1997

Cultural War : the defeat of the Helms amendment

Joan K. Selna
San Jose State University

Follow this and additional works at: https://scholarworks.sjsu.edu/etd_theses

Recommended Citation

Selna, Joan K., "Cultural War : the defeat of the Helms amendment" (1997). *Master's Theses*. 1597.
DOI: <https://doi.org/10.31979/etd.29jc-sxyc>
https://scholarworks.sjsu.edu/etd_theses/1597

This Thesis is brought to you for free and open access by the Master's Theses and Graduate Research at SJSU ScholarWorks. It has been accepted for inclusion in Master's Theses by an authorized administrator of SJSU ScholarWorks. For more information, please contact scholarworks@sjsu.edu.

INFORMATION TO USERS

This manuscript has been reproduced from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps. Each original is also photographed in one exposure and is included in reduced form at the back of the book.

Photographs included in the original manuscript have been reproduced xerographically in this copy. Higher quality 6" x 9" black and white photographic prints are available for any photographs or illustrations appearing in this copy for an additional charge. Contact UMI directly to order.

UMI

A Bell & Howell Information Company
300 North Zeeb Road, Ann Arbor MI 48106-1346 USA
313/761-4700 800/521-0600

CULTURAL WAR: THE DEFEAT OF THE HELMS AMENDMENT

A Thesis

Presented to

The Faculty of the Department of Art History

San Jose State University

In Partial Fulfillment

of the Requirements for the Degree

Master of Arts

by

Joan K. Selna

December 1997

UMI Number: 1388215

**Copyright 1997 by
Selna, Joan Karen**

All rights reserved.

**UMI Microform 1388215
Copyright 1998, by UMI Company. All rights reserved.**

**This microform edition is protected against unauthorized
copying under Title 17, United States Code.**

UMI
**300 North Zeeb Road
Ann Arbor, MI 48103**

© 1997

Joan K. Selna

ALL RIGHTS RESERVED

APPROVED FOR THE DEPARTMENT OF ART HISTORY

A stylized, handwritten signature in black ink, appearing to read 'B. Radde', written over a horizontal line.

Dr. Bruce Radde

A handwritten signature in black ink, appearing to read 'Anne Simonson', written over a horizontal line.

Dr. Anne Simonson

A handwritten signature in black ink, appearing to read 'J. Thompson', written over a horizontal line.

Dr. Jan Thompson

APPROVED FOR THE UNIVERSITY

A handwritten signature in black ink, appearing to read 'William Fisk', written over a horizontal line.

ABSTRACT

CULTURAL WAR: THE DEFEAT OF THE HELMS AMENDMENT

by Joan K. Selna

Since 1989, a cultural war has been fought in America concerning public subsidy of art. The victim of this war is the grand experiment of government patronage of art of thirty-two years, the National Endowment for the Arts (NEA). On October 28, 1989, Congress enacted the Helms amendment to define obscene art and restrict the granting practices of the NEA. A lawsuit initiated by the Newport Harbor Art Museum (NHAM) defeated the amendment.

This thesis traces the history of public subsidy of art in the United States, defines the controversy that surrounds public subsidy, relates the events that led to the implementation of the Helm legislation and discusses NHAM's legal challenge. The conclusion addresses the ramifications of the amendment's defeat, the adjustments the NEA has implemented and the future of the agency.

Table of Contents

Introduction.....	1
Chapter 1: The History of the Subsidized Muse	4
Chapter 2: Devil's Advocate.....	15
Chapter 3: Crisis	27
Chapter 4: Turmoil in Newport Beach.....	39
Chapter 5: Board Decision.....	51
Chapter 6: Litigation.....	61
Chapter 7: Aftermath	71
Appendix A: Summary of Appropriated Funds 1966-1997	80
Appendix B: NEA Chairmen	82
Appendix C: NEA Organization Chart of 1992.....	83
Appendix D: Summary of NEA Grants to NHAM 1972-1990	84
Appendix E: Summary of 1988 Grants to NHAM.....	87
Appendix F: Resume of Thomas H. Nielsen	88
Appendix G: Grant Application Questions.....	89
Appendix H: Evolution of NHAM Since Overturning the Helms Amendment.....	91
Bibliography	97

Introduction

Since 1989, a cultural war has been fought in America concerning public subsidy of art. The victim of this war is the grand experiment of government patronage of art of thirty-two years, the National Endowment for the Arts (NEA). Although the NEA administers funds to programs in dance, music, theater, literature and education, it is in the field of the visual arts where controversy arose. Ironically, President Nixon boosted the budget of the NEA during the seventies because he felt that art could unite a country that was divided by the Vietnam War. Today art has torn our country apart into two P.C. groups--patriotic correctness on the far right and political correctness on the far left. There seems to be no middle ground. It is a paradox that personal freedom which forms the basic tenet of the American system of government and translates to freedom of expression, the basic tenet of the artist, initiated the downfall of government sponsorship of art.

In the ebb and flow of the cultural war, legislation was enacted to combat obscenity and restrict the granting practices of the NEA. This thesis relates the story of the defeat of that legislation, the Helms amendment. One lone museum, the Newport Harbor Art Museum (NHAM), through a lawsuit challenged the amendment. As a direct result of this litigation, the NEA's so called "loyalty oath," or "obscenity pledge," instituted by Sen. Jesse Helms (R-North Carolina), was ruled unconstitutional.

On October 28, 1989, Congress passed Public Law No. 101-121, 103 State. 701, the Department of the Interior and Related Agencies Appropriations Act, 1990. Inasmuch as its title did not suggest a relationship with the arts, the law contained the following provision known as the Helms amendment which stated:

None of the funds authorized to be appropriated . . . may be used to promote disseminate, or produce materials which in the judgment of the NEA . . . may be considered obscene, including but not limited to depictions of sado-masochism, homoeroticism, 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.¹

Although the Helms law was in effect for only one year, from October 1, 1989 to September 30, 1990, the legislation impacted the arts community. The subsequent defeat of the Helms legislation was hailed as a victory for arts subsidy advocates. However, the obscenity issue brought the NEA to the public's attention and scrutiny, and Congress reopened the old question about the role of government subsidy of the arts. As the cultural war smoldered, the NEA's funding for 1996 and 1997 was reduced by 40% and the agency faced possible elimination by 1998. In 1995, it appeared that the NEA was doomed for extinction and that the Helms defeat was a last hurrah for the agency. But recent events indicate that the NEA may not be terminated after all.

In order to understand fully the enactment of the Helms amendment and its defeat by legal challenge, this thesis will trace briefly the history of public subsidy in the United States, define the controversy that surrounds public subsidy, relate the events that led to the implementation of the Helms legislation and discuss NHAM's legal challenge. Insight will be provided into the

¹ Richard Bolton, ed., *Culture Wars: Documents from the Recent Controversies in the Arts* (New York: New Press, 1992) 121.

organization and grant application process of the NEA, the operations of a museum, as well as the legal system. The conclusion will address the ramifications of the amendment's defeat, the adjustments the NEA has implemented and the future of the agency.

Unlike many art historical theses that clarify and analyze style, technique, provenance, patronage and iconography, this thesis is interwoven with politics, public policy, economics and jurisprudence. On the other hand, it does bring forward time-honored questions posed by art history--what is art, what is appropriate subject matter for art, what is the public's relationship to art and whose patronage funds the arts?

Chapter 1: The History of the Subsidized Muse

Since it was not until 1965 that the federal government became a direct patron to art, public support of the arts is a relatively new concept in the United States as compared to Europe. A chronology of art funding in the United States begins with an excerpt from a letter John Adams wrote to his wife in 1780. "I must study politics and war, that my sons may have liberty to study mathematics and philosophy, geography, natural history and navigation, commerce and agriculture, in order to give their children a right to study painting, poetry, music and architecture."¹ In other words, for the arts to flourish there must be freedom first, followed by economic security. There is no mention of the government's need to fund art. The fledgling democracy considered the arts elitist, the pastime of an aristocracy, not deserving of direct public support. Without a monarchy, papacy and aristocracy, who would patronize the arts? Furthermore, the arts in America were ruled by the Puritan concepts of utility and practicality. Alexis de Tocqueville, in *Democracy in America*, wrote in 1846, "Democratic nations will habitually prefer the useful to the beautiful and they will require that the useful be beautiful."²

¹ National Endowment for the Arts, *1965-85 A Brief Chronology of Federal Involvement in the Arts*.

² Robert Hughes, "Pulling the Fuse on Culture," *Time*, 7 August 1995, 61.

Before the 1930s, the federal government had little concern for the arts. The first known federal commission was a statue of Minerva placed above the House Speaker's chair in Philadelphia in 1790. In 1804, the Pennsylvania Academy was formed by a group of artists and their friends to assist in the training of painters and sculptors. John Trumbull received a federal commission to paint four Revolutionary War scenes to hang in the Capital Rotunda in 1817. The Smithsonian was funded in 1846. President Buchanan appointed a National Arts Commission in 1859, which disbanded two years later. Utah was the first state to create an art council in 1899. By 1910, Congress established the National Commission on Fine Arts which functioned to suggest designs and decorations for federal buildings. With the inception of federal taxation of income and estates in 1913, the arts received indirect government subsidy through the deductibility from taxable income and estates of contributions to nonprofit artistic organizations.

Federal involvement in art began in the thirties through New Deal agencies created to reduce the unemployment caused by the Depression. The Public Works of Art Project, a program of the Civil Works Administration (CWA), as part of the Federal Emergency Relief Administration (FERA), was organized in November 1933 as a selective white-collar employment program for artists. A temporary Emergency Work Program established by FERA in 1934 employed about 1,000 people on arts-related projects and was administered by the states. In January 1935, Congress funded the Works Progress Administration (WPA) with an initial \$5 million appropriation. Within the WPA, cultural activities were administered under the Federal Project Number One.

Federal One met opposition and came under attack by the House Committee on Un-American Activities headed by chairman Martin Dies in August 1938. The Dies Committee exposed communists on Federal One's employment rolls. In early 1938, Congressmen John M. Coffee (D-Washington) and Claude Pepper (D-Florida) recommended a bill for the establishment of a permanent and independent Bureau of Fine Arts "to assume all function, powers and duties exercised by the WPA in the arts."³ The bill's inclusion of a controlling role for labor unions led to debate among artists and politicians, which fueled the Dies Committee to enact the Emergency Relief Act of 1939 that transferred Federal One programs to state control.

World War II reduced the unemployment rate and diverted attention from the Depression. Agencies within the WPA were gradually phased out and in 1943, all WPA activities were halted by President Roosevelt. Since the end of World War II, the arts have flourished in the United States in part the result of increases in private incomes and population, a substantial rise in educational levels and technological changes. There was only limited interest in federal support of the arts in the fifties. In 1951, President Truman requested a report on the state of the arts which was not submitted until 1953 during the Eisenhower administration. The report recommended increased support for the Smithsonian. In 1954, President Eisenhower initiated the Program for Cultural Presentation Abroad to sponsor tours of performing and creative artists and sports organizations. From 1956 to 1961, Congress appropriated \$16.2 million for this program. In 1955, Eisenhower called for the establishment of a Federal Advisory Commission on the Arts within the Department of Health, Education and Welfare,

³ Dick Netzer, *The Subsidized Muse* (Cambridge: Cambridge University Press, 1978) 57.

but Congress did not act. In 1958, Congress approved legislation to provide land for a National Cultural Center in Washington, D.C., which eventually became the Kennedy Center. However, the construction funds had to be raised by private sources. In 1964, Congress capitulated and authorized \$15 million for construction.

