LEGISLATIVE SURVEY

National Endowment for the Arts—The Federal Government's Funding of the Arts and the Decency Clause—20 U.S.C. § 954(d)(1) (1990)

I. Introduction

The National Endowment for the Arts (NEA)[1] came into existence when President Lyndon B. Johnson signed the National Foundation on the Arts and Humanities Act in 1965.[2] The program began as part of President Johnson's Great Society agenda of social reform that he envisioned for America.[3] Upon signing the act, President Johnson said, "Art is a nation's most precious heritage . . . for it is in our works of art that reveal to ourselves, and to others, the inner vision which guides us as a nation."[4] With this in mind, the NEA's mission is clearly defined: to initiate and administer a program of grants, loans and contracts to organizations and exceptionally talented individuals involved with the arts.[5]

Through the NEA, the federal government quickly became one of the country's most influential art patrons.[6] Nevertheless, the NEA's five-year authorization was due to expire on September

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1 20 U.S.C. § 954(a) (1990) (establishing the NEA within the National Foundation on the Arts and the Humanities [hereinafter NFAH]).

2 Pub. L. No. 89-209 (1965) (codified at 20 U.S.C. § 953(a) (1965)). The NFAH also established the National Council on the Arts, the National Endowment of the Humanities, the Federal Council on the Arts and Humanities and the Institute of Museum Services. *Id.*

3 Edward Rothstein, *You Can't Please All of the People . . .*, N.Y. TIMES, July 26, 1992, at H1, H22. It was President Johnson's intention to undertake a "mammoth program of social reform." DORIS K. GOODWIN, LYNDON JOHNSON AND THE AMERICAN DREAM 211 (1991). His Great Society agenda attempted to offer "something to almost everyone: medicare for the old, educational assistance for the young, tax rebates for business, vocational training for the unskilled, food for the hungry, housing for the homeless . . . and more and more and more." *Id.* at 216.

4 Rothstein, *supra* note 3, at H1.

5 20 U.S.C. § 954(c) (1990).

6 Daniel W. Hawthorne, *Subversive Subsidization: How the NEA Art Funding Abridges Private Speech*, 40 KAN. L. REV. 437, 438-40 (1992). *See also* Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 785 (C.D. Cal. 1991) (holding that the NEA's funding guidelines were unconstitutional because they were vague and impermissibly chilled the grant recipients' right to free speech).

30, 1990, the agency's twenty-fifth anniversary.[7] As Congress began its legislative review of the NEA, considerable controversy brewed over certain recent grants. Consequently, in 1990, Congress sent to President George Bush a three year reauthorization package that included many substantive and procedural changes in the NEA.[8] The President signed the bill into law on November 5, 1990.[9] The most contentious of these modifications specifies that, in funding decisions, the NEA will judge an applicant's artistic excellence and merit by "taking into consideration general standards of decency."[10] Since its passage, the decency clause, as it is known,[11] has created ample debate over how the federal government supports the arts.

II. The Controversy

By the end of 1988, the NEA had awarded over 85,000 grants.[12] In 1989, however, the funding awards to photographer Andres Serrano and to a Robert Mapplethorpe photo exhibition prompted Congress to scrutinize and redevelop how the NEA determines what artists, organizations or projects will be given

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7 20 U.S.C. § 960(2)(A) (1985).

8 *See* Amendments to the National Foundation on the Arts and Humanities Act of 1965, Pub. L. No. 101-512, 104 Stat. 1915, 1961, 1972 (1990) (codified as amended at 20 U.S.C. § 951 (1990)). These alterations, for example, included the creation of a new program, entitled "Access to the Arts Through Support of Education." The program intended to increase the accessibility of art to Americans through education, to develop and stimulate research in ways to teach art and to encourage and facilitate artists, institutions and government agencies in art education. *Id.*

9 20 U.S.C. § 954a (1990).

10 20 U.S.C. § 954(d)(1) (1990).

11 *See* Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1460 (C.D. Cal. 1992) (calling the decency section the "so-called decency clause"). *See also* Catherine Foster, *Endowment for the Arts Wins a Court Round in Obscenity Debate*, CHRISTIAN SCI. MONITOR, June 12, 1992, at 3 (referring to the decency language as the "so-called decency clause").

