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PORNO AMENDMENT

(f) Where a federal court determines that a person is guilty of violating a law prohibiting the dissemination of pornographic materials [that are legally obscene] (and that determination has become final) and the creation or production of such materials is or was funded under the Act, the Department of Justice [Chairperson of an Endowment] shall seek through all available legal means to recoup grant monies furnished under this Act to support the creation or production of such materials.

DISCUSSION OF THE LANGUAGE

Any amendment "punishing" artists receiving assistance from the Endowments will most likely be perceived by the arts community as an infringement on freedom of artistic expression. Thus, the proposed "porno" amendment (above) if adopted may have a chilling effect on artists applying for and receiving grants from the Endowment notwithstanding the fact that the actual numbers of persons that will be asked to repay funds will be miniscule (close to zero).

Set out below are the reasons why few if any persons will be asked to return money.

1. The proposed amendment requires that a federal court finds a person guilty of violating a criminal law. The overwhelming majority of criminal obscenity cases are tried in state and local and not federal courts. The number of obscenity cases in federal court was described to me by a former U.S. Attorney (who is presently a leading expert in constitutional law and a Dean at the Georgetown Law School) as "miniscule".

2. Under the proposal, the ability to recoup funds is triggered when the "determination has become final". The inclusion of this phrase means that nothing can happen until all appeals have been exhausted.

2. The focus of the provision is on the dissemination of "pornographic" material. Legally, the courts have held that "child pornography" and "pornography" that is legally obscene can be considered crimes but that "pornography" that is not obscene is not a crime.

Thus, the decision whether or not to include the phrase in the brackets ("that are legally obscene") is not legally
significant. By not including the phrase in the brackets, members like Delay and Armey might think that the provision is broader (and therefore more acceptable) than it really is. Thus, the decision whether to include the phrase "and is legally obscene" is more a political call than a legal question.

3. The amendment places the responsibility for prosecuting the criminal conduct on the U.S. Attorney and recouping funds on the Department of Justice. Placing the responsibility in the statute on the Department of Justice should be looked at positively by Delay and Company who obviously likes the folks who are in the Department. The substitution of the Department of Justice for the Chairperson of the Endowment (which is in brackets in the proposal) is of minimal import since recoupment of funds by an executive agency is routinely handled by the Department of Justice anyway.