With America's emergence as a world power after World War II, President Kennedy sought to elevate the status of American culture. In 1961, Kennedy proposed the creation of a Federal Advisory Council on the Arts which was defeated by Congress. Kennedy appointed August Heckscher, director of the Twentieth Century Fund, as his consultant on the arts. Heckscher recommended the creation of an Advisory Arts Council to review federal policies and propose programs for the involvement of the artistic community in government activities. Heckscher went as far as to propose the establishment of a National Arts Foundation to offer grants-in-aid to organizations and state arts councils. Kennedy's comment, "Government can never take over the role of patronage and support filled by private individuals and groups in our society," suggested a limited role of government in arts subsidy.⁴ In June 1963, Kennedy issued an executive order forming an Advisory Council on the Arts, that never went into operation. After Kennedy's assassination, the Senate led by Claiborne Pell (R-Rhode Island) and Jacob Javits (D-New York) approved a bill establishing the National Arts Foundation which would award matching grants to states and nonprofit professional arts organizations with appropriations of \$5 million for its first year and \$10 million for each succeeding year. The bill never reached the floor of the House as opponents feared federal support would lead to government

⁴ Netzer, 58.

control of the arts. In mid-1964, Congress revised the bill and established a National Council on the Arts to be composed of a chairman and twenty-four private citizens appointed by the President. This council acted as an advisory body in the Executive Office and did not have funds for grants-in-aid.

In 1965, the Johnson administration introduced, as part of the Great Society legislation, a bill offering federal grant support to cultural institutions. The model for this legislation was the New York State Art Council founded in 1960 under Governor Nelson Rockefeller. Perhaps Johnson wanted to prove himself a cultivated successor to Kennedy and equal of Rockefeller, perennial seeker of the Oval Office and Johnson rival.⁵ The bill met opposition from conservative Republicans and Southern Democrats as well as from artistic circles. Artist Larry Rivers compared the government's role in art to "a gorilla threading a needle. It is at first cute, then clumsy, and most of all impossible."⁶ The president of the American Artists Professional League told a Congressional hearing that he feared government involvement would result in artistic sterility. Nevertheless, the bill continued through Congress with strong support from Senators Pell and Javits and Congressman Brandemas. On September 29, 1965, President Johnson signed the bill, Public Law 89-209, and stated at the Rose Garden ceremony:

Art is a nation's most precious heritage. For it is in our works of art that we reveal to ourselves and to others the inner vision which guides us as a nation. And where there is no vision, the people perish. We in America have not always been kind to the artists and the scholars who are the creators and keepers of our vision. Somehow, the scientists always seem to get the penthouse, while the arts and humanities get the basement. . . . This bill . . . bring[s]

⁵ Rockefeller was a cultured private patron of the arts and his mother was one of the founders of New York's Modern Museum of Art.

⁶ Netzer, 59.

active support to this great national asset, to make fresher the winds of art in this great land of ours.⁷

Thus was born the partnership of government and art, the National Foundation on the Arts and Humanities, which is composed of three institutions--the National Endowment for the Arts, the National Endowment for the Humanities and the Federal Council on the Arts and Humanities. The humanities include the study of both modern and classical language, linguistics, literature, history, jurisprudence, philosophy and archeology, while the arts are defined as music, dance, drama, folk art, creative writing, architecture and allied fields, painting, sculpture, photography, graphic and craft arts, industrial design, costume and fashion design, motion pictures, television, radio, and tape and sound recording.⁸ Congress, weary of potential censorship problems, inserted language in the bill stating that "no department, agency officer, or employee of the United States shall exercise any direction, supervision, or control over the policy determination, personnel, or curriculum or the administration or operation of any school or other non-Federal agency, institution, organization or association."⁹ Grants to nonprofit institutions were to be in the form of matching grants through a Treasury Fund. Roger L. Stevens became the first NEA chairman and oversaw twelve employees and a budget of \$2.5 million (see Appendices A and B).

Both Endowments (Arts and Humanities) were granted a three year authorization in 1965. An examination of the budgeting patterns of the NEA, that range from \$2.5 million in 1966 to a high of \$180 million in 1990, and the reauthorization periods, that vary from two to five years, provides an enlightening

⁷ Joseph Wesley Zeigler, *Arts in Crisis* (Chicago: Chicago Review Press, Inc., 1994) 17.

⁸ Nixon added comparative religion and ethics to the humanities classifications in 1970.

⁹ Netzer, 60.

perspective upon the character of federal arts policy and the politicalization of art.¹⁰ The 1968 reauthorization modestly increased the ceilings on spending despite the fact that Republicans in the House, among them Gerald Ford and George Bush, voted 2-1 against the reauthorization. Nixon in 1970 requested a new authorization statute, with increased ceilings for 1971 through 1973. He wanted to demonstrate that Republicans could have capable leadership in the arts and did not want to use art to fan the polarity produced by the Vietnam War. Art was to be used to bring the country together. The reauthorization of 1973 provided further large increases. When asked about the arts in 1976, Jimmy Carter said, "I would like to see government aid to the arts decentralized."¹¹ Assistance by the NEA began to reach more Americans across the country. In his May 13, 1979 article for the *New York Times*, John Friedman wrote,

There is now a discernible and growing trend toward the politically popular policy of assisting newer, more regionally dispersed "populist" groups rather than traditional "elitist" cultural institutions. . . .

The agency's approach to the dilemma of geographic access versus quality at the arts agency was succinctly explained by P. David Searles [NEA deputy chairman for policy and planning]: "There is a clear understanding at the endowment that we do consider geography in making grants. If there are two institutions of the same quality and one exists in an area of the country where there is considerable arts activity and the other exists in an area where there is less, the grant will go where there isn't as much activity."¹²

By 1980, the fifteenth anniversary of its founding, the NEA had spent \$1 billion on 40,000 grants. The election as President of the actor, Ronald Reagan, brought continued hope to arts advocates. He issued the statement:

¹⁰ Margaret Jane Wyszomirski, ed, *Congress and the Arts: A Precarious Alliance?* (New York: American Council for the Arts Books, 1988) 11.

¹¹ Zeigler, 37.

¹² John Friedman, "A Popular Shift in Federal Cultural Support," *New York Times*, 13 May 1979, Sec. III, 1 and 35.

I will end as soon as possible the politicalization of the National Council on the Arts so conspicuous during the Carter-Mondale administration. . . . As to what levels of funding I would recommend for the future, I cannot say. I would hope that we could see a steady increase. . . . Artistic creativity cannot be bought but it can be encouraged and should be without domination by any governmental body.¹³

Conversely, within two weeks of his inauguration the OMB (Office of the Management of the Budget) proposed draconian cuts to the agency's budget in order to trim appropriations by 50% to \$88 million in the fiscal year 1982. The Reagan administration felt that art funding should come primarily from the private sector not the government. The complaints lodged by the arts community forced Reagan to rescind the recommendation.

While the NEA budget remained stable throughout the eighties, the nineties would find drastic budgetary change and political turmoil.¹⁴ According to Alice Goldfarb Marquis in *Art Lessons*:

As the Reagan era ended in the late 1980's, a turning point had been passed. The federal effort to support the arts had calcified into a rigid bureaucracy dispensing mostly entitlements, its dwindling funds divided and subdivided among an ever-increasing tribe of claimants. . . . The wider public remained disinterested in partaking of the arts. Stung by the arrogance and elitism that artists and their patrons often conveyed, many ordinary people dared to voice their displeasure. Here was a recipe for disaster.¹⁵

The objectives of the NEA are to make art more accessible to Americans, preserve cultural heritage, strengthen cultural organizations and encourage creativity of talented individuals. Grants finance only specific programs, projects

¹³ Zeigler, 45-6.

¹⁴ If inflation is taken into consideration, it would appear that the NEA's budget really was cut during the eighties. Average annual growth under the chairmanship of George Stevens was 57%; it greatly increased by 161% under Nancy Hanks; while it declined under Biddle and Hodsoll with rates of 4% and 2%, less than the rates of inflation.

¹⁵ Alice Goldfarb Marquis, *Art Lessons* (New York: Basic Books, 1995) 203.

or activities. Grants do not provide funds to nonprofit organizations to cover deficits, capital improvements and construction, general support, purchase of equipment and property.¹⁶

The Endowment operates twelve programs: Architecture, Dance, Education, Expansion Arts, Literature, Museums, Music, Public Media, Special Projects, Theater, Visual Arts and Federal State Partnership.¹⁷ Museums did not participate in the NEA until the period from 1971 to 1974. Their declining values of endowments, inflation and difficulties in private fund raising led to their inclusion. By 1974, the Museum Program could claim the second largest allocation of NEA funds, 12%. The grants provided by these twelve programs go to individuals and arts organizations, sponsor art education programs and assist state, local and community groups technically and financially.

As agencies of the Department of Interior, the Humanities Endowment (NEH) and Arts Endowment (NEA) each has a National Council which is a policy board consisting of a chairman and twenty-six private citizens appointed by the President. The Federal Council on the Arts and Humanities, composed of twelve federal agency administrators, two of which are the NEA and NEH chairmen, coordinates the foundation's activities with other federal programs. The NEA is headed by a chairman appointed by the President with the advice and consent of the Senate for a four year term. By 1992, the agency had 275 employees (see Appendix C). The NEA's National Council on the Arts advises the Endowment on programs, policies and procedures.¹⁸ It reviews and makes recommendations on

¹⁶ Conservation of collections in museums often does involve some capital improvements.

¹⁷ This was the organization of the NEA in 1989 at the time of the inception of the cultural war. Recent reduction of the NEA's budget has resulted in a reorganization which will be discussed in a subsequent chapter.

¹⁸ The original council appointed in 1965 was

applications for grants and is composed of the chairman and twenty-six presidentially appointed citizens for six year terms. One-third of the council rotates every two years. Advisory panels together with the council provide a system of peer review. Approximately 1,200 private citizens serve on panels and evaluate 18,000 applications yearly. A panel member serves a one year term with reappointment possible for a maximum of three years. The grant application process usually takes six months. Each NEA program has a staff and advisory panel of artistic professionals who first screen the applications. The National Council on the Arts reviews the recommendations of the NEA's staff and panels. The chairman of the council processes smaller grants. Grants to individual artists are highly competitive while a higher proportion of arts organizations receive grants.

Every two, three or five years the NEA must justify its existence in the reauthorization process by passing through an obstacle course of hearings before a subcommittee, then a full committee and a final Congressional vote.

Marquis assesses the NEA's record:

In its first 20 years, the endowment underwent six reauthorization hearings that lasted a total of 222 days. Each time an average of 17 witnesses testified creating . . . some 7,800 acid free pages. During these two decades, when the endowment was relatively uncontroversial, reauthorization was valid for as long as five years.

a highly visible conclave of America's arts aristocracy, this council had no peer. It included the violinist Isaac Stern, the Museum of Modern Art director Rene d'Hamoncourt, the film director George Stevens, the architects William Pereira and Minoru Yamasaki, the choreographer Agnes De Mille, the conductor Leonard Bernstein, the newscaster David Brinkley, the composer Richard Rodgers, the actor Gregory Peck, the author Ralph Ellison, and the sculptor David Smith. Though many gifted individuals would serve on the council in the future, never again would such a distinguished body of talent gather around the NEA's grant-giving table.

