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Regarding Reauthorizing the National Endowment for the Arts: Statement Before the Senate Subcommittee on Education, Arts, and Humanities

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Abstract

Mr Chairman and Members of the Subcommittee: I am grateful for your generous invitation to offer testimony addressing legislation to reauthorize the National Endowment for the Arts.

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Mr. Chairman and Members of the Subcommittee:

I am grateful for your generous invitation to offer testimony addressing legislation to reauthorize the National Endowment for the Arts. The issues raises a more important component of public policy and democratic philosophy than is frequently apprehended. For as the literary giant Shelley perspicaciously observed: "Poets are the unacknowledged legislators of the world." The reason is that the arts inform the evolution of public opinion; and, in democratic governments like our own, public opinion or conventional wisdom, whether right or wrong, is an irresistible legislative juggernaut.

I. Artists Enjoy No Constitutional Right To Subsidies

The Constitution does not compel government funding of artistic expression that is protected from censorship under the First Amendment. Writing for the Supreme Court in *Maher v. Roe*, 432 U.S. 464 (1977), Mr. Justice Powell underscored the basic fundamental difference "between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." Thus, while the Constitution, at present, recognizes a right to an abortion, it does not guarantee a right to have the government subsidize that choice; while the Constitution guarantees a right to private education, it does not insist on government funding of that parental choice; and, while the First Amendment protects the right to acquire and to display Vincent Van Gogh's *Irises*, it does not guarantee the owner a \$55 million government bequest to foster exercise of the right.

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The Supreme Court reiterated in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), that congressional decisions regarding allocation of public largess, tax exemptions, or deductions are generally shielded from judicial oversight in deference to the policy choices of legislators. A legislature's decision to decline subsidies for the exercise of a fundamental right, whether affecting abortion, free speech, or otherwise, is irrefragable unless animated by an illegitimate constitutional purpose, such as hostility towards a particular idea, *simpliciter*.

In sum, no artist is crowned with a constitutional right either to insist that NEA be reauthorized or to receive an NEA grant if the program is extended and funded.

II. Does NEA Deserve Reauthorization?

The arguments in favor of prolonging NEA's life seem inconclusive at best in an era of worrisome budget deficits. Artistic expression that enlarges and enriches the marketplace of ideas and the pleasures of the eye and ear deserve encouragement. They can provide insights into human nature, knowledge, and evoke emotions that nurture tolerance, stretch the imagination, and offer psychological repose or exhilaration. These are central ingredients to discovery of individual or collective meaning and joy in life.

But it seems inaccurate to suggest that public subsidies are necessary to great or inspiring art. Sam Johnson, Charles Dickens, Henry David Thoreau, and Van Gogh, for instance, produced artistic masterpieces in impecunious circumstances.

This is not to say that public subsidies preclude works of artistic genius. History is to the contrary. But it does suggest that cultural life in the United States would not be extinguished if an epitaph were written for the NEA.

During its 25 year existence, I am unaware of any NEA funded art that seems a strong candidate to live for the ages ala Shakespeare, Beethoven, Michelangelo, or Rembrandt. NEA should not be condemned for seeming to subsidize a surplus of artistic mediocrity. Identifying artistic greatness is itself a high risk art, not a science, and many great artists have been overlooked by their contemporaries.

NEA, however, seems a miscast institution for discovering artistic virtuosity. Its dominant incentives are political and bureaucratic. The imperative of annual appropriations when combined with the prevailing political ethos means that concern over the ethnicity, gender, and geo-

graphical distribution of grantees will be smuggled into the grant-making process. Further, the tropism of all adult bureaucracies like the NEA is toward the conventional and uncontroversial, not towards Voltairean wit and parody of governing officials. The instinctive supine reaction of NEA to the contretemps over the questionable Serrano and Mapplethorpe exhibitions is illustrative.

In sum, persons especially endowed with an eye or ear for artistic talent are more probably to be discovered as employees or consultants of Sotheby's or Christy's than of NEA. The wisdom of elongating the life of NEA is not intuitively obvious, and seems weak as a matter of logic or experience. But if Congress decides in favor of reauthorization, then concurrent content-based restrictions on NEA grantees is constitutionally and prudentially compelling.

