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Reauthorization: Hearing and Reports (1990): Memorandum 02

John H. Hammer

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5 October 1989

MEMORANDUM

TO: NHA Members (and Friends)

FR: John Hammer

RE: Update on the FY-1990 NEH Appropriation

The appropriations process this year for the NEH and its sister agencies has been the most tumultuous in the nearly twenty-five year history of the Endowment. Beginning last May, the entire process came to be dominated by the controversy over the Arts Endowment's grants of public funds to facilitate the exhibition of photographs by Robert Mapplethorpe and Andres Serrano. Works by both artists are considered highly offensive by many: In Serrano's case, a photograph of a crucifix submerged in the artist's own urine; for Mapplethorpe, a number of photographs on homoerotic and violent themes. The controversy has centered on the unresolved tension between the need to preserve artistic and intellectual freedom on the one hand and the demand for careful stewardship of the taxpayers' dollars on the other. But, also present from the beginning of the controversy has been the fundamental question of the appropriateness of government support for the arts (and by implication, the humanities).

While the controversy has focused almost entirely on the arts (and no evidence of improper grants from NEH has been suggested), several of the measures attached to the appropriations bill in the House and Senate were also directed at NEH. The major actions taken by the two houses prior to their September 27-29 conference included:

- o The House responded to the controversial grants by voting on July 12 for an FY-90 Interior bill that reduced the NEA budget by \$45,000, the amount of the two controversial grants; and includes report language calling for intensified oversight of regrant actions by the Chairmen and Councils of the two Endowments.

- o On July 26, the Senate not only accepted the actions chosen by the House but also agreed to several other steps including a floor amendment introduced by Senator Jesse Helms (R-NC) that reads as follows:

(Purpose: To prohibit the use of appropriated funds for the dissemination, promotion, or production of obscene or indecent materials or denigrating a particular religion)

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.

Although, Mr. Helms appears to have only intended the amendment to affect the Arts Endowment, after the vote it was determined that the prohibition would actually extend to all agencies in the bill, including NEH, Institute of Museum Services, Smithsonian, Wilson Center, National Gallery of Art, and so forth.

The Senate also went beyond the House actions by voting to include a five-year ban on NEA grants to the two organizations which sponsored the controversial projects (Southeastern Center for Contemporary Art of Winston-Salem, NC and the Institute for Contemporary Art at the University of Pennsylvania) and by transferring \$400,000 from the Visual Arts program to other NEA programs. On a more positive note, the Senate also added \$100,000 for a study of the NEA's grant making process to be conducted by an outside agency.

Overnight -- and probably to the Senator's delight -- the Helms amendment became the touchstone and reference point for the overall controversy. Although the NEH had already been directly affected by the controversy through its inclusion in the re-grants oversight policy directives, the scope of the Helms amendment was the catalyst for widespread interest and activity on the part, of scholars, first amendment advocates, and a wide array of other groups and individuals who joined with the arts constituency. In the two months between the Senate's action and the conference, the legislators received vast numbers of communications from constituents, national organizations, and many others. Debate over various aspects of the conflict between the first amendment right to freedom of expression versus the right to control taxpayer expenses was carried out across the country in meetings, radio and television, op ed and letters to the editors etc.

In the House on September 13, a major effort to pass a non-binding instruction to the House conferees to support the Helms amendment was deflected through adroit parliamentary tactics but did result in an instruction to "address the concerns" raised by the Helms amendment.

While the conferees had a very full agenda of disagreements between the two houses that had to be resolved to produce a unified bill, by all accounts the measures to find agreement on the NEA controversy were the most contentious and time consuming. In the ten days prior to the conference, the principle figures (Mr. Yates and Ralph Regula [R-OH], the ranking minority member for the House and Senator Robert C. Byrd [D-WV] and ranking minority member James A. McClure [R-ID] for the Senate) formally met at least four times in attempts to identify an acceptable formula for a compromise -- apparently with little success. The actual conference stretched over three days, 27-29 September.

