USIA CENSORSHIP OF EDUCATIONAL FILMS FOR DISTRIBUTION ABROAD

I. INTRODUCTION

Since 1942 the United States government has been certifying films and other audio-visual materials as educational in order to facilitate their duty-free entry into foreign countries that accord educational materials privileged customs treatment.[1] In 1967 the United States entered into a multinational agreement designed to promote mutual understanding among the peoples of the world by circulating educational, scientific, and cultural materials worldwide.[2] The United States Information Agency (USIA), which succeeded the Department of State in administering the program, promulgated regulations for certifying materials to be sent to the agreement signatories and for authenticating the certificates borne by materials entering the United States.[3]

In recent years the USIA has denied certificates to films it deemed likely to be misunderstood or misinterpreted by foreign audiences lacking adequate American points of reference.[4] Filmmakers who have been denied certificates claim the USIA uses the regulations to penalize those whose political viewpoints it abhors. These filmmakers are in the process of filing a suit against the government for infringing their first amendment right of freedom of speech.[5]

This Note will explore the conflict between the government's view of its role in carrying out the agreement, as can be seen through the USIA's application of the implementing regulations and in the regulations themselves, and the first amendment

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[1] World-Wide Free Flow (Export-Import) of Audio-Visual Materials, 22 C.F.R. § 502.7(b) (1984).

[2] Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, *opened for signature* July 15, 1949, 17 U.S.T. 1578, T.I.A.S. No. 6116, 197 U.N.T.S. 3 (*entered into force for the United States* Jan. 12, 1967) [hereinafter cited as Agreement].

[3] 22 C.F.R. §§ 502.1-502.8 (1984).

[4] Rosenberg, *For Our Eyes Only*, AMERICAN FILM, July-Aug. 1983, at 40; the phrase "lacking adequate American points of reference" appears often in letters from the Chief Attestation Officer of the United States to applicants for certificates of internationally educational character in the years 1981 through 1983 (letters available at Center for Constitutional Rights, 853 Broadway, New York, New York 10003).

[5] Rosenberg, *supra* note 4, at 43; interview with Sarah Wunsch, attorney, Center for Constitutional Rights (Sept. 20, 1984). Before a court will review the U.S.I.A.'s decisions, the agency's appeals process must be exhausted. *See infra* text accompanying notes 58-60.

rights[6] of filmmakers seeking to take advantage of the customs privileges contemplated by the agreement.

II. The Agreement

In 1967 the United States became party to the multinational Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character.[7] The Agreement calls for each signatory state to exempt educational, scientific, and cultural auditory and visual materials imported from the other signatory states from customs duties and other restrictions.[8] By facilitating the circulation of these materials, the signatories agreed, "the free flow of ideas by word and image will be promoted and the mutual understanding of peoples thereby encouraged. . . ."[9]

This was the goal of the United Nations Educational, Scientific and Cultural Organization (UNESCO), which adopted the Agreement at its third general session in Beirut in 1948.[10] In a 1946 report on worldwide mass communication, UNESCO's Preparatory Commission had urged that UNESCO adopt measures to facilitate the international exchange of visual and auditory materials as a first step toward freeing the flow of communication among all peoples.[11]

Underlying UNESCO's commitment to free communication worldwide was the belief that every individual, wherever he lives, is entitled through the power of the mass media to be drawn closer to his fellow individual elsewhere in the world.[12] The members of UNESCO hoped mutual understanding and a truer, more perfect knowledge of each other's lives would replace the suspicion and mistrust that had too often led the peoples of the

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[6] The first amendment guarantees freedom of religion, speech, the press, assembly, and the right to petition the government for redress of grievances. U.S. Const. amend. I. In this Note the term "first amendment" will refer exclusively to the guarantee of freedom of speech.

[7] *See supra* note 2.

[8] Agreement, art. III, para. 1, 17 U.S.T. 1578, 1581.

[9] Agreement, preamble, 17 U.S.T. 1578, 1580; *see also* UNESCO Preparatory Commission report, Chapter III, Mass Communication, UNESCO/C/2 at 6, UNESCO Doc. 1945-46 [hereinafter cited as Preparatory Commission report].

[10] 22 C.F.R. § 502.1(a) (1984); UNESCO General Conference Records: Sess. 3 (17th Plen. mtg.) 174, 175 (1948) [hereinafter cited as 17th plenary meeting report].

[11] Preparatory Commission report, *supra* note 9, at 6. The report also recommended measures to improve international telecommunications services for press and radio and to improve international copyright protection. *Id.* The commission noted that in addition to deficiencies in equipment and other physical obstacles, UNESCO must take account of "less tangible but equally potent" obstacles to worldwide communication, such as the severe curtailment of individual freedom in many parts of the world. *Id.*

[12] *Id.* at 7.

world to settle their differences in war.[13]

Many countries had been granting customs exemptions for educational materials[14] and were pleased to continue to do so under a more formal arrangement.[15] The Agreement was approved in 1948 and opened for signature in 1949; it entered into force in 1954.[16]

The materials covered by the Agreement are films, filmstrips and microfilm, sound recordings, glass slides, models, wall charts, maps, and posters.[17] An appropriate governmental agency of the state of origin must certify their educational, scientific, and cultural character;[18] on this recommendation the state into which duty-free entry is sought makes an independent decision whether the materials are entitled to the privilege.[19]

The Agreement provides that materials shall be deemed to be of an educational, scientific, and cultural character:

> 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 When the materials are representative, authentic and accurate . . . .[20]

In comments on the draft Agreement solicited prior to its adoption by the General Conference of UNESCO, the representatives of Belgium, Canada, and the Netherlands complained that the definition of "educational" did not clearly exclude commercial items. The French representative proposed stipulating in the Agreement that the materials be directed exclusively toward cultural and noncommercial use.[21] The representative of the United Kingdom commented that the definition of "educational" was so broad as to per-

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[13] UNESCO CONST. preamble, 1946/47 U.N.Y.B. 712-13. The constitution, written in 1945, refers to "the great and terrible war which has now ended." *Id.*

[14] 22 C.F.R. § 502.7(a) (1984).

[15] The delegates from Brazil and Venezuela each recommended the Agreement for the aid it could provide in educating the people sparsely populating their large countries. The Venezuelan delegate pointed out, as had the Iraqi delegate before him, that his country was already exempting educational materials from import duties. 17th plenary meeting report, *supra* note 10, at 176, 179.