Marquis, 64.

Since then, two-year authorizations have kept the endowment on an exceedingly short leash, leaving the agency unable to plan for the future.¹⁹

¹⁹ Marquis, 220.

Chapter 2: Devil's Advocate

The necessity of the NEA's existence has been debated since its inception. Arguments favoring art subsidy state that the NEA increases opportunities for an appreciation and enjoyment of the arts; sustains and develops existing independent institutions of the arts; aids and encourages individual performers and creative artists; increases the importance and awareness of the arts and increases the participation of the people in local artistic programs. All these contribute to an enriched cultural legacy for the country.

The case against arts subsidy rests on the following propositions:

1. Public subsidy lacks constitutional authority.
2. Public subsidy endangers the autonomy of the arts creating dependence of the artists on the government and making the artist vulnerable to governmental control.
3. Public subsidy is a transfer of income from the poor to high-income and educated classes and from one geographical region to another.
4. The free market should determine the cultural institution's existence.¹

Robert Hughes, art critic for *Time*, relates the connection of the NEA to economics. Hughes says that the U.S. government in 1994 spent less than five-hundredths of 1% of its national budget on all forms of cultural subsidy. Yet this

¹ Arthur Schlesinger, Jr., "America, the Arts, and the Future: The First Nancy Hanks Lecture on the Arts and Public Policy," In *The Future of the Arts: Public Policy and Arts Research*, eds. David B. Pankratz and Valerie B. Morris (New York: Praeger, 1990) 4.

modest sum exerts "large leverage on private and corporate patronage through 'matching grants' (to qualify, the recipient must raise as much as \$3 from private sources for every federal dollar) . . ." ² Hughes argues that culture is good business. ³ "Not-for-profit arts support 1.3 million jobs and yield \$37 billion a year in economic activity and return \$3.4 billion a year to the treasury through tax--some 20 times the budget for the NEA." ⁴ Scores of cultural programs "would not have had private underwriting without the spur of public money. Corporations need reassurance and are reluctant to disgorge without it." ⁵ France sets aside 1% of its state budget for culture. ⁶ Should the U.S. be reduced to countries like Haiti or Zaire where virtually no money is provided for culture? Why is there a

² Hughes, 64.

³ Two economists, Gregory Wassall of Northeastern University and John Sullivan of the University of Hartford, studied the economic activity of 787 nonprofit arts organizations in Connecticut from 1987-1988.

their study produced some remarkable findings. It has virtually written a new chapter in the meaning of arts investment. . . .

Employment in the organizations studied rose nearly 45 percent, to more than 12,300 in less than a decade. Spending by those organizations increased 128 percent, to \$188 million. And administrations grew by 53 percent, to more than \$8.5 million. Spending by the audiences alone generated \$165 million. When institutional and audience activity are combined, the result for 1987 was \$353 million.

Gary M. Young, "As the Arts Contribute More to the Economy, They Must Be Protected." *New York Times*, 28 May 1989, Sec. XXIII, 28

This study shows that the arts are indeed an industry and are making an increasingly larger and direct contribution to the state's economy.

⁴ Hughes, 64.

⁵ Hughes, 64.

⁶ The French government is supportive of art, but in France corporate support is virtually non-existent. What would the situation be in the U.S. without corporate support? The city of Berlin in fiscal year 1995 spent 2.6% of its total municipal budget (\$800 million) on art and culture, which approximated to \$225 for each of its 3.5 million residents. In comparison, the city of San Francisco received NEA grants in 1994 totaling \$3,844,750, amounting to \$5.50 per resident. Kenneth Baker, "The Unkindest Cuts of All. Who Gets NEA Grants in San Francisco?" *San Francisco Chronicle*, 27 August 1995, A1 and A10.

reluctance to spend money in America? Hughes believes it is because in America the arts have always had to prove how moral they are. In addition, Americans have a long history of despising taxation. Hughes concludes that if the conservative agenda to cut NEA funding proceeds, the cultural life in America will be severely impaired and thus contribute to the so called "dumbing down" of the country.

On the other hand, Jonathan Yardley, literary critic of the *Washington Post* offers a different view of subsidy. Yardley acknowledges that the issue of government subsidy has been dragged into partisan politics. There needs to be a discussion about the effects of the relationship between government and the arts. Has this been a healthy and creative relationship and have the arts in the United States flourished during three decades of government subsidy? Yardley bases the rest of his argument on a quotation by Kingsley Amis, the British novelist.

The way an artist is paid profoundly affects his product. At one extreme, he sells what he has already made. At the other, he is paid in full before he starts making anything. An artist in that position is relieved of the pressure to please the public, the audience, and is free to court the approval of an inner circle of colleagues, critics and experts--to be self-indulgent. My case is, the effect of public subsidy has been to keep art turned away from the public, instead of bringing it to the public. It has damaged the very people i was designed to benefit--not the least, the artist himself, or herself."⁷

Although subsidy reaches back to the pharaohs, Caesars and Renaissance princes, Yardley adds that it

was not the same as subsidy by a democratically elected government, and it was not a one-way street. Contrary to what today's arts advocates believe, patronage was not extended

⁷ Jonathan Yardley, "When Art Goes on the Dole," *Civilisation*, 2, no. 5, (September/October 1995): 32.

unconditionally, as they expect the government of the United States to do. The Caesars and the princes expected to reap their own rewards from the labors of the artists they supported . . .⁸

The life of the WPA was brief as it was not intended to be a permanent institution but bridged the Depression to a revived economy. Yardley concludes that apologists for arts subsidies like to compare the Medicis and the Sforzas through their patronage of Michelangelo and Leonardo with arts subsidy today. However, their attachment to notable artists was one way to achieve reflected glory and a way to have pleasure. Pleasure was the primary objective in the contract between patron and artist. Pleasure is the rich experience of opening one's mind and heart to things--words, pictures and sounds. It may or may not be original or inspiring or beautiful, but it reaches our innermost selves.

The NEA boasts of its role in art education and promotes many studies indicating that exposing children to the arts will enhance their future consumption and appreciation. Alice Marquis argues,

Little evidence supports this assumption: Schools expose children to all sorts of disciplines--mathematics, history, social studies, science--but few adults choose to pursue further knowledge in these fields. By contrast, Americans enthusiastically expend their money and leisure on interests they never learned in school: spectator sports, popular music, television, supermarket tabloids, shopping, religious activities, and socializing in bars.⁹

In its thirty year history, the NEA has saved and resurrected some worthwhile institutions. Marquis laments that the NEA "has also maintained some moribund carcasses on permanent life support. It has fostered an interest and appreciation of various arts in all the corners of this diverse nation, but its mindless litany that

⁸ Yardley, 32.

⁹ Marquis, 240.

'art is good, art is great' has not brought forth a better educated, more discriminating and more critical audience."¹⁰

The debate of subsidy of the arts should reach every citizen rather than be restricted to just journalists, sociologists, political scientists, arts managers, economists, attorneys, lobbyists and elected officials. Today, three words further define the controversy. Cost, bureaucracy and censorship are the issues. While this reduction seems rather simplistic, perhaps it is not, for each of these words carries a series of complex questions and problems that are most difficult to answer and resolve.

Recent polls indicate that the majority of Americans favor a balanced budget. Spending for entitlements, the right to guaranteed benefits under the federal government, gobbles federal revenue. For example, in 1992, 48.6% of federal spending, \$717 billion, paid for entitlements and it is estimated that in 1997 that amount will rise to \$868 billion or 51.8%. The pie has been halved and that leaves the remainder for defense, federal programs and the interest on the national debt. How does federal support of culture figure into this? For many it does not have a priority. In 1995, Congress slashed the NEA budget by 40% and proposed to phase out the agency in three years. Critics of the NEA insist that the arts will flower without the NEA, since the arts existed in this country with the absence of a federal agency for nearly 200 years. Inasmuch as the NEA's appropriation is a meager amount, the cuts have to begin somewhere. Is it the obligation of the government to fund art?

The NEA is anathema to libertarians and many conservatives and William Craig Rice predicts that the NEA "is also likely to lose key political

¹⁰ Marquis, 243.

support as President Clinton and other Democrats resolve to keep moving toward a balanced federal budget without compromising Medicare, Medicaid, education, or the environment."¹¹ If the demise of the NEA is a *fait accompli*, it does not mean that the loss of the agency's funding will sound a death knell for the arts in America.¹² Rice contends that new strategies will be adopted to vitalize American culture. He adds that there will be a period of sacrifice and uncertainty, but artists are very resilient and resourceful and will not disappear.¹³

As an agency of the federal government, the NEA is just another bureaucracy, one among an estimated three hundred federal programs, activities and services for the arts and humanities. Is a bureaucracy the most efficient way to provide the arts with public funds? Jennifer Dowley, Visual Arts Chair of the NEA, remarked that of the \$100 million that the NEA was appropriated for 1996, 20% of those funds were used for administrative costs--salaries, equipment, utilities, etc.¹⁴ A 1991 study tabulated the bureaucratic infrastructure's cost as high as 53%.¹⁵ Even with all the administrative expenditure, former NEA

¹¹ William Craig Rice, "I Hear America Singing," *Policy Review*, March/April 1997, 37.

¹² In a *Time/CNN* poll dated July 19-20, 1995, the question was asked, "Which of the proposals in Congress for funding the arts do you favor?" Thirty-seven percent favored cutting federal funding of the NEA 5% a year for the next five years; 30% favored continuing federal funding of the NEA at current levels; while 21% favored eliminating all federal funding of the NEA within two years. Hughes, 61.

¹³ Rice, 45.

¹⁴ Jennifer Dowley, 1997 interview by author, New York, New York, 14 February.

¹⁵ "Federal Funding of the Arts," *Congressional Digest*, 70, no. 1 (January 1991): 4, 6 and 10.

Money magazine ranked 25 major U.S. charities on the basis of how efficiently they spent public money. The American Red Cross ranked first spending 91.5% of public support on programs and Catholic Charities was second with 87.7%. The Metropolitan Museum's efficiency outshines the NEA with an efficiency rate of 76.8%. Ellen Stark, "Which Charities Merit Your Money," *Money*, November 1996, 101.

chairman, John Frohnmayer, complained in his book, *Leaving Town Alive: Confessions of an Arts Warrior*, that the NEA was hardly a cultural hub for the country.¹⁶ The offices, located in the Old Post Office Building, were messy and disorderly with underlit workspaces and shabby furniture. As late as 1992, there was not a computer system available to process the 18,000 grants the agency received yearly.

Problems that plague the agency are "its lack of specific goals, the overlap among programs, its profusion of grantees, and its high staff turnover . . ."¹⁷ Livingston Biddle complained that each program degenerated into a personal fiefdom and according to Marquis, "noted with dismay the 'class struggle' between the larger art groups, whose annual grants had become entitlements central to sustaining sharp budget growth, and small 'emerging groups' desperate for the pittance they needed to survive."¹⁸ The agency's organization, the National Council on the Arts, has an impossible task of scrutinizing thousands of grants approved by panels during its quarterly three-day meetings.¹⁹ The Council's members have been criticized by Marquis for having conflicts of interests: "In 1989, the media arts panel distributed grants totaling \$232,000 to

¹⁶ John Frohnmayer, *Leaving Town Alive: Confessions of an Arts Warrior* (New York: Houghton Mifflin, 1993) 60.

