[66] The clear language of the Act, however, prohibits the establishment of an office at the behest or direction of the PLO.[67] The court construed the statements by members of Congress, that the Act would not prohibit contact with the Palestine Liberation Organization, to redefine the words "behest" and "direction" as requiring a transfer of funds.[68] In so doing, the court gave a different meaning to the Act than the specific statutory language suggests and found, on the basis of these isolated statements, an underlying intent of Congress that was inconsistent with the stated intent of the statute.[69] Since the Act expressly prohibits the establishment of such an office, the judicial branch should be unwilling to circumvent the statutory language.

B. Treatment of Foreign Entities Under the Constitution

The *Mendelsohn* court acknowledged that the Anti-terrorism Act, "would present a classic Bill of Attainder were it not for the fact that, as we construe it, it is an exercise of Congress' foreign affairs powers."[70] Although originally considered to include only the penalty of death, the Supreme Court expanded the Bill of Attainder clause to include any punishment inflicted by the legislature absent a proper trial.[71] The importance of the Bill of Attainder clause was perhaps best described by the Supreme Court in *United States v. Brown*, in which the court stated that:

> the best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise

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66. 695 F. Supp. at 1486.
67. 22 U.S.C. §5202(3).
68. 695 F. Supp. at 1486.
69. *Id.*
70. *Id.* at 1488.
71. In Cummings v. Missouri, 71 U.S. 277 (1867), the United States Supreme Court stated that, "a bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." 71 U.S. at 323. Also, in United States v. Lovett, 328 U.S. 303 (1946), the Supreme Court held that both *Cummings* and Ex Parte Garland, 71 U.S. 333 (1867), "stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." 328 U.S. at 315.

of the judicial function, or more simply — trial by legislature.[72]

Clearly, the Anti-terrorism Act, by its prejudicial penalization of those affiliated with the PLO, violated this very important and viable constitutional doctrine. Nevertheless, the statute survived constitutional scrutiny by falling within an exception permitting legislative control over certain aspects of foreign affairs.

The Act contains several provisions that purport to control the interrelationship between the United States and the PLO in the international arena as well as within the United States.[73] Certainly, the *Mendelsohn* court was justified in deferring to the judgment of the executive and legislative branches. "The judicial reluctance to become involved in essentially political foreign relations matters is consistent with the repeated emphasis, in cases concerning allocation of constitutional powers, on the need for the nation to 'speak with one voice' with respect to foreign nations."[74] Although the PLO is not a nation, it is a foreign entity standing in substantially the same position as a foreign nation and has no legal interest in the enforcement of the Constitution.

The tension surrounding the *Mendelsohn* case lies in the struggle between a governmental policy of strong opposition to terrorism and a domestic tradition based on the freedoms of speech, association, and the free flow of information. Although special concerns arise because of the plaintiffs' status as American citizens:

> in order to be able to contribute effectively to the evolution and enforcement of international norms of behavior, the United States must be able to do more than just talk. It must preserve the flexibility to exert meaningful pressure against those financial, commercial or other interests of the foreign state over which the United States has some control.[75]

This tension would be substantially relaxed if, as the government argued, the plaintiffs were considered agents of the PLO. In such a case,

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72. 381 U.S. 437, 442 (1965).

73. Damrosh, *Foreign States and the Constitution*, 73 VA. L. REV. 485 (1987). Any subject matter that touches a foreign state's interests in the United States, United States interests in a foreign country, or the interrelationship between the United States and a foreign state in the broader international community is a proper subject for action by the federal political branches under the foreign affairs powers.

Id. at 516.

74. *Id.* at 517.

75. *Id.* at 533.

the fact that the plaintiffs were also American citizens would be of less relevance and the court would have been faced with a significantly more formidable task if it wanted to allow the plaintiffs to establish their proposed office.[76] The constitutional protections afforded American citizens are not without limitation or exception. In a world in which regional activities yield worldwide results, the arm of the government responsible for the development and implementation of foreign policy must be given the necessary freedom to effectively deal with the unique threat posed by international terrorism. American citizens should not, and must not, be permitted to use their status as citizens to protect the very groups that the government seeks to punish.