[16] UNESCO, *Agreement for facilitating the international circulation of visual and auditory materials of an educational, scientific and cultural character*, A Guide to its Operation 7 (1954) [hereinafter cited as Guide].

[17] Agreement, art. II, 17 U.S.T. at 1581.

[18] *Id.*, art. IV, para. 1-2, 17 U.S.T. at 1583.

[19] *Id.*, para. 4.

[20] *Id.*, art. I, 17 U.S.T. at 1580-81.

[21] UNESCO General Conference: Sess. 3 at 4, U.N. Doc. 3C/9 (1948) [hereinafter cited as U.N. Doc. 3C/9]. The Dominican Republic also agreed that the profitable use of educational materials was incompatible with preferential fiscal treatment. *Id.* at 6.

mit almost anything. He argued that any film with a historical subject could satisfy the "instruct or inform" requirement; any documentary film could be said to "increase or diffuse knowledge"; disagreement would inevitably arise over whether or not particular material would "augment international understanding and goodwill"; and it would be difficult to formulate standards to define "representative, authentic and accurate."[22] There is no record that this comment inspired any attempt to refine the definition of "educational." The representatives were primarily concerned with preventing the commercial exploitation of materials imported duty-free. In the end, the representative of the United Kingdom agreed that it was "clear that a great deal of material, especially films, which is produced for commercial exploitation could be claimed as falling under these definitions."[23] He suggested, the Agreement should be amended to include safeguards against the commercial exploitation of any material that has entered a state duty-free.[24]

In discussion of the draft Agreement by the General Conference a few months later, the French delegate again proposed the addition of the words, "it being understood that this material would not be used for profit-making purposes."[25] The amendment was rejected.[26] The United States delegate pointed out that the Agreement permits any signatory to impose regulations, as it sees fit, to ensure that material is used only for non-profit-making purposes.[27] Moreover, "if a film is truly educational in character, any opportunity to show it, whether for a commercial or non-commerical purpose, advances the interests of Unesco."[28] There was no further discussion of this article of the Agreement or of the characteristics of an educational film. The Agreement entered into force for ten nations, not including the United States, on August 12, 1954.[29]

III. United States Acceptance of the Agreement

In May of 1960[30] the United States Senate ratified the Agree-

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22 UNESCO General Conference Addendum: Sess. 3 at 2, U.N. Doc. 3C/9 Addendum (1948) [hereinafter cited as U.N. Doc. 3C/9/Addendum].

23 *Id.*

24 *Id.*

25 17th plenary meeting report, *supra* note 10, at 178.

26 *Id.* at 180.

27 *Id.* at 178. Agreement, art. IV, para. 5, 17 U.S.T. at 1584.

28 17th plenary meeting report, *supra* note 10, at 178.

29 Guide, *supra* note 16, at 11. The United States signed the Agreement in 1949 but did not ratify it and deposit its acceptance until 1966. The Agreement entered into force for the United States in 1967. *See supra* note 2.

30 During House discussions — six years later — the question arose why there had been such a delay between the signing of the Agreement in 1949 and the Senate's ratification of it in 1960. Representative Thomas Curtis speculated that there were no eco-

ment.[31] Senator Mike Mansfield, Chairman of the Committee on Foreign Relations, told his colleagues that in considering the Agreement, "emphasis rightly should be given to its importance in terms of promoting international understanding and, accordingly, of assisting this Government's information program."[32]

He placed greater emphasis, however, on the commercial aspects of the Agreement. Noting that the United States is the largest producer of educational, scientific, and cultural materials and that its imports of such material are very small, Mansfield said participation in the Agreement would mean an "insignificant loss of customs revenue much outweighed by the commerical opportunities that should open up for American exporters."[33] He urged ratification on the grounds that the Agreement "has both cultural and commercial significance for the foreign policy interests of the United States."[34]

A House joint resolution giving effect to the Agreement was passed in 1966 by both Houses of Congress and signed into law by President Lyndon Johnson.[35] The law authorized the president to designate a federal agency to carry out the provisions of the Agreement; it also amended United States tariff schedules to exempt from duty those articles deemed to be educational, scientific, and cultural within the meaning of the Agreement.[36]

In its preamble the law invokes the country's "national policy to promote a better understanding of the United States in other countries, and to increase mutual understanding between the people of the United States and the people of other countries. . . ."[37] The discussion in the House indicates that the members of Congress who passed it had other concerns.[38] One of these was the possibility that duty-free importation would aid foreign countries in competing with domestic sources. In re-

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nomic public interest groups involved, and this was the type of legislation that requires a particular group to push it through. "In other words," he said, "I do not see any ulterior motive" for the delay. 112 CONG. REC. 22,217 (1966).

31 106 CONG. REC. 11,192 (1960).

32 *Id.* at 11,187.

33 *Id.*

34 *Id.*

35 H.R.J. Res. 688, 89th Cong., 2d Sess., 112 CONG. REC. 22,218-19 (1966).

36 *Id.* at 22,219.

37 *Id.* at 22,218.

38 For example, Representative Durward Hall wanted to be sure there was no possibility that material vital to national security, such as information on nuclear devices, could leak out simply because it might be termed scientific. *Id.* at 22,217 (1966). Representative Wilbur Mills responded that national security laws, such as the Atomic Energy Act or the National Security Act, would not be affected by the Agreement and that, in any case, material for certification had to be scientific, or educational or cultural, within the meaning of the Agreement. *Id.*

sponse to this possibility the initial House joint resolution was amended to include a provision empowering the president to restrict the entry of foreign articles targeted for profit-making uses that might interfere significantly with domestic production of similar articles.[39]

Representative Thomas Curtis pointed out that, as the "primary exporter" of educational, scientific, and cultural materials, the United States unquestionably stood to benefit from participation in the Agreement.[40] Representative Wilbur Mills, Chairman of the House Ways and Means Committee, cited monetary figures to support this claim. He said testimony given during public hearings before his committee indicated that, while American exports were valued at about $3.5 million annually, the customs duties on imports into the United States, which would be forgiven under the Agreement, amounted to only about $20,000 per year.[41]

Another concern was the specter of foreign material being released into the United States "for political purposes."[42] Mills worried that material would enter the United States "under the guise of an educational or cultural or scientific showing that would not be desirable from at least my own point of view."[43] He acknowledged, however, that the Beirut Agreement does not disturb the rights of any signatory state to restrict imports of "that kind of material."[44] Participation in the Agreement, said Mills, "does not require us to bring in a single film from Yugoslavia that is communistic in nature."[45]

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[39] *Id.* at 22,216. In its comments on the draft Agreement, see *supra* text accompanying notes 22-24, the United Kingdom noted the exclusion from a prior draft of a provision allowing the signatory states to exclude material for reasons based on the need to encourage their own domestic production. U.N. Doc. 3C/9/Addendum at 2.