12 136 CONG. REC. S17,979 (daily ed. Oct. 24, 1990) (statement of Sen. Jeffords). The NEA funds artists, projects and organizations by matching every non-federal dollar with a federal dollar. 20 U.S.C. § 954(p)(3) (1990). In 1991, for example, the NEA received 17,879 grant applications of which it approved 4453. NATIONAL ENDOWMENT FOR THE ARTS, IF YOU ARE REPORTING ON THE ARTS ENDOWMENT . . . YOU OWE IT TO YOURSELF TO GET THE FACTS. SO HERE THEY ARE . . . 5 (1991) [hereinafter IF YOU ARE REPORTING]. The grants totalled $153 million, with 92.4% of the funds going to organizations and 7.6% to individual artists. *Id.* Eighty-nine percent of these grants were less than $50,000. *Id.*

funds.[13]

The controversy surrounding Andres Serrano began after the NEA awarded $75,000 to the Southeastern Center of Contemporary Art (SECCA) for its annual visual arts competition.[14] SECCA selected a panel of distinguished art curators and visual artists who chose Serrano as one of the competition's ten winners and awarded him $15,000.[15] One of the New York photographer's images, entitled "Piss Christ," depicted Jesus Christ nailed to the crucifix while submerged in the artist's urine.[16]

Many members of Congress sharply criticized the NEA for allowing government funds to be awarded to Serrano for his creation.[17] In the Senate, for instance, members questioned how the NEA made its funding decisions and sent a letter to its Acting Chairman, Hugh Southern, in which they recommended that the NEA thoroughly review its procedures and determine how it would prevent such abuses from recurring in the future.[18] The memo

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13 *See* 135 CONG. REC. 16,276 (1989). *See also* 136 CONG. REC. S17,981 (daily ed. Oct. 24, 1990) (statement by Sen. Chaffe); George F. Will, *The Helms Bludgeon . . .*, WASH. POST, Aug. 3, 1989, at A27; Elizabeth Kastor, *Senate Votes to Expand NEA Grant Ban; Helms Amendment Targets 'Obscene' Art*, WASH. POST, July 27, 1989, at C1.

14 IF YOU ARE REPORTING, *supra* note 12, at 6. After the competition, the exhibit visited Los Angeles, Pittsburgh and Richmond. *Id.*

15 *Id.*

16 The description comes from the author's viewing of the photograph [hereinafter Author's Viewing]. *See also* 135 CONG. REC. 9788 (1989) (describing the photograph as one portraying a "crucifix submerged in the artist's urine").

17 *See* 135 CONG. REC. 9789 (1989). Senator Jesse Helms (R-N.C.) declared Serrano not to be an "artist," but rather just "a jerk." *Id. See also* 135 CONG. REC. 9788 (1989). Senator Alphonse D'Amato (R-N.Y.) called the funding of this "deplorable, despicable display of vulgarity . . . an outrage," and said that "our people's tax dollars should not support this trash." *Id.* Andres Serrano responded to his critics by stating:

> The images I make are somewhat ambiguous in that they do not offer any absolute answers or statements. The picture in question, "Piss Christ," is not meant to give offense although I leave its interpretation entirely up to the viewer. The title is descriptive and refers to my ongoing investigations of such bodily fluids as milk, blood and urine.
>
> Over the years I have addressed religion regularly in my art work. Complex and unresolved feelings about my own Catholic upbringing inform this work which helps me to redefine and personalize my relationship with God. For me art is a moral and spiritual obligation that cuts across all manner of pretense and speaks directly to the soul. Although I am no longer a member of the Catholic Church I consider myself a Christian and I practice my faith through my work.

Statement by Andres Serrano (Apr. 24 1989) (on file with the *Seton Hall Legislative Journal*).

18 135 CONG. REC. 9788 (1989). The letter, dated May 18, 1989, stated in sum:

received signatures of over twenty republican and democratic Senators.[19]

The NEA Chairman responded by assuring the Senate that the NEA's panel review system allowed it to maintain competence and integrity in its grant decisions.[20] Shortly thereafter, however, Senator Helms (R-N.C.) learned that this same approval mechanism gave $30,000 to subsidize an exhibit of Robert Mapplethorpe photographs that included pictures of homo-eroticism and naked children.[21] Helms described the exhibition as an offensive collection of pornography and said that the portrayals were "unspeakable."[22] He went on to declare that, at a minimum, the NEA should be prohibited from using federal dollars to fund "filth" like Mr. Serrano's and Mr. Mapplethorpe's.[23] Senator Helms then proceeded to introduce an amendment to the NEA charter that would prevent it from financing similar projects.[24]

> Millions of taxpayers are rightfully incensed that their hard-earned dollars were used to honor and support Serrano's work.
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> There is a clear flaw in the procedures used to select art and artistsdeserving of taxpayer support. That fact is evidenced by the Serrano work itself. . . .
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> This matter does not involve freedom of artistic expression — it does involve the question of whether taxpayers should be forced to support such trash.
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> And finally, simply because the Endowment and SECCA did not have a direct hand in choosing Serrano's work, does not absolve either of responsibility. . . .
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> We urge the Endowment to comprehensively review its procedures and determine what steps will be taken to prevent such abuses from recurring in the future.
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> *Id.*

19 *Id.* Many prominent senators signed the letter including Alphonse D'Amato (R-N.Y.), Jesse Helms (R-N.C.), Robert Dole (R-Kan.), Tom Harkin (D-Iowa), Howell Heflin (R-Ala.), Robert Kerrey (D-Neb.) and Arlen Spector (R-Pa.). *Id.*

20 135 CONG. REC. 16,277 (1989).

