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The Constitutional Administration of the Beirut Agreement: Paradox or Possibility?

by
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Introduction

The Beirut Agreement[1] is a multilateral treaty designed to promote the exchange of audiovisual materials between foreign nations.[2] The Agreement grants an export certificate to materials deemed by the exporting country to be "educational, cultural or scientific," entitling them to duty-free status and other favorable treatment in the importing country.[3] An importing country has the power to override an export certificate and to place a duty on the materials,[4] but no country receiving materials from the United States has ever exercised this circumvention.[5]

Before the United States will grant an export certificate, a film must meet the certification criteria set forth in regulations established by the United States Information Agency (USIA).[6] Although denial of a certificate does not preclude distribution abroad,[7] high exporting costs could act as an economic barrier for overseas distribution of uncertified films.[8]

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1. Beirut Agreement, *opened for signature* July 15, 1949, 17 U.S.T. 1578, T.I.A.S. No. 6116, 197 U.N.T.S. 3 [hereinafter Beirut Agreement].

2. The United States is one of 29 signatory nations, and an additional 28 nations participate in the Agreement. The United States also recognizes the exporting certificates of an additional 15 countries. 22 C.F.R. § 502.7(e) (1988).

3. Beirut Agreement, *supra* note 1, at art. I, 17 U.S.T. at 1580-81, T.I.A.S. No. 6116, 197 U.N.T.S. at 4. A certified film becomes exempt from importing requirements such as "import duties, import licenses, special taxes, quantitative restrictions, and other restraints and costs." 22 C.F.R. § 502.1(b) (1988).

4. Beirut Agreeement, art. IV, part 4, 17 U.S.T. at 1583-84, T.I.A.S. No. 6116, 197 U.N.T.S. at 8.

5. *See* Bullfrog Films v. Wick, 646 F. Supp. 492, 500 (C.D. Cal. 1986).

6. 22 C.F.R. §§ 502.1-502.8 (1988).

7. 22 C.F.R. § 502.3(j) (1988).

8. Duties assessed can be as much as $50,000 per film. *See* Rosenberg, *For Our Eyes Only*, AM. FILM, July-Aug. 1983, at 40-42.

The constitutionality of the United States' certification process was challenged in the case of *Bullfrog Films v. Wick*.[9] Filmmakers, whose films were classified as "propaganda"[10] and denied certification, alleged that the USIA's certification guidelines were impermissibly vague and gave the Agency unconstitutional discretion to deny certificates to films with viewpoints different than its own.[11] The district court held that the guidelines were unconstitutional, and that the Agency's obligation under the Beirut Agreement "may not, consistent with the Constitution, place the USIA in the position of a censor."[12]

The purpose of this Note is to determine whether constitutionally acceptable certification criteria can be formulated to fulfill the mandates of the Beirut Agreement. Part I will examine the purpose of the Beirut Agreement and the USIA's certification criteria. Part II will analyze the application of the criteria to the films in the *Bullfrog* case and the reasoning behind the court's decision. Part III will examine the Agency's continued efforts to draft acceptable certification regulations, as well as the United States' obligations to the other Treaty members under the Vienna Convention. The Note will conclude with proposals for certification criteria that could satisfy both the Constitution and the goals of the Beirut Agreement.

I
Foundation for Analysis of the Treaty

A. Delegation of Authority to the USIA to Carry Out the Provisions of the Beirut Agreement

The Beirut Agreement is the product of several years of negotiations among the members of the United Nations Educational Scientific and Cultural Organization (UNESCO).[13] Although the United States Senate approved the Agreement on May 26, 1960, it withheld actual ratification until enactment of the legislation needed to implement the Treaty.[14] Congress passed the implementing legislation on October 8, 1966,[15] and

9. 646 F. Supp. 492 (C.D. Cal 1986).

10. Under 22 C.F.R. § 502.6(a)(3)(iv), the Agency has the discretionary authority to label material that in its opinion constitutes propaganda. The Agency defines propaganda as material that is "substantially adapted to prevail upon, indoctrinate, convert, induce or in any other way influence a viewer or user with reference to any specific political, religious or economic views, practices, movements, causes or systems or belief." *Id.*

11. Plaintiffs' Complaint at 25, Bullfrog Films v. Wick, 646 F. Supp. 492 (C.D. Cal. 1986) (No. CV 85-7930).

12. 646 F. Supp. at 510.

