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IS IT ART OR TAX-PAID OBSCENITY? THE NEA CONTROVERSY

Jesse Helms[*]

America is in the midst of a cultural war. On one side are those of us who want to keep our nation rooted in Judeo-Christian morality. On the other, are those who would discard this traditional morality in favor of a radical moral relativism. It is nothing less than a struggle for the soul of our nation. How this controversy is resolved will determine whether America will succeed and prosper, or be left in the dust bin of history.

That is why the use of taxpayers' dollars by the National Endowment for the Arts ("NEA") to subsidize offensive and obscene "art" -- in effect, to subsidize the efforts of moral relativists to undermine America's Judeo-Christian heritage and morality -- is such a threat to the future of our nation. The role of the National Endowment for the Arts in this struggle first surfaced in 1989 when the agency awarded a grant -- and the stamp of *public* approval -- to Andres Serrano for his photograph of a crucifix in a vat of urine. Going out of his way to insult Christians, as well as non-Christians who recognize how essential a role religion plays in the affairs of our nation, Mr. Serrano gave this blasphemous "work" the mocking title, "Piss Christ."[1]

Shortly after making the grant to Mr. Serrano, the NEA funded a Pennsylvania art gallery, enabling it to assemble an exhibition of Robert Mapplethorpe's photographs.[2] Included in this exhibit were photos of men engaged in sexual and excretory acts with one another, as well as sexually suggestive photos of nude children.

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[1] 135 CONG. REC. S5594-95 (daily ed. May 18, 1989) (statements of Sen. D'Amato, Sen. Coats and Sen. Helms).

[2] 135 CONG. REC. S8807-08 (daily ed. July 26, 1989) (statement of Sen. Helms).

That same year, the NEA funded a New York publication, *Nueva Luz*, which featured photos of nude children in explicit poses with nude adults, men with young girls, and young boys with adult women.[3] The NEA gave tax dollars to support this publication claiming such photographs have "artistic merit," despite the fact that Congress had previously enacted legislation to prevent such sexual exploitation of children by pornographers.[4]

The National Endowment for the Arts never apologized for funding the aforementioned items. It never even expressed regret for using tax dollars to finance the exhibition of photographs which, I am certain, the vast majority of Americans found abhorrent. And since that time, when it comes to funding activities which are an anathema to most Americans, the NEA has gotten worse. For instance, in 1992, the NEA gave photographer Joel-Peter Witkin a $20,000 fellowship -- his *fourth* grant since 1980.[5] How did Mr. Witkin earn the admiration of the NEA, and thus a healthy grant of the taxpayers' money? For those unfamiliar with his work, Mr. Witkin is the so-called "artist" who, for one of his photographs, cut the head off of a dead body, hollowed out the head and used it as a flower vase. He also cut sexual organs off of other cadavers to create other morbid and grotesquely perverted photographs.[6]

All of these examples of so-called "works of art" are offensive to the majority of Americans who are decent, moral people; I dare anyone to prove otherwise. Moreover, as any student of history knows, such gratuitous insults to the religious and moral sensibilities of fellow citizens contribute to the erosion of civil comity and democratic tolerance within a society. This is why the NEA is such

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[3] Ricardo T. Barros, II NUEVA LUZ, A PHOTOGRAPHIC JOURNAL (Spring 1988).

[4] 18 U.S.C. §§ 2251, 2252 (1990).

[5] Richard B. Woodward, *An Eye For the Forbidden*, VANITY FAIR, Apr. 1993, at 194.

[6] *Id. See* 139 CONG. REC. S11664-75 (daily ed. Sept. 14, 1993) (statement of Sen. Helms); 139 CONG. REC. S11708-25 (daily ed. Sept. 15, 1993) (statement of Sen. Helms).

a powerful weapon in the crusade of the radical moral relativists to undermine the Judeo-Christian foundation of our nation.

