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Office of the
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Washington, D.C. 20530

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Memorandum for Edwin Meese, III
Attorney General

Re: Intent and Constitutionality of Legislation
Prohibiting the Maintenance of an Office of
the Palestine Liberation Organization in the
United States

The Department of State has requested the views of this Department regarding the intent and constitutionality of certain provisions of the "Anti-Terrorism Act of 1987" ("Act")¹ forbidding the Palestine Liberation Organization ("PLO") to "establish or maintain an office . . . within the jurisdiction of the United States." Specifically, the State Department has asked whether Congress, in passing the Act, intended to require the executive to close the permanent observer mission (the "Observer Mission" or "Mission") of the PLO to the United Nations ("U.N."), even if such an action would place the United States in breach of pre-existing obligations under international law. Next, assuming that Congress did so intend, we have been asked whether the President is obligated to adhere to the Act or to an inconsistent (according to the State Department) obligation of the United States under the U.N. Headquarters Agreement. Joint Res., Aug. 4, 1947, c. 482, 61 Stat. 756, 22 U.S.C. 287 (note) ("Headquarters Agreement").² Finally, we have been asked whether Congress may, consistent with the President's exclusive powers to "receive Ambassadors and other public Ministers" under Article II, section 3, of the Constitution and to conduct foreign relations, require him to close the Mission.³

¹ (Title X of the Foreign Relations Authorization Act of 1988-89), Pub. L. No. 100-204, approved Dec. 22, 1987.

² The Act directs the Attorney General to enforce its provisions. We here discuss the authority of the President -- and by implication that of his subordinates -- to refuse to fulfill the terms of the Act.

³ The formal opinion request from the State Department Legal Adviser posed two slightly different questions: "(1) Is each of the three prohibitions in section 1003 constitutional?" and "(2) In light of the answer to (1), how does the Attorney General intend to comply with section 1004(a) of the Act?" Letter of

For the reasons stated below, we conclude that Congress intended the executive to close the PLO Mission, regardless of the legality of such an action under international law. We further conclude that, consistent with more than a century of Supreme Court precedent, the later act of Congress is to be given effect over any earlier inconsistent treaty obligation. Finally, we believe that neither the President's exclusive power to receive ambassadors nor his general foreign affairs powers are impermissibly infringed by the Act.

I. Intent of Congress in Passing the Anti-Terrorism Act

The relevant provision of the Act, Section 1003, provides in pertinent part 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 the effective date of this title --

* * *

(3) notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof.

The Act directs the Attorney General to "take the necessary steps and institute the necessary legal action to effectuate the policies and provisions of this title." Section 1004(a).

The plain terms of the Act apply to both the Palestine Information Office (the "PIO") in Washington³ and the PLO's

³ (Cont.) January 6, 1988, from Abraham D. Sofaer, The Legal Adviser, Department of State, to Arnold I. Burns, Deputy Attorney General, Department of Justice, at 3. Although we address these questions in this memorandum, in our view the three questions posed above are the most pertinent, as they are responsive to arguments posed by the State Department in its oral and written submissions to this Office.

⁴ The State Department has already invoked its authority under the Foreign Missions Act, 22 U.S.C. 4301 et seq., and ordered this office to close. The PIO challenged this action in the district court of the District of Columbia. Judge Richey denied the plaintiff's request for a preliminary injunction. Palestine Information Office v. Shultz, C.A. No. 87-3085 (filed Dec. 2,

Observer Mission to the United Nations. The purpose of the PLO Mission is to further the PLO's interests; those running the Mission are "maintaining an office;" and the financing for the Mission is provided by the PLO. Moreover, there can be no question that one of the express purposes of the Act was to require the closing of the Mission. Although the language of the Act had been a part of a number of bills that had been introduced in both the House and the Senate, its specific origin was as Amendment 940 to the Foreign Relations Authorization Act for Fiscal Years 1988 and 1989. In introducing the Amendment, Senator Grassley acknowledged that the State Department had already acted to close down the Washington office of the PLO, but said:

[T]he PLO also maintains a U.N. observer mission in New York. For some time, Members of Congress have questioned the administration policy which permits PLO operations on our soil. Consequently, . . . we now have 50 Senators who have cosponsored this bill to shut down the PLO safe harbor in the United States.

133 Cong. Rec. S13851 (daily ed. Oct. 8, 1987).

This view -- that one of the purposes, if not the primary purpose, of the bill was to close the PLO Mission to the United Nations in New York -- was echoed by many members of Congress who supported the Amendment. See, e.g., Remarks of Senator Lautenberg, 133 Cong. Rec. S13854 (daily ed. Oct. 8, 1987) ("I join Senators Grassley and others in offering this amendment to close down the PLO office in Washington, D.C. and the PLO Observer Mission in the United Nations. . . . [T]his amendment goes farther than the State Department's action. It will finally close not only the office in Washington but the PLO office in New York."); Remarks of Representative Burton, *id.* at H8790 (daily ed. Oct. 20, 1987) ("The State Department, recognizing the support for the Kemp-Mica-Grassley bill, closed down the Washington Office of the PLO with considerable reluctance. But the PLO 'mission' at the U.N. will remain open unless the Kemp-Mica-Grassley bill is signed into law."); Remarks of Representative Broomfield, *id.* at H11421 (daily ed. Dec. 15, 1987) ("The House conferees were under instructions from the House to accept the Grassley amendment which would order closed the United States offices of the Palestine Liberation Organization. This provision has been retained."); Remarks of Representative Snowe, *id.* at H11429 ("The closure of the PLO office in New York is another issue.").