13. Beirut Agreement, *supra* note 1.

14. S. REP. NO. 1626, 89th Cong., 2d Sess. 2, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3143, 3144.

15. Pub. L. No. 89-634, 80 Stat. 879 (1966).

authorized the President to designate a federal agency which would be responsible for carrying out the provisions of the Treaty.[16] Pursuant to this mandate, the President delegated authority to the United States Information Agency.[17] Formal operations under the Treaty officially commenced on January 12, 1967.[18]

According to its Preamble, the primary objective of the Beirut Agreement is to facilitate "the free flow of ideas by word and image" in order to promote "the mutual understanding of peoples."[19] The first article of the Agreement sets forth the criteria materials must meet to receive favorable treatment from the importing country:

> Visual and auditory materials shall be deemed to be of an educational, scientific and cultural character:
> (a) When their primary purpose or effect is to instruct or inform through the development of a subject or aspect of a subject, or when their content is such as to maintain, increase or diffuse knowledge, and augment international understanding and goodwill; and
> (b) When the materials are representative, authentic, and accurate; and
> (c) When the technical quality is such that it does not interfere with the use made of the material[s].[20]

Construing these mandates, the USIA enacted substantive and procedural certification criteria to make the provisions operable.

B. The USIA's Certification Criteria

The pertinent provisions of the USIA's procedural guidelines require the applicant to complete the Agency's application form and to submit a description of the content of the materials, as well as copies or examples of the materials.[21] The certification requests are then reviewed,[22] and once a certificate is granted, it serves as a *recommendation* to the importing country that the materials meet the requirements set forth in the Agreement.[23]

16. *Id.*

17. Exec. Order No. 11,311, 3 C.F.R. 593 (1966-1970), *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 4673.

18. 22 C.F.R. § 502.1 (1988).

19. Beirut Agreement, *supra* note 1.

20. *Id.* Some commentators have stated that the duty requirements are aimed at commercial films that generate profits for the filmmakers, rather than at documentary films which usually do not generate enough of a profit. *Not-So-Sly Censorship*, L.A. Times, Aug. 3, 1988, at B6, col. 1.

21. 22 C.F.R. § 502.3(g) (1988).

22. *Id.* at § 502.3(h). The Chief Attestation Officer of the USIA and his/her staff make the initial rulings. *Id.* at § 502.4(a).

23. Beirut Agreement, *supra* note 1 (emphasis added).

The regulations also provide for a process of review for films that have been denied certificates.[24] An applicant may ask for a formal review by the Review Board,[25] which will reexamine materials that are denied certificates.[26] If the review results in a denial, the applicant may make a written appeal to the director of the USIA.[27]

The substantive criteria define what material is to be considered "educational, cultural or scientific."[28] The first section of the regulations incorporates Article I of the Beirut Agreement;[29] the subsequent sections further define what constitutes "educational, cultural or scientific" material under the Treaty. Section 502.6(b)(3) states:

> The Agency does not certify or authenticate materials which by special pleading attempt generally to influence opinion, conviction or policy (religious, economic, or political propaganda), to espouse a cause, or conversely, when they seem to attack a particular persuasion.[30]

Section 502.6(b)(5) provides:

> The Agency does not regard as augmenting international understanding or goodwill and cannot certify or authenticate any material which may lend itself to misinterpretation, or 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.[31]

II
Bullfrog Films v. Wick

A. Films at Issue in the Action

The USIA denied export certificates to filmmakers and distributors in *Bullfrog Films v. Wick* for the following films:[32] *In Our Own Backyards: Uranium Mining in the United States* (describing the effects of mining on the environment, mine workers, and local populations); *Peace: A Conscious Choice* and *Save the Planet* (both anti-nuclear films); *Whatever Happened to Childhood?* (depicting drug-use among youth); *Ecocide: A Strategy of War* and *The Secret Agent* (detailing the environmental aspects of Agent Orange and the United States' role in the Viet-

24. 22 C.F.R. § 502.5 (1988).
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at §§ 502.6(a)(3), (b)(3), (b)(5).
29. See text accompanying notes 19-20, *supra*.
30. 22 C.F.R. § 502.6(b)(3) (1988).
31. *Id.* at § 502.6(b)(5).
32. 646 F. Supp. 492, 494 (C.D. Cal. 1986). The maker of a seventh film, *The Secret Agent*, was originally denied a certificate, but the Review Board reversed this decision on appeal. Nevertheless, the filmmaker had standing to sue in the *Bullfrog* case in order to seek declaratory relief by challenging the USIA's regulations. *Id.* at 496 n.5, 498 n.11.

nam War); and *From the Ashes . . . Nicaragua Today* (a historical account of United States/Nicaraguan relations).[33] Several of the documentaries had been awarded Red Ribbons at the American Film Festival,[34] and most had received critical acclaim.[35]

The Agency denied certificates to the various films because they "espouse[d] a cause" and were allegedly "inaccurate," "imbalanced," or capable of "being misinterpreted or misunderstood by foreign audiences lacking adequate American points of reference."[36] Specifically, the Agency found that *In Our Own Backyards* did not meet the "neutral viewpoint" requirement of section 502.6(b)(3) because it presented an anti-nuclear message and attempted to "persuade the audience that all uranium mining should be prevented."[37] The Agency determined that *Whatever Happened to Childhood?* failed to portray youths who are "typical or representative of all American youth today,"[38] and therefore was "not representative" under section 502.6(a)(3).[39] *Ecocide* was denied a certificate because the film "attack[ed] the United States" and failed to promote international understanding.[40] *From the Ashes* was found to lead viewers to conclude "that the United States Government is the primary cause of instability, poverty, and oppression in Nicaragua," thereby constituting both an "attempt to persuade" contrary to section 502.6(b)(3), and "an attack on the institutions of the United States [in violation of] section 502.6(b)(5)."[41] Based on these findings, the Agency refused to label the films as "educational" and denied them export certificates.[42]

