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The Beirut Agreement: A License to Censor

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The Beirut Agreement: A License to Censor?

I. INTRODUCTION

The Beirut Agreement1 is a multilateral treaty intended to facilitate international circulation of certain audiovisual materials.2 To accomplish this goal, the Agreement authorizes participating countries3 to issue certificates to films determined to be of an “educational, scientific and cultural character.”4 When presented to importing coun-


3. Current signatories to the Agreement are:
   - United States of America
   - Brazil
   - Canada
   - Costa Rica
   - Cuba
   - Cyprus
   - Denmark
   - El Salvador
   - Ghana
   - Greece
   - Haiti
   - Iran
   - Iraq
   - Jordan
   - Khmer Republic

   In addition, the following countries routinely honor certificates on an informal basis:
   - Afghanistan
   - Belgium
   - Bermuda
   - Dominican Republic
   - Equador
   - Finland
   - France
   - Gibraltar
   - Guatemala
   - Guyana
   - India
   - Ireland
   - Kuwait
   - Liberia

4. Beirut Agreement, supra note 1, art. IV, § 2, and art. I.
tries, these certificates exempt the films which they accompany from import duties aimed primarily at money-making, blockbuster motion pictures.\(^5\) Certified films also escape any limits on the number of prints that can be imported and the need to apply for import licenses, thereby saving their distributors a great deal of time and paperwork.\(^6\)

Certificates are particularly advantageous, if not essential, to distributors of educational or documentary films because the import duties which would otherwise be imposed on such films can be prohibitively high.\(^7\) And, even if these import duties do not make foreign distribution altogether too costly, they still represent additional handling costs which discourage overseas distributors from buying or renting films that are not certified.\(^8\) Thus, decisions to issue certificates authorized under the Beirut Agreement can significantly enhance the ability of film distributors to exhibit documentary or educational films abroad.\(^9\)

In the United States, the United States Information Agency (USIA) administers this certification program,\(^10\) and under its direction, the program has reached significant proportions.\(^11\) From its ini-

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5. N.Y. Times, Mar. 19, 1984, at B8, col. 1 [hereinafter cited as Comments of John Mendenhall]; Beirut Agreement, supra note 1, art. III, § 1. The Agreement, however, does not exempt films from fees or charges which are imposed on all imported goods, irrespective of their nature or origin. Beirut Agreement, supra note 1, art. III, § 2.

6. Comments of John Mendenhall, supra note 5. Exemption from the need to apply for an import license, however, does not guarantee that the importing country will accept the film, since Article V of the Agreement preserves the right of each country to ban material under its own censorship laws. Beirut Agreement, supra note 1, art. V.

7. Foreign import duties on a documentary film, for example, can run as high as 100% of the film’s cost, and an import duty of $50,000 per print is not unheard of. Rosenberg, For Our Eyes Only, AMERICAN FILM, July-Aug. 1983, at 40, 41; Comments of John Mendenhall, supra note 5.

8. Rosenberg, supra note 7, at 42.

9. It is evident from its terms that the Beirut Agreement gives the country from which a film originates considerable power to shield a film from another country’s import duties and restrictions. As a matter of state sovereignty, however, the final decision to impose or not to impose those duties or restrictions formally rests with the receiving government under Article IV of the Agreement. See Beirut Agreement, supra note 1, art. IV, § 6; telephone interview with Sally Lawrence, Attestation Officer (Mar. 8, 1985). That government, however, must give “due consideration” to the certifying country’s judgment. Beirut Agreement, supra note 1, art. IV, § 6.


11. The certification program is administered from a staff of 3,400, USIA Fact Sheet, July 1, 1983, at 2 (available from the Office of Congressional and Public Liaison, United States Information Agency, 1750 Pennsylvania Ave. NW, Washington, D.C. 20547) [hereinafter cited as USIA Fact Sheet], and, in 1985, will share a budget of approximately $850 million with
ception in 1966 through 1982, the USIA certified over 36,000 films. During 1982 alone, it certified nearly 2,000 films for duty-free importation abroad. Because the United States produces and exports more educational films than all other countries combined, the Beirut Agreement has probably benefited the American documentary and educational film industry most.

Nonetheless, the fact that the USIA also rejects twenty-five to thirty films each year has spawned recent criticism. Specifically, some commentators have suggested that the USIA has imposed unnecessarily restrictive eligibility requirements which infringe upon film distributors’ first amendment rights. This Comment explores the legal issues raised by this criticism.

First, however, the USIA’s certification process, including its legislative history and administrative guidelines, will be discussed in Part II. Concerns that the USIA’s regulations and actions have been inconsistent with congressional intent; that the statutes creating the certification program and the USIA’s regulations unconstitutionally inhibit expression; and that the entire process violates the equal protection component of the due process clause of the fifth amendment will then be addressed in Part III. Finally, in Part IV, a suggestion for assuaging criticism of the program will be presented.

II. THE CERTIFICATION PROCESS

A. Historical Background

On September 13, 1949, at the third meeting of the United Nations Educational, Scientific and Cultural Organization (UNESCO) held in Beirut, Lebanon, twenty-one countries, including the United States, signed an agreement to facilitate the international circulation of other departments of the USIA. BUDGET OF THE UNITED STATES GOVERNMENT FY 1985 at 8-185.

13. Id.
15. Comments of John Mendenhall, supra note 5, at col. 3.
17. See supra note 3.
of certain audio-visual materials. Specifically, under this treaty, known as the Beirut Agreement, signatories agreed to exempt audio-visual materials that are of an "educational, scientific and cultural character" from nearly all import duties and restrictions. On October 8, 1966, after fifteen years during which the United States issued certificates on an informal basis, Congress authorized President Lyndon B. Johnson to designate a federal agency to administer the terms of the Agreement. President Johnson assigned this task to the International Communication Agency, currently known as the United States Information Agency.