The Breakdown Of Judeo-Christian Morality

The NEA controversy has played itself out during a period when even the "liberals" in America are finally acknowledging that our society is suffering a breakdown in moral values. As former Secretary of Education William Bennett has noted, where teachers in the 1940s worried about children "chewing gum, making noise" or "running down the halls," today's teachers worry about children abusing drugs, getting pregnant, being raped, assaulted, or shot in school or on the streets.[7] Secretary Bennett has documented the moral breakdown of our society. For example, between 1972 and 1990, teenage pregnancy almost doubled from 49.4 to 99.2 per thousand,[8] and teenage abortions rose from 19.9 to approximately 43.8 per thousand in the same period.[9] There are a multitude of reasons for these trends. Unfortunately, the NEA's encouragement, promotion, financial support, and legitimation of immoral and perverse artistic activities exacerbates these trends, and in turn, helps undermine the traditional Judeo-Christian morality that has historically held this kind of societal breakdown in check.

The NEA Abandons Its Congressionally-Mandated Mission

The National Endowment for the Arts of today would likely be unrecognizable to those members of Congress who established it in 1965. The individuals responsible for the NEA's creation sought to establish an organization which would support projects with substantial artistic and cultural significance in order to encourage the development, appreciation and enjoyment of the arts. They envisioned that as a public, *tax-supported* institution, the NEA

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[7] WILLIAM J. BENNETT, THE INDEX OF LEADING CULTURAL INDICATORS 9 (1994).

[8] *Id.* at 74.

[9] *Id.* at 75.

would be responsible for supporting art that benefits the public at large, not for subsidizing, propagating and enforcing the private, decadent tastes of a limited few.[10] Terence Moran, in a commentary in *Legal Times*, hit the nail on the head when he called for the NEA and the arts community to focus its attention on public sensibilities.[11] But, as Mr. Moran notes, the NEA has done the opposite: "Part utopian fantasy, part special-interest scam, the endowment has been a misguided and elitist institution since the beginning."[12] My colleague from Indiana, Senator Dan Coats, has spoken of the danger the NEA creates for itself when it fails to live up to its intended mission. As he recently told Senators:

> unless the NEA can get its act together in terms of responsible expenditure of public funds, it is going to jeopardize and risk its entire mission because it has certainly placed itself in the position where the public has very little respect for its mission.[13]

Congressional Efforts To Restrict NEA Grants

To compel the NEA to cease jeopardizing its own mission and poisoning America's cultural climate, I offered amendments to the Interior Appropriations bills for 1990, 1991 and 1992 to prohibit the National Endowment for the Arts from using tax dollars to subsidize or promote obscene, indecent or anti-religious "art." For instance, the amendment the Senate approved as part of the 1990 Appropriations Act provides that:

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[10] CONG. REC. H23937 (daily ed. Sept. 15, 1965) (statement of Rep. Powell). *See generally* 20 U.S.C. § 954(c) (1990).

[11] Terence Moran, *Art or Our Sake: Abolish the NEA*, LEGAL TIMES, May 15, 1992, at 23.

[12] *Id.*

[13] 139 CONG. REC. S11718 (daily ed. Sept. 15, 1993) (statement of Sen. Coats).

> None of the funds authorized to be appropriated pursuant to this Act may be used to promote, disseminate, or produce: (1) obscene or indecent materials, including but not limited to depictions of sadomasochism, homo-eroticism, the exploitation of children, or individuals engaged in sex acts; or (2) material which denigrates the objects or beliefs of the adherents of a particular religion or non-religion; or (3) material which denigrates, debases, or reviles a person, group, or class of citizens on the basis of race, creed, sex, handicap, age, or national origin.[14]

One would think this amendment to be eminently reasonable. Unfortunately, shortly after the Senate approved the amendment, its text became a matter of heated discussion between members of the House-Senate Conference Committee who were drawing up the final version of the Appropriations bill. The conferees ultimately developed a substitute which prohibited the NEA from using federal funds for the promotion or production of art, that, *in the judgment of the NEA*, "may be considered obscene, including depictions of sadomasochism, homo-eroticism, the sexual exploitation of children or individuals engaged in sex acts. . . ." On October 2, 1989, Congress enacted this severely weakened version of my original Senate-passed amendment.[15]

The enacted language gutted my original amendment because it essentially allows the NEA to regulate itself by giving the NEA the power to decide which works are, or are not, obscene -- the precise problem with the NEA from the beginning. The congressionally-enacted language was a toothless restriction on the NEA's ability to fund outrageous so-called "art." It thus failed to prohibit

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[14] 135 CONG. REC. S8807 (daily ed. July 26, 1989) (statement of Sen. Helms).