B. Plaintiffs' Claims

The plaintiffs alleged that the Agency engaged in selective censorship by only issuing certificates to films " 'whose point[s] of view' the

33. *Id.* at 496.

34. *Id.*

35. Plaintiffs' Complaint at 10, 13, 14-15, 20-21, 23, Bullfrog Films v. Wick, 646 F. Supp. 492 (C.D. Cal. 1986) (No. CV 85-7930).

36. 646 F. Supp. at 496.

37. *In Our Own Backyards: Uranium Mining in the United States*, USIA certification decision, Feb. 22, 1985, at 3 (available from the USIA).

38. *Whatever Happened to Childhood?*, USIA certification decision, Aug. 28, 1985, at 3 (available from the USIA).

39. *Id.*

40. *Ecocide: A Strategy of War*, USIA certification decision, July 13, 1984, at 3, 4 (available from the USIA).

41. *From the Ashes . . . Nicaragua Today*, USIA certification decision, Aug. 28, 1985, at 3, 4 (available from the USIA).

42. 646 F. Supp. at 497.

[A]gency finds consistent with its own views."[43] Arguing that the Agency was using the Beirut Agreement "as a content-based censorship mechanism" to "promote a particular ideological point of view,"[44] the plaintiffs cited as support the certification of less controversial films such as *To Catch a Cloud: A Thoughtful Look at Acid Rain, Radiation . . . Naturally* and *The Family: God's Pattern for Living*.[45]

Plaintiffs sought declaratory and injunctive relief[46] based on the theory that sections 502.6(b)(3) and (b)(5) were facially invalid under the first and fifth amendments to the Constitution.[47] Plaintiffs also alleged that the two regulations, along with Article I of the Agreement, as codified at section 502.6(a)(3), were invalid as applied and in violation of the mandates of the Beirut Treaty.[48]

C. District Court Findings

The District Court of the Central District of California first examined the substantive regulations to determine if they were consistent with the Treaty's provisions. If the regulations were found to be inconsistent with the underlying statutory basis, then the issue of their constitutionality would not need to be addressed; "[if] it is possible to decide this case on non-constitutional grounds, the court must do so."[49] The court, however, found that the regulations "seem to be consistent with the guidelines set out by [UNESCO] . . . . Thus, there is no basis on which to hold that the regulations are inconsistent with the Treaty."[50]

1. Standard of Review

In determining the standard of review, the district court raised the issue of the scope of first amendment protection with regard to communications with foreign audiences.[51] The court held that "there can be no question that, in the absence of some overriding governmental interest, . . . the First Amendment protects communications with foreign audi-

43. Plaintiffs' Complaint at 25, Bullfrog Films v. Wick, 646 F. Supp. 492 (C.D. Cal. 1986) (No. CV 85-7930).

44. *Id.* at 26.

45. *Id.* at 25-26. *The Family* was certified under § 502.6(b)(3) for use by moral or religious organizations. 646 F. Supp. at 497 n.7.

46. 646 F. Supp. at 497.

47. *Id.* The Court, sua sponte, also found § 502.6(a)(3), which sets forth the language from Article I of the Treaty, to be unconstitutional on its face. *See* notes 77-84 and accompanying text.

48. *Id.* at 497.

49. *Id.* at 500.

50. *Id.* at 501.

51. *Id.* at 502. The Court raised this issue sua sponte at oral argument. *Id.*

ences to the same extent as communications within our borders."[52] The unprotected areas of speech include obscenity,[53] fighting words,[54] and words that could threaten national security.[55] Because the defendants in *Bullfrog* did not claim that the filmmakers' speech fell into these unprotected categories, the district court concluded that the regulations were subject to "the same constitutional analysis as would be applied to any legislation claimed to infringe on First Amendment freedoms at home."[56] The *Bullfrog* court therefore applied the strict scrutiny standard to the certification criteria.