The USIA was the logical and natural receptacle of this program since the Agency was originally established expressly to provide other countries with information about American society. To accomplish this broad goal, the USIA conducts international communication, educational, cultural and exchange programs. Its policies are guided by the executive branch, and its director reports to the President and the Secretary of State. The USIA is staffed by 3,400 people in the United States, most of whom are in Washington, D.C. In addition, the USIA employs approximately 4,300 people stationed throughout 127 foreign countries.

Through foreign press centers, speakers, publications and exchange activities, the USIA generally strives to project an "accurate and positive image of the United States and its foreign policy abroad." The Agency devotes the most resources to Voice of America, which is broadcast in forty-two languages throughout the

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19. Id. art. II.
20. Id. art. III, § 1.
25. APPENDIX TO THE BUDGET OF THE UNITED STATES GOVERNMENT FY 1985 at I-Y99 [hereinafter cited as Appendix to Budget].
27. USIA Fact Sheet, supra note 11, at 2.
28. Id. at 5.
world, is the USIA's main instrument, and is the "centerpiece" of the current effort to counter the "large and growing . . . Soviet disinformation campaign." Other programs include "Project Truth," under which the USIA publishes a monthly "Soviet propaganda alert" and provides a cable service also to refute Soviet disinformation overseas. Additionally, the USIA produces a news feature service for use abroad, and the USIA publishes ten magazines and several commercial bulletins that contain reprinted articles from American periodicals. Many foreign exchange programs, including the Fulbright Scholarship, the Humphrey Fellowship and several private sector exchange programs, come under the USIA's direction as well. Further, the "Arts America" program allows the USIA to select certain groups of performers and art exhibitions for viewing abroad. Finally, of course, the USIA administers the terms of the Beirut Agreement, under its television and film service.

B. Procedure for Obtaining a Certificate

As directed by Congress and the President, and in accordance with the Beirut Agreement, the USIA has drawn up an orderly procedure for obtaining a certificate. In the United States, a person or entity who holds "basic rights" in a film, generally the owner, must complete and return a preprinted USIA application and, if feasible, accompany it with a copy of his material. The applicant is asked, among other things, to summarize his film's content and state its intended audience. Based upon this application, the USIA's Chief At-

29. MAJOR THEMES AND ADDITIONAL BUDGET DETAILS FY 1985 at 518, 519.
30. USIA Fact Sheet, supra note 11, at 5.
31. Id.
32. Id.
33. Appendix to Budget, supra note 25.
34. USIA Fact Sheet, supra note 11, at 8. While film industry observers have questioned the USIA's certification procedure, members of the art community have complained that the USIA uses overly restrictive, excessively patriotic criteria in selecting art exhibits it considers suitable for viewing abroad. See Madoff, Sending U.S. Art Abroad: Federal Ways and Means, ART IN AMERICA, Sept. 1982, at 10.
35. 22 C.F.R. § 502.1.
36. See Resolution 688, supra note 21 and text accompanying notes 21 and 22; Exec. Order No. 11,311, supra note 10.
37. Beirut Agreement, supra note 1, art. IV, § 6.
38. 22 C.F.R. § 502.3.
39. Id. § 502.3(a), (g)(1), (3).
testation Officer and his staff then begin their determination of whether the film should be granted a certificate.  

In reviewing a film, USIA officials regularly consult with a group of advisors who comprise the Interdepartmental Committee on Visual and Auditory Materials for Distribution Abroad. These advisors represent a broad spectrum of governmental agencies, including the executive departments headed by cabinet secretaries, and the United States Postal Service, General Services Administration, Veterans’ Administration, Library of Congress, NASA, National Gallery of Art, and the National Science Foundation. In addition to the members of this committee, the USIA consults with “experts” from both government and the private sector to determine whether a film’s content is “educational, scientific, and cultural” and therefore entitled to certification. For example, the USIA consulted officials from the Department of Defense to determine whether a film addressing the difficulties facing female army recruits should receive a certificate. Similarly, the USIA consulted officials at the Environmental Protection Agency to decide whether a film dealing with nuclear waste should be given a certificate. Based upon its independent judgment, and in consultation with advisors or experts when needed, the USIA will grant a film a certificate if the Agency considers it eligible under the Beirut Agreement as interpreted in the USIA’s regulations.

C. Eligibility for Certification

1. Eligibility under the Beirut Agreement

Under the Beirut Agreement, only films of an “educational, scientific and cultural character” are eligible to receive certificates. The Beirut Agreement contains three broad guidelines for determining whether a film meets these criteria. First, the country from which the film originates must determine that the film’s “primary purpose or effect is to instruct or inform through development of a subject or aspect of a subject, or [that the film’s] content [will] maintain, in-

41. 22 C.F.R. § 502.4(a).
42. Id. § 502.4(b).
43. Id.
44. Id. § 502.4(a).
45. Comments of John Mendenhall, supra note 5, at col. 2; Rosenberg, supra note 7, at 42.
46. Comments of John Mendenhall, supra note 5, at col. 2; Rosenberg, supra note 7, at 41.
47. Beirut Agreement, supra note 1, art. IV, § 2.
crease or diffuse knowledge, and augment international understanding..."48 Second, the country of origin must find the film "representative, authentic and accurate."49 Finally, there must be an assurance that the technical quality of the film will not interfere with its use.50