[40] 112 CONG. REC. 22,216 (1966).

[41] *Id.* at 22,218. Mills stated, "So long as we are the predominant country in the world supplying this type of material for these purposes, then we certainly have more to gain in the long run than any of the other contracting parties to it." *Id.* at 22,216. Mills was presumably unaware of the comment of the Dominican Republic on the draft Agreement, suggesting that exemptions accorded by the state of origin would demonstrate the state's "disinterestedness." The Dominican government remarked that "if the material were exempted only from import duties and subsequent internal taxes, the consequences of the . . . Agreement would be borne mainly by the small importing countries." U.N. Doc. 3C/9 at 6. *See supra* note 21.

[42] 112 CONG. REC. 22,218 (1966) (remarks of Representative Durward Hall).

[43] *Id.*

[44] *Id.* Agreement, art. V, 17 U.S.T. 1578, 1584 reads as follows:
Nothing in the present Agreement shall affect the right of the contracting States to censor material in accordance with their own laws or to adopt measures to prohibit or limit the importation of material for reasons of public security or order.

[45] 112 CONG. REC. 22,218 (1966).

IV. The USIA Regulations

By executive order dated October 14, 1966, President Johnson designated the USIA to carry out the provisions of the Agreement.[46] The USIA issued implementing regulations dealing with procedures, background, and substantive criteria for granting certificates.[47] This Note is concerned with the substantive criteria set forth in the regulations.

Section 502.6(a) of the regulations states that for both exports and imports the USIA applies the criteria set forth in the Agreement, which the section then quotes.[48] Section 502.6(b) sets out the USIA's interpretation of the Agreement's criteria. It states that the USIA does not certify or authenticate materials whose primary purpose or effect is to amuse or entertain[49] or to inform concerning timely current events;[50] 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";[51] materials 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;[52] 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 [sic] purpose or effect to attack or discredit economic, religious, or political views or practices";[53] or materials which have not yet been produced at the time of application.[54]

The regulations call for the Chief Attestation Officer of the United States and his staff to consult experts at the USIA and elsewhere in the government whenever examination of the materials, for either certification or authentication, indicates "the desirability of substantive expertise in making a fair evaluation."[55] In addition to these *ad hoc* consultants, a standing Interdepartmental Committee on Visual and Auditory Materials for Distribution Abroad exists to advise the USIA both on broad pol-

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[46] Exec. Order No. 11311, 31 Fed. Reg. 13413 (1966), *reprinted in* 19 U.S.C. § 2051 (1982).
[47] 22 C.F.R. §§ 502.1-502.8 (1984).
[48] *Id.* § 502.6(a)(3). *See supra* text accompanying note 20.
[49] 22 C.F.R. § 502.6(b)(1).
[50] *Id.* § 502.6(b)(2).
[51] *Id.* § 502.6(b)(3).
[52] *Id.* § 502.6(b)(4).
[53] *Id.* § 502.6(b)(5).
[54] *Id.* § 502.6(b)(6).
[55] *Id.* § 502.4(a).

icy and on the evaluation of specific materials.[56] The committee is composed of representatives of the USIA and other federal entities ranging from the Department of Defense to the National Science Foundation.[57]

Any applicant for certification or authentication may request formal review of any ruling of an attestation officer[58] by the Review Board, which consists of three USIA members appointed by the Director.[59] From the Review Board decision the applicant may appeal to the Director of the USIA, whose decision constitutes final administrative action on the case.[60]

V. Administration of the Regulations

The USIA interpreted the criteria in the Agreement so as to disqualify entertainment, spot news, and propaganda—three categories of material not barred by the Agreement itself.[61] Entertainment and spot news are arguably excluded by the Agreement's language requiring that the primary purpose or effect of the material be "to instruct or inform through the development of a subject or aspect of a subject" or that its content be such as "to maintain, increase or diffuse knowledge."[62] Entertainment has by definition a primary purpose other than to instruct or inform or to maintain, increase or diffuse knowledge;[63] spot news does not develop a subject.[64]

It is not clear, however, that material which attempts "to influence opinion" or "to espouse a cause"[65] is therefore not instructive or informative. Yet, in the words of the Chief Attestation Officer of the United States, "if we feel that the purpose of a film is to advocate a cause or is persuasive of one point of view, that's one type of propaganda, and we deny it a certificate."[66] Even if the Agreement itself required this result, and by

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56 *Id.* § 502.4(b).

57 The departments represented are State, Defense, Agriculture, Health and Human Services, Education, Transportation, Commerce, Energy, Interior, and Treasury, the Postal Service, General Services, Veterans, and National Aeronautics and Space Administrations, the National Gallery of Art, and the National Science Foundation. *Id.*

58 22 C.F.R. § 502.5(b) (1984).

59 *Id.* § 502.5(a).

60 *Id.* § 502.5(c).

61 *See supra* notes 49-54.

62 *See supra* text accompanying note 20.

63 To entertain is defined as "to hold the attention of agreeably; divert; amuse." The Random House College Dictionary 441 (1st ed. 1980).

64 News is defined as "a report of a recent event" or "on current events." *Id.* at 896.

65 *See supra* text accompanying note 51.

66 Rosenberg, *supra* note 4, at 41, quoting John Mendenhall, Chief Attestation Officer of the United States.

its terms it does not, the danger in relying on that standard is that the standard permits government officials to deny certificates on the basis of individual, subjective responses to films whose subject matter is within their "expertise"—if not their protective custody.

