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Leave to file amicus brief granted 11/27/87

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| PALESTINE INFORMATION OFFICE et. al. | : | |
| Plaintiffs, | : | No. 87-3085 (Judge Sporkin) |
| vs. | : | |
| GEORGE P. SHULTZ et. al. | : | MEMORANDUM OF LAW OF THE AMERICAN JEWISH CONGRESS AS AMICUS CURIAE |
| Defendants. | : | |

## Interest of the Amicus

The American Jewish ("AJCongress") is an organization of American Jews founded in 1918 to advance the political, economic and civil rights of American Jews, and of Jews the world over. Because terrorism as practiced by plaintiffs' principal, the Palestine Liberation Organization ("PLO"), typically targets Jews, the American Jewish Congress has devoted much attention in recent years to suppressing terrorism and groups like the PLO which practice it.

As a civil liberties group, however, AJCongress has striven to ensure that the measures necessary to oppose terrorism do not impinge on constitutional liberties. It believes that the order challenged in this case, closing the Palestine Information Office, is a significant, if not decisive, step in implementing the United States' enunciated policy of isolating terrorists,

and suppressing terrorism and is fully consistent with the First Amendment.

This memorandum addresses only plaintiffs' First Amendment arguments; amicus does not address the question of the defendants' entitlement to a preliminary injunction, or the statutory authority to isssue the challenged order or the vagueness challenge to the Foreign Mission Act.

## THE CLOSURE ORDER DOES NOT VIOLATE THE FIRST AMENDMENT

### A. International Practice Sanctions The Closing of the PLO Office

States express their views about international affairs in a variety of ways, among which are various forms of non-recognition of, or refusal to treat with, other actors on the international scene. International law fully recognizes this fact of diplomatic life. While a state cannot ignore rights recognized under international law as owed to other states or other entities, it does not follow that it must extend full or even any recognition to such entities. A state's decision whether or not to enter into formal or informal diplomatic relations with a foreign entity, or with a particular government to allow it a presence in its capital is a political, and therefore discre- tionary, act, I. Brownlie, Principles of Public International Law (3d Ed. 1979) 95. Banco Naccional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964).

Recognition can be implicit as well as explicit, Id. at 98. Therefore, by necessity, a state will find it important to counteract erroneous conclusions that it has informally granted recognition to some putative state or entity; or that it regards a particular non-governmental group as an acceptable, or a tolerable, potential governing party. They will act to demonstate that as to such states or entities, it maintains "a

general policy of disapproval and boycott," Id. at 94. See generally 2 M. Whiteman, Digest of International Law, 27-34 (1963).

A nod of approval from the United States, no matter how subtle, is a significant political gain for non-governing (or, for that matter, even governing) entities. Perhaps Americans, used to our system of constitutional law, can discern the difference between allowing the PLO to maintain an office and United States approval of the PLO, which claims to be an important actor in the Middle East, despite its prediliction for terrorism. It is surely reasonable for the United States government to conclude that foreigners, at least, will not notice such distinctions, and that to maintain the credibility of American foreign policy on terrorism it is necessary to dispel any such misconceptions.

Sanctions such as a refusal to recognize a government to treat with a guerilla group (i.e., El Salvadoran rebels, the contras, or SWAPO), to recall or expel an ambassador are not mere expressions of pique, a polite way to blow off steam or to appease domestic interest groups. Not long ago, the United States withdrew its ambassador from Syria, because it was harboring notorious terrorists. Apparantly because Syria wished to resume full diplomatic relations with the United States, it has expelled those terrorist groups. The United States subsequently returned its ambassador, see 7 M. Whiteman, Digest of International Law at 87 (1970) (citing other precedents). The

sanctions imposed on the PLO have the same aim--the renunciation of terrorism by the PLO, the PIO's principal.

The closing of the plaintiff PIO's office is a manifestation of the United States' "general policy of disapproval and boycott" of its principal, the Palestine Liberation Organization so long as it supports terrorism. Whether or not the PLO should be permitted to maintain an office in the capital of the United States, with the prestige and significance attendant upon such a presence, is a political judgment--committed by Constitution to the Executive Branch. It is no different in constitutional principle than a decision not to permit the Libyan Government to maintain an embassy here, even if it is staffed by dual nationals, or for Syria to have an ambassador here. As we demonstrate below, a foreign policy judgment of that kind does not violate the First Amendment rights of the PLO, the PIO, its employees, or American citizens.