2. Eligibility under USIA regulations

The USIA's regulations governing the issuance of certificates incorporate the guidelines set forth in the Beirut Agreement.51 These regulations, however, expand upon the Agreement to give specific examples of material that will not be deemed appropriate for certification.52 For example, the USIA will not certify material primarily intended to amuse or entertain.53 Likewise, it will not certify material which is primarily intended to inform viewers about timely current events, including newsreels or newscasts.54 Nor will the USIA certify most kinds of material aimed at influencing opinion, conviction, or policy, espousing a cause, or attacking a particular persuasion or belief.55 Furthermore, it will not certify "material which may lend itself to misinterpretation or misrepresentation of the United States or other countries...or which appear[s]...to attack or discredit economic, religious or political views..."56

In short, the USIA will issue certificates only to material which it views as uncontroversial and which the USIA believes participating countries would be willing to admit duty-free.57 This apparently restrictive view58 of the guidelines set forth in the Beirut Agreement is at the root of criticism of the USIA's procedure.

III. CRITICISM OF THE CERTIFICATION PROCESS

A. The USIA's Interpretation of the Beirut Agreement

It has been suggested that USIA officials exercise too much dis-

48. Id. art. I(a).
49. Id. art. I(b).
50. Id. art. I(c).
52. Id. § 502.6(b).
53. Id. § 502.6(b)(1).
54. Id. § 502.6(b)(2).
55. Id. § 502.6(b)(3).
56. Id. § 502.6(b)(5).
57. Id. § 502.6(d)(2).
58. See Sobel, supra note 16, at 9 ("Apparently, the USIA's conservative regulations are intended to assure that USIA certifications are rarely if ever rejected by foreign governments.").
cretion in deciding whether to issue a film a certificate. Specifically, in American Film, the publication of the American Film Institute located in Washington, D.C., one writer suggested that the USIA bases its decision upon criteria which are unnecessarily more restrictive than the criteria found in the Beirut Agreement itself and implicitly adopted by Congress when it enacted the Agreement. To illustrate this point, the writer commented that the USIA’s policy against certifying films primarily intended to amuse or entertain, for example, is authorized neither by the terms of the Beirut Agreement, nor by the legislative act or executive order empowering the USIA to implement the Agreement. Rather, he argues, this policy appears to be predicated solely upon agency regulations that extend far beyond the terms of the Agreement and the laws which empowered the USIA to issue certificates. This observation suggests that the USIA may have unconstitutionally exceeded its administrative authority by writing regulations which are inconsistent with Congress’ intent.

Under elementary principles of administrative law, an administrative agency cannot adopt regulations which do not reflect the intent of Congress as expressed in legislation empowering the agency to perform its task. Thus, administrative regulations cannot, for example, “require more than the statute under which they were promulgated.” Regulations which violate these principles are considered void. Accordingly, if regulations drafted by the USIA deny certificates to films which would nonetheless be eligible under federal legislation, then those regulations apparently misrepresent Congress’ intent and are therefore void.

In delegating to the USIA the power to issue certificates under the Beirut Agreement, federal legislators intended that United States participation in the certification program would “promote [a] better understanding of the United States in other countries and would increase mutual understanding between the people of the United States and those of other nations.” To help accomplish this goal, Congress envisioned that the certification program would “have the effect of

59. Rosenberg, supra note 7, at 41.
60. Id.
61. Id.
62. Id.
increasing the institutional use abroad of certified American educational films. . . ."67 Consequently, Congress simply incorporated and did not attempt to restrict or more precisely define the eligibility guidelines set forth in the Beirut Agreement.68 Four USIA regulations "interpreting" the Beirut Agreement, however, do appear to restrict these guidelines.

1. Films which address timely current events

According to section 502.6(b)(2) of the Agency's regulations, the USIA does not consider material intended to "inform concerning timely current events (newsreels, newscasts, other forms of 'spot news')" to be of an educational, scientific and cultural character and, therefore, eligible for certification.69 Neither legislation directing the USIA to implement the Beirut Agreement, nor the treaty itself, however, appear to support this interpretation. One might reasonably conclude that films informing viewers about current controversies might "promote [a] better understanding of the United States" among foreign viewers. Similarly, such films could come within the guidelines of the Beirut Agreement since it is presumably intended to "inform through the development of a subject . . . ." Additionally, one would think such films would "increase . . . knowledge, and augment international understanding in satisfaction of the Beirut Agreement's requirements. Thus, neither federal legislation nor the Beirut Agreement appears to require the USIA's refusal to certify films which inform viewers of timely current events.

2. Films which attempt to influence opinion

The Agency also does not consider films which "attempt to influence opinion, conviction or policy (religious, economic or political propaganda), [which] espouse a cause, or . . . [which] seem to attack a particular persuasion" to be of an educational, scientific and cul-
tural character under section 502.6(b)(3) of its regulations. As an illustration of this policy, according to American Film, the USIA refused to issue a certificate to a 1981 film on the hazards of uranium mining and milling operations after experts at the Department of Energy found "'the primary purpose or effect of the film [was] less to instruct or inform in an educational sense than to present a special point of view.'"71

Consistent with Congress’ expressed intent, however, opinionated films that espouse a particular cause or present a special point of view could also “promote [a] better understanding of the United States” among foreign viewers. On the other hand, section 1 of Article I in the Beirut Agreement conspicuously omits material that is opinionated from its description of one type of eligible material.