¹⁷ Marquis, 211.

¹⁸ Marquis, 211.

¹⁹ Leah Garchik, columnist for the *San Francisco Chronicle*, wrote of the applicant's frustration:

A local scholar/artist/writer/editor/fund-raiser--who wishes to remain anonymous but also wishes to say nuts to the NEA--notes that applications for NEA grants were due on April 30, [1997] with awards to be announced in almost a year, next March. It's not that the waiting is so hard. According to the guideline specification: "Reviewers generally spend no more than three to five minutes on the work sample(s) for each application."

Leah Garchik, "Personals," *San Francisco Chronicle*, 5 May 1997, E8.

organizations with which five of the six panelists were connected?"²⁰ Additional complaints by Marquis bemoan that older, more established institutions are favored over newer, experimental ones; urban centers receive more than rural ones; non-representational art is supported over representational and there are biases that promote western art over non-western and restrict feminist and homosexual subject matter. John Updike preferred patronage from "a host of anonymous citizens digging into their own pockets for the price of a book or a magazine than a small body of enlightened and responsible men administering public funds."²¹ Bureaucrats continue to cave to the demands of Congressmen who beseech the NEA to benefit their districts.²² In addition, there is rarely a follow-up by the NEA staff to determine if the finished product matches the intention of the grant application.

What remains for discussion is the issue of censorship which raises some serious questions. Is sponsorship possible without censorship? John Frohnmayer adds, "Are there circumstances in which censorship is justified? Do

²⁰ Marquis, 227.

²¹ Marquis, 243.

²² Even Jesse Helms, the noted combatant of the NEA, sent John Frohnmayer a letter dated November 30, 1989, reminding the chairman of a grant applied for by the Sawtooth Center of Visual Design in Winston-Salem, North Carolina. Since it was an important part of craft education in that area, would we please give its application every possible consideration. Although Helms had specifically commended the application of the Charlotte-Mecklenburg County Arts and Science Council, he had no interest in participating in any favorable publicity about the Arts Endowment, so when . . . [Frohnmayer] went to Charlotte in December to announce a \$1 million arts education grant to that council, he would have no part of it.

Frohnmayer, 92.

we need to protect the young and impressionable? If so, how? Should public art be acceptable to the majority? What about minority views? Is all art speech?"²³

There are those who believe that only art that lends beauty and grace to life deserves support. Consider the comments from a speech by this artist, Adolf Hitler:

It is not the function of art to wallow in dirt for dirt's sake, never its tasks to paint men only in states of decay, to draw cretins as the symbol of motherhood, to picture hunchbacked idiots as representatives of manly strength. . . . Art must be the handmaiden of sublimity and beauty and thus promote whatever is natural and healthy. If art does not do this, then any money spent on it is squandered.²⁴

Plato warned about the corrupting influence of art:

artists imitate the natural world, which is itself only a pale imitation of the true and transcendent reality of the Forms. The pleasure that the arts provide thus distracts us from the pursuit of knowledge through dialogue and contemplation. . . . Art corrupts . . . by arousing intemperate and inappropriate emotions, and the work of the most skillful artists is the most affecting and thus the most dangerous. In this way art undermines social order and plants the seeds of disobedience.²⁵

What about the works that degrade and dispirit us?

Some artists and advocates of the arts bristle at the very suggestion that artists bear social responsibility for their work and its effects. Artists stand above and apart from society, they aver, and the value of their work lies only within itself. To demand that artists uplift rather than degrade their audiences is to confuse the moral with the aesthetic. The nature of art itself and the inherent demands of artistic creation require that these two categories of value be kept strictly separate.²⁶

²³ John Frohnmayer, *Out of Tune: Listening to the First Amendment* (Golden, Colorado: North American Press, 1995) 51.

²⁴ Frohnmayer, *Leaving Town Alive*, 45.

²⁵ David A. Hoekema, "Artists, Humanists, and Society," *Art Journal*, 50 (Fall 1991): 45.

²⁶ Hoekema, 47.

Arts advocates contend that a society which rests on the premises of originality, individuality, experimentation and creative freedom is one in which the arts will flourish and is a better society than one of rigid conformity. The First Amendment was instituted to protect the right of freedom of expression and the "Supreme Court has consistently grappled with the problem of defining the boundaries between decency and morality as expressed by the will of the political majority and the free-speech demands to be free from the constraints of existing community norms."²⁷

Censorship is nothing new. Savonarola celebrated the "Bonfire of the Vanities" in Renaissance Florence. In 1545, the Council of Trent hired Daniel da Volterra, Michelangelo's apprentice, to cover the genitalia on some of the figures in *The Last Judgment* in the Sistine Chapel. The French Academy, in the nineteenth century, inadvertently censured by refusing the entrance of the work of the Impressionists for Salon competition. In this century, Thomas Hart Benton's nudes, *Susanna and the Elders* and *Persephone*, brought public dismay. The NEA has always exercised censorship in its decisions to deny some grant requests and approve others. Of the tens of thousands of grants that the NEA has made in its history, perhaps a dozen have excited serious controversy. The public has fallen into three camps. Dennis Barrie, director of the Contemporary Arts Center in Cincinnati, exemplifies those who advocate that art should reach the wider world and that it be "expressed openly and without restriction."²⁸ Diametrically opposed are those who favor boundaries and

²⁷ Barbara Hoffman, "The Thought Police Are Out There." *Art Journal*, 50 (Fall 1991): 40

²⁸ Dennis Barrie, "The Scene of the Crime," *Art Journal*, 50 (Fall 1991): 29.

Dennis Barrie was indicted in 1990 and acquitted of charges of pandering obscenity to a minor and the illegal use of nudity-related materials seen in the exhibition of Robert Mapplethorpe's photography, "The Perfect Moment."

definition of appropriate subject matter. Finally, there are those who might find some art indecent and tasteless, but they do not want to sacrifice First Amendment rights and certainly do not want their tax money to pay for objectionable art.

The case of an Alaskan experiment at the Anchorage Visual Arts Center illustrates the public's attitude toward controversial art and may prophesy the fate of the NEA. The Center put together a show of sixty works that had been condemned in the United States for the last few decades. John Frohnmayer explained,

The artwork depicted nudes, some provocative and some seemingly innocent; defacing or trampling upon the flag; criticism of politicians and policies; oppression of women; issues of sexuality, including homosexuality, condoms and lesbian art; depictions of intolerance, such as Nazi skinheads and the Ku Klux Klan; pregnant women; body mutilation; and unflattering depictions of ethnic groups.²⁹

The image that stirred the most passion was Dread Scott's installation of an American flag spread out on the floor, above which was a shelf supporting a comment book inside which viewers responded to the question, "What is the proper way to display a U.S. flag?" Over the shelf was a flag-draped coffin. The visitor could stand on the flag to write in the comment book. The flag was repeatedly removed by the horrified, particularly veterans groups, and replaced by others, mostly museum staffers. The commentary contained divergent opinions:

This exhibit is not about disrespect to the flag. It's about the right to free expression. . . .

²⁹ Frohnmayer, *Out of Tune*, 40.

I think this is disgusting. Dread Scott is taking advantage of his rights that my father fought for. The First Amendment only goes so far and this definitely crosses the line. . . .³⁰

Two thousand visitors came to this exhibit in a three week period. Art did what it is supposed to--provoke thought and dialogue--and the Visual Arts staff educated the public on censorship issues. However, the long and short of it were that a month after the show closed, the Alaska State Council for the Arts cut off all funding for the Visual Arts Center, claiming that the exhibition offended a majority of Alaskans. The executive director was laid off, the Center closed three months later and its equipment was sold at auction to pay off a \$100,000 debt. Was the showing of censored art worth the cost?

³⁰ Frohnmayer, *Out of Tune*, 41 and 43.

Chapter 3: Crisis

As the debate of public subsidy of the arts continued, the NEA managed to exist as a benign, minor federal agency quietly dispensing funds to artists and artistic organizations. Life for the minor agency would drastically change in 1989. Many factors contributed to the cultural war which ensued--the photographs of Andres Serrano and Robert Mapplethorpe, an inept chairman and apathetic administration, a new *cause célèbre* for ambitious politicians, the rise of the religious right, an unorganized artistic community and the awakening of an indifferent public.

The crisis actually began as early as 1987, when ten artists chosen by the Southeastern Center for Contemporary Art (SECCA) in Winston-Salem, North Carolina received a visual-arts grant of \$15,000 from the Rockefeller Foundation, Equitable Life and the NEA. One of these artists was Andres Serrano, who created a photograph of a plastic crucifix submerged in a Plexiglas container of urine. Serrano entitled his photo, *Piss Christ*, and said of it,

I think it's charged with electricity visually. It's a very spiritually . . . comforting image, not unlike the icons we see in church. . . . At the same time, it's meant to question the whole notion of what is acceptable and unacceptable. There's a duality here, of good and evil, life and death.¹

¹ Peter J. Boyer, "Mean for Jesus," *Vanity Fair*, September 1990, 225.

Intended as a depiction of man's inhumanity to the Son of God, *Piss Christ* was exhibited later in Los Angeles and Pittsburgh and caused no outrage. However, in Richmond it was seen by Philip L. Smith, a computer designer, whose angry letter was published in *The Richmond Times--Dispatch*:

During a recent visit to the Virginia Museum of Fine Arts, I was appalled to find a very large, vivid photograph of a crucifix submerged in urine. The work was given prominent placement among other offensive works.

The Virginia Museum should not be in the business of promoting and subsidizing hatred and intolerance. Would they pay the KKK to do a work defaming blacks? Would they display a Jewish symbol under urine? Has Christianity become fair game in our society for any kind of blasphemy and slander. . . .

it is disquieting to have the tax-supported arbiters of our culture justifying the desecration of a symbol so precious to so many of our citizens.²

This letter was read by a follower of Donald E. Wildmon, a southern fundamentalist minister and executive director of the American Family Association in Tupelo, Mississippi. With a mailing list of over 400,000 and a budget of \$5 million per year, the AFA pursued a decency crusade against the media. When Wildmon heard from his follower, he mailed his supporters this missive April 5, 1989:

We should have known it would come to this. In a recent art exhibition displayed in several museums throughout the country, one "work of art" was a very large, vivid photograph of a crucifix submerged in urine. The work, by Andres Serrano, was titled "Piss Christ." When asked, since he had worked with urine, what could be expected next. Mr. Serrano said, "Semen." And of course, defecation will follow that. The bias and bigotry against Christians, which has dominated television and the movies for the past decade or more, has now moved over to the art museums.³

² Boyer, 225. This one letter truly had an impact as its author's observation reached Congress and led to the eventual enactment of the Helms amendment.

³ Bolton, 21.