The State Department was opposed to closing the PLO Mission for reasons of both foreign policy and international law. This

⁴ (Cont.) 1987 D.D.C.). The case is now on appeal in the D.C. Circuit, with oral argument set for February 23rd. Palestine Information Office v. Shultz, No. 87-5398 (app. pending,

opposition was well known to all members of Congress. With this in mind, the Conference Committee considered, and rejected, an amendment that would have made an exception for the Observer Mission in New York and would have required closing only the PIO in Washington. 133 Cong. Rec. S18186 (daily ed. Dec. 16, 1987) (remarks of Senator Helms). Thus, it is clear, as the State Department acknowledges, that the specific intention of Congress in passing the legislation was to close down the PLO Observer Mission in New York. Memorandum of Law re: The Anti-Terrorism Act of 1987, Attachment 4 to Letter of February 5, 1988, from Abraham D. Sofaer, The Legal Adviser, Department of State, to Edwin Meese III, Attorney General, Department of Justice, at 2, ("State Department Memo") ("The Act's language and legislative history leave no doubt that Congress' main goal was to accomplish the closure of the PLO Observer Mission to the United Nations . . ."). The State Department acknowledges that the plain terms of the Act so provide and that Congress so intended. Id. at 2-3.

Notwithstanding the plain and unqualified language of the Act, the State Department suggests that Congress intended that the Attorney General enforce the Act only if it does not violate the U.N. Headquarters Agreement and, thus, international law.⁵

⁴ (Cont.) D.C.Cir.).

⁵ If Congress intended that the Act be enforced whether or not it violates international law, and if (as we conclude in part II of this memorandum) Congress' legislative authority over domestic federal law is not limited by pre-existing obligations under international law, the status of the Act under international law becomes irrelevant. Therefore, for the purposes of this memorandum, we assume arguendo the validity of the State Department's assertions that enforcement of the Act would violate international law.

We are constrained to note, however, that the issue -- whether closing the Mission would violate international law -- is by no means clear. Indeed, while this Administration (including the Justice Department) has taken the position in both Congress and the courts that the United States is obligated under international law to permit the operation of observer missions, there is much force to the arguments supporting the contrary proposition.

None of the written agreements governing the relationship between the United States and the United Nations provide for permanent observer missions. The specific provisions of Articles 104 and 105 of the Charter of the United Nations protect only the "Organization," its representatives, and "Representatives of the Members of the United Nations." It therefore cannot be that closing the mission of a non-member, non-governmental entity such as the PLO breaches our obligations under the Charter.

The State Department advances this position despite the fact that

⁵ (Cont.) The primary textual basis for the State Department's position is found in the Headquarters Agreement. Section 15 of that Agreement, titled "Resident Representatives to the United Nations," protects the rights of member states to maintain permanent missions to the United Nations in the United States. That section makes clear that the United States is obligated to accord to resident representatives to the United Nations of member states recognized by the United States "the same privileges and immunities . . . as it accords to diplomatic envoys accredited to it." Under that section the United States is also obligated to extend to resident representatives to the United Nations of states not recognized by the United States "such privileges and immunities . . . only within the headquarters district, [and] at their residences and offices outside the district" Plainly, section 15 contemplates that all resident representatives of member states would have permanent residences and offices here; these privileges, however, are limited to member states only.

On the other hand, section 11 of the Headquarters Agreement, the specific provision on which the State Department relies, makes no such references to "offices" or "residences." As the Legal Adviser for United Nations Affairs wrote in a confidential memorandum to the Legal Adviser, "Observer missions apparently were not contemplated when [the Charter of the United Nations and the Headquarters Agreement] were drafted." Memorandum of April 23, 1987, re Authority With Regard to PLO UN Observer Mission and Information Office from Bruce C. Rashkow, Legal Adviser for United Nations Affairs, Department of State, to Judge Abraham D. Sofaer, Legal Adviser, Department of State, at 1, ("April Memo"). Section 11 simply prohibits the United States from, inter alia, "impos[ing] impediments to transit to or from the headquarters district of . . . (5) other persons invited to the headquarters district by the United Nations" (emphasis added). This language by its terms does not protect permanent observer missions of non-governmental entities. The entire section is styled only as preventing impediments to "transit." It is difficult to see how this protects permanent missions of any sort; we think it far more likely that the section was referring to temporary visitors rather than to permanent guests. Nor does the negotiating record discussed in the State Department's recent memo on this issue necessarily contradict this reading of section 11. Memorandum of February 1, 1988 re Authority of the United States Under International Law to Prevent Operation of The PLO Observer Mission at the United Nations from Judge Abraham D. Sofaer, Legal Adviser, Department of State, at 3 ("February Memo").

The practice under the Headquarters Agreement with regard to permanent observer missions does not conclusively settle the question either. Permanent observer missions were established

Congress knew of, and expressly rejected, the State Department's

⁵ (Cont.) shortly after the United Nations was formed, although in at least one case -- that of the Swiss observer mission -- the diplomats were formally accredited to the United States through their embassy to the United States in Washington. Until 1974, the only permanent observer missions were established by non-member states and, in three cases, by intergovernmental organizations such as the Organization of American States and the League of Arab States. April Memo, at 6. Throughout this period the United States maintained that "[s]ince Permanent Observers of non-member States do not have an officially recognized status, facilities which are provided to them by the Secretariat are strictly confined to those which relate to their attendance at a public meeting and are generally of the same nature as those extended to distinguished visitors at the United Nations headquarters" UN Juridical Yearbook, 1962, quoted in April Memo, at 5. For a substantial period of time, the United Nations agreed, stating that "[i]f [Permanent Observers] are not listed in the United States diplomatic list, whatever facilities they may be given in the United States are merely gestures of courtesy by the United States authorities." Id. at 4-5. Contrary to the State Department's suggested reading, April Memo, at 4-5, it appears that the U.N. Legal Adviser was addressing more than just the privileges and immunities to be accorded to observer missions. He apparently was stating that the very use of any facilities in the United States -- such as would be encompassed in the establishment of a mission -- was at the pleasure of the United States.