Specifically, the description of material which “maintain[s], increase[s] or diffuse[s] knowledge,”72 appears to be intended to exclude material aimed at “changing” knowledge, that is, persuasive or opinionated material. In another provision, however, the Agreement specifically declares that material which is intended to inform viewers is eligible for certification.73 This latter rubric of eligible material would seem to include almost any material, including opinionated films which are specifically denied certificates under section 502.6(b)(3) of the USIA’s regulations. However, given the apparently deliberate absence of opinionated material from section 1 of the Beirut Agreement, the USIA’s practice of denying such films certificates appears to be justified.

3. Films which criticize economic, religious, or political views

Under section 502.6(b)(5) of its regulations, the USIA does not consider films which “attack or discredit economic, religious, or political views” to be of an educational, scientific and cultural character.74 Films of this type, however, appear to be eligible to receive certificates under guidelines of the Beirut Agreement since their purpose also can be to inform. Likewise, one would think that certifying such films would be consistent with Congress’ intent to promote a better understanding of the United States among foreign viewers. Hence, the

70. 22 C.F.R. § 502.6(b)(3).
71. Rosenberg, supra note 7, at 40.
72. Beirut Agreement, supra note 1, art. I.
73. Id.
USIA's refusal to certify films which criticize economic, religious or political views does not appear to be required by federal legislation.

4. Films which are intended to amuse or entertain

In its effort to segregate blockbuster motion pictures from educational films, the type of material with respect to which the Beirut Agreement was conceived, the USIA refuses to certify films whose "primary purpose or effect... is to amuse or entertain," under section 502.6(b)(1) of its regulations.\footnote{Id. § 502.6(b)(1).} Some entertaining films might enhance foreign viewers' understanding of the United States, consistent with Congressional intent. Likewise, such films are not necessarily opinionated or uninformative, qualities which would render them ineligible under the guidelines of the Beirut Agreement. Thus, although such films might be primarily entertaining, they may still be entitled to certification under federal legislation.

While these examples do not exhaust the types of films the USIA will not certify,\footnote{The USIA also does not certify films whose "purpose or effect... is to stimulate the use of a special process or products to advertise a particular organization or individual, or to raise funds." Id. § 502.6(b)(4). Nor does the Agency certify films "which may lend [themselves] to misrepresentation of the United States or other countries, their peoples or institutions, or which appear to have as their purpose or effect to attack or discredit economic, religious, or political views or practices." Id. § 502.6(b)(5).} they apparently represent the regulations under which most films are disqualified.\footnote{See Rosenberg, supra note 7.} As demonstrated, several of these regulations appear to impose requirements neither contemplated by Congress in delegating to the USIA the authority to administer the certification process, nor required under the guidelines set forth in the Beirut Agreement and adopted by Congress. Consequently, they appear to be void.

B. The First Amendment

As described in Part I, a certificate issued by the USIA exempts the certified film from certain quantitative restrictions, the need to apply for an import license, and, most importantly, foreign import duties.\footnote{See supra notes 5 through 9 and accompanying text.} Since import duties on films are generally steep and sometimes prohibitively high, the USIA's decision to issue a certificate can significantly enhance a distributor's ability to exhibit his film abroad.\footnote{Rosenberg, supra note 7, at 42; Comments of Mendenhall, supra note 5, at col. 1.} Therefore, the certification procedure can have a considera-
ble impact on film distributors’ first amendment rights.

Since 1952, films have been a form of speech protected under the first amendment.80 Concurrently, the Supreme Court has held that people in the United States have a right, under the first amendment, to disseminate information irrespective of their intended recipients’ right to receive it.81 It therefore follows that film distributors have a first amendment right to send films abroad irrespective of the fact that foreign viewers may not have a first amendment right to view them. Consequently, the USIA’s certification process raises the issue of whether, under the first amendment, the USIA can constitutionally deny film distributors certificates based upon the criteria set forth in the USIA’s regulations.82

Although the USIA’s certification process has not been challenged in court, a similar film review process administered by the Justice Department has been challenged. In Keene v. Smith,83 California State Senator Barry Keene, as a would-be film exhibitor, sought to enjoin the Justice Department from screening incoming foreign films and classifying them as “political propaganda” as authorized by the Foreign Agents Registration Act.

Under this Act, registered foreign agents are prohibited from disseminating “political propaganda” in the United States unless the material is actually affixed with a label stating, among other things, that the person “transmitting” the propaganda is a registered foreign agent.84 The Act defines “political propaganda” as any “visual . . . expression . . . which is reasonably intend[ed] to . . . indoctrinate, convert . . . or . . . influence [someone] in the United States with reference to the political or public interests . . . of a foreign country . . . or [intended to] promote in the United States racial, religious, or

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81. See, e.g., Procunier v. Martinez, 416 U.S. 396, 408 (1974) (prison inmates were entitled to receive uncensored mail since, irrespective of the status of the prisoners’ first amendment rights, the senders enjoyed full first amendment protection); see also T. Emerson, The System of Freedom of Expression 94 (1967).
82. One commentator has correctly noted that the failure to obtain a certificate technically does not bar a distributor from sending a film abroad; a certificate just makes it easier for him to do so. Sobel, supra note 16, at 9. This fact, however, does not make the USIA incapable of violating the first amendment rights of film distributors—along with the equal protection clause. See infra Part III, section c; FCC v. League of Women Voters, 104 S. Ct. 3106 (1984) (federal government violated the first amendment rights of a broadcaster by conditioning the availability of federal funds on the broadcaster’s willingness to refrain from editorializing); see also infra notes 100-02, and accompanying text.
84. Id. at 1516.
social dissensions . . . .’" In addition, the Act gives the Justice Department the responsibility of determining which foreign films fall within this definition and therefore must display a label.85