Wildmon sent a letter of protest to every member of Congress. In the House, Richard Armey (R-Texas) spoke about Serrano and in the Senate Alphonse D'Amato (R-New York) and Jesse Helms (R-North Carolina) led the charge. The cultural war was declared on May 18 as Helms railed,

For that, the National Endowment for the Arts gave him \$15,000, to honor him as an artist. . . . That is all right for him to be a jerk but let him be a jerk on his own time and with his own resources. . . . I have sent word to the Endowment that I want them to review their funding criteria to ensure abuses such as this never happen again.⁴

Thirty-nine senators expressed their outrage to the NEA. On June 8, Richard Armey sent to the NEA a letter co-signed with 107 congressmen protesting the Serrano grant as well as the retrospective, "Robert Mapplethorpe: The Perfect Moment," scheduled to open at Washington's Corcoran Gallery of Art in July. This exhibition had been assembled by the University of Pennsylvania's Institute of Contemporary Art with a \$30,000 NEA grant.⁵ Fearing financial repercussions from the show would affect their NEA funding and the Arts Endowment's congressional appropriations, the director of the Corcoran canceled the Mapplethorpe show on June 12.⁶ The art world was enraged and equated the cancellation with censorship. On June 16, the gallery was picketed by

⁴ Bolton, 31. Helms incorrectly said that the \$15,000 was directly funded by the NEA.

⁵ Among Mapplethorpe's photos of flowers, scenes and people were the homoerotic, *X Portfolio*, of naked men and rough gay activity, and two photos of young children with their genitalia exposed. The exhibition had already been shown in Philadelphia and Chicago without incident and was scheduled for Hartford, Berkeley and Boston after the Corcoran show. When the exhibition moved to Cincinnati, pandemonium resulted with the eventual indicting of the museum director, Dennis Barrie. The reception of this exhibition demonstrated the differing tolerance levels and community standards across the country.

Dennis Barrie's criminal case was a counterpart of the Newport Harbor Art Museum's civil case. Although Barrie's case did not involve NEA funding, both cases were concurrent and involved issues of government censorship.

⁶ The Corcoran received a \$292,000 grant from the NEA in 1988.

hundreds of artists while Mapplethorpe photos were projected onto the gallery's outside walls during a candlelight vigil while newspapers across the country ran the story on front pages.

At the same time, another leader of the religious right, the televangelist Pat Robertson, head of the Christian Coalition, broadcasted an attack on Serrano on June 8.⁷ Coinciding with all this controversy was the NEA appropriations process for fiscal year 1990. On July 12, the House rejected the Dana Rohrabacher (R-California) proposal to eliminate the NEA and passed an appropriations bill to cut \$45,000 from the NEA budget, the amounts spent on Serrano and Mapplethorpe, 361 in favor and 45 against. The Senate Appropriations Committee accepted the \$45,000 cut on July 25, but added to the bill a transfer of "\$400,000 from the NEA Visual Arts Program (which had supported both Mapplethorpe and Serrano, though neither directly) to Folk Arts and Locals; and imposed a five-year ban on NEA grants to both SECCA and the Institute of Contemporary Art (sponsors of Serrano and Mapplethorpe)."⁸

Then late at night on July 26, Jesse Helms attacked in a virtually deserted Senate chamber and introduced an amendment:

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 sado-masochism, homoeroticism, the exploitation of children, or individuals engaged in sex acts; and (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

⁷ The religious right numbers several million people (fewer than the overall arts constituency)--Wildmon's American Family Association; Pat Robertson's Christian Coalition, 450,000 members; Concerned Women for America, 500,000 members; Phyllis Schlafly's Eagle Forum, 75,000 members and Focus on the Family, 100,000 members.

⁸ Zeigler, 79.

person, group, or class of citizens on the basis of race, creed, sex, handicap, age, or national origin.⁹

John Frohnmayer suggests that with the end of the Cold War, the NEA provided an easy target for ambitious legislators to rally their constituents and receive national attention.¹⁰ Helms offered this explanation:

A difference exists between an artist's right to free expression, and his right to have the government, that is to say the taxpayers, pay him for his work. . . . There is a fundamental difference between government censorship, the preemption of publication or production, and government's refusal to pay for such publication and production.¹¹

The few senators in the room passed the Helms amendment and added it to the bill. Throughout the summer of 1989, the Senate and House debated amendments to the appropriations bills and on September 13, the House passed its appropriations bill and rejected the Helms amendment, 246-53. The Senate also refused Helms, 62-35 on September 28, and both houses approved a 1990 appropriation of \$171,255,000.¹²

The congressional letter sent to the NEA on June 8 was received by Hugh Southern, acting chairman. It was not until July that George Bush announced his choice of John Frohnmayer as NEA chairman. Frohnmayer did not receive Senate approval until September 29. Frohnmayer was a Washington outsider

⁹ Bolton, 73-74.

¹⁰ Robert Hughes echoes this opinion:

America's present "culture" wars do not exist in liberal democracies on the other sides of the Pacific or the Atlantic. Their intolerance is aggravated by the deep anguish that descended on America after it won the Cold War--and found itself no better off without Communism. . . . With the death of Communism new Antichrists and minor demons had to be found inside America.

Robert Hughes, *American Visions: The Epic History of Art in America* (New York: Alfred A. Knopf, 1997) 619.

¹¹ Bolton, 78.

¹² With all the controversy, the fiscal year 1990 appropriation was a \$2 million increase over 1989's \$169,090,000.

and not as politically savvy as were his predecessors. This Oregonian was an attorney specializing in constitutional law, particularly First Amendment rights, and did not come from the arts but the audience. His claim to fame was serving as GOP campaign manager for his brother's unsuccessful bid for the governorship of Oregon. Frohnmayer was doomed from the start, arriving in Washington with his tuxedo pressed, expecting to enjoy the rush of galas, previews and openings for the arts, totally unaware of how difficult his job was going to be. As a new member of the Bush administration, Frohnmayer was told by the chief-of-staff, John Sununu, "that 'the obscenity thing' was a serious problem and that it could imperil the whole agency . . . [and] there was a difference between public and private art (he didn't say what it was) and that we simply couldn't fund art that was political and only intended to get publicity."¹³ Clearly, the Bush Administration was lukewarm to the arts and did not want controversy and conflict to mar a presidency which espoused "family values." Frohnmayer tried to appease both the arts community and the administration continually straddling the fence. In the process, he alienated both groups and was the first NEA chairman to be fired.

Meanwhile, the Helms amendment did not fade away, for on October 28, Congress passed Public Law 101-121 for fiscal year (FY) 1990 specifying that

prior to the award of any direct grant to . . . SECCA . . . or for the Institute of Contemporary Art at the University of Pennsylvania, the National Endowment for the Arts shall submit to the Committees on Appropriations of the House and Senate a notification of its intent to make such an award . . . that such notification shall delineate the

¹³ Frohnmayer, *Leaving Town Alive*, 123.

Frohnmayer confessed in his memoir, *Leaving Town Alive*, that he did not even vote for George Bush.

purposes of the award which is proposed to be made and the specific criteria used by the Endowment . . .¹⁴

Congress was punishing the institutions that supported Serrano and Mapplethorpe and monitoring future granting by the NEA. Law 101-121 revived the Helms amendment with this stipulation:

None of the funds authorized to be appropriated . . . may be used to promote, disseminate, or produce materials which in the judgment of the NEA . . . may be considered obscene, including but not limited to depictions of sado-masochism, homoeroticism, 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.¹⁵

Rep. Sidney Yates (D-Ohio) proposed that the questions of obscenity be based on the Supreme Court 1973 decision in *Miller v. California* which defined obscene art as works that "an average person, applying community standards finds appealing to prurient interests; (2) depict or describe sexual conduct in a patently offensive way; and (3) taken as a whole, lack serious literary, artistic political, or scientific value."¹⁶ Yates told Joseph Zeigler,

What I did was to propose bringing the Miller case out from the wings and into the forefront. I was changing nothing in the law itself. All I was saying was there's no need for anything else, this is the law, and we will go by the law. That was the reason for bringing the Miller case into the settlement. To show that the Helms stuff wasn't needed.¹⁷

This law went beyond *Miller v. California*, because it specified homoeroticism and sado-masochism as obscene. The bill did not deal with the question of prurient interests. Joseph Zeigler added, "Perhaps most significantly, the law also switched the determination of obscenity from the *judicial* branch of

¹⁴ Bolton, 121.

¹⁵ Bolton, 121.

¹⁶ Zeigler, 81.

¹⁷ Zeigler, 81.

government (the courts) to the *executive* branch (a government agency)."¹⁸ In the end, Jesse Helms had succeeded.

Faced with the implementation of this law, John Frohnmayer wrote,

From the beginning I doubted the law's constitutionality. It lacked standards and definitions, placed judicial functions in the executive department, and was both vague and overly broad. . . . The questions were endless--which, of course, was precisely the result that Helms and the other cultural vivisectionists wanted.

Because this law could mean so much or so little, it held potential for causing great mischief in the world of art and politics. We needed to reduce its uncertainty, and the best way to do that, I believed, was to force a court to interpret it, which would either void or narrow the law. To make it as broad a target as possible and assure that someone would sue us, I reproduced the Helms amendment verbatim in the terms and conditions for grant recipients. It could not be ignored there, and if it was to be declared unconstitutional, it had to appear where the courts could not ignore it either. I took tremendous heat for that decision, and was at times even blamed for having originated the language. But at least it would be dealt with and settled this way. Litigation was a world I knew.¹⁹

How did the religious right, art world and the public react to Public Law 101-121? The religious right continued with their assaults. In March 1990, Wildmon sent members of Congress another mailing indicating NEA support of pornography, enclosing a copy of David Wojnarowicz's work of a thorn-crowned Jesus with a drug needle in his arm. Wildmon followed through with another mailing concerning Wojnarowicz urging an abolishment of the NEA.²⁰ The Christian Coalition mounted a \$200,000 advertising campaign determined to

¹⁸ Zeigler, 81.

¹⁹ Frohnmayer, *Leaving Town Alive*, 69.

²⁰ In May, Wojnarowicz sued the American Family Association for defamation of character and copyright violation found in AFA's pamphlet "Your Tax Dollars Helped Pay for These Works of Art." By August 1990, the U.S. District Court demanded AFA to revise the pamphlet and awarded Wojnarowicz \$1 in damages. AFA revised the pamphlet and redistributed it in October.

reach 50 million households. In June 1991, the Southern Baptist Convention urged George Bush to dismiss Frohnmayer.

The arts lobby was rather silent and disorganized during the congressional haggling of the summer of 1989. Most arts organizations accepted their money and signed the "loyalty oath." A few refused to sign. The editors of *Art Journal* did not tackle the issue of censorship until as late as the fall and winter of 1991. Since she condemned contemporary visual art as "a mediocre art enterprise of dubious quality," Helen Frankenthaler, the painter and member of the National Council on the Arts, was often quoted by those who wished to abolish the NEA.²¹

By "mediocre art enterprise"--I mean: Has the council run its course in terms of doing a necessary quality job? Should it change its course from within? Is it possible? I myself find the council--the recommendations of the panels and the grants given--of increasingly dubious quality. Is the council, once a helping hand, now beginning to spawn an arts monster? Do we lose art along the way, in the guise of endorsing experimentation.