21 *Id.* The exhibit was entitled "Robert Mapplethorpe: The Perfect Moment." *Id.* One of the photographs, for instance, showed Mapplethorpe himself with a bullwhip protruding from his rear end, 136 CONG. REC. S17,980 (daily ed. Oct. 24, 1990) (statement by Sen. Helms), and another displayed a female child standing naked with her hands between her legs. Author's Viewing, *supra* note 16.

22 135 CONG. REC. 16,277 (1989).

23 135 CONG. REC. 16,278 (1989).

24 *See* 135 CONG. REC. 16,276 (1989). The amendment was Number 420 to the Department of the Interior and Related Agencies Appropriations, Fiscal Year 1990 Act. H.R. 2788, 101st Cong., 1st Sess. (1989). Its introduction was a "surprise turn" in the battle over NEA funding. Kastor, *supra* note 13, at C1. The amendment provided that:

The Senate passed Senator Helms' amendment,[25] but the House rejected it. A joint conference committee, nevertheless, found a compromise amendment that both congressional chambers ratified and that President Bush signed into law on October 23, 1989.[26] The Helms Amendment, as it continued to be called, prohibited the use of any appropriated funds to promote, disseminate or produce materials that were considered to be obscene by the NEA.[27] This included works of art that depicted homoeroticism, sadomasochism, individuals engaged in sex acts or the sexual exploitation of children and that had no serious literary, artistic, political or scientific value when viewed as a whole.[28] The Helms Amendment, however, was only authorized to last until the NEA's current authorization terminated on September 30, 1990.[29] Also, as part of the temporary changes to the NEA charter, the legislators created an Independent Commission (the Commission) to conduct a comprehensive review of the NEA's grant making procedures and to report its recommendations to Congress before the NEA's authorization expired.[30]

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.

135 CONG. REC. 16,276 (1989).

25 135 CONG. REC. 16,279 (1989). The Senate approved the amendment to H.R. 2788 on July 26, 1989. *Id.* The Washington Post reported the next day, however, that only a few senators' votes were needed to approve the amendment on a voice vote. Kastor, *supra* note 13, at C1.

26 Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, tit. III, § 304, 103 Stat. 701, 741 (1989) (expired 1990) [hereinafter Appropriations Act]. Considering the controversy caused over the NEA's grants to Mapplethorpe and Serrano and the passage of Helms Amendment, it is interesting to note that President Bush did not make any statements regarding the new funding restrictions upon signing the Appropriations Act into law. *See* Statement on Signing the Department of the Interior and Related Agencies Appropriations Act, 25 WEEKLY COMP. PRES. DOC. 1590 (Oct. 23, 1989).

27 Appropriations Act, *supra* note 26, § 304(a), 103 Stat. at 741.

28 *Id.*

29 *Id.* § 304(c)(6), 103 Stat. at 742.

30 *Id.* § 304(b)(2)(D), 103 Stat. at 742. The Commission consisted of twelve appointed members: four by the President, four by the President upon the recommen-

III. Legislative History

Due to a delay by President Bush in picking the twelve member panel, the Commission did not meet until June 6, 1990, seven months after the signing of the Helms Amendment.[31] Nevertheless, the Commission managed to meet its statutory deadline and released its report to Congress on September 11, 1990.[32] The Commission concluded that the NEA was not an appropriate tribunal for making the legal determination of obscenity during the grant selection process in that the NEA's nature and structure did not allow it to make the necessary findings of fact and conclusions of law involved in these judgments.[33]

Prior to the release of the Commission's report, each congressional chamber was busy formulating its own recommendations regarding the NEA's reauthorization package. In drafting its amendments, Congress sought to rectify two perceived problems: first, it wanted greater accountability to Congress in the grant-making process of the NEA;[34] second, Congress wanted to stop government funding of artists and organizations that produced obscene art work.[35] These two legislative goals, in essence, attempted to remedy what really irritated Congress: forcing taxpayers to fund art that was not compatible with American values.[36]

In the House, the Committee on Education and Labor reported the Arts, Humanities, and Museums Amendments of 1990

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dation of the Speaker of the House of Representatives and four by the President upon the recommendation of the President pro tempore of the Senate, with the consideration of the minority leader of the Senate. *Id.* § 304(c)(2)(A)-(C), 103 Stat. at 742. Additionally, the chairman was to be chosen by a vote of this Commission's members. *Id.* § 304(c)(2)(D), 103 Stat. 742.