In 1974, the United Nations, which had taken to asserting an ever-increasing scope of privileges and immunities for permanent observer missions and their representatives over United States objections, invited the PLO to participate in its deliberations. The United States objected to inviting the PLO, but acquiesced in granting to its representatives visas to enable them to enter the United States and attend the General Assembly. The State Department takes the position that this acquiescence bound the United States to permit even observer missions of non-governmental organizations to remain in the United States. The State Department further notes that the United States has made "repeated acknowledge[ments] in the U.N., in the courts, in the Congress, and in the public, that such permanent observer missions are entitled to operate under the Headquarters Agreement. This practice, in accordance with accepted principles of treaty interpretation, has established a legally binding obligation on the United States to permit the operation of such missions." February Memo, at 1.

We are reluctant to endorse the proposition that acquiescing in a practice for a limited period of time necessarily makes that practice binding on the non-objector. The Restatement of Foreign Relations, quoted by the State Department,

interpretation of international law. Indeed, the State Department acknowledges this fact, noting: "Congress was aware of and expressly rejected the State Department opinion that closure of the PLO Observer Mission would violate the [U.N. Headquarters Agreement]." Id. at 6. The State Department nevertheless argues that, while Congress refused to accept the executive branch's interpretation of the Headquarters Agreement as definitive, it nonetheless did not intend that the Mission be closed if doing so would violate the Headquarters Agreement. According to the State Department:

While the Act was intended to compel the President to seek to close the PLO mission despite our interpretation of the Headquarters Agreement, it was not intended to force an actual violation of the Agreement. So far as we are aware, not a single legislator in either chamber expressed the view that the Act should be enforced even if that course would require a result contrary to the United States' obligations under the Agreement.

Id. at 5.

Having rejected the State Department's interpretation of international law, yet not wanting to violate international law, Congress was, according to the State Department, in effect ordering the Attorney General, prior to enforcing the statute, to secure a binding determination on the international law issue from a competent authority such as the International Court of Justice, or an arbitration tribunal impaneled under the dispute resolution⁶ process prescribed in Article 21 of the Headquarters Agreement.

⁵ (Cont.) states that "[a]ny . . . subsequent practice between the parties in the application of the agreement is to be taken into account in interpreting the agreement." Restatement (Revised) of Foreign Relations Law of the United States, section 325 (Tent. Final Draft 1985)(emphasis added). It is a different matter entirely to say that permitting non-governmental organizations to maintain permanent observer missions in the United States for fifteen years makes such permission part of an agreement that is otherwise entirely silent on the question of observer missions. This is not to suggest or predict which arguments would prove persuasive to an international law arbitrator or to the International Court of Justice; it is to say that a neutral third party adjudicating a dispute on this international law issue would hardly be presented with an open-and-shut case.

⁶ The State Department argues as follows (State Department Memo, at 6-7):

A preferable reading [of the Act] in our view . . .

It is important to note at the outset that sustaining this interpretation of the Act requires more than a showing that Congress did not intend, in passing the Act, to violate international law. For it would be entirely consistent with this premise for Congress to have studied the international law arguments made by the State Department against the bill, rejected those arguments on the merits, and ordered closure of the PLO Mission notwithstanding those arguments. Indeed, as we demonstrate below, our reading of the legislative record yields precisely this conclusion. Rather, the State Department must also demonstrate that Congress intended the PLO mission to remain in operation unless and until the United States obtained an authoritative determination that closing the Mission would not violate the United States' obligations under international law. The language and legislative history of the Act, however, contradict this construction.

The Act's language unequivocally orders closure of PLO offices such as the Observer Mission. There is no exception for closures that violate international law, nor any other suggestion that enforcement is dependent upon an authoritative determination that the closure is consistent with international law. Indeed, the Act expressly provides that all PLO offices are to be closed "notwithstanding any provision of law to the contrary." Section 1003(3)(emphasis added).⁷ This proviso necessarily includes the Headquarters Agreement. Moreover, while this unambiguous

6 (Cont.) would be to require the Attorney General to attempt to enforce the Act with respect to the PLO office, but to refrain from doing so if it is authoritatively determined that the [Headquarters Agreement] requires the U.S. to allow the Observer Mission to operate

The Agreement's Article 21 sets out a procedure for obtaining a judgment which would . . . bind the parties. . . .

Under this view, it would seem appropriate to allow the PLO Observer Mission to operate while an authoritative determination is being obtained.

7 We note that since the Senate did not give its advice and consent to the Agreement, it cannot be considered a treaty for the purposes of constitutional law. Nonetheless, as the State Department correctly points out in its memo, State Department Memo, at 6 note 3, the Headquarters Agreement is the "law" of the United States, having been enacted into law by a joint resolution of the Congress. Joint Res., Aug. 4, 1947, c. 482, 61 Stat. 756, 22 U.S.C. 287 note. It has international law effect, moreover, as an agreement between a sovereign and an international organization with a juridical personality, separate from that of

language renders unnecessary consideration of legislative history, Caminetti v. United States, 242 U.S. 470, 485 (1917), this history further confirms that the Mission is to be closed despite arguments that doing so would violate international law.

The primary basis for the State Department's objections was that the obligations of the United States under the U.N. Headquarters Agreement required it to tolerate the presence of the Mission. This position was communicated to Congress many times, and was consistently maintained by the State Department. As State advised Congress:

The PLO Observer Mission in New York was established as a consequence of General Assembly Resolution 3237 (XXIX) of November 22, 1974, which invited the PLO to participate as an observer in the sessions and work at the General Assembly. The PLO Observer Mission represents the PLO in the U.N.; it is in no sense accredited to the U.S. The U.S. has made clear that PLO Observer Mission personnel are present in the United States solely in their capacity as "invitees" of the United Nations under the meaning of the Headquarters Agreement. . . [W]e therefore are under an obligation to permit PLO Observer Mission Personnel to enter and remain in the United States to carry out their official functions at U.N. Headquarters

Letter from Secretary of State George Shultz to Senator Grassley, printed in 133 Cong. Rec. S6449 (daily ed. May 14, 1987).