I think the council is in trouble, in my eyes as well as in the eyes of much of the public.²²

It was not until the spring of 1990 during the reauthorization of the NEA that the arts advocacy effort came alive. In March, the American Council for the Arts' Cultural Advocacy Day rallied on the Capitol steps, attracting hundreds, and lobbied Congress. In May, the press, NEA staffers and members of the House, along with the directors of the museums who had shown Mapplethorpe's "The Perfect Moment," issued a statement denouncing censorship. The National Campaign for Freedom of Expression was formed in April specifically to unseat Jesse Helms in the upcoming fall elections. The Arts Day USA protest was staged on June 7. The public had awakened as well. Congress received more

²¹ Helen Frankenthaler, "Did We Spawn an Arts Monster," *New York Times*, 17 July 1989, A15.

²² Frankenthaler, A15.

mail in 1989 through 1990 about NEA grants than it did about the whole savings and loan scandal.²³

1990 was a turbulent year for the NEA. At the beginning of the year Bush planned for a five-year authorization. In March, he announced,

I am against censorship, but I will try to convince those who feel differently . . . that we will do everything in our power to stop pure blasphemy. . . . Having said that, I don't know of anybody in the government or a government agency that should . . . censor what you write, or what you paint, or how you express yourself.²⁴

His moderate inclinations found him at odds with his own party. In the House, Philip M. Crane proposed a bill to abolish the NEA entirely and Dana Rohrabacher continued his attacks, while in the Senate, Jesse Helms requested a full investigations of the NEA by the Government Accounting Office. Censorship issues involved rap and heavy-metal music, film-ratings, funding for the Corporation for Public Broadcasting, burning and desecrating the nation's flag and the Mapplethorpe showing in Cincinnati. Frohnmayer had his own encounters with the arts community.²⁵ Almost every day, there was an NEA related story in the press exploiting the shock value of Mapplethorpe and Serrano, the antics of Helms and Wildmon and the confusion of Frohnmayer. However, the most serious threat to the NEA's future came from the

²³ The power of the written word is undeniable. The majority of NEA letters received by Congress in 1989 were from the religious right, whereas, the majority in 1990 were from arts advocates. Is it a coincidence that the "loyalty oath" was enacted in 1989 and revoked in 1990?

²⁴ "President Bush Reaffirms Support for the NEA Without Restrictions," *American Council for the Arts Update*, March/April 1990, 3.

²⁵ Frohnmayer rescinded a \$10,000 NEA grant to Artists Space, an alternative gallery, specifically for a catalogue essay by David Wojnarowicz for the AIDS show, "Witnesses: Against Our Vanishing." Wojnarowicz criticized Helms, Rep. William Dannemeyer (R-California) and John Cardinal O'Connor, the Roman Catholic Archbishop of New York, for their views on homosexuality and AIDS. In addition, Frohnmayer vetoed grants to the NEA Four, comprised of the performance artists, Karen Finley, John Fleck, Holly Hughes and Tim Miller.

recommendation of the National Assembly of State Arts Agencies to transfer 60% (a 300% increase) of NEA program funds to state arts councils. According to Joseph Zeigler, "NASAA's proposal was a betrayal of the NEA by the states. It showed that people in the arts were their own and each other's worst enemies, and that if they could not stand together, they would fall."²⁶

Public Law 101-121 expired September 30, 1990, because it was only related to fiscal year (FY) 1990.²⁷ Congress reauthorized the Endowment in October for three years. The "obscenity pledge" was replaced with a milder requirement of "general standards of decency" to be taken into account when awarding grants. With the expiration of Public Law 101-121, Frohnmayer lifted the "loyalty oath." But what about those few arts organizations who refused to sign the FY 1990 "loyalty oath," citing it as unconstitutional and an infringement of their First Amendment rights? These organizations refused a total of nearly \$500,000.²⁸ The following is a list of those organizations who refused to sign and the amount of grants they stood to lose.

<i>American Poetry Review</i>	\$ 10,000
Bella Lewitzky Dance Company	72,000
Cornerstone Theater Company	7,500
<i>Gettysburg Review</i>	4,550
Lehman College Art Gallery	15,000
New School for Social Research	45,000
New York Shakespeare Festival	50,000
Newport Harbor Art Museum	100,000

²⁶ Zeigler, 100.

²⁷ The government's fiscal year (FY) begins October 1st and ends September 30th of the following year.

²⁸ Zeigler, 115-116

Northern California Grantmakers	75,000
Oregon Shakespeare Festival	49,500
<i>Paris Review</i>	10,000
Penn State Center for Performing Arts	25,000
Theatre for the New City	25,000
Time and Space Limited	10,000
University of Iowa Press	12,000

Frohnmyer was correct--he would get that lawsuit he hoped for when he inserted the "loyalty oath" into the grant guidelines of November 1989. Of the fifteen organizations who refused to sign, who would litigate? Obviously, the Newport Harbor Arts Museum would sustain the biggest funding loss--\$100,000.²⁹

²⁹ In actuality, three institutions--Bella Lewitzky Dance Co., New School for Social Research, and the Newport Harbor Art Museum--litigated. Of these, the Newport Harbor is the only visual arts organization.

Chapter 4: Turmoil in Newport Beach

Nestled along the ribbon of towns named for Spanish saints on Southern California's sunny coast is Newport Beach, an affluent city with opulent waterfront homes, yacht clubs and a mast-studded harbor. In the past, it was simply a "new port" on the California coast between San Diego and San Pedro. Although Newport's attractions are still at the beach, the city has expanded beyond its elegant waterfront, with housing developments, a financial complex, the huge Fashion Island shopping center and the Newport Harbor Art Museum, located at 850 San Clemente Drive. Newport is part of Orange County, an area of 2.5 million residents, many of whom contribute to the urban sprawl of Los Angeles. Orange County nurtures a rich economy based upon oil, citrus, tourism, land development and aircraft production. Orange County's spirit of free enterprise and rugged individualism are well reflected by Walt Disney's theme park and John Wayne's airport. Known as a bastion for political conservatism, Orange County houses the Nixon Library and is represented in Congress by Dana Rohrabacher, William Dannemayer, Christopher Cox and former representative, Robert Dornan, all foes of the NEA.

The Newport Harbor Art Museum (NHAM) owes its existence to twelve remarkable women. These matrons hailed from the Pasadena/San Marino area and summered in the moderate climate of Newport. While their husbands sailed

the coast and harbor of Newport, the women did not spend their days in idle relaxation. All had an interest in California contemporary art and volunteered at the progressive Pasadena Art Museum. When Norton Simon took over the Pasadena Art Museum, the women were disenfranchised and directed their attention to creating their own museum to advance the visual arts in Orange County. In 1962, they rented space on the second floor of the Balboa Pavilion, a former dance hall in the recreational area of the Balboa Peninsula. These *audacious* matrons painted the walls, designed the installations, framed the paintings and even filled in empty spaces with art from their own collections.¹ Later the gallery moved to a space owned by the *Orange County Daily Pilot*, the local newspaper. It was not until 1977 that the NHAM occupied its present location.

Jonathan Borofsky's *Red Ruby* of red lights and movable parts perched atop the NHAM's corrugated concrete building invites all to come see the mysteries which reside inside. Tony Delap's outdoor sculpture, *Floating Lady*, a mystical construction of a wooden beam suspended between two concrete posts further beckons the public. Inside the 6,000 square foot space is Loren Madsen's *Sluice*, a site specific piece of bricks held together with airplane wire and screws symbolizing the separation of gold from dirt, of treasure from the mundane. The focus of the Museum is post-World War II art with a particular emphasis upon California artists. A permanent collection is maintained and exhibitions are sponsored, presented and loaned to other national museums. In its thirty-five years, "the Museum has developed an international reputation for the quality and

¹ A photographic exhibition, *The Audacious Years*, chronicled the exploits of these women in a special exhibit at the NHAM in 1985.

scholarship of its exhibitions."² Accredited by the American Association of Museums, the NHAM is internationally recognized and has received grants and awards from the United Kingdom, Germany, France, Belgium and Italy. Awards and grants from government agencies, national and regional foundations, and major corporations attest to the Museum's national stature. As a regular recipient of NEA funding, the Museum received fifty-six grants totaling over \$1.2 million from the time period of 1972-1990 (see Appendix D).

Just as the period between 1989-1991 was a time of crisis for the NEA, it was also a period of turmoil for the NHAM. 1988 marked the heyday of the NHAM which boasted a staff of fifty full and part-time employees and a budget of \$1.8 million.³ Donald Bren, president of the Irvine Corporation, gave the Museum a valuable ten acre parcel of land at the intersection of MacArthur Boulevard and the Pacific Coast Highway with the intention that the Museum move and expand. A \$50 million capital campaign was launched to raise funds and the prestigious architect, Renzo Piano, designer of Paris' Pompidou Centre, was commissioned to create a new museum. 1989 brought an abrupt change in fortune--economic recession hindered the capital campaign which could only muster \$10 million; Donald Bren, dissatisfied with Piano's performance, fired the architect; both the Museum's director, Peter Concey, and chief curator, Paul Schimmel, resigned;

² *Newport Harbor Art Museum v. National Endowment for the Arts*. "Evidentiary Appendix in Support of Motion For Summary Judgment," CV 90-5142 JGD(BX), U.S. District Court, Central District of California, 27 December 1990, Exhibit A, Declaration of Kathleen Costello, 12.

³ Kathleen Costello, Associate Director of Development and grant officer at the time, estimated that in 1988 \$406,649 or 25% of all revenue was derived from grants and NEA money constituted \$131,900 or 33% of the grant revenue (see Appendix E).

Kathleen Costello, 1997 interview by author, tape recording, Fullerton, California, 12 June.

and Bren's parcel was eventually returned to the Irvine Corporation.⁴ Indifferent to the NHAM's plight, the conservative county offered little support to the contemporary Museum.

With the absence of a director and curator, the leadership of the Museum fell to a triumvirate of three senior staff members--Jane Piasecki, associate director, Margie Shackelford, director of development, and Ellen Brightman, director of education--as well as the Board of Trustees. The composition of Newport's Board was typical of many charity boards. At least half of the Museum's revenue came from the individual board members or the companies that they represented. The common thread of Newport's Board was that the people had an interest in art. In the normal course of activities, the people were active for six or seven years and then departed. There were no art educators or artists on the Board, but rather the thirty-five members were business people, wives of prominent gentlemen in the community and three attorneys.⁵ Thomas Nielsen, vice chairman of the Irvine Company, was asked to head the Board

⁴ The County's wealth was heavily dependent on the real estate market which the recession hit the hardest. Individual donations to the Museum were stable but corporate donations declined. In addition, contributions to construction of the Orange County Performing Arts Center in 1986 drained the funds of wealthy benefactors. Concey and Schimmel were rising stars in the museum world. Kathleen Costello suggested that their departures were a result of the Museum's failure to expand. Concey, lured by the Chicago Museum of Modern Art, departed November 15, 1989, while Schimmel left in April 1990 for the Los Angeles Museum of Contemporary Art. Costello interview.

⁵ Costello offered this revealing view: One-third of the members were very loyal to the mission of the institution, cared passionately about art, were collectors and visited other museums. Another third supported the Museum in their community, but may not have been passionate about art. They were the business leaders who brought their expertise. The last third were involved for social purposes or they might have been invited to join the Board to represent a certain ethnic or community group that could give the Board diversity. Costello interview.

during the period of 1990-91 (see Appendix F). Nielsen had quite an accomplished record of community and public service, was a former assistant secretary of the U.S. Air Force for Financial Management, held a bachelor's degree in civil engineering and a master's degree in business administration and was a Certified Public Accountant. In addition, he was affiliated with the Irvine Company, the largest benefactor of the NHAM.