31 H.R. REP. No. 566, 101st Cong., 2d Sess. 37-38 (1990) [hereinafter H.R. REP. No. 566]. In their dissenting viewpoints, Representatives Joseph M. Gaydos and Austin J. Murphey refer to the delay as a "major" one, implying that the Executive Branch was purposely slow in the selecting the panel. *Id.*

32 *See* S. REP. No. 472, 101st Cong., 2d Sess. 11 (1990) [hereinafter S. REP. No. 472].

33 136 CONG. REC. S17,978 (daily ed. Oct. 24, 1990) (statement of Sen. Jeffords). The Commission also stated that the courts were the proper place to decide civil and criminal violations of obscenity and that the NEA was only to comply with federal and state laws in making grant decisions. *Id.* (statement of Sen. Pell).

34 S. REP. No. 472, *supra* note 32, at 3.

35 *Id.* at 8.

36 *See* 136 CONG. REC. H9682 (daily ed. Oct. 15, 1990) (statement by Rep. Hyde); 136 CONG. REC. S17,976 (daily ed. Oct. 24, 1990) (statement by Sen. Hatch).

to the full chamber on June 28, 1990.[37] It recommended the reauthorization of the NEA with only minor and technical changes.[38] The House, however, declined the Committee's advice and introduced five alternative amendments, four of which included significant modifications in the NEA's award selection process.[39] Representatives Pat Williams (D-Mont.) and Ronald D. Coleman (D-Tex.) put forth a compromise substitute amendment among the various proposals that required artistic excellence and merit to be the criteria by which funding applications are judged, while "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[40] The House approved the Williams-Coleman Amendment on October 11, 1990.[41]

Disagreement over NEA funding guidelines also permeated the Senate. After completing its legislative inquiry, the Senate Subcommittee on Education, Arts and Humanities recommended that the NEA be reauthorized without any changes.[42] The Committee on Labor and Human Resources, however, refused to follow the Subcommittee's advice[43] and reported an alternate amendment to

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37 H.R. 4825, 101st Cong., 2d Sess. (1990). *See also* REP. NO. 566, *supra* note 31, at 1.

38 *Id.* at 4. Some examples of these changes were to amend the definition of arts to include the traditional arts engaged in throughout America, to change the "internal section references of the Code section numbers" and to rewrite certain reporting guidelines for state art agencies. *Id.* at 12.

39 136 CONG. REC. H9406-07 (daily ed. Oct. 11, 1990) (statement of Rep. Beilenson). First, Representative Crane's amendment abolished the NEA altogether; second, Representative Rohrabacher's amendment prohibited the NEA from specific activities or projects and included procedures for granting awards; third, Representative Williams and Representative Coleman's amendment was a compromise substitute that prohibited funding of obscene works and made changes in the grant process; fourth, Representative Grandy's amendment required the grant recipient whose work is determined to be obscene to repay the award before being eligible to reapply for another; last, Representative Traficant's amendment expressed a desire that the grant recipients purchase American-made equipment and products for creating their federally funded works. *Id.*

40 *Id. See also* 136 CONG. REC. H9681 (daily ed. Oct. 15, 1990) (statement of Rep. Weiss).

41 136 CONG. REC. H9465 (daily ed. Oct. 11, 1990) (statement of Rep. Goodling). The vote count on the Williams-Coleman Amendment yielded 349 ayes and 76 nays. *Id.*

42 S. REP. NO. 472, *supra* note 32, at 4-5.

43 *Id.* at 5. The Committee on Labor and Human Resources also declined to accept an amendment to the bill by Senator Coats that would have a project's obscenity determined prior to its grant approval because the Committee did not believe that

the Senate floor.[44] The amendment by Senator Orrin Hatch (R-Utah) proposed that if an individual, organization, arts group or agency created a project or production with government funds that was found by either a federal or state court to be obscene or to violate child pornography laws, the violator had to repay the funds and was barred from receiving NEA financing for at least three years or until he returned the proceeds.[45] The Senate readily approved the Hatch Amendment,[46] making it necessary for a joint conference committee to reconcile the two different amendments passed by each chamber.