[15] Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 101-121, § 340, 103 Stat. 741 (1990).

public funding, even for works such as those by Mapplethorpe and Serrano, which had started the controversy in the first place. Despite its inherent weakness, this congressionally-enacted amendment became the target of often absurd criticisms from liberals in the "arts community."

Congressional Restrictions On NEA Funding Are Constitutional

Opponents of my legislative efforts to establish common-sense funding standards for NEA grants frequently make unfounded and misleading allegations concerning the constitutionality of the amendments to the Appropriations Acts. An objective analysis of legal precedent, however, demonstrates that (1) making federal funding contingent on congressionally-established standards constitutes neither direct nor indirect censorship; and (2) Congress is not compelled by the Constitution to use the obscenity test set forth by the Supreme Court in *Miller v. California*,[16] when determining whether to restrict eligibility for NEA grants. However, Congress would be compelled to use this test if it proposed an outright *ban* on specific types of art financed by private sources.

The Constitution confers upon Congress the duty and responsibility of overseeing the expenditure of *all* federal funds, including funding for the arts.[17] The amendment I proposed to the 1990 Interior Appropriations Act, as well as the water-downed version that eventually became law, only forbids the federal government from using taxpayers' money to subsidize or reward obscene, indecent, or anti-religious art. It does *not* outlaw or ban such art. Because the legislation did not prevent artists from producing, creating, selling, or displaying so-called blasphemous or obscene "art" at their own expense, or at the expense of other private sponsors, and on their own time, the legislation has in no way "censored" any artists.

Sanctimonious comparisons of my amendment to actions by

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[16] 413 U.S. 15 (1972).

[17] "Congress shall have the Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . ." U.S. CONST. art. I, § 8.

communist dictatorships also have no basis in fact. In communist countries, *everything* is paid for by the government. Thus, if something is not approved by the government, it is not produced. On the other hand, the United States is based on a free market economy under which ideas and products are free to compete in the marketplace for support from the public.

Furthermore, there are an abundance of non-governmental funds in this country available to artists. Congressman Phillip Crane of Illinois pointed out during a debate in the House of Representatives that the private sector spends approximately $9.3 *billion* annually on art. The $174 million spent on art last year by the NEA, therefore, amounted to roughly 1.8% of the total funds available to our nation's artists.[18] Thus, regardless of any restrictions on the use of government monies to fund the arts, artists who choose to shock and offend the public can seek funding from the literally billions of dollars made available to artists from private sources. In short, *censorship* is not involved when government refuses to subsidize obscene "art" or "artists" who produce such "art." People who want to scrawl dirty words on bathroom walls are free to furnish their own walls and use their own crayons.

Indirect Censorship Is Not An Issue

There is also the curious argument propounded by some of the NEA's staunch proponents that subsidizing some art forms with tax dollars, but not others, somehow constitutes indirect censorship by the government. These apologists for the NEA conveniently skip over the Supreme Court's recent ruling in *Rust v. Sullivan*,[19] where the Court reaffirmed that it is entirely within the constitutional purview of Congress to condition the distribution of public funds.[20]

In *Rust*, the Court specifically declared that government

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[18] 139 CONG. REC. H4637 (daily ed. July 14, 1993) (statement of Rep. Crane).

[19] 111 S. Ct. 1759 (1991).