Senator Keene alleged that by classifying several Canadian films about nuclear war and environmental hazards as political propaganda, the Justice Department violated his first amendment rights by deterring him from showing the film and denigrating his reputation.86 Applying the Ninth Circuit’s test for granting a preliminary injunction,87 the United States District Court for the Eastern District of California enjoined the Justice Department based upon its finding that Keene had raised serious questions warranting litigation and had demonstrated the balance of hardships was significantly in his favor.88

Specifically, the court found “the [Registration Act] unambiguously implicate[d] freedom of speech . . . .”89 In addition, “by focusing on materials that address issues of public policy, the [Act was] content-sensitive; content-sensitive statutes have long been held to present the most significant threat to First Amendment rights.”90 Finally, “by focusing on materials that address public policy issues, the statute appl[ied] to those materials whose protection is the central concern of the First Amendment.”91 Consequently, the court concluded, Keene’s complaint raised serious questions which merited litigation.92 And, because “every day that the films which [Keene] wish[ed] to exhibit [bore] the stigma of a characterization as ‘political propaganda’ [was] a day when the films [were] unavailable to him as a medium of communication, thus abridging [Keene’s] freedom of speech,” the court concluded Keene had suffered irreparable injury.93

The Justice Department labelling practice was also challenged in the federal District Court for the District of Columbia. In that case, Block v. Smith, the court dismissed the suit, declaring that the plaintiff lacked standing.94 The court indicated that, unlike the California
court in *Keene v. Smith*, it would have held that Senator Keene lacked standing since the Registration Act did not condition his right to show foreign films on his compliance with the labeling requirement.95

Assuming a distributor who is denied a certificate by the USIA because his film is not educational, scientific and cultural could establish standing, the case for preliminary relief as stated in *Keene v. Smith* could probably also be made out in a challenge to the USIA procedure. USIA regulations such as section 502.6(b)(3), which provides that the Agency does not certify religious, economic or political propaganda, or films which espouse a cause, appear indistinguishable from the provisions of the Registration Act: both concentrate on issues of public policy. And, like the Act, these regulations are "content-sensitive" to the extent that they focus on the subject matter of films submitted for certification. Thus, a film distributor alleging that the USIA's certification procedure violates his first amendment rights could also probably raise serious questions meriting litigation. In addition, a film distributor who is denied a certificate is, presumably, irreparably injured if he cannot otherwise export his film because of prohibitively high foreign import duties or if he is delayed in exporting the film as a result of being denied a certificate. Therefore, such a film distributor might prove he is entitled to preliminary relief in light of *Keene v. Smith*. It remains to be seen whether that film distributor would ultimately prevail on the merits.

1. The potential for restraining expression

Of the benefits derived from issuance of a certificate, exemption from foreign import duties is apparently the primary reason a film distributor seeks a certificate.96 Being denied a certificate is analogous to being refused tax-exempt status.97 In theory, it is settled that an administrative agency cannot deny a valuable benefit, such as tax-exempt status, to persons who engage in certain forms of speech since the effect of doing so would be to penalize them for that speech.98 In practice, this principle remains true except occasionally where invok-

95. *Id.* at 1296 n.10 & 1293 n.4.
96. See Rosenberg, *supra* note 7; Comments of John Mendenhall, *supra* note 5.
97. One difference between denying a certificate and refusing tax-exempt status is that unlike tax-exempt status, a certificate does not constitute a government subsidy. As this Comment will discuss, however, this difference appears to make the case against the constitutionality of denying distributors certificates even stronger.
ing it would require the government to “subsidize” speech by spending public funds or foregoing tax revenues. The issuance of a certificate by the USIA, however, does not require the government to appropriate special funds (beyond the administrative cost of running the USIA), nor deprive the treasury of revenue (instead, foreign governments honoring the certificates lose money). Therefore, the USIA’s certification program appears to come within the general rule against government denying valuable benefits on the basis of speech. Thus, instances where the USIA has declined to issue a certificate to a distributor whose film did not meet the criteria set forth in the USIA’s regulations can be compared to cases in which the Internal Revenue Service has refused to grant tax-exempt status to a non-profit organization whose first amendment activities made it ineligible under the Internal Revenue Code. Two recent cases in which the Circuit Court of Appeal for the District of Columbia found this IRS practice to be unconstitutional support the criticism that the USIA’s procedure might also violate distributors’ first amendment rights.

In *Big Mama Rag, Inc. v. United States*, the publisher of a non-profit feminist newspaper, “Big Mama Rag,” sought tax-exempt status afforded to other non-profit organizations whose purposes are mainly “charitable” or “educational” under section 501(c)(3) of the Internal Revenue Code. Based upon its determination that the paper’s content was not “educational,” the IRS denied the application. Appealing the IRS decision to the United States District Court for the District of Columbia, the publisher argued section 501(c)(3) violated the first amendment by licensing the IRS to discriminate among non-profit organizations on the basis of speech. The court rejected this argument and upheld the IRS decision, finding that in drafting section 501(c)(3), the Treasury Department had not “intended” to discriminate on the basis of speech.

99. See, e.g., *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (“Congress is not required by the First Amendment to subsidize lobbying” by granting tax-exempt status to non-profit organizations which engage in lobbying).

100. In addition, courts have held that a person need not be totally barred from disseminating his views before his first amendment rights can be violated. *Swope v. Lubbers*, 560 F. Supp. 1328, 1332 (W.D. Mich. 1983).

101. 631 F.2d 1030 (D.C. Cir. 1980).


