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Reauthorization: Williams/Coleman Compromise (October 27, 1990): Memorandum 02

James F. Fitzpatrick

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MEMORANDUM

TO: Sandy Crary and Kathy Kruse
FROM: James F. Fitzpatrick

I wanted to bring to your attention one provision in the Williams/Coleman House compromise that I believe should be a particular target at conference. This is the first provision of Section 103(b), Artistic Excellence and Obscene Matter. That section says that the Chairperson shall establish regulations and procedures to "ensure" that --

(1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public. . . ."

If this provision is, in fact, to have any meaning, it could become a separate funding standard requiring that the Chairman, who now will be making the grants, is in a position to "ensure" to the Congress and others that a particular grant meets the standards of decency and respect for American values.

Such a standard clearly would be unconstitutional -- for all the reasons of which you are well aware that
make questions of indecency, denigration, blasphemy, etc. etc., unconstitutional.

I don't believe that there is going to be any chance at all to do anything about this provision on the House floor. Thus, the only hope is to eliminate it at conference. I have told my colleagues in the arts community that this is the most important target from a civil liberties point of view for the conference, although there are other issues like state funding and overly-restrictive application procedures which are also of concern.

For your information I am enclosing a short memorandum that details the flaws in this new funding provision.

The response might be that this language is merely precatory and has no real effect. If that is in fact the case, then better to strike it. If it does have meaning as a funding standard, then it is unconstitutional and likewise should be stricken.

Call if you have any questions.
SUMMARY: CONSTITUTIONAL ISSUES RAISED IN SECTION 103(a) OF THE WILLIAMS/COLEMAN COMPROMISE VERSION OF H.R. 4825

Section 103(a) creates two new de facto funding standards, requiring NEA grantmaking regulations and procedures to "take[e] into consideration":
- "general standards of decency," and
- "respect for the diverse beliefs and values of the American public."

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.