The first of these amendments, the William-Coleman Compromise Amendment, required the NEA Chairman to ensure that funding decisions were made within general standards of decency.[47] On the other hand, the Hatch Amendment left the determination of obscenity and law violations to the courts and gave the NEA a method to recoup its losses and prevented the violator from receiving any funds from the NEA for a minimum of three years.[48] The conference committee resolved to delete the Hatch Amendment language and to adopt the Williams-Coleman Amendment's language for the final version of the Amendment and then sent it back to both chambers for approval.[49] Shortly thereafter, Congress ratified the Williams-Coleman Amendment as their mandate to the NEA.[50] Then, ironically, upon signing an appropriations bill that included the NEA amendments into law on November 5, 1990,[51]

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this decision could be made before a project was completed. *Id.* On roll call, the Committee voted down the Senator's amendment by fourteen nays and two yeas. *Id.*

44 *Id.* at 5-6.

45 *Id.* at 8-9.

46 136 CONG. REC. S17,995 (daily ed. Oct. 24, 1990) (statement of Sen. Simpson). Seventy-three senators voted for the Amendment, twenty-four against it and three abstained. *Id.*

47 136 CONG. REC. H9681 (daily ed. Oct. 15, 1990) (statement of Rep. Weiss).

48 S. REP. NO. 472, *supra* note 32, at 8-9.

49 H.R. CONF. REP. NO. 101-971, 101st Cong., 2d Sess. 73 (Amendment No. 191 and 192) (1990). *See also* 136 CONG. REC. H12,415 (daily ed. Oct. 27, 1990) (statement by Rep. Coleman). The Conference Committee did partially incorporate Senator Hatch's proposals into another section of the new statute. 20 U.S.C. § 954 (l)(1). The section lets the NEA Chairperson, after a hearing, determine that an in-progress or completed project is obscene and requires the applicant to repay the financial assistance they received.

50 136 CONG. REC. H12,417 (daily ed. Oct. 27, 1990); 136 CONG. REC. S17,679 (daily ed. Oct. 27, 1990).

51 Department of the Interior and Related Agencies Appropriations Act, Pub. L.

President Bush did not even mention this new and controversial decency standard that would now determine how the federal government supports the arts.[52]

IV. The Statute and Its Application

The decency clause is located in the section of the NEA charter that describes what regulations and procedures must be followed for an applicant to receive a grant.[53] The NEA Chairperson, appointed by the President, has the responsibility to establish these regulations and procedures.[54] This section requires the Chairperson to ensure that "artistic excellence and artistic merit are the criteria by which applications are judged."[55] In doing this, he or she must "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[56]

To implement this congressional directive into the selection process, the NEA devised a three-tier citizen review system.[57] The first tier consists of rotating panels of private individuals that evaluate the requests when funding applications first arrive.[58] The decency standard at this initial stage is complied with by including qualified individuals from all over the country and by seeing to it that all cultural and ethnic groups and beliefs are represented on the panels.[59]

No. 101-512, 104 Stat. 1915, 1961 (1990). *See also* Statement on Signing the Department of the Interior and Related Agencies Appropriations Act, 1991, 26 WEEKLY COMP. PRES. DOC. 1768 (Nov. 5, 1990) [hereinafter President's Statement 1990].

52 President's Statement 1990, *supra* note 51, at 1768. The President's statement did not include any discussion on the reauthorization and the amendments to the National Foundation on the Arts and Humanities Act of 1965. *Id.*

53 20 U.S.C. § 954(d) (1990).

54 *Id.*

55 *Id.* § 954(d)(1).

56 *Id.*

57 IF YOU ARE REPORTING, *supra* note 12, at 5.

58 *Id.* These panels include artists, critics, academicians, art administrators and patrons and others with a recognized expertise in a particular art category. *Id.* This group generally consists of about 800 members who comprise roughly 100 panels every year. *Id.* The panelists come to Washington, D.C., from anywhere between two and seven days, on an alternating basis, to evaluate and recommend the projects. *Id.*

59 Letter from John E. Frohnmayer, Chairman, National Endowment for the Arts, to an unnamed Senator (Jan. 3, 1991) (on file with the *Seton Hall Legislative Journal*). In the letter, the Chairman also requested the Senator to forward directly to him any recommendations of potential panelists that the Senator might have in his state. *Id.* *See also* 20 U.S.C. § 959(c) (1990) (directing the NEA Chairperson to ensure that, to the extent possible, all the panels are composed of individuals who reflect a wide

The first tier's recommendations are then sent to the National Council on the Arts (NCA).[60] This group of twenty-six private citizens consists of individuals who have made distinguished contributions to, have broad knowledge of or have a profound interest in the arts.[61] The NCA reviews the panels' suggestions and then makes their own suggestions to the NEA Chairperson.[62] The decency clause is complied with at this second tier by all NCA members being appointed by the President by and with the advice and consent of the Senate,[63] allowing both the President and the Senate to supervise the NCA's compliance through staffing.

