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9-22-1993

## Arts: Policy and Talking Points (1994): Report 01

Susan Boren

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# CRS Report for Congress

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## National Endowment for the Arts: Background on Grant Issues

by Susan Boren, Specialist in Social Legislation  
Education and Public Welfare Division

### SUMMARY

The controversy over certain National Endowment for the Arts (NEA) grants supporting projects regarded by critics as inappropriate and possibly obscene continues. The purpose of this report is to give background on previous NEA grant controversies, to explore the current grant controversies, to delineate some of the court decisions related to NEA grants, and finally, to outline the congressional consideration of NEA grant issues. On July 15, 1993, the House voted to cut NEA's FY 1994 appropriation by 5 percent. On September 15, 1993, during passage of the FY 1994 Interior appropriations, the Senate tabled an amendment to eliminate NEA individual fellowships. The issue of appropriate grant support and whether there should be content restriction language will continue to be both a legal and political issue during the appropriations and the reauthorization processes, both under consideration by the 103rd Congress.

### NEA

The NEA is an independent agency in the executive branch of the Federal Government and, with its 26-member National Council on the Arts, is part of the National Foundation on the Arts and the Humanities. NEA's purpose is to promote a broad national policy of support for the arts. It was established by the National Foundation on the Arts and the Humanities Act of 1965 (NFAHA).

### 1993 REAUTHORIZATION

On June 29, 1993, the House Education and Labor Committee ordered reported H.R. 2351, the Arts, Humanities, and Museums Amendments of 1993 (H. Rept. 103-186). Three proposed amendments to the Committee bill were not agreed to: one to eliminate NEA, NEH and IMS, one to increase the NEA's State allocation from 27.5 to 65 percent, and one to eliminate increases in NEA funds for States that reduce their State arts appropriations (with some exceptions.) On July 14, 1993, Senators Pell and Jeffords introduced S. 1218 to extend the NFAHA for 2 years.



## CURRENT CONTROVERSY

There are several recent controversial grants that have been attributed to the NEA, as follows: 1) Three experimental artists in San Diego handed out 10 dollar bills to illegal immigrants with money from part of a Museum of Contemporary Art commissioned grant. On August 6, 1993, NEA released a statement about the 1989 NEA grant to the Museum of Contemporary Art in San Diego, a \$250,000 award for a multi-year project requiring a three-to-one match of nonfederal funds. The special artistic initiative "Dos Ciudades/Two Cities: the Border Project," called for a series of exhibitions, artists' residencies, lectures, educational activities and multidisciplinary programs. NEA claims that they did not sanction the distribution of 10 dollar bills and they would **not** have considered it an "allowable expense"; 2) Acting NEA Chairman Ana Steele reversed an earlier decision and approved a \$17,500 grant to an organization called the National Alliance for Media Arts and Culture for festival events for the International Gay and Lesbian Film Festival. NEA stated that the money could only be used for lectures and symposia and not for the presentation of films. The Christian Action Network showed excerpts of some homosexual films from the Pittsburgh Lesbian and Gay Film Festival held in October 1991, claiming that NEA had funded the making of these films. NEA claims they did not provide funding for the films or that festival; 3) The Whitney Museum's "Abject Art: Repulsion and Desire in American Art" exhibit has some graphic and explicit works of body functions and body parts. The exhibit was not an NEA grant but was paid for by private funds. The only indirect association with it was NEA's grant to the Whitney's independent study program.

## CRITICS OF NEA

In the light of current budget constraints, there are questions about the need for and proper role of the NEA. There are two separate issues--One is whether the NEA is the proper entity or appropriate mechanism to support the arts, and if it is, how can accountability be ensured. The second is whether the Federal Government should be involved in support of the arts.

Critics assert that taxpayers' money should not be spent on exhibiting works that are offensive to the general public. Some recent and past exhibits given NEA grants have been characterized as pornographic or sacrilegious. Critics argue that taxpayers' money has been wasted and that there have been questionable grants given by the NEA as far back as 1969 when a poem was criticized as "illiterate." Some critics assert that NEA is still giving controversial grants in spite of the safeguards that were built into the last reauthorization with the revised panel system, more direct funding to the States, and explicit grant power to the Chairman of the NEA.