103. *Id.* at 479.
The court of appeals reversed.\textsuperscript{104} It considered section 501(c)(3) to be so vague that it violated the first amendment by allowing the IRS to deny tax-exempt status in a discriminatory fashion.\textsuperscript{105} In reaching this issue, the court noted, "[e]ven though tax exemptions are a matter of legislative grace . . . , the discriminatory denial of tax exemptions can impermissibly infringe free speech."\textsuperscript{106}

In another case involving section 501(c)(3) of the Internal Revenue Code, \textit{Taxation With Representation v. Regan},\textsuperscript{107} a non-profit organization formed to promote certain tax interests challenged an IRS ruling that the organization was not entitled to tax-exempt status because it engaged in substantial lobbying activities. Like the publisher of "Big Mama Rag," Taxation With Representation argued that section 501(c)(3) violated its first amendment rights by allowing the IRS to deny organizations tax-exempt status on a discriminatory basis. Although the court of appeals ultimately held that section 501(c)(3) violated the equal protection clause, it rejected the first amendment argument because, in the court's view, it assumed that section 501(c)(1) required the organization to refrain completely from lobbying in order to obtain tax-exempt status.\textsuperscript{108} The court noted that, in reality, Taxation With Representation (unlike the publishers of Big Mama Rag) could have segregated out its lobbying activities so that its remaining functions could have qualified the organization for tax-exempt status;\textsuperscript{109} the logical implication of this reasoning being that if

\textsuperscript{104} Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C. Cir. 1980).

\textsuperscript{105} Id. at 1035. Specifically, the court found the term "educational" to be excessively vague. This holding suggests the language of the Beirut Agreement and USIA regulations, "educational, scientific and cultural," might also be so vague as to violate the due process clause of the fifth amendment. Unlike the Treasury Regulations in which the term "educational" was used, however, the USIA regulations accompanying the term contain specific examples of types of material which do not come within this definition: for example, material which is intended to inform of timely current events, entertain or propagandize. Consequently, "educational" is apparently less vague as used by the USIA. See Retired Teachers Legal Fund v. Commissioner, 78 T.C. 280, 283 (1982) ("[r]ead the general statements defining 'educational' together with the . . . subsequent concrete examples which provide objective norms to illustrate its meaning," the term "educational" is not unconstitutionally vague).

\textsuperscript{106} 631 F.2d at 1034.


\textsuperscript{108} Id. at 726.

\textsuperscript{109} Id. In reversing the court of appeals because it applied a strict scrutiny test to the equal protection argument, the Supreme Court also addressed the first amendment argument. It ultimately agreed with the appellate court's disposition of this issue. In doing so, however, the Court emphatically stressed that no first amendment rights are implicated when Congress decides to spend funds on one form of speech but not on another. 104 S. Ct. 3262 (1984). As discussed, because a USIA certificate does not represent a decision by the government to "sub-
the case had instead involved an organization which could not have segregated its activities according to the source of its funding, the IRS’s discriminatory denial of tax-exempt status might have violated the first amendment.  

Both *Big Mama Rag* and *Taxation With Representation* involved the decision of an administrative agency to withhold a tax-saving benefit from a non-commercial organization because its members had engaged in certain forms of controversial speech. The courts in both cases indicated the denial of such a benefit could violate the first amendment rights of those organizations’ members. More specifically, in *Taxation With Representation*, the court stated that if the government were to condition its provision of tax benefits on an applicant’s willingness to refrain from exercising its first amendment rights, this would be unconstitutional unless the conditions imposed were both important and necessary to assure that the legitimate objectives of the benefit program were attained.  

Since a USIA certificate entitling a film distributor to be exempt from foreign import duties is available only if the distributor’s film does not entertain, inform of timely current events, editorialize or propagandize, one might conclude the USIA, analogous to the IRS in *Big Mama Rag* and *Taxation With Representation*, has conditioned a certificate on the willingness of film distributors to refrain from exercising certain first amendment rights. Two recent decisions of the Supreme Court involving regulations containing criteria identical to the USIA’s, however, imply there is no asserted purpose that could justify this practice.

2. The insufficiency of asserted government objectives

In *Regan v. Time, Inc.*, a magazine publisher challenged the constitutionality of an amendment to a federal law against counterfeiting. The law had originally banned the use of all photographic reproductions of currency. Under the amendment, however, the

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1. See *FCC v. League of Women Voters*, 104 S. Ct. at 3128 (“in contrast to the appellee in *Taxation With Representation*, [a publicly funded radio station] is not able to segregate its activities according to the source of its funding . . . . [Therefore,] we must reject the Government’s contention that our decision in *Taxation With Representation* is controlling here”).

Treasury Department was empowered to allow the reproduction of currency "'for philatelic, numismatic, educational, historical or newsworthy purposes. . . .'"114 The district court had declared the amendment to be an unconstitutional time, place and manner regulation.115

Hearing a direct appeal, eight members of the Supreme Court upheld this ruling, noting "'[a] determination concerning the newsworthiness or educational value of [some instrument of expression] cannot help but be based on the content of that [expression] and the message it delivers.'"116 In other words, under a regulation which calls on the government to make such a determination, one type of expression will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted by the other is not. Such a regulation is, on its face, unconstitutional.117 Analogous to the amendment at issue in Time, Inc., is the federal legislation enacting the Beirut Agreement which calls upon the USIA to determine whether a film is "educational, scientific and cultural."118 Since this law requires the USIA to judge the eligibility of films based upon their content, under Time, Inc., it too would apparently be unconstitutional.

If, however, one were to assume the USIA's procedure would not be unconstitutional merely on the basis that it requires the USIA to make a determination based upon the content of a film, the procedure might still be invalid because of the nature of the USIA's criteria. The most controversial of the USIA's practices stems from the Agency's refusal to certify films which "attempt . . . to influence opinion, conviction or policy . . ., to espouse a cause or conversely, . . . seem to attack a particular persuasion."119 In a recent case involving a similar practice by the Federal Communications Commission, FCC v. League of Women Voters,120 the Supreme Court held that a restriction on the expression of an opinion or a conviction, implicitly tied to a threat to end government funding, is unconstitutional.