III. Content-Based Restrictions On NEA Grants

President George Bush and his winsome helmsman at the NEA, David Frohnmayer, have wrong-headedly voiced opposition to the imposition of statutory restrictions on grants awarded by the NEA. An alleged harrowing prospect of content-based government censorship of free speech is the arpeggio of their refrain. But Bush's misunderstanding of the First Amendment is unbecoming a president devoted to educational excellence.

At present, NEA is prohibited from funding obscene art, which raises no substantive constitutional concerns. The United States Supreme Court held in *Miller v. California* (1973) that obscenity enjoys no First Amendment protection. This includes any art that appeals to the prurient interest of the average person; depicts or describes in a patently offensive way, to a local community, sexual organs or acts; and lacks "serious literary, artistic, political, or scientific value."

Unquestionably within the obscene concept are the much discussed crudities of Annie Sprinkle, who, in a performance that masquerades as dance, masturbates on the stage, urinates in a toilet, and invites the audience to rivet on her cervix with a flashlight. There cannot be much doubt that the refusal of NEA to underwrite such degenerate ululations would be perfectly acceptable and raise no legitimate objection of free-speech censorship.

Nor should the stentorian cry of censorship inhibit the NEA from refusing to underwrite child pornography, indecent art or art that is intended to arouse racial or religious bigotry.

In *New York v. Ferber* (1982), the Supreme Court sustained a

state criminal prohibition on the knowing promotion of depictions or performances of children engaged in various sexual acts. Writing for the majority, Justice White explained that government may punish child sexual exhibitions even if they were not obscene under the three-pronged *Miller* test. Several reasons were assembled to support the holding:

- the government interest in safeguarding the physical and psychological well-being of minors is compelling;
- the distribution of child pornography may permanently scar the child's psyche, and creates a commercial incentive for child sexual abuse;
- the First Amendment is wholly compatible with restrictions based on speech content, exemplified by rules curbing indecency, adult bookstores, fighting words, and individual or group libel.

If such reasoning permits the *criminal* punishment of content-based speech aimed at the sexual exploitation of children, then there can be no First Amendment constraint whatsoever upon enacting legislation to prohibit taxpayer monies from subsidizing NEA grantees who would either produce or display child pornography.

And Congress should forbid NEA from funding indecent art. As defined by the Supreme Court in *F.C.C. v. Pacifica Foundation* (1978), indecent compositions or performances are those that appeal to the prurient interest, and describe or depict sexual acts or organs in a patently offensive manner. The *Pacifica* decision upheld broadcast curbs on indecency, at least if children were likely members of the audience. Writing for a plurality, Justice Stevens emphasized that any idea worth hearing could be communicated without employing indecent elocutions. At the very least, an indecency ban should pertain to all art subsidized with taxpayer dollars.

Nor is there justification for NEA subventions of art intended by the author or promoter to vilify or arouse hatred against a group based on race or religion. Certainly nothing in the First Amendment compels the expenditure of federal dollars on such artwork. And if Congress foreclosed NEA from doing so, there is strong justifying Supreme Court authority in *Beauharnais v. Illinois* (1952).

There, a state law made it a crime to defame any "class of citizens, of any race, color, creed or religion [by exposing the class members] to contempt, derision, or obloquy, or which [was] productive of breach of the peace or riots." The statute was invoked to punish the distribution of an incendiary leaflet intended to arouse racial

tred. Speaking for the Court, Justice Felix Frankfurter noted that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution." He upheld the group libel law, and tacitly recognized that racially or religiously bigoted maledictions seek to close minds permanently, not to open them to ideas, and seek to exploit the human instinct to find vulnerable scapegoats to vent personal or professional unhappiness.

Indeed, to the extent the Constitution comes into play at all with respect to prejudicial art inspired by race or religious hatreds, it is in the funding by the NEA, not in the denial of funding. In *Reitman v. Mulkey* (1967), and *Norwood v. Harrison* (1973), the Supreme Court denounced as unconstitutional any government action that might induce, encourage, or promote private persons to practice racial discrimination. Thus, NEA funding of reproductions or exhibitions of the racist film *The Birth of a Nation* would flout the Constitution if the intended consequence was an exacerbation of racial prejudice.