[20] *Id.* at 1772.

programs are not constitutionally suspect simply because they encourage some activities to the exclusion of others.[21] The Court explained that:

> To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternate goals, would render numerous government programs constitutionally suspect.[22]

The Supreme Court, in *Rust*, found that Congress *did not* deny a women her "right" to have an abortion merely because it prohibited the use of federal funds to pay for the abortion.[23] Congress was "simply insisting that public funds be spent for the purposes for which they were authorized," and this did not include paying for abortions.[24] Analogously, Congress does not infringe or deny an artist's constitutional right to freedom of expression simply because it refuses to financially support that artist's exercise of this right.

The proposition that subsidizing some art forms, but not others, constitutes "indirect censorship" is an example of flawed logic. If this proposition were accurate, then the NEA has been in the censorship business for 25 years, inasmuch as it funds some, but not all, artists who apply for funding. By its very nature, the NEA is charged with the duty of *subjectively* deciding which art should receive funding, and which should not. So, those who are crying "censorship" in this regard are ignoring the defect in their logic, or

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[21] *Id.* at 1773.

[22] *Id.*

[23] The Court erred, however, in *Roe v. Wade*, 410 U.S. 113 (1973), when it inferred a right to abort a child.

[24] 111 S. Ct. at 1774.

lack thereof. Indeed, following the logic of these critics, every applicant denied federal funding can protest that he or she has been "censored" by the *subjective* value judgments of the NEA's artistic panels because some artists were funded while he or she was not. It also follows, using *their* logic, that the only way to completely remove the government from "censorship business" would be to dismantle the NEA.

It should not be surprising that the NEA has a hard time defining art "worthy" and "unworthy" of public support when, as George Will has written: "[i]t seems to regard standards -- the linking of public funds to defensible public purposes -- as disguised censorship."[25] Yet, the NEA obviously does not have the resources to fund every request. If it did, NEA grants would be entitlements, not awards. But, subsidizing some art and not others within a limited budget does not constitute indirect censorship as the critics claim.

The Miller Definition of Obscenity Is Not Required When Restricting Funding

Another myth expressed by opponents of Congressional standards for NEA funding is that such restrictions must follow the Supreme Court's definition enunciated in *Miller v. California.*[26] In *Miller*, the Supreme Court established a definition of obscenity for the purpose of criminalizing certain activities -- not for the purpose of restricting government funding for the arts, or, indeed, for any other activity. This did not stop former NEA Chairman John Frohnmayer and the "arts community" from erroneously asserting that the government was constitutionally compelled to use the criminal definition of obscenity set forth in *Miller* when establishing standards for federal funding for the arts.[27]

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[25] George F. Will, *Acts of Art*, WASH. POST, Aug. 22, 1993, at C8.

[26] 413 U.S. 15 (1972).

[27] Laura Bleiberg, *Limits Sought to Arts Funding: Sheldon's Coalition Targets U.S. Agency*, ORANGE COUNTY REG., Mar. 6, 1990, at B1. *See also* Allan Parachini, *Federal Funding of Controversial Artworks Is Applauded and*

For the record, the Court in *Miller* established that to *ban* obscenity or to successfully *prosecute* an individual for obscenity, the government must first show that the obscene materials in question: (1) appeal to a prurient interest in sex; (2) depict in a patently offensive manner sexual or excretory activities or organs; *and* (3) lack serious artistic or scientific value.[28] The *Miller* test does not apply to NEA funding for the simple reason that refusing to subsidize something does not "ban" it. This is borne from a whole line of cases in which the Supreme Court has refused to apply the same constitutional requirements to the government's refusal to ***fund*** First Amendment activities as it does to governmental attempts to ***ban*** such activities.