Kathleen Costello, grants officer at NHAM, began working at the Museum in 1983. She described her working relationship with the NEA as a favorable experience. Many of the Museum's applications to the NEA were rejected in the early eighties, however by the mid-eighties, the Museum was consistently awarded. The NEA was prompt, efficient and accessible. Costello related, "Under Frank Hodsell, it was a terrific agency. The field representative was based in Long Beach."⁶ Costello found the NEA a lot easier to work with than its state counterpart, the California Arts Council. "[The NEA] knew what the institution needed and was doing. All they expected was for us to do it well. [We] applied under 'Acquisitions to the Permanent Collection,' 'Conservation' or 'Exhibition of the Collection.' That even tells you that they understand what a

⁶ Costello added,

There were some years when they were late releasing the applications and guidelines for the next deadline. That reflected what was going on internally at the NEA--budget and policy-wise. They did not know what their appropriations would be. Some years, they would release the guidelines that would state that this was all dependent upon approval of the appropriation process.

Costello interview.

The field representative told Costello, "that she read the handwriting on the wall," when Frohnmayer was appointed. Costello inferred from her remark that Frohnmayer was selected from a conservative state in order to bring someone from outside the Boston-Washington, D.C. corridor to focus on constitutional issues and dismantle the agency. As the NEA's budget was reduced, the field representative's position was eliminated.

Costello interview.

museum has to do."⁷ Costello knew the program officers on a professional basis and could call the program officer after the panels met and learn the panel recommendations in advance of formal written communication. Her only regret was that neither the NHAM's curator, director nor director of education ever participated on an NEA panel. She saw panel participation as a goal of the Museum.⁸ At the conclusion of a project, the NEA requested a final report summarizing and documenting the financing and success of the project.⁹

Costello applied for four NEA grants for FY 1990. Once a program was conceptualized, the grant came together quickly. The curator knew what was needed and worked around the deadlines. The NEA application is quite lengthy and inquisitive (see Appendix G). The number of persons expected to benefit from a project, as well as direct and indirect costs, are estimated. The institution must relate its current fiscal activity for the grant period. The information is then

⁷ Costello interview.

The CAC with its limited means was much more political in nature. Costello commented,

They had more hoops to jump through. You could see that in the way they ranked and scored applications. There would be a ranking for artistic merit, ethnicity, outreach efforts. Artistic purpose was diluted and paled with ancillary concerns, though it was more successful to lobby for state appropriations on the basis of things like multi-cultural representation and educational outreach efforts than on artistic qualities. They did not have programs to promote acquisitions, conservation and exhibition. Their funds were for organizational support.

Costello interview.

⁸ Costello felt that the success of NHAM's grant applications relied on the reputation of the curator, Paul Schimmel. Many of his peers served on the panels and knew Schimmel's reputation and the integrity of his curatorship. A curator's network of professional familiarity existed through the panels.

Costello interview.

⁹ After submitting these final reports, Costello never heard back from any NEA official. "I think they pretty much closed the file. I put a lot of work into those reports and never got a call back."

Costello interview.

certified as true and correct by an authorizing official, project director and payee (that person to whom the grant payment will be sent). The information contained in the application can be used for "grant processing, statistical research, analysis of trends and for congressional oversight hearings. Failure to provide the requested information could result in rejection of . . . [the] application."¹⁰ Finally, the museum must show proof of its exemption from tax by the Internal Revenue Service.

The first grant for which NHAM applied on October 13, 1989 was \$25,000 as partial support of a total budget of \$72,500 for the acquisition of works by Howard Fried, a conceptual installation artist, and Mike Kelley, a painter. The application read:

The acquisitions will be the Museum's first for both artists. Howard Fried's "Derelict" will complement the Museum's holdings of major room installations (i.e., Chris Burden, James Turrell, George Stone and Bill Viola among others) and the Mike Kelley acquisitions reflect the Museum's long interest in the work of Cal Arts alumni as reflected in our 1988 participation in "Cal Arts: Skeptica Belief(s)" and our acquisitions (i.e., Tim Ebner, Jill Giegerich, Matt Mullican, Marc Pally and Mitchell Syrop among others).

If awarded, grant funds will be matched with private funds from new sources secured by the Acquisition Committee, which was formed as a direct response to the NEA's previous Purchase Plan grants and which continues to provide major support for the collection. Additional Matching funds will be provided by a grant from The Peter Norton Family Foundation.

A major expansion is underway to construct and endow a new facility by 1992; 15,000 square feet of gallery space will be dedicated to the permanent collection.

Five previous NEA Purchase Plan grants supported the acquisition of works by twenty artists, including Lita Albuquerque, Billy Al Bengston, Elmer Bischoff, Joan Brown, Ron Davis, Sam Francis, Loren Madsen, John McLaughlin, Nathan Oliveira, Charles

¹⁰ "Evidentiary Appendix in Support of Motion For Summary Judgment," Exhibit B, Section XIII of the NEA application, 28.

Ray, Allen Ruppersberg, Ed Ruscha, Mitchell Syrop, Masami Teraoka and James Turrell.¹¹

Derelict Three and Four (1977 and 1983) was to be the first acquisition of a Fried installation by any institution. This major room installation involves a space characterized by a large cup on a wooden platform plus a photograph of that space taken from a vantage point not accessible to the viewer. Kelley's *White Virgin* (1989) is five white canvases joined by C-clamps and framed with a heavy steel chain. Ten works would be selected from the artist's *Garbage Drawings* (1988), that are cartoon-style ink on paper images. On March 28, 1990, NHAM received notification of an award of \$20,000 by the NEA to be applied to these acquisitions.¹²

Paul Schimmel decided to bring a rich and representative body of the British sculptor, Tony Cragg, to the United States and Canada. A second grant to the NEA for \$87,000 as part of a total budget of \$277,822 was submitted November 2, 1989. Forty sculptures ranging from fragile to immense were to be lent from Chicago, New York, Miami, London, Italy, France, Germany, Switzerland and Japan. The exhibition would open October 14, 1990, at the NHAM in conjunction with the Southern California "Festival of Britain" arts celebration and move to the Corcoran Gallery in Washington D.C., the Power Plant in Toronto and conclude at the Contemporary Arts Museum in Houston on February 9, 1992.

Cragg's aggressive constructions counteract the British sculpture dominated by Henry Moore's and Barbara Hepworth's pastoral, romantic works in natural, biomorphic forms. Cragg's work stems from observation and attention to

¹¹ "Evidentiary Appendix in Support of Motion For Summary Judgment," Exhibit B, 25. Note the mention of the planned Museum expansion.

¹² Costello admitted that she always applied for a little more than she needed, hence the difference of \$5,000. Costello interview.

the real world as he elevates poor materials and simple processes to art status.

Here is the grant summary:

The exhibition will survey Cragg's conceptual, non-formalist oeuvre from 1976 to the present and will examine how his utilization of the techniques of a scientist and inventor informs his sculptural assemblages, constructions, carvings and castings. Over 40 works will be included, beginning with the *arte povera*-inspired stacked works (1976), to the figurative assemblages of plastic found object pieces (1978), through the collaged constructions of the early 1980s, onto the varied carvings in wood and stone, and up to the current cast vessels/sculptures in bronze, plastic, glass, iron and aluminum. The 180-page catalogue will feature essays on Cragg's multi-disciplinary background and his conceptual orientation; the Museum is pursuing confirmation of a co-publishing agreement with an international distributor of art publications. The Education Department will organize a comprehensive educational component dealing with Cragg as well as the tradition of English sculpture since Henry Moore.¹³

On August 7, 1990, the NEA granted \$50,000 for the Tony Cragg exhibition.

Another grant application was submitted on November 2, 1989, to organize and present "Typologies: A Photographic Dialogue."¹⁴ This photographic exhibition would originate in Newport April 7, 1991, and travel to the Akron Art Museum, Corcoran Gallery and San Francisco Museum of Modern Art. The photographs of ten contemporary photographers begin chronologically with Ed Ruscha's photographic works of the sixties and range from Bernd and Hilla Becher's industrial architecture to Thomas Ruff's faces and Roger Martin's apple trees. Forty-five thousand dollars of NEA money was requested for partial funding for the project's \$116,046 budget to underwrite "the first international survey of a type of photography that presents suites of formally similar

¹³ "Evidentiary Appendix in Support of Motion For Summary Judgment," Exhibit C, 60.

¹⁴ A typology is a collection of members of a common class or type. This ordering activity is associated more with science than art and stresses similarities and differences within subject matter.

photographs to comprise an examination of a class of subject matter."¹⁵ The grant application describes the exhibition's intent:

In these works . . . the Americans' ironic sensibility and taste for the vernacular will contrast with the more detached and conceptual approach of their German contemporaries. Each of these photographers has evolved a consistent, anti-formal style which permits the exhibition of images as typological combinations; in these groupings of prints, the images reveal political, sociological or perceptual subtexts. Despite the considerable attention that has been given to photography that is staged, fabricated or post-modern, these artists demonstrate the continuing validity of a photography whose initial premise is the depiction of visual facts. The accompanying publication will provide critical and historical discussions of the work and of each of the artists.¹⁶

On July 31, 1990, the NEA granted only \$25,000 for this exhibition.

The final application of FY 1990, also sent on November 2, 1989, requested \$10,000 to present at the Museum a traveling exhibition entitled, "Committed to Print." Organized by the Museum of Modern Art in 1987, the exhibition contained over 100 individual prints exploring social and political subjects in America from the sixties to the present. The theme of the exhibition was that contemporary artists continued the trend started by Brueghel, Goya and Daumier with the use of prints to disseminate social and political content. Even with the advent of photography and television, prints are used today as a vehicle for "approbation, inquiry, and dissent."¹⁷ The application added:

The exhibition includes 180 works and has been organized around major issues that have produced compelling images, such as governments and leaders; race and culture; gender, nuclear power and ecology; war and revolution; and economics, class struggle,

¹⁵ "Evidentiary Appendix in Support of Motion For Summary Judgment," Exhibit D, 130.

¹⁶ "Evidentiary Appendix in Support of Motion For Summary Judgment," Exhibit D, 130.

¹⁷ Deborah Wye, *Committed to Print*, (The Museum of Modern Art: New York, 1988) 7.

and the American Dream. There are 108 artists including Vito Acconci, Benny Andrews, Chris Burden, Elizabeth Carlett-Mora, Leon Golub, Hans Haacke, David Hammons, Edgar Heap-of-Birds, Jenny Holzer, Jerry Kearns, Barbara Kruger, Les Levine, Robert Morris, Juan Sanchez, Nancy Spero and Andy Warhol. The exhibition chronicles a significant tradition in recent art while also offering fresh and vivid insights into major concerns of our time. While contemporary art has been well documented through analysis of stylistic developments and individual artists, "Committed to Print" is the only survey of this important active print tradition of political, sociological or perceptual subtexts. The accompanying publication provides critical and historical discussions of the work and each of the artists.¹⁸

The Museum received notification also on July 31, 1990, of a \$5,000 grant for this exhibition.