2. Certification as a Government Benefit, Not a Government Subsidy

The district court then considered whether the regulations abridged the filmmakers' rights under the first amendment. The USIA argued that since the denial of a United States certificate did not preclude exportation of uncertified films to foreign nations, plaintiffs had been denied only a government subsidy. The Agency asserted that "First Amendment rights are not infringed merely because the government refuses to subsidize those rights."[57] The district court found, however, that certification is not a government subsidy, but rather a government benefit, and "an indispensible [sic] prerequisite to obtaining the benefits of the Treaty."[58] According to the court, "once the government makes benefits available, it may not withhold them on the basis of 'unconstitutional conditions'."[59]

The withholding of a government benefit was addressed in *Perry v. Sinderman*,[60] where a state college professor's employment contract was terminated without a hearing. Although the college had not adopted a formal tenure system, the professor alleged that the college had a de facto tenure policy and that he was entitled to prove the legitimacy of his claim for a tenured position.[61] The Supreme Court found that a de facto tenure policy could constitute a claim for a property interest in continued em-

52. *Id.*

53. Roth v. United States, 354 U.S. 476 (1957).

54. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

55. Near v. Minnesota, 283 U.S. 697 (1931). *See also* New York Times Co. v. United States, 403 U.S. 713 (1971).

56. 646 F. Supp. at 502.

57. *Id.* at 501. *See, e.g.*, Regan v. Taxation With Representation, 461 U.S. 540 (1983) (tax exemption statute for non-profit organizations held valid, even though it required the organization to not engage in lobbying in order to benefit from the exemption); Cammarano v. United States, 358 U.S. 498 (1959) (tax placed upon advertising expenditures of private individuals held not to violate first amendment right to freedom of speech).

58. *Id.* at 501-502. *See supra* notes 4-5 and accompanying text.

59. *Id.* at 502.

60. 408 U.S. 593 (1972).

61. *Id.*

ployment,[62] and that the denial of the benefit without hearing violated the professor's right to due process. The Court stated that because such benefits had been given, they could not be denied "on a basis that infringes . . . constitutionally protected interests . . . ."[63] Similarly, the *Bullfrog* court held that the government benefit of certification cannot be withheld on a basis that abridges the filmmakers' first amendment rights to freedom of speech.[64]

3. Vagueness Challenge to Sections 502.6(b)(3) and (b)(5)

A statute is considered void on its face if it is "[s]o vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ."[65] Vagueness violates the due process clause of the fifth amendment because it not only fails to give sufficient notice of what to avoid, but also allows those implementing the law boundless discretion.[66] The district court in *Bullfrog* applied this standard to sections 502.6(b)(3) and (b)(5) and found them both impermissibly vague.[67]

Several of the phrases used in section 502.6(b)(3),[68] such as "special pleading," "seem to attack" and "particular persuasion," were found to provide a "classic example of a [constitutionally impermissible] . . . 'invitation to subjective or discriminatory enforcement'."[69] The court also found the provision that "films may not attempt generally to influence opinion"[70] did not define an objective standard for measuring the effect of a film on its viewers.[71] The court held that this breadth "leav[es] the decision to the subjective standards of the USIA [, which] is precisely the evil that the vagueness doctrine seeks to avoid."[72]

Section 502.6(b)(5) was rejected as "vague," and "inherently incapable of objective application."[73] This section stated that the Agency cannot certify "any material which may lend itself to misinterpretation or misrepresentation of the United States."[74] The court found this phrase "hopelessly unclear,"[75] since "how is one to determine what is 'misrepre-

62. *Id.* at 599-602. *See also* Board of Regents v. Roth, 408 U.S. 564 (1972).
63. 408 U.S. at 597.
64. 646 F. Supp. at 502.
65. Connally v. General Construction Co., 269 U.S. 385, 391 (1925).
66. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-31 at 1035 (1988).
67. 646 F. Supp. at 505.
68. *See supra* text accompanying note 30.
69. 646 F. Supp. at 505 (quoting Grayned v. City of Rockford, 408 U.S. 104, 113 (1972)).
70. 22 C.F.R. § 502.6(b)(3) (1988).
71. 646 F. Supp. at 505.
72. *Id.*
73. *Id.*
74. *See supra* text accompanying note 31.
75. 646 F. Supp. at 505.

sentative' of an open, diverse and pluralistic society as is the United States?"[76]

4. Constitutionality of the Beirut Agreement

On its own accord, the district court addressed the constitutionality of section 502.6(a)(3),[77] which sets forth the provisions of Article I of the Beirut Agreement. The court found section 502.6(a)(3) unconstitutional on several grounds. First, the provision that material will not be considered "educational" unless it "augment[s] international understanding and goodwill" was unconstitutionally vague because it did not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly."[78] Further, the requirement that a film be "accurate" in order to be certified[79] was unconstitutional as applied because it "cannot help but be based on the content of the [film] and the message it delivers."[80]

In finding section 502.6(a)(3) unconstitutional, the court held that it could strike down the provision without invalidating the Beirut Agreement itself: " '[When] a treaty is not self-executing, it is not the treaty but the implementing legislation that is effectively' [the] law of the land."[81] As support, the *Bullfrog* court cited the case of *Hopson v. Kreps*,[82] where native Alaskan whalers challenged the authority of the Department of Commerce to implement the regulations made pursuant to the International Whaling Convention.[83] The Ninth Circuit stated that "[a] treaty has no independent significance in resolving [the intended meaning of the terms of the statute]" in a legal action concerning the validity of the implementing regulations, and is relevant only to the ex-

76. *Id.*

77. The plaintiffs' cause of action alleged only that § 502.6(a)(3) was unconstitutional as applied to the films in the case. The court, sua sponte, found the section to not only be unconstitutional as applied, but also to be unconstitutionally vague on its face: "In the circumstances here, the as applied challenge cannot be distinguished from a facial challenge. Thus . . . both species of challenge—facial and as applied—are questions of law which may be freely addressed." 646 F. Supp. at 507 n.19 (quoting Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 796-98 (1984)).