Some recommend that the structure of the NEA be changed to make it a true foundation or endowment to sustain arts institutions; or that it should provide a kind of revenue sharing to the States with relatively few strings at the Federal level, with the States being given more responsibility and grant-giving power. Other critics argue that the NEA should be abolished altogether, contending that the Federal Government should never have been in the business of supporting the arts in the first place.

## NEA's RESPONSE AND RECORD

In response to its critics, NEA asserts that only a small number of grants are in question out of one hundred thousand given since its inception. Responding to sensationalized headlines, NEA contends that some of the exhibits, films, and performances characterized as pornographic that have been attributed to NEA grants have **not** been their responsibility. **No** NEA project has been judged obscene by the courts. Ironically, in some cases when NEA has been blamed, the grants were often not direct individual artist fellowships but rather were grants to larger organizations that ultimately made the final decisions on what to exhibit. NEA points to a successful record. Since 1966, NEA has awarded grants totaling over \$2.6 billion with the private sector contributing approximately \$4 billion in matching funds. In 1992, approximately 13,000 artists-in residence reached about 4 million students and teachers through NEA arts education projects. NEA supports successful television series like "Live from Lincoln Center." NEA support for local non-profit theater productions has helped make successes of "Driving Miss Daisy," "Children of a Lesser God," and "Annie," among others. Of the 11,000 artists fellowships given, many have won awards including Pulitzers, National Book Awards, Obies, Guggenheim fellowships and other distinctions.

In response to critics who want to abolish the NEA, some have proposed to make a cabinet level post for the arts and humanities. In a recent survey "The importance of the Arts and Humanities to American Society," by the National Cultural Alliance, 81 percent of the public surveyed felt that the arts and humanities contribute to the economic health and well-being of society. The survey concluded that "government and businesses could do more to ensure that the arts and humanities are available to everybody."

## PREVIOUS GRANT CONTROVERSY

The current controversy over the NEA stems in part from several previous grants that were characterized by some critics to be obscene. The mechanism for dealing with the NEA controversy has been through reductions in appropriations to the NEA, isolated court cases, and statutory changes through NEA's reauthorization. As part of the FY 1990 Interior Appropriations debate two grants sparked controversy that subsequently caused a reduction in funding for the NEA. The two NEA grants in question were the grant for the Mapplethorpe exhibit and the subgrant to Serrano.

1. **Mapplethorpe Exhibit.** An exhibit of work by the late Robert Mapplethorpe, photographer, called "Robert Mapplethorpe, the Perfect Moment" was assembled by the Institute of Contemporary Art in Philadelphia (which received \$30,000 from NEA's Museum program in FY 1988 for the purpose of planning the exhibit). It was a retrospective of Mapplethorpe's work and included what were characterized as homoerotic works. According to NEA's Museum program, the advisory panel did see examples of Mapplethorpe's work, but those slides did not include the most controversial "X" Portfolio. The NEA Museum program grant financed the original show by the ICA, although the show was scheduled to tour in Chicago, Washington, Hartford, Berkeley, Cincinnati, and Boston. According to ICA there was no controversy at the time they presented the exhibition nor when the show went to Chicago. The touring show was canceled at the Corcoran Gallery in Washington due to political repercussions, but after protests was presented at the Washington Project for the Arts. When the exhibit arrived in Cincinnati the director of the Contemporary Arts Center was charged with pandering obscenity for showing Mapplethorpe's exhibit. On October 5, 1990, the director was acquitted.

2. **The Serrano Grant.** Andres Serrano, a New York photographer, photographed a plastic crucifix submerged in a container of urine. Critics called it sacrilegious. The photograph was already part of a body of work that Serrano had produced at the time that he was awarded a \$15,000 grant by the Southwestern Center for Contemporary Art (SECCA) in Winston-Salem, North Carolina. Therefore, the fellowship did **not** finance the creation of that particular work. The NEA's Visual Arts (Special Projects) program had provided a \$75,000 grant to SECCA (matched by \$75,000 in funds from other sources) to help support a program called "Awards in the Visual Arts program 7." NEA did **not** select Serrano. He was one of 10 artists selected by 5 jurors to receive a \$15,000 fellowship. His works were to be part of a traveling exhibit that concluded at the Virginia Museum of Fine Art in Richmond in January 1989. The NEA had helped support SECCA's "Awards in the Visual Arts (AVA)" program since 1981. According to the NEA program director, that was the only subgrant that the Visual arts program gave (note: this is **not** the same as the **individual artists fellowship** category of the NEA's Visual Arts program, which is a direct grant by the NEA to individual artists.)