In FCC v. League of Women Voters, Pacifica, a non-profit educa-

114. 104 S. Ct. at 3265.
116. 104 S. Ct. at 3267.
117. Id.
118. Resolution 688, supra note 21.
119. See Rosenberg, supra note 7, at 41.
tional corporation which operated five radio stations, challenged the constitutionality of a federal statute which prohibited "editorializing" by any noncommercial educational broadcast station funded by the federally created Corporation for Public Broadcasting. Rejecting the government's asserted interest in ensuring that noncommercial broadcasters do not become propaganda organs for the government, the Court observed, "'a regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues,'" or discussion of an entire subject matter "'is the purest example of a "law . . . abridging the freedom of speech."'"121 Even assuming that government can legitimately curtail discussion of controversial topics, the Court continued, a ban on all editorializing is unconstitutional because it is overbroad and based solely upon the content of suppressed speech.122 Accordingly, the Court held the FCC's ban on editorializing by public broadcasting stations was an unconstitutionally overbroad and impermissable regulation of speech.123

The USIA's practice of refusing to certify all films which propagandize or espouse a particular cause seems indistinguishable from the statute at issue in League of Women Voters. Although the USIA's asserted purpose is to ensure the free flow of accurate information,124 the USIA refuses to certify all films which propagandize or espouse a particular cause, regardless of the accuracy of any facts they may contain. In addition, as the Court in League of Women Voters implied, a ban on any editorializing may be facially unconstitutional.125 Accordingly, the USIA's refusal to certify films which propagandize or espouse a belief appears to be unconstitutional under League of Women Voters.

3. The certification procedure as a prior restraint

Aside from the constitutional issues raised by the withholding of a government benefit based upon the content of speech, the USIA's procedure for issuing certificates might also be an unconstitutional prior restraint. Administrative agencies, such as the USIA, are primarily viewed as political organs, rather than impartial decision-mak-

121. Id. at 3120.
122. Id. at 3119, 3127.
123. Id. at 3127.
125. 104 S. Ct. at 3127.
ing bodies. Consequently, under the first amendment, an administrative scheme which imposes a prior restraint on the exhibition of a motion picture must contain certain procedural safeguards against censorship. First, the administrative agency must carry the burden of instituting judicial proceedings and proving that the film is not a form of protected speech. Second, the prior restraint can only be imposed for a specified period of time in order to preserve the status quo. Third, the scheme must provide for a prompt, final judicial determination that the decision of the administrative agency was correct.

Under the USIA's procedure for issuing certificates, the film distributor, rather than the Agency, has the burden of instituting judicial proceedings to set aside the USIA's decision to deny him a certificate. In addition, if an applicant is denied a certificate, the denial is of indefinite duration, rather than temporary and intended merely to preserve the status quo as required. Finally, although the USIA's procedure provides a means of administrative review, it lacks any provision for a "prompt, final judicial determination" that the USIA's decision was correct. Thus, it would appear to be an unconstitutional prior restraint.

To summarize, although the USIA's refusal to issue a film distributor a certificate does not impose a direct restraint on expression, such withholding of a government benefit can nonetheless amount to an unconstitutional infringement of speech. Furthermore, because the USIA's regulations are "content-sensitive" and, more specifically, condition the granting of a certificate on a film distributor's willingness to refrain from exporting films which propagandize or editorialize, these regulations impose the kinds of restraints on expression that the Supreme Court has held unconstitutional. Lastly, because the certification process does not appear to contain the procedural safeguards required of administrative agencies, it appears to impose an

128. Id. at 57-58.
129. Section 502.5 of the USIA's regulations outlines the administrative appellate procedure and establishes that the decision of the Director constitutes final administrative action. 22 C.F.R. § 502.5 (1984).
130. Id. § 502.5(b), (c).
131. See also Healy v. James, 408 U.S. 169, 184 (1972) (holding that once a group of students had filed an application seeking official recognition as a college campus organization, "the burden shifted to the college to justify its decision of rejection").
unconstitutional prior restraint on film distributors’ rights to send their films abroad.

C. Equal Protection Implications

While the withholding of a valuable government benefit, such as a USIA certificate, can unconstitutionally infringe first amendment rights, the withholding of a benefit more often runs afoul of equal protection guarantees. Specifically, the equal protection component of the due process clause of the fifth amendment bars the federal government from granting a valuable benefit to some individuals yet denying it to others who are similarly situated, unless the differing treatment can be justified. Thus, along with raising first amendment issues, the USIA’s practice of denying certain films certificates raises the question of whether, under the equal protection requirement of the fifth amendment, the USIA’s certification procedure is constitutional.

The answer to this latter inquiry is unclear. First, it is uncertain what level of scrutiny a court would use to determine the equal protection issue. The fact that the certification procedure affects film distributors’ first amendment rights justifies a strict scrutiny standard. On the other hand, because the issuance of a certificate represents the USIA’s decision to withhold a benefit rather than impose an outright restriction on a distributor, a court might employ some lower level of scrutiny.

Likewise, since the certification program is carried out pursuant to an international treaty, thereby implicating the conduct of foreign affairs, a court might show greater deference to the party

132. See L. Tribe, American Constitutional Law 1002-03 (1978). In the first amendment area, several courts and commentators have noted the overlap between first amendment and equal protection issues. See, e.g., Taxation With Representation, 676 F.2d at 726 n.23; Emerson, The Affirmative Side of the First Amendment, 15 Ga. L. Rev. 795, 802-03 (1981). Similarly, these issues, although addressed separately in this Comment, are not entirely distinct.