Late in the evening of September 28, perhaps stimulated by reports that after two days of jousting, the conferees were beginning to make headway on a compromise, Senator Helms introduced an amendment to the Defense Appropriation bill that would instruct the Senate conferees to insist on the Helms amendment as adopted in July. After hours of discussion in which a number of Senators indicated that they were repulsed by the photographs of Mapplethorpe (of which Mr. Helms had glossy sets of six of the most offensive copied in mass for selective distribution to his colleagues) but found the full three-clause Helms amendment excessive. The proposal to instruct was tabled on a vote of 62 to 35. The following morning, Mr. Helms proposed a similar measure but agreed to limit the amendment to the first (obscenity) clause and dropping the second and third clauses (denigration of religions, groups, etc). A proposal from Senator Wyche Fowler to delete "indecent" from the clause was accepted and then the measure passed 65 to 31. Whether this action in the Senate was critical to resolving the issue in conference is unclear -- By the second day reports from the conference indicated that efforts to craft wording were centered on the language of the Miller vs California decision (the Supreme Court decision on obscenity)

Conference Actions Affecting NEH

The Conference Committee completed action late on Friday, September 29. Typically, once issues on appropriations bills have been resolved in conference, the compromise bill is rapidly enacted by both houses. The FY-90 bill passed the House on October 3 but the process was punctuated by more acrimonious debate focussed mainly on whether a) the steps approved in conference would prevent grants like Mapplethorpe and Serrano in the future, and b) whether the Helms-like measure heralds an unacceptable leap into official art. As of this date, the Senate had not scheduled time for the bill and the rumors are rife as to possible new amendments and punishments. Therefore, the following reports conference and House action only:

a) First the money - An appropriation of \$159,130,000 for NEH (increased from \$153 million in FY-89) includes \$4.2 million for an "initiative in the Humanities for the Office of Preservation.

... for matching support for museums, universities, and other institutions to assist them in stabilizing collections of material culture and for support of professional conservation training to address the needs of these collections. Testimony before the Committee indicated that the majority of material culture collections are housed in cramped conditions, which not only makes them inaccessible but also threatens their existence."

Other significant budgetary changes include a \$600,000 increase in the Division of Research Programs budget (significant in that the increase was proposed by the administration); \$1,000,000 more for the Division of State Programs; \$1,120,000 additional for the Office of Preservation's filming initiative launched last year; increases in the Division of General Programs' Public (\$300,000) and Museums & Historic Organizations (\$260,000); \$50,000 for the Division of Education Programs; and a decrease of \$2,000,000 in the Office of Challenge Grants due to termination of the on-going special grants to the New York Public Library. A chart summarizing recent NEH appropriations history appears below.

b. Regrants policy - The House Committee proposed and the Senate accepted report language (i.e., language that strongly urges but not with the force of law) instructing the NEH and NEA to make exercise significantly more active oversight of regrants. Early in the imbroglio over the controversial NEA grants, subgranting (or regrants) -- the process in use for more than two decades whereby the Endowments grant funds to institutions which in turn regrant the funds to individuals -- was identified by some policy makers as an improper delegation of grantmaking authority by the Endowments and, by implication, a source of improper grants of federal funds. Rep. Sidney R. Yates (D-IL), long-time Chairman of the Interior and Related Agencies Appropriations Subcommittee, led the Subcommittee in a finding that NEA and NEH did not have statutory authority to make subgrants. Mr. Yates considered legislation that would have prohibited the practice but, in response to arguments that regrants are necessary to the programs of both Endowments -- and in fact are an important part of the infrastructure of scholarly activity in the U.S. -- concluded in the report "if subgranting is permitted it should be undertaken with procedures that will make the chairmen and councils as thoroughly informed and responsible for the subgrants as they are for direct grants. ...the objective can be achieved by giving subgrantors authority only to recommend to NEA and NEH awards they propose for final approval. NEA and NEH are directed to amend their procedures and guidelines accordingly." (In August, a committee of the National Council on the Humanities chaired by Leon Kass reviewed NEH's regrants oversight procedures in light of the report language. The Council provided NEH with a recommended course of action to comply with the Congressional directive that appears to be especially sensitive to the realities of the scheduling and selection problems facing the institutions managing regrant fellowship programs. Further NEH action is not expected until after the FY-90 process is completed.)

c) With the exception of a paragraph attached to NEA's budget allocation requiring 30 days prior notice of any intended award to SECCA and ICA with detailed reporting requirements on the purpose of the proposed project and criteria used to justify the award, the conference's compromise on responses to the controversy (and to the Senate vote to instruct conferees to accept the first clause of the Helms amendment) are assembled in Amendment No. 153 of the conference report. The specific involvement of NEH is restricted to section A, a prohibition on the support for obscenity (from Helms):

A) "None of the funds authorized to be appropriated for the National Endowment for the Arts or the National Endowment for the Humanities may be used to promote, disseminate, or produce materials which in the judgement of the National Endowment for the Arts or the National Endowment for the Humanities may be considered obscene, including but not limited to depictions of sadomasochism, homo-eroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political or scientific value.