These two controversial grants called into question the grants process, the panel system, the rights of artists, the power of the NEA's chairman, and the fine line between censorship and accountability.

### HELMS AMENDMENT

The FY 1990 Interior and Related Agencies Appropriations Act (P.L. 101-121) (H.R. 2788), contained an amendment reducing NEA funding by \$45,000 as a protest measure against NEA's grants to SECCA and ICA. In addition, it contained Senator Helms' amendment prohibiting the use of appropriated funds to "promote, disseminate, or produce . . . obscene materials." The conferees modified the Helms amendment to incorporate the language from the *Miller v. California* 413 US 15 (1973) case. Further, the law provided that House and Senate appropriations committees be notified 30 days prior to disbursement of a direct grant to either SECCA or ICA.

### INDEPENDENT COMMISSION

The FY 1990 Interior Appropriations Act established a temporary bipartisan Independent Commission on the Arts to review the grantmaking procedures of the NEA, including the panel system and to consider what standards should be used for publicly funded art. Its report was published September 11, 1990. The Independent Commission recommended against specific content restrictions on works of art supported by the NEA. It suggested that when measured solely in terms of artistic qualities there should be no difference between publicly and privately funded art in its standards of artistic excellence. However, it concluded that publicly funded art must take into account the conditions that traditionally govern the use of public money.

### 1990 ARTS REAUTHORIZATION

The Senate reported version of the FY 1991 Interior and Related Agencies Appropriations bill (H.R.5769) (P.L.101-512), reinstated the restrictive language on obscenity in art that had appeared in the FY 1990 Interior Appropriations Act. However, the House-passed version of the bill had appended the text of the arts reauthorization allowing a 3-year reauthorization for NEA. The FY 1991 Interior Appropriations Act (P.L. 101-512) dropped the Senate restrictive language and contained the reauthorization, the **Arts, Humanities, and Museums Amendments of 1990**. There were several new provisions in the Arts,

Humanities, and Museums Amendments of 1990, P.L. 101-512 that dealt with the grants process as follows:

**State allocation**--The law reserved up to 27.5 percent in 1993 of the total NEA program funds to be allotted to States (as compared to the previous 20 percent of that allotment going to States.) In addition, an allotment (up to 7.5 percent of program funds in 1993) is targeted to programs related to access to the arts in rural and inner city areas. The rationale for the change in the allocation was in part because it 1) would increase States' responsibility for grantmaking; 2) would make States more accountable for grants within their own States; 3) would emphasize that States know best how to distribute funds within their States; and 4) would allow States to make appropriate decisions on grants.

**Obscenity**--P.L. 101-512 provided that a work would be considered obscene if it were deemed obscene in the final judgment of a court. The term "obscene" was defined with respect to a project as: "1) the average person, applying contemporary community standards, would find that such project, production, workshop, or program, when taken as a whole appeals to the prurient interest; 2) depicts or describes sexual conduct in a patently offensive way, and; 3) when taken as a whole lacks serious literary artistic, political or scientific value." There were repayment provisions whereby the NEA would have to be repaid if the work receiving a grant were deemed obscene by the courts. Further, no Federal payment could be made unless it took "into consideration general standards of decency and respect for the diverse beliefs and values of the American public."

**Panel System**--The statute requires that the NEA panels of private citizens (artists, administrators, and lay persons) who review NEA grants reflect a wide "geographic, ethnic and minority representation" from "diverse artistic and cultural points of view."