Thus, the court in allowing the informational office to be established impermissibly encroached upon the interests of foreign policy and national security. As the Supreme Court stated in *Chicago and Southern Airlines, Inc. v. Waterman S.S. Corp.*,

> such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[77]

The *Mendelsohn* holding may well have frustrated the purpose of the Anti-terrorism Act by allowing the plaintiffs to provide the Palestine Liberation Organization a forum through which it can accomplish its objectives and obtain the benefits, i.e. media access, of operating within the United States.

The most significant aspect of the court's ruling, however, was its general affirmation of the Anti-terrorism Act itself. This unique statute

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76. As stated in, Damrosh, supra, 73 VA. L. REV. at 556-57:
There is nothing anomalous about taking a more flexible approach to judicial review in cases involving *individuals* who represent foreign states than in decisions concerning foreign states as juridical entities . . . . This does not mean that individual foreign representatives could claim all the personal liberties to which citizens, resident aliens, or even other categories of nonimmigrant aliens, are entitled. To the Contrary, there is no question that foreign state representatives may be subject to restrictions on their activities that would be impermissible as regards other individuals.

77. 333 U.S. 103, 111 (1948).

stands for the proposition that the United States can legitimately place significant burdens on terrorist organizations that seek to use the freedoms of the United States to speak to a worldwide audience. As the Supreme Court stated in *Harisiades v. Shaughnessy*, policies regarding the conduct of foreign affairs "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[78] The court's recognition of this principal in *Mendelsohn* significantly eases the tension between the domestic and foreign policies of the United States and establishes the legitimacy of legislation, such as the Anti-terrorism Act, as a useful tool capable of being implemented in other countries as well. A line, however, must of necessity be drawn beyond which an American citizen is no longer enveloped by the protective cloak of the Constitution at its most dynamic, such as when a citizen willfully takes on the role of a foreign agent.

VI. CONCLUSION

The *Mendelsohn* opinion confirms the authority of the federal government to take appropriate domestic measures, to effectuate important national security and foreign policy objectives. The need for judicial deference stems not only from the separation of powers doctrine, but also from the United States' need to retain credibility in international relations by appearing to be unified behind one clear set of objectives.

The *Mendelsohn* holding paves the way for future statutes narrowly tailored to address the harm caused by specific terrorist organizations. It is perfectly just and reasonable for the courts to scrutinize such statutes because of their unique framing and relation to bills of attainder. Once a legitimate foreign policy rationale is shown, however, the courts must adhere to the structure of the United States Government — the separation of powers — and the special nature of international relations and refrain from assuming an activist position.

As was stated in the introduction to this note, the *Mendelsohn* holding was both logical and flawed. The logic in recognizing a governmental interest in preventing terrorism and restraining terrorist organizations that seek to establish surrogates within the United States is readily apparent. The shortcomings of an opinion that allows an informational and fund raising arm of a terrorist organization to establish an office by obtaining the cooperation of American citizens within the United States are equally significant. Clearly, Congress will, and should, enact similar group-specific legislation to deal with the domestic derivatives of United States foreign policy. Judicial interpretation of

78. 342 U.S. 580, 589 (1952).

such legislation should be internally consistent and courts must be reluctant to impose an interpretation that ignores or contradicts the very wording of the statute. Although the judiciary has the authority to strike out portions of the legislation it reviews while leaving the remainder intact,[79] courts should not, without authoritative evidence, redefine statutory provisions to avoid their full effect.

The problem of international terrorism presents serious legal and political difficulties both within the United States and throughout the world. In order to be effective, it is essential that the United States retain international credibility by following through on its foreign policy objectives. The United States will most certainly lose its credibility if it announces its policy against terrorism and strives for the arrest and incarceration of terrorists abroad, while allowing the same terrorist organizations to have an agency relationship with support facilities within the United States. Although the government can not, and must never be able to, destroy the great American institutions of freedom and political advocacy under the pretext of saving them, neither can it allow foreign entities to use American citizens and the liberties they enjoy, to accomplish substantially the same result.

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79. Marbury v. Madison, 1 Cranch 137 (1803).