The NEA Chairperson is the third and final tier.[64] This individual reviews the NCA's recommendations and has the final authority to approve or disapprove each application.[65] Here, as with the NCA, the President appoints the Chairperson by and with the advice and consent of the Senate.[66] In the case of the Chairperson, if he or she does not uphold the decency mandate, he or she can be removed by the President.[67] Therefore, through the three-tier

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geographic, ethnic and minority background, as well as individuals reflecting diverse cultural and artistic points of view).

60 20 U.S.C. § 955 (1990). The NCA is statutorily created as a separate body within the NEA. *Id.* § 955(a). Section 955(f) charges the NCA with the duties of advising the NEA Chairperson on policies, programs and procedures for carrying out his or her responsibilities and functions. Second, the NCA reviews grant applications and then makes their recommendations to the chairperson for either the approval or disapproval of each application and the amount of funds, if any, to be provided. *Id.*

61 *Id.* § 955(b). *See also* IF YOU ARE REPORTING, *supra* note 12, at 5. Some current members of the NCA include Arthur Mitchell, founder and head of the Dance Theater of Harlem, Roger Mandle, Deputy Director of the National Gallery of Art in Washington, D.C., and Roberta Peters, leading soprano with the Metropolitan Opera in New York City. NATIONAL ENDOWMENT FOR THE ARTS, MEMBERS OF THE NATIONAL COUNCIL ON THE ARTS 7-9 (1992).

62 20 U.S.C. § 955(f) (1990). The NEA Chairperson is also the NCA Chairperson. *Id.* § 955(b).

63 *Id.* § 955(b). This is consonant with most Executive Branch appointments and flows from the U.S. Constitution as part of the separation of powers doctrine. U.S. CONST. art. II, § 2.

64 IF YOU ARE REPORTING, *supra* note 12, at 5.

65 20 U.S.C. § 955(f)(2) (1990).

66 *Id.* § 954(b) (1990).

67 RICHARD M. PIOUS, AMERICAN POLITICS AND GOVERNMENT 323 (1986) (noting the President's authority to remove subordinate officials). After the decency clause was enacted in 1990, the NCA voted *not* to include any written decency requirement in its grant guidelines, leaving only the NEA Chairperson to enforce the new decency standards. Allan Parachini, *NEA Board Rejects Written Decency Guidelines*, L.A. TIMES, Dec. 15, 1990, at F1, F7. In response to the NCA's action, Chairman Frohnmayer said,

citizen review system, the decency standard is implemented into the federal government's funding of the arts,[68] setting the stage for the legal battle over the clause's validity.

V. The Legal Challenge and the NEA's Response

Four performance artists and the National Association of Artists' Organizations (NAAO) challenged the decency clause's legality and filed suit against the NEA in U.S. District Court.[69] In *Finley v. National Endowment for the Arts*,[70] the artists and NAAO sought a declaratory judgment that the decency provision was an unconstitutional funding guideline.[71]

The plaintiffs asserted that the new underwriting selection cri-

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there "will not be a case where I will impose my own judgement [on a grant based on decency concerns]. I am not going to be the decency czar around here." *Id.*

On October 24, 1991, Frohnmayer met with President Bush and tendered his resignation, which the President accepted. Press Release, John Frohnmayer, Chairman, National Endowment for the Arts (Feb. 21, 1992) [hereinafter Press Release]. However, it was reported that President Bush dismissed Frohnmayer "because he did not satisfy the most conservative critics of the Endowment." *See* Rothstein, *supra* note 3, at H22. When he resigned, Frohnmayer said that he "believe[d] adequate Federal government support of the arts, free of content restrictions, is vital to our educational, economic, community and intellectual success as a country." Press Release, *supra*.

68 After an artist or organization has been selected, compliance with the decency provision is achieved in different ways. First, the prospective recipient artist or organization must give "assurance[s]" that the project will conform to the statute standards. 20 U.S.C. § 954(i)(4) (1990). In practice, this means the NEA has every grant recipient sign a 10 page document entitled "terms and conditions" that includes the decency language prior to receiving his or her grant proceeds. IF YOU ARE REPORTING, *supra* note 12, at 8.