This interpretation was well known to Congress, although many Congressmen disagreed with the Secretary's view. For example, Senator Grassley, the sponsor of the bill,⁸ took the following position:

With respect to the New York office in particular, the fact that it is loosely connected with the United Nations does not confer any automatic rights for the PLO nor create any absolute obligations on the United States. The U.N. Office of Legal Affairs has ruled that--

⁷ (Cont.) its member states.

⁸ The Act was introduced in both the House and Senate by a number of different sponsors at different times. It was first introduced by Senator Grassley on May 14, 1987. It is identical to the bill eventually passed as part of the Foreign Relations Authorization Act of 1988-89. Pub. L. No. 100-204, approved Dec. 22, 1987. S.1203, 100th Cong., 1st Sess., 133 Cong. Rec. S6448 (daily ed. May 14, 1987). See also H.R. 2211, H.R. 2587, and H.R. 2548, all introduced in the 1987 session.

Permanent observer missions (such as that of the PLO) are not entitled to diplomatic privileges or immunities If they are not listed in the United States diplomatic list, whatever facilities they may be given in the United States are merely gestures of courtesy by the United States authorities.

Nor does the United Nations headquarters agreement confer any particular rights on the PLO.

133 Cong. Rec. S13852 (daily ed. Oct. 8, 1987).⁹

In addition, many Congressman spoke of the need for the legislation without opining upon its effect under international law. Remarks of Senator Lautenberg, 133 Cong. Rec. S13854-55 (daily ed. Oct. 8, 1987); Remarks of Representative Miller, 133 Cong. Rec. H11427 (daily ed. Dec. 15, 1987); Remarks of Senator Helms, 133 Cong. Rec. S18186 (daily ed. Dec. 16, 1987). Nor do either of the Committee reports mention any such limitation.

Moreover, it severely strains credulity to believe that Congress decided to insist on closing the Observer Mission even though it was repeatedly informed by the State Department of its view that this action would violate international law, but nonetheless simultaneously decided to condition closure on an authoritative determination by an arbitrator or the International Court of Justice that closure would not violate international law. In short, there is nothing to suggest that Congress as a whole intended to defer to the international law conclusions of these international tribunals while not extending similar deference to the conclusions of the executive branch.

Against all of this evidence we have only the statement of a single Senator who consistently opposed the measure and ultimately voted against it. Remarks of Senator Pell, 133 Cong. Rec. S13855 (daily ed. Oct. 8, 1987).¹⁰ Statements of individual

⁹ A number of other members of Congress took this position. See, e.g., Remarks of Representative Burton, 133 Cong. Rec. H8790 & H11425 (daily ed. Oct. 20, 1987 & Dec. 15, 1987). Others were not especially concerned with the international law ramifications of the bill. See, e.g., 133 Cong. Rec. S18186 (daily ed. Dec. 16, 1987) (remarks of Senator Helms).

¹⁰ Senator Pell argued:

[T]he administration has expressed concern that the language on the PLO might require the closing of the Observer Mission to the United Nations in violation of U.S. obligations under international law. The bill language, as I read it, does not necessarily require

legislators made in opposition to a measure can hardly be given deference in determining the intention of the legislature as a whole. See Brock v. Writer's Guild of America West, Inc., 762 F.2d 1349, 1356 (9th Cir. 1985) ("The remarks of legislators opposed to legislation are entitled to little weight in the construction of statutes.") Particularly is this true when the statement runs counter to the statute's language and other legislative history. See, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203 n.24 (1976); NLRB v. Fruit Packers, 377 U.S. 58, 66 (1964). We can find no basis on which to elevate the view of a single Senator who opposed the measure above the language of the statute.

Finally, in light of the State Department's repeated and categorical public statements that there is a "legally binding obligation on the United States to permit the operation" of the PLO Mission, February Memo, at 1, we are unclear as to what purpose would be served by submitting the issue to arbitration under the Headquarters Agreement. Given these repeated representations, we suspect that an international tribunal would view with skepticism any defense offered by the executive that the closing was legal under international law. This point fortifies us in our conclusion that Congress did not intend to condition its directive to close the PLO Mission on a determination that to do so would not violate international law. To impute such an

10 (Cont.) the closure of the PLO Observer Mission to the United Nations, since it is an established rule of statutory interpretation that U.S. courts will construe congressional statutes as consistent with U.S. obligations under international law, if such construction is at all plausible.

The proponents of closing the PLO mission argue that the United States is under no legal obligation to host observer missions. If they are right as a matter of international law, then the language in this bill would require the closure of the PLO Observer Mission.

On the other hand, if the United States is under a legal obligation as the host country of the United Nations to allow observer missions recognized by the General Assembly, then the language in this bill cannot be construed, in my opinion, as requiring the closure of the PLO Observer Mission. The bill makes no mention of the PLO Mission to the United Nations and the proponents never indicated an intent to violate U.S. obligations under international law. Rather, they asserted that closure of the New York PLO office was not a violation of international law and that they were proceeding on this basis.

Remarks of Senator Pell, 133 Cong. Rec. S18185-86 (daily ed. Dec.

intention to Congress is to conclude that Congress, which affirmatively and definitively rejected the interpretation of the Headquarters Agreement propounded by the State Department, intended the executive branch to reverse field and defend before an international tribunal a position it had consistently debunked. Given the remarks of those congressmen who did address the international law issue, this argument is simply not credible.