The second section (B) of the Amendment is a "Sense of Congress" on the issues raised by the controversial NEA grants. It provides guidance for an independent commission to look into NEA's grant making process and to determine if there should be new standards for selecting awardees. Section (C) Provides necessary information for the appointment and operation of the commission.

The impact of the anti-obscenity clause on NEH's application and review process is unclear. Even on a casual reading, the ambiguities in language and potential for confusion appear great. Likewise, the affect of the Commission on NEA -- if it comes up with substantive suggestions for changes in the grant review process at NEA, the likelihood is that the same changes may also apply to NEH. The text of Amendment No.153 as it appeared on pages H 6407-6408 of the Congressional Record (but enlarged by means of the copier) are attached to provide NHA members with a fuller understanding of the issue as somewhat uncomfortably resolved by the conferees.

NATIONAL ENDOWMENT FOR THE HUMANITIES BUDGET SUMMARY
(in thousands)

	FY-1989 Enacted	President & Senate*	House Chge from Pres	FY-1990 Conference	Chge FY-90 to FY-89
EDUCATIONAL PROGRAMS	\$16,150	\$16,200	--	16,200	+50
FELLOWSHIPS & SEMINARS	15,560	15,400	+160	15,560	--
GENERAL PROGRAMS	22,840	23,180	+220	23,400	+560
o Media	(9,400)	(9,180)	(+220)	(9,400)	(-)
o Museums & Historic Orgs	(8,640)	(8,900)	(-)	(8,900)	(+260)
o Public	(2,000)	(2,300)	(-)	(2,300)	(+300)
o Libraries & Archives	(2,800)	(2,800)	(-)	(2,800)	(-)
RESEARCH PROGRAMS	16,400	17,000	--	17,000	+600
STATE PROGRAMS	25,000	25,000	+1,000	26,000	+1,000
PRESERVATION	12,330*	13,500	+6,400	17,700	+5,370
<u>Total Definite Funds</u>	<u>108,450</u>	<u>110,220</u>	<u>+7,780</u>	<u>115,860</u>	<u>+7,410</u>
CHALLENGE	16,700	14,700	--	14,700	-2,000**
TREASURY	12,000	12,000	--	12,000	--
<u>Total Indefinite Funds</u>	<u>28,700</u>	<u>26,700</u>	<u>--</u>	<u>26,700</u>	<u>-2,000</u>
ADMINISTRATIVE	16,020	16,270	+300	16,570	+560
<u>Total NEH Funds</u>	<u>\$153,000</u>	<u>\$153,250</u>	<u>+\$8,080</u>	<u>\$159,130</u>	<u>+\$6,130</u>

*In July, the Senate accepted its Committee on Appropriations' recommendation and voted an NEH budget identical with the Presidents proposal for FY-90.

**The \$2 million decrease in Challenge Grant funds for FY-90 is the amount 'saved' through the 1988 decision to discontinue special grants to the New York Public Library.

OTHER SELECTED ARTS & HUMANITIES BUDGETS INCLUDED IN THE INTERIOR APPROPRIATIONS

	FY-1989 Enacted	President	FY-1990 House	Senate	Conference
National Endowment for the Arts	\$169,090	\$170,100	\$171,400	\$171,155	\$171,255
Institute of Museum Services	22,270	22,350	23,000	22,350	22,675
Smithsonian Institution	245,935	270,890	278,250	263,732	270,142
Woodrow Wilson International Center for Scholars	4,540	4,700	4,611	4,700	4,700
National Capitol Arts & Cultural Affairs Program	5,000	-0-	5,000	5,500	5,500

Conference Report on H.R. 2788, Department of Interior and Related Agencies Appropriations Act, 1990 - Congressional Record 10/2/89 from pages H 6407/08

TITLE III—GENERAL PROVISIONS

Amendment No. 153: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate with an amendment as follows:

In lieu of the matter proposed by said amendment, insert the following: *Provided, That—*

(A) None of the funds authorized to be appropriated for the National Endowment for the Arts or the National Endowment for the Humanities may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts or National Endowment for the Humanities may be considered obscene, including but not limited to, depictions of sadomasochism, homo-eroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political or scientific value.