Similarly, the NEA would violate constitutional strictures by underwriting art that promoted or denigrated religion. The Supreme Court has repeatedly decreed that the First Amendment's establishment clause forbids use of taxpayer monies to sponsor either religion or non-religion. Thus, the NEA cannot subsidize the authorship or reproduction of a prayer book. Nor could it fund Marilyn Murray O'Hair diatribes against religion, or, most probably, depictions of the crucifix upside down in a bowl of urine.

By placing off-limits to the NEA the funding of obscene art, child pornography, indecent art work, and racially or religiously bigoted matter, Congress does not impose an overly prudish standard. Yet even if some might disagree on this point, a bar against grant awards for any such artwork is of no constitutional concern. To the extent President Bush and David Frohnmayer have suggested otherwise as their ground for opposing legislative constraints on NEA funding, they are hiding behind an invisible shield. There is no First Amendment cover to be found.

The idea that NEA must shun content-based evaluations of grant applications is fatuous. How can evaluations otherwise be sensibly made? NEA employees and consultants should be fired if they decline that task so indispensable to their useful employment.

NEA, of course, regularly does make content-based distinctions in the grant-making process. The General Counsel of NEA has publicly confessed, for instance, that one proposal was denied because it seemed to celebrate animal cruelty. How is that content-inspired decision any

different than one refusing a proposal because it would depict children engaged in sexual acts?

IV. Why Congress Should Be Concerned With NEA Subsidized Messages

A nation lives by symbols. When the government funds works of art, it necessarily gives tacit approval to the grantee and the goals he promotes with taxpayer dollars. As Justice Louis D. Brandeis lectured in *Olmstead v. U.S.* (1928), "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."

The government, accordingly, must be scrupulously concerned with the messages it sends to the public by underwriting specific types of art. Bigotry, for instance, intended to arouse racial or religious prejudice should receive no government backing. Suppose David Duke, a former member of the Ku Klux Klan and current member of the Louisiana legislature, requested a grant from NEA to paint a picture glorifying post-Reconstruction lynching of "niggers". To make the grant would signify government approval or indifference to racial bigotry, and would inflame race relations throughout the country.

Suppose a neo-Nazi sought NEA funding of a mural applauding the Holocaust. To underwrite the applicant would foster anti-Semitism, and suggest the government would be phlegmatic about private persecution of Jews.

The government is vitally interested in suppressing, not promoting, bigotry because it threatens democracy. Freedom and liberty cannot thrive in communities steeped in racial, ethnic, or religious prejudice, as the German Third Reich verifies.

President Harry Truman explained in 1952 that "Mutual respect and tolerance for the beliefs of others is the secret of the strength of this blessed land." Truman was echoing the sentiments conveyed by President George Washington in writing to a Hebrew Congregation in 1790. He asserted that our Government "gives to bigotry no sanction, and to persecution no assistance."

Exploiting the human instinct towards racial or religious intolerance in times of hardship, personal despair, or low esteem was the evil genius of Adolf Hitler. Writing in *Mein Kampf*, Hitler observed that the art of successful propaganda requires directing speech "more and more toward feeling, and only to a certain extent to so-called reason." That understanding is why many colleges and universities have em-

braced rules of student conduct that discipline stigmatization or vilification for reasons unrelated to individual merit. The University of Michigan, for example, adopted a policy against "any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, age, marital status, handicap or Vietnam veteran status," and creates a demeaning educational environment. (On September 7, 1989, a federal district judge enjoined enforcement of the policy because of vagueness.)

It is said that identifying a malignant intent of the author of racially or religiously bigoted speech is unworkable. But proof of intent is a legal commonplace; it is an element of most crimes, libel suits, litigation addressing claims of racial or religious discrimination, and free speech challenges to removal of books from public school libraries. Even a dog knows the difference between the kick and an unwitting bump from his master!

It is said that if racially or bigoted speech is squelched, there will be no stopping point to prevention of genuine free speech. Nonsense! The progress of civilization has been the progress of making refinements and differentiations in the law. As Justice Oliver Wendell Holmes observed, all law depends on matters of degrees "as soon as it is civilized."

To search for a mechanism of public funding of the arts that is devoid of tacit expressions of government approval for the ideas promoted by grantees is a futile quest. In the public mind, the underwriter cannot be separated from the author. The United States Supreme Court has acknowledged that psychological phenomenon in declaring that government funding of religious institutions, even if limited to their secular endeavors, nevertheless frequently created a prohibited appearance of state sponsorship of religion. *See School District of City of Grand Rapids v. Bell*, 473 U.S. 373 (1985).