In *Maher v. Roe*,[29] for example, the Court held that the Constitution, under the equal protection clause, did not require a "medicaid state" to pay the expenses of indigent women for non-therapeutic abortions merely because it chose to otherwise cover expenses incident to childbirth. The Court stated that merely because an individual has a constitutional right to *engage* in an activity, does not give him or her a constitutional right to receive federal funding for that activity.[30] Even as long ago as 1942, in *Wickard v. Filburn*,[31] the Court stated that, "[i]t is hardly lack of due process for the Government to regulate that which it subsidizes."[32] Moreover, in *Regan v. Taxation With Representation*,[33] a unanimous Court held that restrictions on the use of taxpayers' funds, in the area of expressive speech does not violate the First Amendment, and need not meet the same strict standards of

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Criticized, L.A. TIMES, Mar. 6, 1990, at F6.

[28] 413 U.S. at 24.

[29] 432 U.S. 464 (1977).

[30] *Id.* at 475-77.

[31] 317 U.S. 111 (1942).

[32] *Id.* at 131.

[33] 461 U.S. 540, 546 (1983).

scrutiny required to ban such speech. Most recently, the Court reaffirmed its support of this view in *Rust v. Sullivan.*[34] In light of this long line of established precedent, it is unlikely that the Supreme Court would require Congress to use the criminal obscenity standard in *Miller* as the standard for regulating what types of art are eligible for NEA funding.

It would be interesting, however, if Congress should decide to adopt the *Miller* standard in its entirety, because the *Miller* case allowed a jury of ordinary citizens to decide whether something was or was not obscene.[35] While, on the other hand, the aforementioned amendment enacted by Congress as part of the Interior Appropriations Acts for 1990, 1991 and 1992 effectively granted the NEA -- and its elitist arts panels -- the *sole* authority to decide what is or is not obscene for purposes of government funding.[36] Again, this has been the crux of the problem with the NEA from the beginning of the controversy.

Calling Obscenity "Artistic" Does Not Mean It Is Not Obscene

Another myth arising from the NEA debate is that there is no such thing as "obscene art." Some art "experts" claim that anything they -- or the NEA -- regard as "art" cannot be obscene no matter how revolting, decadent, or repulsive it is. As former NEA Chairman John Frohnmayer has stated, "[i]f an [NEA art] panel finds there is serious artistic intent and quality in a particular piece of work, then by definition that is not going to be obscene."[37] It should be readily apparent that such moral relativists will always have a hard time finding anything that is unworthy of being called

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[34] 111 S. Ct. at 1771-72. *See supra* notes 19-24 and accompanying text.

[35] Note that the Supreme Court in Pope v. Illinois, 481 U.S. 497, 500-501 (1986), used the standard of a reasonable person in applying the obscenity test's third prong, rather than that of the local community standard.

[36] Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 101-121, § 340, 103 Stat 741 (1990).

[37] Bleiberg, *supra* note 27, at B1.

"art." In their view, "anything goes," even if it undermines the moral and spiritual foundations of our nation. Such one-sided ideological approaches to art and obscenity are inappropriate when the public's interest -- and *pocketbooks* -- are at stake.

This "anything goes" mentality is, in fact, restricted as it relates to other activities undertaken by our government. For instance, in public broadcasting, the Federal Communications Commission regularly makes determinations that some broadcasts are indecent and/or obscene. Similarly, the U.S. Postal Service determines what constitutes obscene or indecent mail. Many states restrict the content of so-called "vanity" license plates issued to motorists. And, the Justice Department's National Obscenity Task Force determines what is considered obscene under federal criminal statutes in order to send pornographers to jail. If these government agencies can handle *their* responsibilities in determining which materials are too obscene or indecent to receive subsidies or support from the general public, the NEA should be able to do so as well.

The NEA Can Perform Better

Anne-Imelda Radice, who replaced John Frohnmayer as head of the NEA, supported a narrower interpretation of art worthy of public support. She did not encourage funding materials when a work's primary claim to "artistic status" was based on its sexual or excretory "shock" value. She focused the NEA's support on art that appeals to the widest audience possible.[38] That is a standard to which I would hope the NEA continues to adhere under Jane Alexander. In addition, another improvement I have proposed for the NEA is to limit the recipients of its grants to non-profit groups -- specifically those which promote the public interest and a healthier society -- to the exclusion of individual artists and for-profit groups. I offered an amendment to this effect when the Interior Appropriations bill for 1994 came before the Senate on

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[38] Jesse Hamlin, *Embattled NEA Boss Stops in Sacramento: Radice Responds to Criticism of Arts Grant Vetoes*, S.F. CHRON., May 28, 1992, at E1.