78. 646 F. Supp. at 507 (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).

79. 22 C.F.R. § 502.6(a)(3) (1988).

80. 646 F. Supp. at 507 (quoting Regan v. Time, Inc., 468 U.S. 641, 648 (1984)). See *infra* notes 85-96 and accompanying text for a discussion of the unconstitutional application of the regulations.

81. 646 F. Supp. at 508 (quoting L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 157 (1972)).

82. 622 F.2d 1375 (9th Cir. 1980).

83. The Ninth Circuit stated that the main issue to be decided was whether the International Whaling Commission exceeded its jurisdiction under the Treaty when it changed the regulations used to implement the International Whaling Convention. *Id.* at 1377.

tent that it will aid in the construction of the regulations.[84] Thus, even though Article I of the Beirut Agreement was incorporated into unconstitutional regulations, its independent validity is not affected.

5. Unconstitutional Application of the Regulations

Regulations of speech that discriminate based on content are generally intolerable under the first amendment.[85] However, because the Beirut Agreement stipulates that only materials deemed to be cultural, educational or scientific are eligible to receive the Treaty's benefits, examination of the films' contents is a prerequisite to the granting of an export certificate. The district court acknowledged that the Agency must exercise some subjective evaluation in the certification process, but held that "any limited inquiry into the content of the speech . . . must be neutral as to viewpoint; discrimination on the basis of political or other beliefs is not tolerated."[86]

Courts recognize that various situations require a reviewing body to evaluate speech based upon its content. In *Big Mama Rag, Inc. v. United States*,[87] the Internal Revenue Service granted tax-exempt status to organizations with "educational" viewpoints, if the organization presented a "full and fair exposition of the pertinent facts [so] as to permit an individual . . . to form an independent opinion or conclusion."[88] Although the District of Columbia Circuit acknowledged the IRS's obligation to administer content-based regulations in order to grant tax-exempt status to these "educational" organizations,[89] it held this definition of "educational" to be unconstitutionally vague.[90]

In the *Bullfrog* case, the district court found that the language in the certification criteria defining "educational" was not viewpoint-neutral and discriminated on the basis of political content.[91] The court held that section 502.6(b)(5), which allows the rejection of materials that "misrepresent the United States,"[92] impermissibly "places the government in the

84. *Id.* at 1380.

85. 646 F. Supp. at 505. *See, e.g.*, Regan v. Time, Inc., 468 U.S. 641 (1984) (statute making it a crime to photograph any security of the United States except for educational purposes held to violate the first amendment because it discriminated on the basis of content); Cohen v. California, 403 U.S. 15 (1971) (government has no power to restrict expression based on subject matter of content); Police Department of Chicago v. Mosely, 408 U.S. 92 (1972) (ordinance distinguishing between labor picketing and other peaceful picketing held to violate the Equal Protection Clause of the fourteenth amendment).

86. 646 F. Supp. at 506.

87. 631 F.2d 1030 (D.C. Cir. 1980).

88. *Id.* at 1033-34.

89. *See id.* at 1033-35.

90. *Id.* at 1034-35, 1037. *See infra* notes 124-126 and accompanying text.

91. 646 F. Supp. at 506.

92. *See supra* text accompanying note 31.

position of determining what is the 'truth' about America, politically and otherwise."[93] In addition, section 502.6(b)(3) "prohibits the certification of materials that state a point of view,"[94] a right that "has always rested on the highest rung on the hierarchy of First Amendment values."[95] Because these provisions allow excessive government regulation based upon content, the *Bullfrog* court held them to be unconstitutional.[96]

III
Impact of *Bullfrog* on Participants in the Beirut Agreement

A. The Agency's Revised Regulations

Upon declaring the USIA's certification criteria unconstitutional, the district court instructed the Agency to draft a new set of substantive regulations that would be both constitutional and allow the Agency to fulfill the mandates of the Beirut Agreement.[97] In compliance with this order, the Agency issued three new interim regulations pending an appeal of the *Bullfrog* case to the Ninth Circuit.[98]

The new regulations contained almost the exact wording of the prior section 502.6(a)(3); the only significant change was a deletion of the subprovision mandating that materials be "representative, authentic and accurate."[99] The three new provisions deem a film to be educational, cultural or scientific if it satisfies the following elements:

> (i) The content of the audiovisual material is presented in a primarily factual or demonstrative manner.
> (ii) To the extent that the material reflects a viewpoint or viewpoints which purport to be supported by factual bases, the facts are not distorted. The facts will be deemed distorted if they do not represent the current state of factual knowledge of a subject or aspect of a subject, vrifiable [sic] by generally accepted methods, or if the facts are presented in such a way as to constitute hate material (such as the racial supremacist material involved in *National Alliance v. United States*, 710 F.2d 868 (1983)).
> (iii) To the extent that the material presents, promotes, or advocates a conclusion or viewpoint for which different viewpoint(s), theory(ies) or interpretation(s) may exist, the material acknowledges, presents or refers to the existence of a difference of opinion or other point of view.[100]

93. 646 F. Supp. at 506.
94. *See supra* text accompanying note 30.
95. 646 F. Supp. at 506 (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)).
96. *Id.* at 506.
97. *Id.* at 510-11.
98. 52 Fed. Reg. 43753 (1987) (to be codified at 22 C.F.R. at 502) (proposed Nov. 6, 1987).
99. *Id.* at 43757.
100. *Id.*

Under these revised regulations, the Agency re-evaluated the films in the *Bullfrog* case and granted a certificate to the film *Whatever Happened to Childhood?*.[101] It also granted a certificate to *From the Ashes... Nicaragua Today*, but required the film to carry a propaganda warning label.[102] The four remaining films were denied certificates.[103]

In the spring of 1988, six months after the Agency redrafted the certification criteria, the district court struck down the interim regulations as unconstitutional on their face.[104] The court expressed concern that the revised regulations allowed the Agency to label a film as "propaganda" if the film simply presented a point of view. Such a procedure was not required by the Beirut Agreement and, in the court's view, had the sole purpose of discouraging foreign countries from granting benefits to films so labelled.[105] Objecting that the Agency may, in effect, condition certification of films on the carrying of a propaganda label,[106] the court ordered provisional certification for all of the *Bullfrog* films so that they could receive the benefits afforded by the Beirut Agreement.[107]

B. Ninth Circuit's Ruling and Subsequent Court Activity

Several days after the district court rejected the revised certification criteria, the Ninth Circuit affirmed the initial *Bullfrog* decision, stating that the original regulations "are so ambiguous that they provide USIA officials with a virtual license to engage in censorship."[108]

The Agency has appealed the ruling on the interim set of regulations to the Ninth Circuit.[109] Meanwhile, the Ninth Circuit granted a request to stay the order for a second rewrite pending the appeal of the interim regulations.[110] The fate of the interim regulations may determine the

101. *Whatever Happened to Childhood?*, USIA certification decision, certificate no. 40,324, Jan. 15, 1988.

102. *From the Ashes . . . Nicaragua Today*, USIA certification decision, certificate no. 40,323, Jan. 15, 1988.

103. 9 ENT. L. RPTR. 8 (Feb. 1988).

104. Memorandum Decision and Order declaring interim regulations unconstitutional, Bullfrog Films v. Wick, 646 F. Supp. 492 (C.D. Cal. May 13, 1989) (No. CV 85-7930).

105. *Id.* at 5-6.

106. The importing country could still veto this certified status if importing officials felt that the film did not meet the mandates of the Treaty. However, no country has ever exercised this power over materials leaving the United States. *See supra* note 4 and accompanying text.

107. Memorandum Decision and Order declaring interim regulations unconstitutional, Bullfrog Films v. Wick, 646 F. Supp. 492 (C.D. Cal. 1986) (No. CV 85-7930 at 6-7).

108. Bullfrog Films v. Wick, 847 F.2d 502, 514 (9th Cir. 1988).

109. Oral arguments were heard before the Ninth Circuit on January 17, 1989. L.A. Daily Journal, Jan. 18, 1989, at 24, col. 1.

110. Order granting a stay of the district court's order to rewrite the interim regulations, pending the appeal of the interim regulations to the Ninth Circuit, Bullfrog Films v. Wick, 847 F.2d 502 (9th Cir. 1988) (No. 88-6310).

future for domestic documentary filmmakers and their ability to distribute films abroad.

C. The United States' Obligations Under International Law and the Vienna Convention

As a signatory member of the Beirut Agreement, the United States has a duty under international law to uphold its obligations to the Treaty. The Vienna Convention[111] governs the obligations of member nations to a treaty, and sets forth the actions a nation may take if one member "materially breaches" a treaty.[112]

A material breach is defined as "[t]he violation of a provision essential to the accomplishment of the object or purpose of the treaty."[113] After the original certification criteria were struck down, operations under the Beirut Agreement were suspended, resulting in a backlog of films awaiting Agency review.[114] Because the virtual standstill in the certification process could constitute a material breach of the Agreement,[115] the Ninth Circuit is allowing the Agency to use the interim regulations to certify films until the Ninth Circuit reviews the regulations.[116]

By invoking the "impossibility of performance" clause of the Vienna Convention, the United States could voluntarily withdraw from the Agreement. The clause provides:

> A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty . . . . Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party . . . of an obligation under the treaty.[117]

Indeed, following the decision by the district court to strike down the interim regulations, Agency sentiment was that constitutional regulations could not be formulated, and that compliance with the Vienna Con-

111. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

112. *Id.* at 346.