B. The Constitution Permits The Exclusion of Foreign Actors Despite Any Incidental Impact on the Marketplace of Ideas

Plaintiff PIO has conceded that it is an agent of the PLO. Moreover, it has conceded (Memorandum at 5, n.8) that its funding from the Palestine National Fund is controlled by a Board of Directors appointed by the Palestinian National Council ("PNC"), innocuously described as the "parliament for Palestinians." What plaintiffs fail to mention is that the PNC is, in fact, the governing body of the Palestine Liberation

Organization--the PIO's principal. See Constitution of the Palestine Liberation Organization, Art. 7(a) (council "is the supreme authority of the Liberation Organization")[1] and that the Palestine National Fund is itself a branch of the PLO. See, Id. at Art. 18(e). Among its members, as the government pointed out in announcing the closing of the PIO, is the notorious terrorist Abu Abbas, responsible for the murder of at least one American citizen, Leon Klinghoffer. See Plaintiffs' Exhibit A, p.4-1. In addition, the governmental defendants have referred to documentation to support their findings, embodied in the "Designation of the PIO As A Foreign Mission, 52 F.R. 5373 (Exhibit B to the Complaint), that the PIO is "substantially owned or effectively controlled by the PLO." In short, despite plaintiffs' efforts to disguise it, the plain fact is that the PIO is the PLO.

Contrary to plaintiffs' startling suggestion (Memorandum at 28), the PLO itself (and hence PIO, since it is simply a branch of the PLO) will not be heard to argue that its own free speech rights to communicate with Americans have been abridged. The PLO/PIO is not a domestic entity, and it is not entitled to invoke the protection of the First Amendment. As Justice Jackson said in Johnson v. Eisentrager, 339 U.S. 763, 784-85

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[1] The Constitution is reprinted in Z. Diab, International Documents on Palestine (1971); see also, The Middle East and North Africa - 1987, p.88; New York Times, June 2, 1985, p.9, col.1.

(1950), rejecting a petition filed by German soldiers for a writ of habeas corpus, alleging violations of their constitutional rights:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view....None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.

Cf. Lamont v. Postmaster General, supra, 381 U.S. 301, 308 (1965). See also dissenting opinion of Justice William O. Douglas in Kleindeinst v. Mandel, 408 U.S. 753, 771 (1972).

Even if this court were to conclude that these cases were not here controlling without more, on the ground that the PIO is simply the alter ego of the PLO, no different result follows. It may be conceded at the outset that if the PIO were a purely domestic organization, without any ties to a foreign power not subject to its discipline, and whose views simply paralleled those of the PLO, the government could not constitutionally order it closed. By its own admission, however, it is not such a domestic entity; it is at a minimum, and again by its own admission, the designated agent of the PLO in this country. Those facts make a constitutional difference.

Restrictions on physical access to the United States and its citizens, or by its citizens to a foreign power, are a

necessary and historically validated adjuncts of foreign policy. During the course of years, such restrictions have been imposed upon both Americans and foreigners in various categories. These restrictions have been repeatedly challenged on the precise grounds advanced by plaintiffs here--that they constitute an improper restraint on the right to exchange ideas and gather information. This claim has been consistently rejected by the courts, and should be rejected here as well.

In Regan v. Wald, 468 U.S. 222 (1984), the constitutionality of regulations restricting expenditures in Cuba was upheld, notwithstanding the claim that it "diminished the right to gather information about foreign countries," 468 U.S. at 241, citing Zemel v. Rusk, 381 U.S. 1 (1965). In Regan, the Supreme Court explained that the interest of Americans in receiving information through travel to Cuba was outweighed by foreign policy considerations supporting an economic embargo of Cuba.

Similarly, in Zemel, the Supreme Court, while acknowledging that a restriction on use of American passports for travel to Cuba impeded the ability of American citizens to obtain information about political developments in Cuba, nevertheless upheld it as a restriction on action, not speech. Speaking through Chief Justice Earl Warren, the Court said:

> There are few restrictions on action which could be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminished the

> citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information. (footnote omitted).

Like the travel restrictions upheld in Zemel and Wald, the closing order is directed at conduct and only incidentally speech. It addresses the act of representing the PLO in the United States, not the speech that may accompany it. It regulates only the activities of American citizens, not in their private, personal capacities, but only insofar as they seek to serve as domestic agents for the PLO. If a ban on acting as the representative of a foreign entity cannot withstand constitutional scrutiny, the United States would be required to tolerate representatives or spokespersons of any group purporting to represent a country or political faction, no matter how murderous or lawless, and no matter what the implication of that presence for American foreign relations. These are not chimerical concerns, as Iran's reaction to the admission of the Shah so vividly demonstrates.

To be sure, just as physical presence has diplomatic and political significance, limiting the opportunity for direct personal exchange of views with representatives of the PLO has some First Amendment significance, Kleindeinst v. Mandel, supra, and Zemel v. Rusk, supra. Hence, it cannot be said that the

closing order has no impact at all on the Free speech rights of American citizens.