In sum, Congress is entitled to formulate its own interpretation of international law and to act upon that interpretation. As the Supreme Court said one hundred years ago, "if the power to determine these matters [whether or not to adhere to a treaty obligation] is vested in Congress, it is wholly immaterial to inquire whether by the act assailed it has departed from the treaty or not, or whether such departure was by accident or design, and, if the latter, whether the reasons were good or bad." Whitney v. Robertson, 124 U.S. 190, 195 (1888).¹¹

II. The Effect of the Statute vis-a-vis the Prior Treaty Obligation

In general, an act of Congress and a treaty should be construed so as to avoid, if possible, any inconsistency between the two. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any possible construction remains"). See Moser v. United States, 341 U.S. 41, 45 (1951); Clark v. Allen, 331 U.S. 503 (1947); Diggs v. Shultz, 470 F.2d 461, 466 (D.C. Cir. 1972), cert. denied, 411 U.S. 931 (1973); Restatement (Second) of Foreign Relations, Reporter's Notes to Section 145, at page 448 (1965). This presumption flows from the general assumption that Congress intends to respect our obligations in international law. For the reasons stated above, however, no reconciliation between treaty and statute is possible under the State Department's view of the Headquarters Agreement.

Where, as here, the treaty and the statute conflict, Supreme Court precedent mandates that subsequent statutes abrogate treaties for the purpose of domestic law. The principle underlying this unbroken line of precedent is that the power

¹⁰ (Cont.) 16, 1987).

¹¹ The State Department contends that the "determination" of the Act condemning the PLO for "threaten[ing] . . . international law," section 1002(b), demonstrates that Congress would not have itself wanted to violate international law as it sanctions the PLO for doing so. State Department Memo, at 5. This legislative finding concerning the PLO simply does not provide a plausible basis for inferring that Congress conditioned closure of the PLO Mission on the executive obtaining first an authoritative determination that closure would be consistent with international

given Congress under the Constitution to make domestic law necessarily trumps international law. See, e.g., South African Airways v. Dole, 817 F.2d 119, 125 (D.C. Cir.), cert. denied, 108 S.Ct. 229 (1987). The Court first stated this rule in the Head Money Cases, 112 U.S. 580, 597-99 (1884):

The Constitution gives [a treaty] no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of government by which the treaty is made, which gives it superior sanctity.

A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by Congress, and which when made, usually suspends or destroys existing treaties between the nations thus at war.

In short, we are of the opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.

Id. at 599.

The Court reiterated this rule, albeit on slightly different grounds, four years later in Whitney v. Robertson, 124 U.S. 190, 193-95 (1888). There the Court said:

[I]f there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control. A treaty is primarily a contract between two or more independent nations and is so regarded by writers on public law. For the infractions of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon

¹¹ (Cont.) law.

any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.

Id. at 194.

The Supreme Court reaffirmed this rule the next year in the Chinese Exclusion Case, 130 U.S. 581, 600-03 (1889).¹² It has been the law of the land ever since.¹³ See, e.g., Reid v.

¹² The Court there said:

The treaties were of no greater legal obligation than the act of Congress. By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control.

130 U.S. at 600.

¹³ As noted above, the legality of Congress' action under international law is fundamentally irrelevant to the analysis. See note 5, supra. It was recognized in Chinese Exclusion, for example, that the Chinese Exclusion Act violated the treaties then in force between the United States and China. Nevertheless, the Court said that the "validity of this legislative release from the stipulations of the treaties was of course not a matter

Covert, 354 U.S. 1, 18 (1957) ("This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of the conflict renders the treaty null.")(dicta); Moser v. United States, 341 U.S. 41, 45 (1951) ("Not doubting that a treaty may be modified by a subsequent act of Congress [footnote omitted], it is not necessary to invoke such authority here")(dicta); Clark v. Allen, 331 U.S. 503, 508-09 (1947), quoting Techt v. Hughes, 229 N.Y. 222, 240 (Cardozo, J.) ("President and senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts.")(dicta); Pigeon River Company v. Cox, 291 U.S. 138, 160 (1934) ("So far as the Act of Congress specifically authorized the charging of tolls for the use of the improvements on the Minnesota side of the boundary, it would control in our courts as the later expression of our municipal law, even though it conflicted with the provision of the treaty and the international obligation remained unaffected.")(dicta).¹³

Even those who believe this approach ill-advised generally acknowledge that it is, in fact, the long-standing rule. Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny, 100 Harv L. Rev. 853, 872 (1987) ("Since [Chinese Exclusion], the courts have accepted the equality of statutes and treaties as an established principle.

13 (Cont.) for judicial cognizance. The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts." 130 U.S. at 602. The Court has simply refused to consider whether Congress' later statutes violate international law.

14 James Madison, for example, believed that the political branches could abrogate a treaty if they deemed it to be breached, although he questioned whether the House of Representatives needed to be involved:

In case it should be advisable to take advantage of the adverse breach a question may perhaps be stated, whether the power vested by the Constitution with respect to Treaties in the President & Senate, makes them competent Judges, or whether as the Treaty is a law the whole Legislature are to judge of its annulment -- or whether, in case the President & Senate be competent in ordinary Treaties, the Legislative authority be requisite to annul a Treaty of peace, as being equipollent to a declaration of war, to which that authority alone, by our Constitution, is competent.

Letter from James Madison to Edmund Pendleton, January 2, 1791, reprinted in 4 P. Kurland and R. Lerner The Founder's Constitution 606 (1987).

Usually they apply it to give effect to a later act of Congress inconsistent with an earlier treaty; less frequently they apply it to give effect to a later treaty inconsistent with an earlier act of Congress." (footnotes omitted)). Section 145 of the Restatement (Second) of Foreign Relations states the principle as follows:

(1) An act of Congress enacted after an international agreement of the United States becomes effective, that is inconsistent with the agreement, supersedes it as domestic law of the United States, if the purpose of Congress to supersede the argument is clearly expressed.

(2) The superseding of the agreement as domestic law of the United States by subsequent act of Congress does not affect the international obligations of the United States under the agreement.