The regulations permit certification of certain materials, despite their resemblance to religious propaganda or product advertising, when the materials are intended for use "only in denominational programs or other restricted organizational use in moral or religious education"[67] or for "personnel training or commodity servicing."[68] Yet the USIA refused to certify *In Our Own Backyards*, a film about the health hazards of uranium mining and milling, for distribution in Canada and Australia.[69] These countries have large uranium industries, which are the subject of widespread public debate and controversy, and the public would presumably welcome any pertinent material. Experts at the Department of Energy described the approach of *In Our Own Backyards* as "emotional rather than technical."[70] They said the film did not include "new regulations and standards [that] have been enacted,"[71] and concluded that its primary purpose or effect "appears to be less to instruct or inform in an educational sense than to present a special point of view."[72] Presenting a special point of view appears to be permitted in some instances but not in others.

When the producers of *The Killing Ground*, a documentary on the problem of toxic waste disposal in the United States, applied for a certificate, the USIA consulted experts at the Environmental Protection Agency (EPA).[73] On the basis of the EPA reviewers' conclusion that the film was dated, the USIA denied its producers a certificate.[74] Pursuant to § 502.6(a)(3) of the regulations,[75] USIA policy permits the denial of a certificate because a film's portrayal of an issue, though "balanced, authentic and accurate"

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67 22 C.F.R. § 502.6(b)(3) (1984).

68 *Id.* § 502.6(b)(4).

69 Rosenberg, *supra* note 4, at 40.

70 *Id.*

71 Letter from Chief Attestation Officer John W. Mendenhall to Bullfrog Films, Inc. (Aug. 5, 1982). The Review Board affirmed the denial on Nov. 13, 1984. Bullfrog Films appealed to the Director of the USIA, Charles Z. Wick, on Dec. 3, 1984. There has been no final decision as of the date of this publication.

72 Rosenberg, *supra* note 4, at 40.

73 *Id.* at 41; Letter from Mendenhall to American Broadcasting Co., Inc. (Dec. 13, 1982).

74 Rosenberg, *supra* note 4, at 41.

75 *See supra* text accompanying note 48.

at the time it was made, has been rendered obsolete by developments since that time.[76] According to the EPA experts, *The Killing Ground* was "mainly of historical interest" since the United States has "made great progress in managing hazardous waste. . . . [T]he United States most certainly *is* dealing with the problem."[77] They argued that "the tone of *The Killing Ground* would mislead a foreign audience into believing that the American public needed arousing to the dangers of harzardous wastes. This is no longer the case."[78] As if to illustrate the unsettled nature of this question, shortly after the film was termed dated, Congress undertook an investigation of the EPA's toxic waste program. This was the result of charges that EPA officials had allowed chemical companies to tamper with their reports; EPA administrator Anne Burford resigned under pressure.[79]

When the producers of a documentary on women in Army basic training applied for certificate, the USIA consulted the Defense Department.[80] Defense experts claimed the film "focuses on aberrations in the basic training process and was obviously filmed and edited more for artistic and dramatic effect than to present an accurate, balanced representation of basic training."[81] The product of three months of filming a platoon of female recruits undergoing basic training at Fort Gordon, Georgia, *Soldier Girls* was denied a certificate on the grounds that it distorted conditions in today's Army.[82]

When consulted on the film *Nursing: The Politics of Caring*, experts at the Veterans Administration conceded that it "does represent a contemporary issue in nursing, namely the movement of some nurse groups to use techniques associated with labor-management organizing activity."[83] But they said the film did not represent the nursing profession "in the sense that it should depict nursing as a professional discipline providing a wide range of professional nursing care and services in a variety of health care settings."[84] They recommended denying certification because

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76 Internal memorandum, Reporters Committee for Freedom of the Press, based on interview with USIA attestation assistant, Sally Lawrence (Aug. 9, 1983) [hereinafter cited as Reporters Committee memo].

77 Letter, *supra* note 73.

78 *Id.*

79 Shabecoff, *Seven Days of Decision: Why Mrs. Burford Quit*, N.Y. Times, Mar. 13, 1983, at 1, col. 3; Taylor, *EPA Inquiries Center on Four Issues*, *id.*, at 36, col. 1.

80 Reporters Committee memo, *supra* note 76; Rosenberg, *supra* note 4, at 42.

81 Rosenberg, *supra* note 4, at 42.

82 *Id.*; *see* Reporters Committee memo, *supra* note 76.

83 Letter from Mendenhall to Fanlight Productions (Dec. 30, 1982).

84 *Id.*

"as a part of the federal government . . . [our] endorsement would then be interpreted as a bias against those nurses who do not wish to engage in the labor management activities."[85]

As these decisions illustrate, the regulations afford wide latitude to the attestation staff and the experts it consults to make subjective evaluations of the educational character of the films they review for certification. The certificate is not intended by the Agreement to be an endorsement by the granting government of the message or statement of a film; it is only supposed to attest to the film's educational—as opposed to entertaining or amusing—character. That evaluation is supposedly a value-free judgment. Furthermore, the regulations permit a film to educate through the development of a subject *or aspect of a subject*; a film about nursing need not depict the profession as a nursing school catalog would.

A recent Review Board decision illustrates that this subjective evaluation process is also employed at the second level of review, although there is no second consultation with "experts." The USIA had denied certificates to the producers of *The Last Resort*, a film about the citizens' campaign against a nuclear plant at Seabrook, New Hamsphire, and *The Secret Agent*, a film about Agent Orange, the defoliant used by the United States in Vietnam, and its effects on the soldiers who were exposed to it.[86] On appeal, the Review Board affirmed the denial for *The Last Resort* and reversed for *The Secret Agent*. The Board said *The Last Resort* was balanced but likely to lead a foreign audience to conclude "that our system of laws was ineffective or unfair and that civil disobedience is not only a 'last resort,' but may well be the only resort."[87] *The Secret Agent* had been denied a certificate initially because the experts consulted felt that its intent was to present a point of view and that it could be misunderstood or misinterpreted by foreign audiences "lacking sufficient American points of reference."[88] The Review Board said that, while the film did present a point of view, that was not its primary intent. "More significantly, the Board found that the film presented a difficult, even emotional, subject in a responsible and balanced manner.

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[85] *Id.*

[86] Letters from Mendenhall to Green Mountain Post Films (Nov. 28, 1983) and (Dec. 28, 1983).

[87] Letter from Review Board to Green Mountain Post Films (Mar. 29, 1984). Upon appeal to the USIA Director, this decision was overturned on July 12, 1984. There was no explanation for the Director's determination that the film did qualify for certification.