However, Kleindeinst v. Mandel, supra, teaches that claims of American citizens to hear foreigners are subject to a rather relaxed standard of review. It suffices to sustain such a restriction that the government shows some justification other than the suppression of speech to justify the restriction of the attack. The government has done that here. It has pointed to certain actions of the PLO, plaintiffs' alter ego, which suggest its commitment to terrorism as an acceptable form of political behavior. The United States has determined that one of its important foreign policy goals is the elimination of terror as a political weapon. Its decisions to expel the PLO/PIO because of its advocacy of terrorism is identical in both foreign policy terms and constitutional law with closing the Libyan Peoples Bureaus for the same reason.

In cases in which the government regulates action which has an incidental impact on speech, the regulations will be upheld if: 1) it is within the constitutional power of government; 2) it furthers an important or substantial government interest; 3) the government interest is unrelated to the suppression of free expression; and 4) the alleged restriction is no greater than essential to further that interest, U.S. v. O'Brien, 391 U.S. 67, 76-77 (1968). Two later cases, while reaffirming U.S. v. O'Brien, add another criterion: that there be available

alternative means of communication for the inadvertently suppressed message to be heard, City of Renton v. Playtime Theaters, 106 S.Ct. 925 (1986) and Young v. American Mini-Theaters, 427 U.S. 50 (1976). The closing order meets each of these tests.

The decision to isolate the PLO/PIO because of its support for terrorism is plainly the sort of judgment about foreign affairs the Constitution commits to the federal government, see generally, L. Henkin, Foreign Affairs of the Constitution (1972). The suppression of terrorism has been repeatedly declared a major foreign policy goal of the United States, as reflected both in official Executive Branch pronouncements and various statutory enactments. See, e.g., 18 U.S.C. §§32, 2331, 3071; 19 U.S.C. §2462; 22 U.S.C. §2349aa-2; 49 U.S.C. App. §1487. The closing of the PLO/PIO is unrelated to the supression of speech. The order allows Americans, resident aliens, or anyone else, including plaintiff Rahman, to be the protaganists of any cause they wish, including that of the PLO; they may espouse its views and contribute to its treasury; they may even be members of the PLO. Indeed, plaintiffs, and other like-minded persons may open and operate an autonomous office representing the American Friends of the PLO. They may urge any policy regarding the Middle East on the government or other Americans. As we understand the order, it permits Americans to communicate with the PLO, so long as it is clear that such communications are not a continuation of the current PLO control

of the PIO. The one thing plaintiffs may not do is become the instrument through which the control and the authority of the PLO itself is introduced into our domestic life.

Although some might argue that there are other means of clarifying American policy towards the PLO, judgments about how far the United States should go to make clear its foreign policy positions is, in the absence of plain overreaching, for the Executive. The order challenged here is not so blatantly overbroad as to allow this Court to question the Executive's foreign policy judgments. And this order leaves numerous alternatives available for supporters of the PLO, or the PLO itself, to inject their views into the domestic marketplace of ideas, including the opening of an "American Friends of the PLO" office and the distribution of literature produced by the PLO.[2]

The Individual plaintiff, Rahman, objects that the closure order denies him the right to act on behalf, or at the behest, of the PLO, and hence denies him the freedom of association. This claim is without merit. One who acts "at the behest of, or direction of" someone else is an agent of that person, and is

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2 In Kleindeinst v. Mandel, supra, the Supreme Court noted (408 U.S. at 765) that the availablity of technology making it possible for excluded aliens to communicate with American citizens was a factor weighing in favor of the constitutionality of access restrictions.

nothing less than his principal's alter ego. When plaintiffs are denied the opportunity to serve as agents of the PLO they are not denied the right to associate with the PLO; they are simply denied the right to create a presence for the PLO in this country. Just as the United States may choose to ban the principal and exclude it from the country it may ban its agent from acting on its behalf. An American citizen, simply put, does not have a constitutional right to be the representative, the alter ego, the personification, of Cuba, Libya, or of South Africa, if the United States, in the pursuit of legitimate foreign policy goals, decides not to sanction such representation. International law, too, recognizes the right of a government to deny its citizens that right, Vienna Convention on Diplomatic Relations, Art. 8. Surely, if the United States expels Libyan diplomats, Libya has no right to insist that the United States government permit willing Americans to serve as surrogate Libyan diplomats.