.See also Restatement (Revised) of Foreign Relations, section 135(2) & (3)(Tent. Draft No. 1, April 1, 1980).¹⁵

¹⁵ Recently, the argument has been advanced that treaties are in fact lexically superior to later statutes. Westen, The Place of Foreign Treaties in the Courts of the United States: A Reply to Louis Henkin, 101 Harv. L. Rev. 511 (1987). Professor Westen reads the decisions in Head Money, Whitney, and Chinese Exclusion as applying an earlier version of the political question doctrine. Under his reasoning, a later statute merely renders claims under the treaty non-justiciable; the treaties remain binding on the political branches. This reading, although highly original, is not supported by the Supreme Court cases on the issue or their subsequent interpretation by courts and commentators. See, e.g., Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972), cert. denied, 411 U.S. 931 (1973).

It is true that the Court generally characterizes the later statute as providing its rule for decision, and not as completely abrogating or "superseding" the treaty. See, e.g., Head Money Cases, 112 U.S. at 599 ("[S]o far as a treaty . . . can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal."); Whitney v. Robertson, 124 U.S. 190, 193-95 (1888) ("When [a treaty and a statute] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other"); Clark v. Allen, 331 U.S. 503, 508-09 (1947), quoting Techt v. Hughes, 229 N.Y. 222, 240 (Cardozo, J.) ("Congress may

The cases cited by the State Department for the proposition that a general statute enacted after a treaty is ratified will not be read to abrogate the treaty even if the two are inconsistent simply do not carry the load the State Department would have them bear. See State Department Memo, at 5, citing Menominee Tribe v. United States, 391 U.S. 404, 413 (1968); Cook v. United States, 288 U.S. 102, 120 (1933); Chew Heong v. United States, 112 U.S. 536 (1884). The State Department maintains that these cases provide that "only actual articulation of the intention to abrogate a treaty is sufficient to accomplish that result." State Department Memo, at 5. First, these cases do not state this proposition. They support the more general rule that "the intention to abrogate or modify a treaty is not to be lightly imputed to Congress." Menominee Tribe v. United States, 391 U.S. at 413, quoting Pigeon River Co. v. Cox Co., 291 U.S. 138, 160 (1934). Second, the Anti-Terrorism Act does provide that it is effective "notwithstanding any other provision of law

15 (Cont.) enact an inconsistent rule, which will control the action of the courts."'). This language, however, does not suggest that treaties are lexically superior. Rather, it is explained by the reluctance of courts to state that a treaty, which continues to be binding on the United States as a matter of international law, is either repealed or superseded. In this reluctance the courts are entirely correct, for the treaty is neither repealed nor superseded. Only the domestic effect of the treaty is altered: it ceases to provide the municipal law of the United States. As the Reporter's Notes to the Restatement point out,

[i]t is inexact to say that Congress has the power to "repeal a treaty." Congress has no authority to act on the treaty itself. But acting within its legislative authority under the Constitution, Congress may enact laws that are, or are determined to be, inconsistent with the laws as previously represented by a self-executing agreement. The courts, and the President, being unable to give effect to both the agreement and the statute will give effect to the later in time.

Restatement (Revised) of Foreign Relations, Reporter's Note No.4 to section 135, page 69 (Tent. Draft No. 1. April 1, 1980).

Indeed, many statements within the relevant opinions state expressly that the subsequent statute does actually abrogate a treaty as a matter of domestic law. For example, in Chinese Exclusion, the Court said that despite the conflict between the Chinese Exclusion Act and an earlier treaty, the Act "is not on that account invalid or to be restricted in its enforcement." 130 U.S. at 600. As Professor Henkin points out in his response to Professor Westen: "The Court's pronouncement that the Act 'is not on that account invalid' seems clearly to be, in Professor Westen's terms, a lexical statement." Henkin, Lexical Priority or "Political Question": A Response, 101 Harv. L. Rev. 524, 524

to the contrary." Moreover, the Supreme Court has often construed general statutes to be inconsistent with treaty provisions even where Congress did not recite in the statute its specific intention to abrogate a treaty. See, e.g., The Chinese Exclusion Case, 130 U.S. 581, 599 (1889); Whitney v. Robertson, 124 U.S. 190, 193-95 (1888).

Finally, even under the Supreme Court's approach in Chew Heong v. United States, 112 U.S. 536 (1884), one of the cases cited by the State Department, the Act must be read as having effect notwithstanding its international law ramifications. In Chew Heong, the Court refused to read a statute enacted in 1882 as abrogating a treaty the United States had entered into in 1881. The Court stated that repeals by implication are not favored, but went on to describe where such a repeal would be found:

"[T]here must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only pro tanto, to the extent of the repugnancy". . . . "It must appear that the later provision is certainly and clearly in hostility to the former. If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part, or wholly, as the case may be."

Id. at 549-50, quoting Wood v. United States, 41 U.S. (16 Pet.) 342, 362-63 (1842) and State v. Stoll, 84 U.S. (17 Wall.) 425, 431 (1873). If we assume that the Headquarters Agreement prohibits the closing of the PLO Mission, we must conclude that the Act is plainly "repugnant" to it and that Congress intended that the Act be given effect over the Agreement. That it affirmatively intended that the Act be given effect is, as noted above, supported by the Act's plain terms.

III. The Constitutionality of Requiring the President to Close the PLO Mission

Congress cannot intrude on the President's exclusive constitutional powers in the area of foreign affairs. These powers include, of course, the power to "receive Ambassadors and other public Ministers," Article II, section 3, the power, with the advice and consent of the Senate, to make treaties, and the authorities of the Commander-in-Chief. The scope of the President's authority to receive ambassadors is particularly broad. Far more than just a ceremonial power, it extends to "all possible diplomatic agents which any power may accredit to the United States" -- doctrine which the record of practice amply confirms." Corwin, at 221, quoting 7 Op. A.G. 186, 209

¹⁵ (Cont.) (1987)(footnote omitted).