133. See Harris v. McRae, 448 U.S. 297 (1980) (upholding government’s right to deny federal funding for certain medically necessary abortions).

134. Regan v. Taxation With Representation, 461 U.S. at 544 (“statutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech”).

135. Compare Roe v. Wade, 410 U.S. 113 (1973), with Harris v. McRae, 448 U.S. 297 (1980). A careful look at the certification program would bear out the important difference between a USIA certificate and other government benefits; namely, the certificate does not require Congress to expend funds or forego revenue. Consequently, a lower level of scrutiny would not be truly justified since no court is faced with the prospect of telling Congress how to spend public funds.
asserting the validity of the program and, therefore, employ a lower level of scrutiny.

In addition, under equal protection analysis, one cannot be certain of the relevant classification, since the USIA's regulatory scheme creates several conceivable classifications. A broad classification would be those distributors denied certificates who wish to export films that are not educational, scientific and cultural, as distinguished from all other film distributors who wish to export films. This classification presents the more specific question of whether the terms of the Beirut Agreement itself are consistent with equal protection requirements since the language of the Agreement delineates this class. Alternatively, a more narrow classification would be those distributors whose films are educational, scientific and cultural, yet whose films also propagandize, entertain or inform of timely current events, as distinguished from other distributors of educational, scientific and cultural films. This classification calls into question the USIA's interpretation of the Beirut Agreement and is the more troubling of the two.

In support of its practice not to certify films which, for example, propagandize, officials at the USIA have implied that their objective is to ensure foreign signatories to the Beirut Agreement continue to honor certificates issued by the United States. Presumably, it is feared that the USIA will lose credibility if it routinely certifies films to which receiving countries object. While this purpose might be served by denying certificates to many types of controversial films, its legitimacy seems questionable.

First, it contradicts that rule of statutory construction which directs that an instrument should be construed to give effect to its terms. The Beirut Agreement allows receiving countries to refuse to accept films under their own censorship laws. In addition, the Agreement leaves the final decision to honor or not to honor a certificate with receiving nations, as a matter of state sovereignty. These

136. Treaties whose terms conflict with the Constitution are technically void rather than unconstitutional. See Two Hundred and Seven Half Pound Papers of Smoking Tobacco v. United States, 11 U.S. (Wall.) 616 (1870).
137. See Rosenberg, supra note 7, at 42-43. Section 502.6(d)(2) of the USIA regulations, which states that the USIA will not certify "classes of materials which it believes participating countries would be unwilling to admit free of duty under the terms of the Agreement," reflects this policy.
138. 2A SUTHERLAND, STATUTORY CONSTRUCTION § 46.06 (1984).
139. See supra note 9.
140. Id.
provisions would be redundant if the Beirut Agreement is interpreted to require a sending country to base its decision to issue a certificate on the practices of the receiving country, instead of on its own laws. Second, this objective suggests it is acceptable for the United States government to engage in unconstitutional conduct as long as it is in furtherance of the interests of a fellow signatory to a treaty which the United States has ratified. Such a principle would be novel. These objections suggest that the USIA’s regulatory scheme might also violate equal protection principles by unjustifiably drawing further distinctions among educational, scientific and cultural films.

IV. A SUGGESTED CHANGE

The suggested shortcomings in the USIA’s certification procedure, its content-based criteria and apparent underinclusiveness, stem from the USIA’s view of material that will not be considered educational, scientific and cultural. Consequently, constructive improvements might be achieved by replacing these specific proscriptions with an objective test, interpreting what “educational, scientific, and cultural” means. Criteria based upon the money-making potential of films, irrespective of their content, would seem to serve to weed out small-scale documentary-type films from the money-making blockbuster motion pictures the Beirut Agreement was intended to exclude.

For example, perhaps the USIA could certify only films which their distributors anticipate will generate revenues of, say, $500,000 or less. If after receiving a certificate and tallying his receipts, a film distributor makes more, he could then reimburse the importing country for the import duties he would have paid without the certificate. While such a standard might still fail to include all educational films which the drafters of the Beirut Agreement sought to protect, it would at least minimize the content-based decision-making process required under USIA regulations as they are now written. In addition, such an objective standard would more likely withstand an equal protection challenge because it would more closely resemble an economic regulation than does the present regulatory scheme.

V. CONCLUSION

The USIA’s administration of the Beirut Agreement raises several legal issues which cast doubt upon the constitutionality of the certification procedure. First, the USIA has adopted regulations
which seem inconsistent with the language of the Beirut Agreement and federal law circumscribing the USIA’s authority. Second, in light of recent Supreme Court rulings in analogous cases, the USIA’s certification criteria appear to violate film distributors’ first amendment rights even though the threatened infringement is in the nature of a benefit withheld rather than a direct restraint imposed. Finally, the procedure may deny film distributors equal protection under the fifth amendment since the criteria appear to be underinclusive and also because the USIA’s presumed purpose behind denying certain films certificates may be illegitimate.

Fortunately, however, these shortcomings largely stem from the way the USIA administers the Beirut Agreement rather than from the Agreement itself. Consequently, the program might be improved if the USIA were to exchange its present regulations for more objective, content-neutral guidelines. In the meantime, both film distributors and the USIA run the risk of the certification program being suspended as a result of a court injunction or political pressure, rendering the Beirut Agreement of little use to any American film distributors, much less exporters of documentary films who need it most.

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