September 16, 1993.[39] In addition, I proposed a second amendment to that bill to provide for more equitable distribution of NEA funding among the various states, thereby giving the individual states a greater say in determining which artists and institutions in their state deserve government subsidies. This would be a marked change from the present situation in which most NEA funding is funnelled to the big cities where it is too often used to promote a liberal, immoral, pro-homosexual, and perverse cultural ethic.[40]

The privileged, self-proclaimed experts from three or four large cities and states who dominate the art funding panels at the NEA in Washington, D.C., do not ensure fairness, or geographic or cultural diversity in their awarding of grants.[41] The concerns of the majority of American taxpayers are overlooked when federal subsidies are allocated in such an elitist manner, because the NEA's national experts generally ridicule mainstream American values. As Andrew Ferguson stated in an August, 1989 *National Review* article, the established national "arts community" deliberately mocks middle-class taxpayers:

> [i]t is one of the primary premises of the art world that [the] line [which separates art from rubbish] doesn't really exist -- that it is in fact a kind of cramp in the consciousness of the unenlightened (read: the Middle-class American) mind.[42]

My amendment would have reduced the clout of such self-appointed elitists in the "arts" and ensured a more equitable distribution of the NEA's funding. It would have also increased the

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[39] 139 CONG. REC. S11709 (daily ed. Sept. 15, 1993) (statement of Sen. Helms).

[40] 139 CONG. REC. S11713. (daily ed. Sept. 15, 1993) (statement of Sen. Helms).

[41] *Id.*

[42] Andrew Ferguson, *Mad About Mapplethorpe*, NATIONAL REVIEW, Aug. 4, 1990, at 20.

variety of cultural viewpoints by moving funding decisions to the state and local level, where individualism, originality, creativity and accountability are more abundant.

Common Sense Requires Congress To Take A Critical View of the NEA

Since February 25, 1992, every day the U.S. Senate has been in session I have reported, down to the penny, the most recent available figure for the total federal debt. I call this the "Boxscore of Congressional Irresponsibility." On February 25, 1992, I reported to the Senate that as of February 21, 1992, the total federal debt run up by the United States Congress stood at $3,823,909,309,474.57. Less than two years later, on January 24, 1994, the national debt had risen $682,880,763,488.72 to a total of $4,506,790,072,963.29. Looking at this on a per capita basis, in January of this year, every man, woman, and child in the United States owed $17,286.54 as his or her share of that national debt.

These debt figures are relevant to any discussion concerning funding for federal programs, including the NEA, and will likely become increasingly relevant in the future. What these figures indicate is that unless Congress starts making tough choices in terms of what should, and should not, be funded with the taxpayers' dollars, the economic future of this nation will literally be destroyed. Inasmuch as all of these programs are being paid for with borrowed funds on which interest must be paid, the National Endowment of the Arts, and other federal programs for that matter, will come under increasing scrutiny, as well they should. In this fiscal climate, Congress can ill afford to fund agencies which have not been responsible with the taxpayers money or programs which do not garner the support of the American people.

CONCLUSION

The National Endowment for the Arts is at a crossroads. It can continue to take sides in the cultural war in which our nation is embroiled by funding activities which undermine America's Judeo-Christian heritage and morality. Or, the agency can seek avenues to meet the mandate established for it by Congress in 1965, to

support art that benefits the public at large. Permitting states to distribute a larger share of NEA grants and limiting grants to non-profit groups are two of the ways the NEA could better fulfill this mandate. I cannot speak for other Senators. But, with pressure increasing on Congress to reduce federal spending, I venture that the NEA's best chance for survival is to establish as its mission its original mandate as set forth by Congress in 1965, rather than waste taxpayers' money on further eroding our nation's culture.