(1855)(Attorney General Cushing). The President also "determines whether the United States should recognize or refuse to recognize foreign governments and whether to maintain or terminate relations with them." ¹⁶ Henkin, Foreign Affairs and the Constitution 47 (1972). Congress may not act in these areas vis-a-vis sovereign states even in the absence of the President's invocation of his constitutional authority. For example, Congress could not choose to "recognize" the PLO, even if the President had not established an official policy of non-recognition. More obviously, Congress could not "receive" the ambassador of France, and the President need not act one way or another for such an action to be constitutionally prohibited to Congress.

Under the doctrine of separation of powers, the President has exclusive plenary authority to represent the interests of the American people in the international arena. As the Supreme Court has put it, the President is "the sole organ of the nation in its external relations, and its sole representative with foreign nations." United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936), quoting John Marshall.¹⁷ Enforcement of the Anti-Terrorism Act would plainly implicate American interests in the international arena, as it threatens to damage our relations with the United Nations. It does not follow, however, that the Act unconstitutionally infringes on the President's exclusive prerogatives.

Congress' legislative power extends to measures necessary to implement through domestic laws the undertakings of the United States in treaties. Pursuant to this responsibility, Congress may make laws affecting the foreign relations of the United States and its international commitments insofar as those laws have domestic effects.¹⁸ Since the Anti-Terrorism Act orders the

¹⁶ The power of the President with respect to this matter is absolute. Appropriately, United States courts will not even take cognizance of a constitutional (or other) claim by a foreign political entity unless the executive recognizes it. United States v. Pink, 315 U.S. 203 (1942). The "established rule" is one of "complete deference to the executive branch" in its determination whether to grant a government access to United States courts. Pfizer, Inc. v. India, 434 U.S. 308, 319-20 (1978).

¹⁷ To quote Professor Corwin, "there is no more securely established principle of constitutional practice than the exclusive right of the President to be the nation's intermediary in dealing with other nations." E. Corwin, The President: Office and Powers 224 (1948) ("Corwin") (footnote omitted).

¹⁸ As the D.C. Circuit has said:

There are certain grants of authority to Congress which are, by their very terms, exclusive. In these

members of the PLO Mission to quit the territory of the United States, its domestic effects cannot be denied.

Congress clearly has authority to govern aliens who are within the United States, and to establish the conditions upon which they may be denied access to this country. See, e.g., Kleindienst v. Mandel, 408 U.S. 753 (1972); Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir.), aff'd by an equally divided Court, ___ U.S. ___ (1987). In each of these cases, the courts reviewed a decision by the executive to exclude an alien to ensure that the exclusion was consistent with the will of Congress. In those cases the President's specific authority to receive foreign ambassadors and his general authority in the area of foreign affairs were not implicated by the executive's decision to exclude the aliens.

Here, similarly, the PLO's representatives to the United Nations, although their presence in the United States is for the purpose of conducting diplomatic relations (though not directly with the United States), fall within the legislative power of Congress over aliens.¹⁹ Nor has the President, in the case of

¹⁸ (Cont.) areas, the treaty-making power and the power of Congress are not concurrent; rather, the only department of the federal government authorized to take action is the Congress. For instance, the Constitution expressly provides only one method -- congressional enactment -- for the appropriation of money:

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.

Art. I, section 9, cl. 7. Thus, the expenditure of funds by the United States cannot be accomplished by self-executing treaty; implementing legislation appropriating such funds is indispensable. Similarly, the constitutional mandate that "all Bills for raising Revenue shall originate in the House of Representatives," Art. I, section 7, cl. 1, appears, by reason of the restrictive language used, to prohibit the use of the treaty power to impose taxes (footnote omitted).

Edwards v. Carter, 580 F.2d 1055, 1057 (D.C. Cir.), cert. denied, 436 U.S. 907 (1978). See also Restatement (Second) of Foreign Relations, section 141(3) ("A treaty cannot be self-executing [and thus effective as domestic law of the United States] . . . to the extent that it involves governmental action that under the Constitution can be taken only by the Congress.")

¹⁹ Congress' constitutional authority to enact the Anti-Terrorism Act is grounded in at least four textual bases: (1) its power to "establish an uniform Rule of Naturalization," Art. I, section 8, cl. 4, generally thought to give it great authority over the

the PLO, chosen to invoke his constitutional authority either to receive ambassadors or to conduct foreign affairs. The PLO observers to the U.N. are neither ambassadors to the United States nor representatives from a sending "state"²⁰ with which the United States has diplomatic relations. Nor is the United Nations a state; it is an international organization that is a creature of a treaty among the member states, one of which is the United States. It is a forum created by its member states. Moreover, it is present within the United States, and subject, to a certain extent, to its sovereignty.²¹ And although its

19 (Cont.) presence of aliens in the United States; (2) its power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," Art. I, section 8, cl. 10; (3) its power to regulate foreign commerce, Art. I, section 8, cl. 4; and (4) its power to make all laws necessary and proper to carrying such laws into execution, Art. I, section 8, cl. 18.

20 Although the PLO is not a state in the traditional sense, the PLO has obviously been accorded observer status at the United Nations. G.A.Res. 3237, 29 U.N. GAOR Supp. (No. 31) at 4, U.N.Doc. A/9631 (1974). It is reported to have diplomatic relations with approximately one hundred countries throughout the world. See Kassim, The Palestine Liberation Organization's Claim To Status: A Juridical Analysis Under International Law, 9 Den. J.Int'l Law & Policy 1, 2-3 (1980). It considers itself a "state" for the purposes of international law, and it claims privileges and immunities generally extended only to a sovereign nation and its representatives.