[88] Letter from Mendenhall to Green Mountain Post Films (Dec. 28, 1983).

Furthermore, the film showed the American 'system' *at its best* . . . ."[89]

Just as the certification of films is not intended to be an endorsement of their statements, evaluation of the films is not intended to be an opportunity to screen out those that may reflect badly on the United States. It is not the function of the USIA officials to shield their government from the possibility of disapproval by foreign audiences; neither the regulations nor the Agreement itself calls for films to show their countries at their best. That the Agreement contemplates material that will "augment international understanding *and goodwill*"[90] is not to the contrary. It was entered into for the purpose of promoting mutual understanding among the peoples of the world;[91] the sincerity of the signatories may be measured by the fact that the materials they disseminate project both positive and negative images. Goodwill may be generated effectively by such candor on the part of the United States, a leader among nations.

As a practical matter, many of the problems depicted in the films for which the USIA has denied certification are shared by other Agreement signatories. In addition to uranium mining and milling, an industry currently controversial in Canada and Australia,[92] there are the issues of nuclear power and arms, hazardous waste disposal, the plight of the neglected elderly, and urban ethnic and social problems.[93] International dialogue about these issues would make information available to all concerned parties regarding other countries' treatment of these problems and might encourage cooperative efforts toward solutions.

There is another reason to prohibit United States government officials from granting aid to filmmakers whose views they approve and denying the same aid to those whose views they disapprove. That reason is the first amendment to the Constitution.

VI. The First Amendment

It has long been settled that motion pictures are a form of speech protected by the first amendment.[94] It is also established

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89 Letter from Review Board, *supra* note 87 (emphasis added).

90 *See supra* text accompanying note 20.

91 Agreement, preamble, 17 U.S.T. 1578, 1580.

92 *See supra* text accompanying notes 69-72.

93 The USIA denied certificates for *Save the Planet*, about nuclear power and arms, produced by Green Mountain Post Films (Jan. 8, 1981); *The Killing Ground*, *supra* note 73; *Old Age: Do Not Go Gentle*, about the elderly, produced by MTI Teleprograms, Inc. (Nov. 28, 1983); and *Hard Bargain*, about urban ethnic and social problems, produced by The Next Manifold, Inc. (Jan. 16, 1981).

94 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); United States v. Paramount Pictures, 334 U.S. 131 (1948).

that first amendment rights, although they occupy a special place among constitutional guarantees,[95] are not absolute. The government may regulate the time, place, and manner of the people's exercise of their "precious First Amendment freedoms"[96] when such regulation is necessary to further a significant governmental interest.[97] Time, place, and manner regulations must be sufficiently narrow, objective, and definite to afford guidance to the speaker and to the officials charged with enforcing them.[98] "But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[99]

The first amendment's categorical commitment to freedom of speech[100] serves interests both private and public. The private interest is self-fulfillment for each individual—a goal basic to democratic society.[101] To achieve this goal the individual must be uninhibited in his own expression as well as free to apprehend the expression of others.[102]

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95 *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943); Meiklejohn, *What Does the First Amendment Mean?* 20 U. CHI. L. REV. 461, 479 (1953).

96 *Southeastern Promotions*, 420 U.S. at 553.

97 Young v. American Mini Theaters, Inc. 427 U.S. 50, 62, *reh'g denied*, 429 U.S. 873 (1976) (Detroit ordinances requiring that "adult" theaters be dispersed; "we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments"); Grayned v. City of Rockford, 408 U.S. 104, 119 (1972) (ordinance prohibiting noise near school in session furthers "Rockford's compelling interest in having an undisrupted school session conducive to the students' learning"); Cox v. Louisiana, 379 U.S. 559, 562 *reh'g denied*, 380 U.S. 926 (1965) (statute prohibiting picketing and parading in or near courthouse is a safeguard "necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence"); Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (ordinance forbidding use of loud speaker that emits loud and raucous noises in streets protects against distractions dangerous to traffic and disruptive of residential tranquility).

98 Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 684 (1968); Shamloo v. Mississippi State Board of Trustees of Institutions of Higher Learning, 620 F.2d 516, 523 (5th Cir. 1980); Milwaukee Mobilization for Survival v. Milwaukee County Park Commission, 477 F. Supp. 1210, 1217 (W.D. Wis. 1979).

99 Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 95 (1972); Kingsley International Pictures Corp. v. Regents of the University of the State of New York, 360 U.S. 684 (1959) ("the First Amendment's basic guarantee is of freedom to advocate ideas").

100 U.S. CONST. amend. I; "no one who reads with care the text of the First Amendment can fail to be startled by its absoluteness. The phrase 'Congress shall make no law . . . abridging the freedom of speech,' is unqualified." A. MEIKLEJOHN, POLITICAL FREEDOM 20 (1948).

101 *See* First National Bank of Boston v. Bellotti, 435 U.S. 765, *reh'g denied*, 438 U.S. 907 (1978); *Mosley*, 408 U.S. at 95-98; Winters v. New York, 333 U.S. 507, 510 (1948); T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-7 (1963); Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965).

102 Lamont v. Postmaster General, 381 U.S. 301, 305 (1965) (federal statute that required an addressee of foreign Communist literture to submit a written request that it be delivered imposed an unconstitutional "limitation on the unfettered exercise of the addressee's First Amendment rights").

The public interest is an informed citizenry—the *sine qua non* of democratic society. To achieve this goal the people must be uninhibited in all discussion essential to the intelligent exercise of their rights as citizens.[103] Supreme Court decisions explicating the prohibition against government abridgment of freedom of speech take for granted that the first amendment protects at the very least individual speech; with that premise as background they assert that the first amendment plays the equally important role of preventing government from "limiting the stock of information from which members of the public may draw."[104]

The press, therefore, "as a vital source of public information,"[105] has always enjoyed unquestioned protection.[106] But exposing the workings of government—historically the primary function of the press[107]—is not alone sufficient "to enable the members of society to cope with the exigencies of their period."[108] The people must be free to educate themselves to "social, political, esthetic, moral, and other ideas and experiences."[109] That the government is constitutionally powerless to dictate which of these other ideas and experiences will be available to them and which will not is a newer notion. Commercial speech, for example, has only recently been accorded full protection under the first amendment.[110] It is no longer disqualified from that protection because the individual advertiser's interest is purely economic.[111] Nor is it disqualified by the nature of the particular consumer's interest, which "may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[112] Thus the first amendment protects not only political speech but also speech that contributes to the quality of people's lives and enhances their sensitivity to their world.[113]

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[103] Grosjean v. American Press Co., Inc. 297 U.S. 233, 249-50 (1936) (quoting from 2 COOLEY, CONSTITUTIONAL LIMITATIONS 886 (8th ed. 1927)).