### COURT DECISIONS

In September of 1990, four artists (Karen Finley, Holly Hughes, John Fleck and Tim Miller) filed a lawsuit in District Court for the Central District of California against the NEA following then Chairman John Frohnmayer's rejection of the artists' applications for performance art fellowships. The artists' claim at the time was that their applications were rejected for "inappropriate" reasons. On June 4, 1993, the NEA reached a legal settlement with the four artists on that portion of the lawsuit that claimed their grant applications were rejected for "inappropriate reasons." The four artists were awarded a total of \$50,000, plus attorney's fees of \$202,000.

**The Tashima Decision**--On June 9, 1992, Los Angeles Federal District Judge A. Wallace Tashima announced that 1) government funding of the arts is subject to the constraints of the First amendment; 2) the grant procedure followed by Chairman Frohnmayer of the NEA violated the First and Fifth amendments; and 3) the change in the NEA which would require the agency to deny funds to art projects based on "public standards of decency" violates due process and freedom of expression. This decision is still pending appeal by the Justice Department.

(For further general information on cases dealing with obscenity and pornography, see U.S. Library of Congress. Congressional Research Service. *Federal Obscenity and Child Pornography Laws*. CRS Report for Congress No. 93-702, by Henry Cohen. Washington, 1993.)

### Selected Congressional Actions on NEA Grants

9/22/93--The Senate Labor and Human Resources Committee held hearings and reported unanimously Jane Alexander's nomination for Chairman of the National Endowment for the Arts.

9/15/93--The Senate passed the FY 1994 Department of Interior Appropriations bill (H.R. 2520) and tabled amendments introduced by Senator Helms to 1) eliminate NEA's individual artists fellowships; and 2) increase from 27.5 to 70 percent the State allocation from NEA program funds; and defeated on 9/14 an amendment to abolish the NEA.

7/15/93--The House passed the FY 1994 Department of Interior and Related Agencies Appropriations bill (H.R.2520) with an amendment cutting the NEA's appropriation level by 5 percent to \$165.9 million.

7/14/93--Senators Pell and Jeffords introduced S. 1218, a 2-year NEA reauthorization.

6/29/93--The House reported H.R. 2351, (H. Rept. 103-186), the Arts, Humanities and Museums Amendments of 1993, a 2-year NEA extension.

10/17/91--In conference on the FY 1992 Interior Appropriations, specific restrictions on arts funding were eliminated and traded instead for an increase in grazing fees--coining it the "Corn for Porn" negotiation.

11/05/90--H.R. 5769, the FY 1991 Interior Appropriations bill was signed into law (P.L. 101-512) containing the Arts, Humanities, and Museums Amendments of 1990, a 3-year reauthorization.

10/24/90--As part of the FY 1991 Interior Appropriations bill the Senate agreed (73-24) to compromise language on the NEA requiring funds to be repaid if a grant recipient's works were found obscene in the courts' judgment. Senator Helms' amendment forbidding the funding of material that denigrates religion passed by voice vote. Helms' amendment to insert other content restrictions was rejected (70-29.)

5/22/90--Representative Williams called a "summit" meeting of major arts groups, to seek a unified position on the arts reauthorization. Recommendations included a 5-year reauthorization, maintaining the current State funding formula, codifying accountability standards and expanding arts education.

5/15/90--Representative Williams introduced the Bush Administration's art reauthorization bill that contained no content restrictions on grants.

--The House Interior Appropriations Subcommittee held further hearings on the NEA. Producer Joe Papp testified about his refusal to accept an NEA grant due to the restrictive language on content placed in the grant application.

4/27/90--The Senate Subcommittee on Education, Arts and Humanities held hearings on the NEA reauthorization, the major focus was the censorship issue. Those who testified included Maestro Mstislav Rostropovich, Phyllis Schlafly of the Eagle Forum and Honorable John Buchanan of the People for the American Way.

11/15/89--The House Postsecondary Education Subcommittee held hearings on the constitutional questions related to the Helms provisions. Some witnesses argued that these provisions impose what is already law. They noted that the Supreme Court has held that obscene material enjoys no constitutional protection. (Miller v. California 413 U.S.15 (1973). According to this argument no additional laws are necessary. Other testimony indicated that the Helms provision strikes at the core of the First Amendment and the language of the Helms provision constitutes a kind of moral censorship over any work that is controversial, radical, political, but not necessarily obscene. There was no consensus reached in the hearings.