In this respect, too, Plaintiffs Rahman and the PIO ought to be in no better situation than accredited diplomats to the United States. Among the duties of ambassadors is the "promotion of friendly relations between the sending State and receiving State; Vienna Convention On Diplomatic Relations Art 3(i)(e). Ambassadors and other diplomats carry out their functions in large measure by speaking to members of the public either directly or through the press. The expulsion of a diplomat or the closing of an embassy or mission (under the same

Foreign Mission Act as is invoked here) has precisely the same impact on the availability of ideas as does the closing of the PIO. Nothing in plaintiffs' papers suggests any basis for distinguishing between the two situations, particularly if this Court sustains the State Department finding that the PIO is owned or substantially controlled by the PLO.[3]

D. The Foreign Agents Registration Act Is Not, As A Matter of Constitutional Law, The Only Modality For Regulating Agents of Foreign Principals

At several points in their papers, plaintiffs urge that the purpose of the closure order must be the suppression of speech since the Foreign Agents Registration Act ("FARA") (with which plaintiffs comply) already regulates speech of foreign agents, and is adequate to protect the government's legitimate interests. Moreover, citing Meese v. Keene, 107 S.Ct 1882 (1987), they argue that FARA is constitutional only because it requires more, not less, speech.

FARA is not so easily limited. First, the plaintiffs point to no authority for their suggestion, necessary if their argument is to prevail, that FARA is the exclusive modality the federal government may employ in regulating the activities of foreign agents. Indeed, it is not the exclusive statute

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[3] Even Rahman's status as an American citizen is not a sufficient distinction. The Vienna Convention (Art 8(2)) permits a national of a "receiving state" to serve as a diplomat for a foreign power with his or her own government's consent "which may be withdrawn at anytime."

regulating speech between American citizens and foreign entitites regarding the foreign relations of the United States. Thus, ever since 1794, the Logan Act, 18 U.S.C. §953, has punished one who "directly or indirectly...carries on any correspondence with any foreign government..with interest to influence...the conduct of any foreign government...in relation to any disputes...with the United States."

Moreover, FARA itself sustains the distinction between speech on behalf of a foreign principle and domestic speech. For example, the disclosure and labelling requirements of FARA could not be compelled in regard to domestic political activity. Thus, the Supreme Court has repeatedly rejected status which would require that those engaged in political activity label their domestic political literature, Talley v. California, 362 U.S. 60 (1960) and other cases, e.g., Brown v. Socialist Workers, 459 U.S. 87 (1982); Bates v. Little Rock, 361 U.S. 516 (1960). cf. Bantam Books Ltd. v. Sullivan, 372 U.S. 58 (1963).

What emerges from the judicial response to FARA--indeed, from the very existence of FARA--is a fundamental distinction between the power of government to abridge the right of citizens to associate amongst themselves to advance their own political goals, and the right to subject oneself to foreign domination with the purpose of furthering the foreign actors' goals, particularly where, as in the FARA case, the "association" takes

the form of service as an agent of foreign interests.[4] The former is "an integral part of [the freedom of association]. Tashjian v. Republic Party, 107 S.Ct. 544, 548-49 (1986); the latter is subject to different and greater restraints in the interest in furthering the foreign policy of the United States.[5]

Healy v. James, 408 U.S. 169 (1970) is, for this reason, not persuasive here. There, a university refused to allow a local chapter of the SDS to function on campus because it was allegedly affiliated with the national SDS. The Court held that the mere association with "an unpopular association"--which was all the record showed--was insufficient to sustain a denial of one's rights. In that case, however, the local group had

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4 Had the government made membership in the PLO illegal, cases such as those cited by plaintiffs (Memorandum p. 24) would require that only "knowing membership" be penalized. Where, however, all that is forbidden is acting as an agent of a foreign government, and plaintiffs have for years publicly acknowledged that association, even the most stringent constitutional standards are satisfied.

5 Among plaintiffs' other complaints is that the closing compels plaintiff Rahman to distinguish between his private speech and his speech on behalf of the PLO. That distinction applies under FARA as well, Viereck v. U.S., 318 U.S. 236 (1943). The Court considered it that criminal case whether the Act required disclosure of the purely private activities of a registered foreign agent which furthered the interests of his principle. A majority of the Court held it did not. Two of the court's most passionate defenders of freedom of speech (Justices Black and Douglas) thought that the statute did reach such activity, and would have sustained a conviction of a Nazi agent for failing to report his personal activities in support of the German Reich. Even under the Viereck majority's view, however, it follows that distinction between one's activities as an agent of a foreign power and one's personal activites is permissible.

proclaimed its non-affiliation with the national group and noted that it did not share all of the national organization's aims. Moreover, there was no showing that it was constitutional to ban the national group in the first place since only some of its activities were illegal.

Healy v. James sets down no general rule that, even in the domestic context, an independent branch of a larger group cannot be banned or punished if the larger group can be. Be that as it may, the PIO is not an independent organization. It has authoritatively been determined to be part of the PLO, which, as demonstrated above, can be banned from this country.

## CONCLUSION

For the reasons stated, the motion for a preliminary injunction based on alleged violations of plaintiffs' First Amendment rights should be denied.

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I certify that copies of the foregoing motion and brief have been delivered to all counsel of record by hand delivery or telecopy.

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