[104] *First National Bank of Boston*, 435 U.S. at 783. Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530 (1980).

[105] *Grosjean*, 297 U.S. at 250.

[106] *See* Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 103 S. Ct. 1365 (1983); *Grosjean*, 297 U.S. 233; Near v. Minnesota, 283 U.S. 697 (1931).

[107] *See, e.g., Near*, 283 U.S. at 719-20.

[108] Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

[109] Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, 395 U.S. 367, 390 (1969).

[110] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

[111] *Id.* at 762.

[112] *Id.* at 763.

[113] Consistent with this scheme, some types of speech, including libel, see, *e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), fighting words, see Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), words that incite to crime, see Brandenburg v. Ohio,

As noted above, even protected speech can be regulated.[114] A law that does not directly prohibit speech but, while regulating another subject, incidentally inhibits first amendment rights can be upheld "if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so."[115] These determinations, like the results of any balancing process, are not always reached unanimously. In *Young v. American Mini Theaters, Inc.*,[116] for example, the Supreme Court upheld a city zoning ordinance subjecting "adult" theaters to certain locational requirements by identifying as the object of the regulation not the content of the films but "the place where such films may be exhibited."[117] While the majority conceded that the ordinance treated adult theaters differently from other theaters and that the classification was predicated on the content of the material shown in the respective theaters, it refused to conclude that the ordinance actually achieved what the dissent characterized as "selective interference with protected speech whose content is thought to produce distasteful effects."[118]

Still, some regulations impinge on first amendment rights more obviously than do others. In *Grayned v. City of Rockford*,[119] the Supreme Court upheld a city ordinance that prohibited making noise near a school in session and disturbing classes. The Court reasoned that, because it was written specifically for the school context and the disturbances were easily measured by their impact on the normal activities of the school, the ordinance gave the required fair notice of what was prohibited.[120] The ordinance was narrowly tailored to further the city's compelling interest in undisrupted school sessions conducive to students' learning. It did not prohibit expressive activity more than was necessary to achieve its purpose,[121] and, above all, it gave no li-

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395 U.S. 444 (1969), and obscenity, see Roth v. United States, 354 U.S. 476 (1957), have been categorically unprotected. Libel, fighting words, and words that incite to crime are unprotected because they "by their very utterance inflict injury or tend to incite an immediate breach of the peace," Beauharnais v. Illinois, 343 U.S. 250, 256 (1952) (quoting *Chaplinsky*, 315 U.S. at 571-72). Obscenity is unprotected because, although it does not necessarily incite unlawful activity, neither does it contribute to the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth*, 354 U.S. at 484.

114 *See supra* text accompanying notes 96-98.

115 Younger v. Harris, 401 U.S. 37, 51 (1971).

116 427 U.S. 50 (1976).

117 *Id.* at 63.

118 *Id.* at 85 (Stewart, J., dissenting) (footnote omitted).

119 408 U.S. 104 (1972).

120 *Id.* at 112.

121 *Id.* at 119.

cense to punish anyone for the content of his speech.[122]

The same day, in *Police Department of the City of Chicago v. Mosley*,[123] the Court struck down another city ordinance that prohibited all picketing or demonstrating near a school in session save "the peaceful picketing of any school involved in a labor dispute."[124] The Court stated that the central problem with the Chicago ordinance was that it described "permissible picketing in terms of its subject matter."[125] Content control is forbidden by the first amendment; "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."[126]

Selective restrictions violate the requirement of the equal protection clause that laws affecting first amendment interests be narrowly tailored to their legitimate objectives.[127] Peaceful nonlabor picketing is no more disruptive than peaceful labor picketing, yet the ordinance in *Mosley* permitted one and not the other.[128] The ordinance thus restricted expressive activity more than was necessary to achieve the city's legitimate interest.[129]

The principle that emerges from these cases is that, to justify infringement of first amendment rights, the government must demonstrate a legitimate, compelling interest, unrelated to the content of the speech, and must tailor the law narrowly to further that interest.

The USIA regulations governing certification of educational films effect a more subtle control of content than does a regulation such as the Chicago ordinance; they give officials the responsibility of determining which content to permit and which to bar. But the USIA regulations are no less vulnerable to attack on constitutional grounds. They are similar to a problematic set of definitional regulations promulgated by the Treasury Department to complement sections of the Internal Revenue Code authorizing tax-exempt status for certain claimants.[130] The analogy is appropriate because the USIA regulations essentially authorize tax-exempt status. The government, in denying a certificate of

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122 *Id.* at 120 (footnote omitted).
123 408 U.S. 92 (1972).
124 *Id.* at 93 (quoting from Chicago Municipal Code, c. 193-1(i) (1968)).
125 *Id.* at 95.
126 *Id.* at 96.
127 *Id.* at 101.
128 *Id.* at 100.
129 *Id.* at 102.
130 I.R.C. § 501(c)(3)(1976) and Treas. Reg. § 1.501(c)(3)-1(d)(2) & (3) (1959). *See infra* text accompanying notes 138-145.

internationally educational character, is withholding its recommendation to foreign governments to exempt the filmmaker from the requirement to pay customs duties on films he imports into those countries. Of course the rationale is not, as it is for closing internal revenue loopholes, to "safeguard the public fisc";[131] it appears to be to protect a certain image of the United States. But that rationale reveals the USIA regulations as pure censorship, for which a distaste—"reflecting the natural distaste of a free people—is deep-written in our law."[132]

It has been argued that, because tax exemptions are a matter of "legislative grace," their denial cannot infringe speech.[133] However, it is well established that tax exemptions may not be denied to any claimant because of the content of his speech.[134] Thus, while the government need not subsidize the exercise of first amendment rights,[135] its discriminatory denial of tax exemptions can impermissibly infringe those rights.[136] Regulations governing tax exemptions, therefore, may not be so vague as to give individual officials the discretion to single out any particular speech for differential treatment.[137]

In *Big Mama Rag, Inc. v. United States*,[138] the Court of Appeals for the District of Columbia examined the aforementioned Treasury regulation. The regulation defined "educational" for the purpose of an Internal Revenue Code section that granted tax-exempt status to "[c]orporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, . . . or educational purposes. . . ."[139] The court ruled that the definition was so vague that it violated the first amendment and defied the court's attempts to review its application in the case.[140] The regulation states that an organization "may be educational even though it advocates a particular posi-

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131 Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1040 (D.C. Cir. 1980).