21 As one New York State court has said:

While it is true that the United States in ceding powers and lands to international control did agree that the Headquarters District shall be under the control and authority of the United Nations (Laws of 80th Congress, First Session, ch. 482, Public Law 357); and, under Section 9(a), supra, did agree further that the "Headquarters District shall be inviolate" such agreement meant only that Federal, State, and local officers shall not enter the Headquarters District to perform any official duties except upon the consent of the Secretary-General.

* * *

Accordingly, it would appear from this agreement that the local law shall have jurisdiction over any acts done or transactions taking place within the Headquarters District which are in violation of such laws and the courts of the appropriate American authorities shall have jurisdiction to try and determine issues between the parties.

officials and the representatives of its member states may be entitled to many of the same immunities as those afforded to foreign governments in the United States (22 U.S.C. 288a(b); Convention on U.N. Privileges and Immunities, Article IV), ambassadors to the United Nations are not ambassadors to the United States. They have no official relationship to the United States. They do not present their credentials to the United States, nor does their presence here in any way imply that the President recognizes either them or their sending state.

Plainly, the President can change all of this. He can accept the current members of the PLO mission as ambassadors to the United States either at large or for limited special purposes; he can establish an official relationship with the PLO and with its representatives; he can accept their credentials and he can choose to recognize the PLO formally. He has not done any of these things. And until such time as the President formally brings the PLO or its representatives to the United Nations within his exclusive constitutional authority, their presence here may be governed by Congress.²²

As noted, this is a situation where Congress has power to act so long as the President has not: The Act implicates domestic concerns and it touches on the admission of aliens to our shores. Congress has spoken and the President has not invoked his exclusive authority under the Constitution, which might shield the Mission from the operation of the Act. Nor does the President intend to recognize the PLO or, so far as we know, take other action in order to achieve this objective.²³ As such,

²¹ (Cont.) People v. Coumatos, 224 N.Y.S.2d 507, 510-11 (1962).

²² Of course, no such change of policy is contemplated. The President's primary justification for signing the bill despite its unconstitutional limitation on his exclusive authority was that "no constitutional conflict is created by this provision." Specifically, in his signing statement to H.R. 1777 he said:

I have no intention of establishing diplomatic relations with the PLO. . . . I am signing the Act, therefore, only because I have no intention of establishing diplomatic relations with the PLO, as a consequence of which no actual constitutional conflict is created by this provision.

Signing Statement of the President, 23 Weekly Comp. Pres. Doc. 1548 (Dec. 22, 1987).

²³ It is clear the President's power to receive emissaries from a foreign entity is exclusive and plenary, as is his power to recognize foreign governments. See L. Henkin, Foreign Affairs and the Constitution 47 (1972); 2 M. Whiteman, Digest of International Law 38-44 (1963). Because the two powers need not be exercised concurrently, the President's decision to engage in diplomatic activity, including the receipt of a diplomatic

even if the Act has the effect (as the State Department maintains) of causing the United States to breach its obligations under international law, it does not constitute an impermissible infringement of the President's powers unless and until he chooses to exercise his exclusive authority under the Constitution to receive foreign ambassadors.²⁴

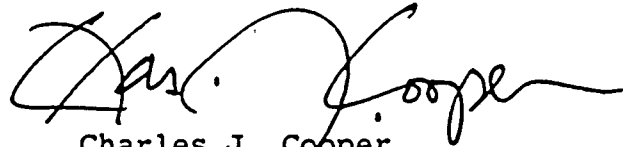
Conclusion

Congress was aware that the State Department opposed the Act on the ground that closing the PLO Mission would violate international law. Nevertheless, it directed the Attorney General to close the Mission "notwithstanding any provision of law to the contrary." Congress thus manifested a clear intention to close the PLO Observer Mission irrespective of the international law ramifications of such action. The Act is

²³ (Cont.) agent, does not obligate him to recognize the state sending those representatives. Cf. *id.* at 122-23, 555, 583. Under such circumstances the President does not formally accept the credentials of the emissary of the sending state, for the formal presentation and acceptance of credentials implies recognition of the sending state. Rather, the President permits the alien representatives to enter the United States or conduct negotiations with our representatives and accords to them the level of diplomatic immunity he wishes. Cf. *Henkin*, at 47 ("[The President] receives 'Ambassadors and other public Ministers' by explicit authorization in Article II, but he also determines how many lesser diplomats shall come and be accredited"). One indication of Presidential permission to enter the United States as a diplomat is the visa given to the foreign emissary. With respect to the PLO, the executive branch has consistently refused to issue to its representatives anything more than a "B-1" (business) visa, which manifests no special diplomatic privileges and immunities. Telephone conversation between Daniel E. Troy, Office of Legal Counsel, and Bruce Rashkow, Office of the Legal Advisor, Department of State.

²⁴ The United Nations has suggested that in the event the Act is enforced, it either will invoke the arbitration procedures under the Headquarters Agreement against the United States or will submit the question to the International Court of Justice. Nothing in this memorandum or in the Act prevents the United States from defending the legality of the decision to close the Observer Mission and arguing that it acted within its rights under international law. Regardless of the outcome of such an adjudication, however, the provisions of the Act are clear. On the day the Act becomes effective (March 22, 1988, ninety days after its enactment), the executive branch must begin taking appropriate steps to enforce it according to its terms (absent the President's invoking his exclusive constitutional authority). And, as noted above, its terms do not admit of an exception to enforcement pending binding resolution of the legality of the closing under international law. See pages 2-12, *supra*.

plainly within Congress' constitutional legislative authority. Nor has the President invoked either his general foreign affairs powers or his authority to "receive Ambassadors and other public Ministers," which would serve to shield the PLO Mission from the operation of the Act. Accordingly, the Act is valid and must be enforced.

A handwritten signature in black ink, appearing to read "Charles J. Cooper", written in a cursive style.

Charles J. Cooper
Assistant Attorney General
Office of Legal Counsel