Artists or scholars who receive government monies can easily exploit the financial tie to boost their ideas. Suppose a grantee authors a work that trumpets the asserted virtues of polygamy. He could thereafter proselytize that his ideas were sponsored and approved by the United States government, and thereby enhance his credibility. Grant recipients who lionized homosexual sodomy or hallucinogenic drugs might similarly claim the government as a votary of their viewpoints to fortify their acceptance in the marketplace.

The purposes of the First Amendment are undisturbed by government scrutiny of the artistic or scholastic ideas it promotes through subventions. Justice Brandeis delineated those purposes as four-fold in

Whitney v. California, 247 U.S. 357 (1927) (concurring): to foster the discovery and spread of political truths; to make individuals free to develop their mental faculties; to make them happy by tolerating their ruminations and expressions; and, to avoid the hate and violence precipitated by censorship of ideas.

Curbs on government funding of particular ideological messages does not impair the quest for political truths. They leave undisturbed the right of all artists or scholars to challenge whatever orthodoxies they wish through private means. Indeed, their credibility may be enhanced by an absence of government financial ties. Their ideas may receive more rather than less attention (but not necessarily more acceptance) if denied government subsidies because public curiosity may be aroused by reasons assembled for the decision. Thus, *The Satanic Verses* achieved instant popularity when it ignited thundering opposition and death threats from the Government of Iran.

History proves that government subsidized ideas enjoy no special prowess in a free marketplace of ideas. Who believes the Communist Chinese prevarications regarding the Tiananmen massacre of Chinese student dissidents? Of course, government sponsorship does not necessarily taint credibility if a reputation for truth has been established, as with the BBC and the Voice of America.

The danger that government funded ideas will necessarily enjoy a competitive advantage over their unsubsidized rivals in the United States marketplace is virtually non-existent, especially because the subsidies are minuscule in proportion to the solely privately sourced propagation of ideas.

Neither do government restrictions on underwriting ideas constrict individuals from honing their mental faculties. They remain free to read, write, compose, and to deliberate without intrusion by government. Concededly, more hours might be devoted to these mental tasks and challenges if the government guaranteed a handsome stipend or funds to purchase newspapers, broadcast stations, or movie studios to all who desired to engage in cogitative or communicative endeavors. But the First Amendment has never been thought to require government to underwrite all who pine for greater personal celebration or success in spreading ideas.

The individual fulfillment and enjoyment that stems from uncurbed ponderings and expositions of ideas is unthreatened by an absence of government funding. And, that absence will not breed the hate and violence associated with censorship because of the sweeping free speech protection in the First Amendment for opposing or unconven-

tional viewpoints, including flag burning.

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Politics and art inevitably intersect. Exemplary are Picasso's "Guernica" and "Peace Dove," Longfellow's "Paul Revere's Ride," Francis Scott Key's "Star Spangled Banner," Charles Dickens' *Oliver Twist* and *A Tale of Two Cities*, William Shakespeare's "Julius Caesar," Thomas Nast's political cartoons, and Pete Seeger's folk songs.

NEA thus should consider how proposed works of art might enrich and strengthen democratic norms and aspirations in awarding grants. That task is comparable to the school teacher who selects readings from Alexander Pope over *Hustler Magazine* in order to promote a mastery of the English language and a penetrating understanding of human nature.

V. Enforcing NEA Restrictions

NEA is ill-suited to administering statutory funding restrictions because its expertise is art, not law. Thus, Congress should instruct NEA to obtain an affidavit from every grant applicant of an intent to adhere to the restrictions. A grantee who broke the promise would be subject to claims of restitution or damages in cases initiated by a United States Attorney, and be permanently barred from NEA funding. In such proceedings, the federal judiciary would adjudicate the merits, including the question of whether any of the statutory curbs on art were unconstitutional. This enforcement procedure obviates the potential of NEA bureaucratic censorship through misapplication of legal standards or through lead-footed decisionmaking. And, it leaves final authoritative interpretation of the First Amendment where it belongs: the contemplative chambers of the United States Supreme Court.