132 *Southeastern Promotions*, 420 U.S. at 553.

133 *Big Mama Rag*, 631 F.2d at 1034.

134 Speiser v. Randall, 357 U.S. 513 (1958) (exemption was conditioned on promise to refrain from arguably protected speech).

135 Cammarano v. United States, 358 U.S. 498, 515 (1959) (Douglas, J., concurring).

136 *Id.* at 515.

137 *See Cammarano*, 358 U.S. at 513 ("Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, *as everyone else engaging in similar activities is required to do* under the provisions of the Internal Revenue Code.") (emphasis added); *Big Mama Rag*, 631 F.2d at 1034; Comment, *Tax Exemptions for Educational Institutions: Discretion and Discrimination*. 128 U. PA. L. REV. 849, 876-82 (1980).

138 631 F.2d 1030 (D.C. Cir. 1980).

139 U.S.C. § 501(c)(3) (1976), *quoted in Big Mama Rag*, 631 F.2d at 1033.

140 *Big Mama Rag*, 631 F.2d at 1035 (footnote omitted).

tion or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion."[141] The district court had found that the way to determine whether the "full and fair exposition" had been set out was to ask whether the facts underlying the conclusions were stated.[142] But instead of applying this test to the magazine published by the organization, the district court had been "forced to resolve the case by resorting to the subjective notion of whether the publication was 'doctrinaire.' "[143] The court of appeals recognized that there is no value-free measurement of the extent to which material is doctrinaire.[144] The court held that the "full and fair exposition" standard was too vague to provide notice of its meaning to those subject to the law and those responsible for enforcing it.[145]

In its requirement of a "full and fair exposition" of the facts, the Treasury regulation appears to be designed with the same goal that the USIA regulations seek to achieve in their requirement of "representative, authentic and accurate" materials.[146] Prescribing a standard by which to evaluate materials for these characteristics is undoubtedly difficult.[147] But the USIA regulations differ from the Treasury regulations in requiring something that may be impossible to accomplish: that educational materials be value-free. The Treasury regulations recognize that advocacy of a particular position or viewpoint is not anti-educational.[148] Even the *Big Mama Rag* trial court, which held in favor of the government,[149] conceded that a publication may advocate a particular point of view and still be educational.[150] The USIA regulations, however, embody the belief that attempting to influence opinion is anti-educational;[151] those who administer the regulations believe that presenting a point of view is propaganda and should not be certified.[152] The Review Board, on the other hand,

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141 Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (1959), *quoted in Big Mama Rag*, 631 F.2d at 1034.

142 *Big Mama Rag*, 631 F.2d at 1038.

143 *Id.*

144 *Id.*

145 *Id.* at 1039. The court held that the standard was also vague as to who was subject to the test. *Id.*

146 *See supra* text accompanying note 20.

147 "Treasury bravely made a pass at defining 'educational,' but the more parameters it tried to set, the more problems it encountered." *Big Mama Rag*, 631 F.2d at 1035.

148 *See supra* text accompanying note 141.

149 Big Mama Rag, Inc. v. United States, 494 F. Supp. 473, 478-91 (D.D.C. 1979).

150 *Id.* at 479.

151 *See supra* text accompanying note 51.

152 *See supra* text accompanying note 66.

will overturn a staff decision to deny a certificate because a film contains propaganda, if the Board agrees with the film's point of view.[153]

Regulations that yield to subjective administration such as this cannot stand. An administrative censor cannot rule that particular material may *lawfully* be banned.[154] An administrative censor charged with denying applications to expression deemed not to be "culturally uplifting or healthful,"[155] or "wholesome,"[156] for example, is likely to be "less responsive than a court, an independent branch of government, to constitutionally protected interests in free expression."[157]

Subjectively applied standards often reflect the speculations of those who apply the standards as to potential harm to come from publication of the expression. When the United States government sought to enjoin the *New York Times* and the *Washington Post* from publishing the contents of a classified study on how the government made decisions on Vietnam policy, the Supreme Court, in *New York Times Co. v. United States*,[158] held that the government had not met its burden of proof of justifying restraint of the press prior to publication.[159] The government's claim was that publication of the materials sought to be enjoined "could," "might," or "may" prejudice the national interest. "But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result."[160] Similarly, the first amendment tolerates no censorship of films for export predicated upon surmise or conjecture that foreign audiences will conclude, for example, that the American system of laws is ineffective or unfair.[161] In any event, preventing foreign audiences from reaching certain conclusion is hardly such a compelling governmental interest as to justify censorship.

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153 *See supra* text accompanying note 88-89.

154 Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). *But see Southeastern Promotions*, 420 U.S. at 564 (Douglas, J., dissenting) ("No matter how many procedural safeguards may be imposed, *any* system which permits governmental officials to inhibit or control the flow of disturbing and unwelcome ideas to the public threatens serious diminution of the breadth and richness of our cultural offerings.") (emphasis added).

155 *Southeastern Promotions*, 420 U.S. at 561.

156 *Shamloo*, 620 F.2d at 518.

157 *Southeastern Promotions*, 420 U.S. at 561 (footnote omitted).

158 403 U.S. 713 (1971) (per curiam).

159 *Id.* Any system of prior restraint is presumed unconstitutional and the burden of proving the expression is unprotected rests on the censor. *Southeastern Promotions*, 420 U.S. 546; Freedman v. Maryland, 380 U.S. 51 (1965); *Bantam Books*, 372 U.S. at 70.

160 403 U.S. at 725-26 (Brennan, J., concurring).

161 *See supra* text accompanying note 87.