Then, after grant is made, the NEA's Inspector General is responsible for making periodic reviews of the funded projects to confirm that they do not violate the decency standard. 20 U.S.C. § 954(k) (1990). If a project is determined to be obscene by the NEA Chairperson, the offender must then repay the grant. *Id.* § 954(l)(1).

69 These four solo artists, Karen Finley, Holly Hughes, Tim Miller and John Fleck, perform a variety of acts. Finley smears her semi-nude body with chocolate, which is to appear to be excrement, to symbolize the debasement of women. William H. Honan, *Judge Overrules Decency Statute For Art Grants*, N.Y. TIMES, June 10, 1992, at A1, C17. Hughes is a lesbian who describes her work as "chock-full of good old feminist satire." *Id.* Miller says his art "explores his identity as a gay person." *Id.* Finally, Fleck simulates masturbation on stage. *Id.*

70 795 F. Supp. 1457 (C.D. Cal. 1992).

71 *Id.* at 1460. The plaintiffs also sought injunctive relief on their statutory and constitutional funding claims and damages under the Privacy Act, 5 U.S.C. § 552a. *Id.*

Finley is the only case that the author is aware of that challenged the decency clause's constitutionality. However, in *Bella Lewitzky Dance Found. v. Frohnmayer*, the court found the Helms Amendment, *see* note 24 and accompanying text, to be an unconstitutional requirement for receiving NEA funding because the Amendment

teria caused them excessive harm.[72] Two of the artists who were already 1991 grant recipients alleged the newly adopted decency language restricted their artistic freedom because they feared crossing some invisible line of decency that would result in the loss of all or some of their 1991 grants and disqualify them for future grants.[73] The other two artists claimed the decency clause blocked their opportunity to apply for funding because of their fear that they would be denied.[74] Further, the NAAO contended the decency standard caused it injury by the expenditure of resources it would have to use to advocate against the NEA's new funding criteria and the chilling effect it would have on its member's productivity.[75]

On summary judgment, the court granted the plaintiffs' motion, finding the decency clause to be unconstitutional.[76] First, the court found the provision void for vagueness under the Fifth Amendment because people of common intelligence have to guess at the clause's meaning and application.[77] The decency requirement, the court ruled, "creates a trap for the unwary applicant" who might "offend[ ] someone's subjective understanding of the standard."[78] Moreover, the court held that it leaves the panelists, the NCA and the NEA Chairperson without any guidance on how to administer the standard.[79] Finally, the court found the provision causes the intrusion of self-censorship greater than necessary because the line of decency is, in effect, "imperceptible."[80]

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was vague and had an impermissible chilling effect on grant recipients' right to free speech. 754 F. Supp. 774, 782, 785 (C.D. Cal. 1991).

72 *Finley*, 795 F. Supp. at 1460.

73 Holly Hughes and Tim Miller. *Id.* at 1469.

74 Karen Finley and John Fleck. *Id.* at 1469-70.

75 *Id.* at 1470.

76 *Id.* at 1476.

77 *Id.* at 1472. *See* U.S. Const. amend. V. The vagueness doctrine maintains that a statute, which forbids certain conduct, is void if persons of "common intelligence must necessarily guess at its meaning and differ as to its application." *Finley*, 795 F. Supp. at 1471 (citing Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)). Further, the court identified three elements that a statute must avoid in order not to be vague: first, it must provide fair warning so as not to trap the innocent; second, the statute must provide objective and explicit standards to prevent arbitrary enforcement; last, the boundaries of the forbidden areas must be marked clearly. *Id.* (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)).

78 *Id.* at 1472.

79 *Id.*

80 *Id.*

Second, the court determined that the standard violated the First Amendment because it was overly broad.[81] Analogizing, the court found that artistic expression, no less than any form of academic speech, is at the center of a democratic society's cultural and political well-being.[82] Because of this special status, the court held that the government should not be permitted to place restrictions on speech in a public university simply because it gives the institution funding.[83] Likewise, the government should not be able to obstruct artistic expression through its funding of the arts.[84] The NEA's underwriting of artistic endeavors, therefore, requires protection under the First Amendment.[85] Since the decency clause is not narrowly drawn and reaches a substantial amount of protected speech, it violates the First Amendment for overbreadth and cannot be given effect.[86] After finding that the decency provision failed these two constitutional protections, the court struck down the NEA's use of it as one of its grant selection criteria.[87]

On June 9, 1992, the same day the court issued its opinion, the NEA issued a statement regarding the decision, declaring that the agency's funding awards "always have been made, are made today, and *will continue to be made* on the basis of artistic excellence,"[88] appearing to dismiss the court's determination as moot. As of the completion of this Survey, the U.S. Department of Justice, acting for the NEA, has filed a Notice of Appeal, reserving its right

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81 *Id.* at 1476. *See* U.S. CONST. amend. I. The doctrine of overbreadth concerning the First Amendment maintains that a statute which "suppresses a substantial amount of constitutionally protected expression must be refused effect unless it is subject to a construction that narrows its reach only to unprotected speech." *Finley*, 795 F. Supp. at 1475 (citing Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 575-76 (1987) (holding that a resolution by an airport could not prevent religious groups from distributing literature in its terminals)).