(B) It is the Sense of the Congress:

(1) That under the present procedures employed for awarding National Endowment for the Arts grants, although the National Endowment for the Arts has had an excellent record over the years, it is possible for projects to be funded without adequate review of the artistic content or value of the work.

(2) That recently works have been funded which are without artistic value but which are criticized as pornographic and shocking by any standards.

(3) That censorship inhibits and stultifies the full expression of art.

(4) That free inquiry and expression is reaffirmed. Therefore, be it resolved:

(a) That all artistic works do not have artistic or humanistic excellence and an application can include works that possess both non-excellent and excellent portions.

(b) That the Chairman of the National Endowment for the Arts has the responsibility to determine whether such an application should be funded.

(c) That the National Endowment for the Arts must find a better method to seek out those works that have artistic excellence and to exclude those works which are without any redeeming literary, scholarly, cultural or artistic value.

(d) That a commission be established to review the National Endowment for the Arts' grant making procedures, including those of its panel system, to determine whether there should be standards for grant making other than "substantial artistic and cultural significance, giving emphasis to American creativity and cultural diversity and the maintenance and encouragement of professional excellence" (20 U.S.C. 954(c)(1)) and if so, then what other standards. The criteria to be considered by the commission shall include but not be limited to possible standards where (a) applying contemporary community standards would find that the work taken as a whole appeals to a prurient interest; (b) the work depicts or describes in a patently offensive way, sexual conduct; and (c) the work, taken as a whole, lacks serious artistic and cultural value.

(c) (1) There is hereby established a temporary Independent Commission for the purpose of:

(a) reviewing the National Endowment for the Arts' grant making procedures, including those of its panel system; and

(b) considering whether the standard for publicly funded art should be different than the standard for privately funded art;

(2) The Commission shall be composed of twelve members as follows:

(a) four members appointed by the President;

(b) four members appointed by the President upon the recommendation of the Speaker of the House of Representatives in consultation with the minority leader of the House of Representatives;

(c) four members appointed by the President upon the recommendation of the President pro tempore of the Senate in consultation with the minority leader of the Senate;

(d) the chairman shall be designated by vote of the Commission members; and

(e) a quorum for the purposes of conducting meetings shall be seven.

(3) Members of the Commission shall serve without pay. While away from their homes or regular places of business in the performance of services for the Commission, members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in Government service are allowed expenses under 5 U.S.C. 5703.

(4) The Commission may, for the purpose of carrying out its duties, hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Commission considers appropriate.

Conference Report on H.R. 2788, Department of Interior and Related Agencies Appropriations Act, 1990 - Congressional Record 10/2/89 from page H 6408

(5) The Commission shall issue a report to the Speaker of the House of Representatives and the President of the Senate no later than 180 days after the date of enactment of this Act.

(6) The Commission shall expire on September 30, 1990.

(7) Expenses of the Commission not to exceed \$250,000, including administrative support, shall be furnished by the National Endowment for the Arts

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

The managers have agreed to language which reaffirms the declaration of freedom of expression for American artists, writers, composers, dramatists and all practitioners of the arts which was contained in the Senate report when the National Endowments for the Arts and Humanities were created in 1965.

The managers agree that the House and Senate have no wish to nor do they intend by expressing their views herein to censor NEA or to impose their views on NEA.

The managers agree that NEA erred in approving the grants for the exhibiting publicly of certain controversial photographs by Robert Mapplethorpe and by granting a fellowship for Andres Serrano, whose subsequent work included a photograph of a crucifix in a jar of urine.

The managers agree that such grants do not come within the requirement of the NEA statute that "only applications and projects be funded that in the context in which they are presented, in the experts' view, foster excellence, are reflective of exceptional talent, and have significant literary, scholarly, cultural or artistic merit." (20 U.S.C. 959)

The managers are of the opinion that it is the sense of the Congress that the procedures of NEA and its panels system can be and should be improved to assure that the Chairman and Council of NEA will be able to carry out their statutory responsibility of reviewing all grants.

The managers agree that a commission of qualified persons should be appointed to review procedures of NEA and its panels looking to their improvement for grant-making.