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Reauthorization: S. 2724 (1990): Report 17

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Preference 1

The version first suggested:

If a court renders a final decision, after appeals, that a work funded by the National Endowment for the Arts is obscene, the Chairperson of the Endowment shall, after reasonable notice and opportunity for hearing, and upon a determination that the grant recipient knowingly disseminated or produced obscene materials that were funded by the proceeds of an Arts Endowment grant, declare that no further grants shall be made to such recipient repays or arranges the repayment, within one year of final appeal, all or a portion of the Federal funds that were so used.

Preference 2

The version agreed upon:

If a court renders a final decision, after appeals, that a work funded by the National Endowment for the Arts is obscene, the Chairperson of the Endowment shall, after reasonable notice and opportunity for hearing, declare that no further grants shall be made to such recipient until the recipient repays or arranges the repayment, within one year of final appeal, all or a portion of the Federal funds received.

The effect of this prohibition would be to put the determination of obscenity in the courts, and not with the Endowment. This accomplishes two things: First, it ensures the application of community standards; and, second, it prevents any problem of prior restraint because the determination is being made after the work has been produced. It also ensures that the appropriate due process safeguards are met. Practically speaking, a community would have to bring the matter to the attention of the courts (most likely through its civic leaders). The court would then consider the matter and render a legal and factual decision regarding whether the work was considered obscene. Once a court decides something is obscene then the Endowment would begin administrative hearing proceedings to recoup the money.

The provision for notice and a hearing after there has been a judicial determination of obscenity is administrative in nature. The hearing is a procedural step necessary to insure that a

factual determination is made regarding the amount of federal money expended to support obscene work. In fact, there may be instances where a court finds that a particular work is obscene without determining whether or not any federal dollars were used to support the work. The factual finding of how much, if any, federal dollars were used to support obscene material would not ordinarily be made by the court of law when it is considering the obscenity issue.

Once the Endowment has made its determination of how many federal dollars were expended to support obscene work, it would refer the matter to the Justice Department for the collection of the funds. The Endowment has, from time to time, determined that grant funds were expended for purposes other than what was stated in the application and has asked for reimbursement through the Justice Department. Accordingly, this collection procedure is already established.