113. *Id.*

114. A USIA review reported a backlog of 3,500 audio-visual materials awaiting review as of early 1988. L.A. Daily Journal, May 18, 1988, at 1, col. 2.

115. Vienna Convention, *supra* note 111, at 346.

116. Order granting a stay of the district court's order to rewrite the interim regulations, pending the appeal of the interim regulations to the Ninth Circuit, Bullfrog Films v. Wick, 847 F.2d 502 (9th Cir. 1988) (No. 88-6310 at 3). However, certificates are still being denied under the interim regulations. The film *The Last Empire: Intervention in Nuclear War* was denied a certificate in the Fall of 1989. Telephone interview with David Cole, attorney for plaintiffs, (Oct. 4, 1989).

117. Vienna Convention, *supra* note 111, at 346.

vention could only be accomplished by withdrawing from the Treaty. The former Director of the USIA, Charles Z. Wick, submitted an affidavit to the court recommending that if the district court's ruling was upheld, the United States would withdraw from the Agreement on the grounds that the court's first amendment standards precluded the United States from fulfilling its Treaty obligations:

> Further attempts to draft regulations which, as envisioned by [the] court, would be less content-based and more 'broadly' define the categories of films which may be certified would, in my opinion, deviate from the requirements of . . . the [T]reaty to such an extent that the [A]gency would no longer be following the language and intent of the [T]reaty.[118]

However, the appointment of Bruce Gelb to the post of USIA director[119] may signal a new Agency sentiment. Shortly after his appointment, Mr. Gelb stated that the Agency would not petition the Supreme Court for certiorari to review the initial *Bullfrog* decision.[120] But it is not known what actions Mr. Gelb and the Agency will take if the Ninth Circuit affirms the district court decision striking the interim regulations as unconstitutional. The options available include further revision of the regulations to meet constitutional standards, withdrawal from the Beirut Agreement as provided by the Vienna Convention, or petition to the Supreme Court for certiorari.

D. Towards a Constitutional Set of Certification Criteria

In order to fulfill the Beirut Agreement's objective of promoting one international exchange of films, a workable definition of cultural, educational and scientific materials must be incorporated into the certification criteria. Several modifications to the interim criteria might achieve this goal.

First, the Agency should consider adopting the procedural test that was used to evaluate content of speech in *National Alliance v. United States*.[121] The Internal Revenue Service formulated this "Methodology" test[122] to cure the vagueness of the definition of "educational" struck down in the case of *Big Mama Rag, Inc. v. United States*.[123] According to the *National Alliance* court, the test minimizes the inquiry into the

118. L.A. Times, July 27, 1988, Part I, at 3, col. 5.

119. Mr. Gelb was confirmed by the Senate on April 13, 1989. USIA, News Release (Apr. 14, 1989), at 1.

120. L.A. Times, March 30, 1989, part 6 (calendar), at 4, col. 1.

121. 710 F.2d 868 (D.C. Cir. 1983).

122. *Id.* at 870.

123. 631 F.2d 1030 (D.C. Cir. 1980).

content of the expression and focuses instead on the method of presentation.[124] It considers the following factors:

> 1. Whether or not the presentation of viewpoints unsupported by a relevant factual basis constitutes a significant portion of the organization's communications.
> 2. To the extent viewpoints purport to be supported by a factual basis, [if] the facts [are] distorted.
> 3. Whether or not the organization makes substantial use of particularly inflammatory and disparaging terms, expressing conclusions based more on strong emotional feelings than objective factual evaluations.
> 4. Whether or not the approach to a subject matter is aimed at developing an understanding on the part of the addressees, by reflecting consideration of the extent to which they have prior background or training.[125]

The Agency could incorporate similar criteria into its own regulations to evaluate films under the "cultural, educational, or scientific" standard set forth in the Treaty. Such a test would allow the evaluation of materials in a viewpoint-neutral manner, "[even] [t]hough a particular public officer may strongly disagree with the proposition advocated."[126]

In addition, the Agency should strike the provision of the interim regulation which states that "the facts will be deemed distorted if they . . . are presented in such a way as to constitute hate material."[127] Because hate material has not been recognized as an area of speech outside of the protection of the Constitution,[128] the provision violates the first amendment as it discriminates based on the content of speech. A film should *only* be denied an export certificate if it fails to meet the cultural, educational, or scientific standard as interpreted under viewpoint-neutral regulations.