82 *Id.* at 1473. *See* note 2 and accompanying text (President Johnson's statement upon signing the NFAH).

83 *Finley*, 795 F. Supp. at 1472-73. *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967) (finding that safeguarding academic freedom is a transcendent value to all and, therefore, laws impeding this freedom violate the First Amendment).

84 *Finley*, 795 F. Supp. at 1473-74.

85 *Id.* at 1475.

86 *Id.* at 1475-76.

87 *Id.* at 1476.

88 Statement by Jill Collins, Public Affairs Director, National Endowment for the Arts (June 9, 1992) (on file with the *Seton Hall Legislative Journal*). The statement also said that the NEA and the Department of Justice were "reviewing the judge's decision." *Id.*

to contest the *Finley* decision at a later date.[89]

VI. Conclusion

By enacting the decency clause, Congress decided artistic talent and the fostering of it are no longer the most important factors in receiving government support. Content is now an issue as well. Restrictions on content, however, are generally controversial because they infringe on one's ability to freely express his or her ideas. These obstructions invade fundamental free speech rights granted by the First Amendment of the U.S. Constitution. The decency clause does not directly preclude someone from conveying his or her ideas, but in many instances, it does obstruct an applicant's ability to nurture or communicate their artistic output by preventing them from receiving the funds that are necessary to create their art. Moreover, because the NEA serves as a catalyst to encourage private support of the arts,[90] this infringement is expanded beyond just government funding. Therefore, when an application is denied because the NEA has found it not to be decent, the artist's or organization's chances of receiving financial assistance, whether public or private, dramatically decrease, further frustrating their ability to express or encourage creative initiative and accomplishment.

Congress attempted to articulate a single standard to judge what art would be given financial assistance when it ratified the decency clause. As the court decided in *Finley*,[91] however, decency does not function well as a criterion. It gives no guidance to the applicant or to those who determine it. Decency is an individual opinion that each person ascertains through his or her own moral values. Inevitability, this means that there are as many definitions of decency as the number of people deciding upon it. As U.S. Supreme Court Justice Harlan said, "one [person's] vulgarity is another's lyric."[92] Consequently, the decency clause leads to per-

89 Telephone Interview with the NEA's General Counsel Office, National Endowment for the Arts (Sept. 15, 1992).

90 IF YOU ARE REPORTING, *supra* note 12, at 2. Private support of the arts increased 40-fold since the NEA came into to existence. *Id. See also* 136 CONG. REC. S17,981 (daily ed. Oct. 24, 1990) (statement of Sen. Chaffe).

91 795 F. Supp. 1457 (C.D. Cal. 1992).

92 Cohen v. California, 403 U.S. 15, 25 (1971) (holding that a state cannot make it a criminal offense to publicly display four-letter expletives).

sonal, subjective decisions that are inconsistent with one another, making the standard unworkable for determining artistic value.

The NEA's implementation of the decency clause into the funding selection process shows the difficulty that this task presents. The three-tier citizen review system only allows an indirect fulfillment of the decency mandate. This system of selection assumes that the diverse representation of private citizens in the decision process will implicitly interject decency into it. The decency clause's effect in the selection process can then vary depending upon who is deciding upon it. At one extreme, it can have little or no effect, and at the other, it lets a decisionmaker have a substantial amount of freedom to reject applications by citing decency as the reason. This latter situation creates the potential for arbitrariness and abuse in the NEA's funding decisions that would not be at issue if artistic excellence was the sole criteria for awarding a grant.

The federal government, nevertheless, does not have an obligation to support the arts. Because of this, decency clause advocates argue that the government can subsidize the arts in any fashion it sees fit, including the selection of criteria with which to give funds. This argument fails, however, because the funds being used belong to the citizenry and the intent of NEA's charter is to have a program that fosters "groups . . . or individuals of exceptional talent engaged in or concerned with the arts"[93] and not a program that fosters only decent art. Artistic excellence and merit are now only as good as a creation is decent. This is not the NEA's objective as defined by the statute.

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[93] 20 U.S.C. § 954(c) (1990).