VII. The Agreement and the First Amendment

The Agreement was drawn up by UNESCO, which was founded in the belief

> that the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil [sic] in a spirit of mutual assistance and concern; that a peace based exclusively upon the political and economic arrangements of governments would not be a peace which would secure the unanimous, lasting and sincere support of the peoples of the world, and that the peace must therefore be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind.[162]

To accomplish these ends the Agreement sought to facilitate an unfettered exchange of information among the nations that would make possible for each a truer and more perfect knowledge of the others' lives.[163]

The United States' facilitation of a *selective* exchange of information, by granting certificates only to filmmakers whose films portray their subjects as the government would have them portrayed, flouts the spirit of the Agreement. It insults the other participating nations and denies the world community its opportunity for intellectual and moral solidarity.

The government's censorship of films it disapproves of violates the letter of the Agreement as well. The language of the Agreement defines "educational" as that which instructs or informs, or maintains, increases, or diffuses knowledge, and its terms require that materials be representative, authentic, and accurate. However, the Agreement does not prohibit presenting a point of view. The United States government may prefer that films it certifies portray the United States in only a favorable light, but it is not authorized by the Agreement to enforce that preference.

Further, the government is prohibited by its own highest law from rewarding filmmakers whose viewpoints it approves and penalizing those whose viewpoints it disapproves by selectively administering an offered benefit.[164] The government's interest in projecting a certain image of the country is not sufficiently compel-

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162 UNESCO Const., preamble, 1946/47 U.N.Y.B. 713.

163 *Id.*

164 *See supra* text accompanying notes 120-129 and 133-137. Denial of a certificate can mean real economic hardship for filmmakers with limited financial resources. Rosenberg, *supra* note 4, at 42. According to the Reporters Committee memo, *supra* note 76, filmmakers could not export their films at all if the certification program did not exist.

ling to justify infringement of the first amendment rights of its citizens.[165]

Under the Agreement, the content of a film must be examined for a determination of its educational character. However, the examination should go no further than the determination whether the film is instructive or informative—a standard capable of objective application. For example, if a film portrays its subject so that the information presented is capable of verification, then the film is instructive or informative. The particular point of view of the film does not make it any less so. Any subject—even the most seemingly neutral—can be presented in more than one light. If a film portrays its subject in fictional form, then the film may be instructive or informative, but its primary purpose is more likely to provide entertainment or amusement. Because entertaining films generally sell better than documentaries, the framers of the Agreement used the word "commercial" to describe them.[166] They did not differentiate between documentaries with points of view and other documentaries. The Chief Attestation Officer of the United States has said that his staff tries "to determine whether, in fact, a film is intended for primarily educational or instructional purposes *or for other, commercial reasons*."[167] The inquiry into whether it presents a point of view becomes offensive to the first amendment. The possibility exists,[168] and we have seen that it often is realized under the USIA regulations,[169] that "individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law."[170]

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165 When the state of New Hampshire criminalized obscuring the state motto embossed on automobile license plates, it acted out of a legitimate interest in promoting appreciation of history, individualism, and state pride. Wooley v. Maynard, 430 U.S. 705 (1977). But the Supreme Court declared the statute unconstitutional because it forced the individual "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable ["Live Free or Die"]." *Id.* at 715. The state's interest in disseminating an ideology cannot outweigh the individual's first amendment "right to avoid becoming the courier of such message." *Id.* at 717. The state may pursue its interest in other ways. *Id. Wooley*, 430 U.S. 705, relied on West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), where the Court held that compelling public school children to salute the flag and recite the pledge of allegiance was unconstitutional. The individual has the right to speak his own mind and to be free from compulsion to speak what is not in his mind. *Id.* at 634. National unity is an end officials may foster by persuasion and example, but not by the sort of compulsion employed here. *Id.* at 640.

166 *See supra* text accompanying notes 21-28.

167 Rosenberg, *supra* note 4, at 41 (emphasis added).

168 "The very existence of this censorial power, regardless of how or whether it is exercised, is unacceptable." International Society for Krishna Consciousness of Atlanta v. Eaves, 601 F.2d 809, 822-23 (5th Cir. 1979).

169 *See supra* text accompanying notes 73-89.

170 *Kingsley International Pictures*, 360 U.S. at 701 (Clark, J., concurring in result).

When that happens, the United States government begins to resemble the governments of those nations in which political freedom is sacrificed to self-preservation. It retreats from the conviction of its founders that "the progress of political freedom gives better assurance of national security than does any program of political repression and enslavement."[171]

The United States undermines its own authority as advocate and exemplar of democratic government when it censors its citizens' speech before foreign audiences. Freedom to impart and receive information is an essential element of self-government, and the United States ought to be demonstrating that that freedom is cherished as dearly in practice as it is in the nation's constitutional framework.[172]

VIII. Conclusion

The United States participates in the Agreement in order to promote mutual understanding among the peoples of the world by facilitating the circulation of visual and auditory materials of an educational, scientific, and cultural character. The USIA has the power, in implementing the Agreement, to deny the very valuable certificate of internationally educational character to films and other materials on the grounds that they present a particular point of view and may be misunderstood or misinterpreted by foreign audiences. This subjective standard lends itself to censorship of films by government officials aiming to defend an image of their country and possibly to ensure that "those who benefit by tax exemption do not bite the hand that gives it,"[173] however indirectly. Censorship of ideas, however, both defeats the purpose of the Agreement and violates the principles of that "great living document,"[174] the United States Constitution. Examination of a film by USIA officials should go no further into its character than is necessary to determine whether it instructs or informs, inasmuch as instructing and informing are objectively distinguishable from entertaining and amusing. The course the USIA has been following is "not the course of a strong, free, secure people," as Justice Black said in another context, "but that of the frightened, the insecure, the intolerant."[175] American agencies, no less than American citizens, should be proud of the

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171 Meiklejohn, *What Does the First Amendment Mean?*, *supra* note 95, at 479.
172 *Lamont*, 381 U.S. at 307-10 (Brennan, J., concurring).
173 *Speiser*, 357 U.S. at 543 (Clark, J., dissenting).
174 *In Re* Yamashita, 327 U.S. 1, 26 (1946) (Murphy, J., dissenting).
175 *Speiser*, 357 U.S. at 532 (Black, J., concurring).

fact that American social organization is not threatened, but is strengthened, by intellectual and spiritual diversity;[176] the government must refrain from attempting to stifle diverse voices.

Sharon Esakoff

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176 *Barnette*, 319 U.S. at 641-42.