The Agency should, finally, discontinue the use of propaganda labels. A main source of dispute over the revised regulations is the continued existence of the propaganda label.[129] The Agency contends that the label is "informative," rather than "disparaging," because it "encourages

124. 710 F.2d at 875.

125. *Id.* at 874.

126. *Id.*

127. 52 Fed. Reg. 43753, 43757 (1987). As an example of hate material, the regulation cites the material at issue in National Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983). When evaluated under the Methodology test, this material (newsletters with general themes that non-whites are inferior to white Americans, and are brutal and dangerous people, 710 F.2d at 871) was not found to have a basis in fact so as to render the material educational. *Id.* at 874.

128. *See* Healy v. James, 408 U.S. 169 (1972); Police Department of Chicago v. Mosely, 408 U.S. 92 (1972); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978). However, if such material could constitute "fighting words," then it would not be constitutionally protected. *See supra* note 54.

129. *See supra* notes 106-07 and accompanying text.

foreign governments to take a second look at a film."[130] The Agency also claims that the filmmakers' allegations of labelling as a form of censorship "are unduly patronizing to foreign governments [by] assuming that they are going to unduly roll over to a USIA comment."[131]

This practice of certifying films and then labelling them with propaganda warnings might cause the importing country to exercise discretion in the certification process for the first time. As evidence of this, Canadian officials have already stated that they will not grant duty-free status to any American film bearing a propaganda label,[132] even though it has been certified by the Agency. If other countries follow suit, this could significantly alter the role of the importing country under the Beirut Agreement,[133] since an importing country has never actually overruled a certification decision by the United States.[134] Thus, because certified films bearing a propaganda label might not receive duty-free status, this labelling practice fails to achieve the underlying Treaty objective of promoting the international exchange of materials.

In addition, the presence of a label could have a chilling effect on American production of documentary films because of the negative connotation associated with the term "propaganda,"[135] as well as the uncertainty surrounding an importing country's decision to accept or deny a film labelled as such. If foreign countries are less inclined to accept films marked as propaganda, filmmakers may be unable to pay the import duties levied on their films. Faced with the possibility of being financially unable to show their films overseas, filmmakers might be deterred from producing the films altogether.[136]

Furthermore, the power to label films as "propaganda" exceeds the powers delegated to the Agency by Congress. Once a film has been certified as having cultural, educational or scientific value, the Agency should have no further influence on its distribution, and the presence of the label on a film already certified as educational could affect the decision of the importing country to grant the certified film the benefits entitled it under the Agreement. Unfortunately, the elimination of the propaganda label and the suggested other changes to the certification criteria may only

130. Egelko, *Ninth Circuit Hears Arguments in 'Propaganda' Film Dispute,* L.A. Daily Journal, Jan. 18, 1989, at 24, col. 1.

131. *Id.*

132. *Id.*

133. *See id.*

134. *See supra* note 5 and accompanying text.

135. Webster's Dictionary states that the term is "now often used disparagingly to connote deception or distortion." WEBSTER'S NEW WORLD DICTIONARY 1138 (2d ed. 1982). *See also* note 10 for the Agency's definition of propaganda.

136. *See supra* notes 8, 20 and accompanying text.

provide a partial solution to the effective administration of the Beirut Agreement.

An additional hindrance may stem from the USIA itself. The USIA's stated purpose, among others, is to "strengthen foreign understanding and support for United States policies and actions."[137] It has been questioned whether the Agency should "simply present a full and fair image of the [United States], warts and all, or [whether it] should . . . emphasize the good and play down or ignore the bad."[138] Since films deemed to be educational under the Treaty could also present a negative view of the United States, the Agency's own declared purpose might conflict with the certification of such films. For this reason, the administration of the Treaty by an agency without this "purpose" might better insure that films which qualify under the Beirut Agreement, despite being controversial or negative, receive certification. Congress should thus reconsider its delegation of responsiblity to the USIA to implement the Beirut Agreement.

Conclusion

The Beirut Agreement exists to facilitate the international exchange of cultural materials and to increase goodwill among the member nations. These objectives can best be fulfilled by regulations which encourage the making and distribution of documentary films. The *Bullfrog* case highlights the need to enact constitutionally acceptable certification criteria that will allow documentary filmmakers to distribute their films abroad. This Note has proposed that certification criteria, though content-based, can be formulated within the bounds of the first amendment. Through the elimination of the propaganda label and modifications to the tests for determining what is "cultural, educational or scientific," the United States may ensure freedom of expression for documentary filmmakers. Such freedom would ultimately augment international goodwill, and as foreign audiences would benefit from American creativity and artistic impression, the United States would thus fulfill the true spirit of the Beirut Agreement.

137. USIA, Fact Sheet (Oct. 1989), at 1.

138. Holt, *Bad Precedents at USIA,* Christian Science Monitor, Sept. 4, 1985, at 15, col. 2.