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MEMORANDUM

FROM: James F. Fitzpatrick

RE: Reconciliation of S. 2724 and H.R. 4825 to Deal With Unconstitutional Standards of "Decency" and "American Values"

S. 2724 and H.R. 4825 both deny NEA funding only for obscene works based on the Supreme Court's Miller v. California standards. H.R. 4825, in Section 103(b) of the bill, also requires that, in grantmaking regulations and procedures which the NEA shall promulgate, the Chairman "shall ensure" that applications are judged not only in terms of artistic excellence and merit but also "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."

H.R. 4825 § 103(b) sets up two new funding approval hurdles, beyond the obscenity criterion, that

There are other differences between the bills. In particular, the Senate bill requires that the obscenity determination be made in a criminal action, while the House bill adopts any final judicial determination of obscenity. Second, the Senate bill is stricter than the House bill in that it also forbids funding for work found to be a criminal violation of child pornography laws, requires payback after conviction rather than appeal, and imposes a three-year funding ban. Compromise on these differences may further reconciliation of the differences discussed in this memorandum.

October 25, 1990
are patently unconstitutional. These new standards fall afoul of the First Amendment in two separate ways. First, they are so amorphous as to be unconstitutionally vague. Second, they violate the bedrock principle that the Government may not impose content restrictions on speech merely because society may find that speech offensive or disagreeable.

There are two bases on which S. 2724 and H.R. 4825 could be reconciled in order to eliminate the problem of unconstitutional funding standards while preserving the spirit of H.R. 4825 § 103. The first involves moving the offensive language to the preamble. The second would justify the obscenity standard on grounds of concern with decency.

A. Moving "Decency" Language to Preamble

1. If the conference adopts S. 2724 as the basic model, language along the lines of H.R. 4825 § 103(b) could be added to the preamble for S. 2724. For example, H.R. 4825 § 101 (amending § 2 of the Act) could be adopted in the conference version, with an additional paragraph, perhaps following subsection (5), to the effect that "Public funding of the arts and humanities should be sensitive to general standards of decency and respect for the diverse beliefs and values of the American public." [This language could also be
incorporated in subsection (5) following the reference to "public sponsorship."

2. If the conference adopts H.R. 4825 as the basic model, the preamble section, § 101, could be amended as outlined above and § 103(b)'s new version of Section 5(d)(1) of the Act could be eliminated.

B. Concern for "Decency" as Basis for Obscenity Restriction

1. If the conference adopts H.R. 4825 as the basic model, § 103(b)'s version of Section 5(d)(1) of the Act could be combined with § 5(d)(2). E.g., the provision could be amended to read:

   . . . In establishing such regulations and procedures, the Chairperson shall ensure that--

   (1) artistic excellence and artistic merit are the criteria by which applications are judged; and

   (2) applications are consistent with the purposes of this section. In consideration of general standards of decency and respect for the diverse beliefs and values of the American public, such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded . . . .

2. If the conference adopts S.2724 as the basic model, language paralleling H.R. 4825 § 103(b) could be added to S.2724 § 107. The language added as Section 11(h)(1) to the Act could include a reference to procedures which "ensure sensitivity to general
standards of decency and respect for the diverse beliefs and values of the American public by requiring that every grant complies with the requirements of subsection (h)(3)(i)(l)." In the alternate, similar language could be inserted in subsection (h)(3)(i)(l) itself, along the lines outlined above.