Insofar as the first grant was awarded on March 28, 1990, and the others followed on July 31 and August 7, Kathleen Costello knew in advance of the grant awards through her contacts with the administrators of the NEA. Of the requested \$167,000, \$100,000 was awarded. In each instance, the grant only covered a part of the project, nevertheless, the NEA funds represented an important and vital source of underwriting. Each acceptance letter related the greeting of the NEA Grants Officer, Laurence Baden, on behalf of the NEA Chairman, John E. Frohnmayer, with acceptance of the grant. However, a new issue, which had never faced the Museum in its eighteen year history as a NEA grant recipient, was raised, and that issue was a newly-imposed requirement to execute an anti-obscenity certification. Included with Baden's advisement letter was the "General Terms and Conditions for Organizational Grant Recipients" of which Paragraph Two stated the Helms statute. If the grantee failed or refused to certify compliance with Paragraph Two of the General Terms, the NEA would not

¹⁸ "Evidentiary Appendix in Support of Motion For Summary Judgment," Exhibit E, 225.

fund. Funds are not automatically advanced with the grant letter. The recipient must then submit a "Request for Advance or Reimbursement" to request funding. The request form seeks additional information, including updated budgets and expenses, and a certification provision which encompasses the entirety of the NEA's General Terms:

I certify that to the best of my knowledge and belief the data reported above is correct and that all outlays were made in accordance with grant conditions and that payment is due and has not been previously requested. Submission of this request for payment constitutes acceptance of all terms and conditions of the grant indicated above.¹⁹

¹⁹ *Newport Harbor Art Museum v. National Endowment for the Arts*, "Notice of Motion and Motion For Summary Judgment; Memorandum of Points and Authorities," SA CV 9005142 JGD(BX), U.S. District Court, Central District of California, 17 December 1990, 8-9.

Chapter 5: Board Decision

The first person at the Museum to learn of the "obscenity pledge" was Kathleen Costello and she communicated this information to the Board. The Museum had to make a decision based upon four courses of action:

1. Refuse the grants on the grounds that compliance with the obscenity clause threatens artistic freedom. This action implies that the Museum believed that it is inappropriate for a government agency to censor art by refusing to fund works that it considers to be obscene according to the . . . [Helms] definition. Some artistic organizations and institutions elected to refuse or not seek funds from any public agencies (federal, state, local) because of these restrictions.
2. Accept the grants and do not agree to comply with the obscenity clause. This action implies that the Museum is opposed to any form of censorship by a government agency. Many arts institutions are reportedly taking this action; however, this action forces the NEA to respond to their failure to agree to comply and puts them at risk of debarment from receiving funds from any federal source for an unspecified period of time. Additionally, this action fails to confront Congress directly as the author of the restrictive language; rather, it occurs only between the Museum and the governmental agency which is charged with following congressional mandates and enforcing sanction.
3. Accept the grants and agree to comply with all terms and conditions. This action implies that the Museum is not opposed to the potential for censorship by the NEA, and/or that the Museum has confidence in the peer panel review system to have judged that the works proposed to purchase and/or exhibit cannot be characterized as obscene according to the definition. Afterall, this is what all the major art institutions did.
4. Accept the grants and agree to comply with all terms and conditions and attach a policy statement defining the Board of Trustee's response to the new restrictions. This action, if combined

with vigorous advocacy efforts, implies that the Museum recognizes Congress rather than the NEA as the source of the new restrictions and offers the Museum an opportunity to take a public stand on the issues of censorship and government funding for the arts.¹

Ultimately, the decision rested with the Board of Trustees. Thomas Nielsen, president of the Board, stated that he could not certify to compliance with Paragraph Two for four basic reasons:

While he has a sophisticated business background and has frequently dealt with complex legal matters, he could not determine whether expenditure of funds under the Museum's four grants would constitute any of the prohibited uses set forth in Paragraph Two. The NEA's obscenity standard did not provide him an objective standard which he could apply with reasonable certainty and clarity to the subject matter of the four grants.

Apart from difficulties with interpreting and applying the standard, Mr. Nielsen noted that Paragraph Two required compliance with the standard according to the "judgment of the National Endowment for the Arts." Mr. Nielsen had no objective means of determining what the judgment of the NEA is or will be with respect to the four projects. For example, the Committed to Print exhibit contains over 100 prints created by American artists since 1960. Those works focus on political and social themes during one of this country's most controversial periods.

In some instances, the works which will ultimately comprise the project have not been determined. Mr. Nielsen has no way to predict what the "judgment of the National Endowment for the Arts" will be with respect to unidentified works.

¹ Costello, Kathleen, "Memorandum to Thomas Nielsen," 24 May 1990.

Costello continued in her memo, Some additional issues to consider: 1) when the Corcoran Gallery canceled their venue of the Robert Mapplethorpe exhibition last summer for fear of losing future funding from the NEA, they subsequently lost their director, curator, 1,000 of their members and much of their prestige and integrity within the museum community; 2) when the Robert Mapplethorpe exhibition opened in Cincinnati, their director and curator were arrested for violating municipal obscenity laws; 3) when the Board of Trustees of the Muckenthaler Center in Fullerton removed from the gallery a work of art they deemed to be controversial, their curator resigned because his artistic autonomy had been overridden.

These comments served as a warning, because the Museum would have to hire a new director and curator in the future.

Finally, Mr. Nielsen is aware that failure to comply with a representation made to the government in the context of soliciting or requesting funds may subject him and the Museum to administrative, civil, or criminal prosecution. Lacking the objective standard in Paragraph Two and the ability to divine the NEA's judgment he does not feel that he can represent compliance with Paragraph Two.²

During the May 24, 1990, Board meeting, after much discussion and comment, the Board took the following action:

WHEREUPON motion duly made, seconded and unanimously passed, the Newport Harbor Art Museum as recipient of grant(s) awarded by the National Endowment for the Arts, agrees to comply with all terms and conditions, except the restrictive language, as set forth in the "General Terms and Conditions" document accompanying grant award letters.³

The Museum would accept grants from the NEA, but it would strike out the "obscenity pledge" from grant forms. Maxine Gaiber, NHAM public relations officer, told Zan Dubin of the *Los Angeles Times* that trustees felt that they could not afford to decline the grants but neither could they accept "in any good conscience" the anti-obscenity language.⁴ Although other arts organizations around the country had announced a similar position, no such forms had been returned. In Orange County, most groups receiving NEA grants signed the forms without questioning them.⁵

² *Newport Harbor Art Museum v. National Endowment for the Arts*, "Notice of Motion and Motion For Summary Judgment: Memorandum of Points and Authorities, SA CV 9005142 JGD(BX), U.S. District Court, Central District of California, 17 December 1990, 11-12.

³ "Evidentiary Appendix in Support of Motion For Summary Judgment," Minutes of the Board of Trustees, 282.

⁴ Zan Dubin, "Newport Harbor Trustees Reject Anti-Obscenity Contract," *Los Angeles Times*, 26 May 1990, F2.

⁵ Officials of the Pacific Symphony and the Orange County Philharmonic Society felt they could sign the forms because anti-obscenity provisions would not apply to musical works.

Concurrent with the Board's decision, a letter was sent May 24, 1990, to the Museum's membership urging support of President Bush's position to reauthorize the NEA without any restrictive language.

Congressmen are receiving tens of thousands of letters from constituents demanding the elimination of the NEA. If a vote were taken in the House of Representatives today, it is questionable whether the NEA would be reauthorized. If it were reauthorized it certainly would be done with language that would act to restrict freedom of artistic expression for artists, scholars and art institutions throughout the nation and permit continued harassment of the NEA and the artists and institutions that benefit from NEA support.⁶

The 4,682 Museum members were encouraged to write and telephone federal legislators in support of reauthorization of the agency. Included in the mailing were sample postcards addressed to members of the California delegation.

On July 10, 1990, the NEA reaffirmed in a "Statement of Policy and Guidance for the Implementation of Section 304" that NEA grant recipients must certify compliance with the terms and conditions of Section 304(a) as reflected in Paragraph Two of its General Terms. One of the NHAM Board members, James Selna, a senior partner in the law firm of O'Melveny & Myers, concluded that the

⁶ Newport Harbor Art Museum, "Memorandum to Members and Supporters of the Arts from Friends of the Newport Harbor Art Museum," 24 May 1990.

Kathleen Costello questioned the Orange County Congressional delegation for their positions on reauthorization of the NEA. Christopher Cox felt that government funds had been inappropriately spent on obscene works, but he opposed any compromise bill which called for reauthorization with restrictive language. Instead of the current option, he favored restored or increased tax incentives for private contributions to the arts. Both Dana Rohrabacher and William Dannemeyer favored no reauthorization or reauthorization with restricted language. Ron Packard supported restrictive language and voted to limit taxpayer dollars given to the NEA. Robert Dornan proposed allocating the majority of NEA funds to state arts councils for regranteeing but was sympathetic to the Rohrabacher view and wanted the arts community to admit that some works funded by the NEA had been obscene. At the state level, Senators Alan Cranston and Pete Wilson supported the Bush position.

statute was just wrong, a poor piece of constitutional legislation and a meritorious case for litigation.⁷ His firm agreed to take the case on a *pro bono* basis.⁸ Selna understood that there was a principle at stake--the government should not censor art--and he was willing to fight for that principle and put the resources of his firm

⁷ Two other arts institutions had already filed suit. The New School for Social Research in New York City filed suit against the Endowment seeking a court order barring the NEA from enforcing the provisions on May 20, 1990. And at the end of June, Bella Lewitzky, the acclaimed 76-year old dance legend, also filed suit. Her announcement was made at a press conference at the Hollywood Roosevelt Hotel attended by Mayor Tom Bradley, reporters, twelve dancers in the company and about fifty arts community supporters. This was the same hotel where Lewitzky refused to answer questions of the House Un-American Activities Committee at the height of the McCarthy scare in the fifties. Lewitzky stated,

I decided that I could not, in good moral conscience, accept the fact that a trampling on the rights of the First Amendment was good or even legal. Sen. Joe McCarthy, after damaging endless lives was . . . declared a madman. I am witness to Jesse Helms' destructive attacks on the NEA. All [these] incidents take down artists and art. How many times must history repeat itself? We must act. Having been witness, I must act.

Allan Parachini. "Choreographer Rejects NEA's \$72,000 Grant," *LA Times*, 15 June 1990. F26.

Lewitzky was represented by Michael Hudson, vice president and general counsel for the liberal organization, People for the American Way. The \$72,000 NEA grant represented about 8.5% of Lewitzky's 1990 operating budget of about \$850,000. "Lewitzky said her company originally struck out anti-obscenity wording in its NEA grant letter and returned the edited version to the endowment, but NEA officials notified the company no money would be distributed unless Lewitzky signed an acknowledgment of the obscenity clause." Parachini, F26.

⁸ *Pro bono* literally means representation for good, for the greater good, for public good. In a *pro bono* case, the firm absorbs the costs for both fees and expenses. O'Melveny & Myers has a long tradition of supporting lawyers doing *pro bono* activities through its program, Community Legal Services. The firm does not direct the activities of its attorneys. Attorneys are encouraged to volunteer their time in an effort that fits their particular talents and expertise. A *pro bono* client is treated just like a paying client. The Los Angeles County Bar Association encourages lawyers to volunteer forty hours of their time per year. James Selna, 1997 interview by author, tape recording, Rancho Santa Fe, California, 15 June.

into the fight. Selna communicated his conclusions to the Board and summarized his decision to represent the Museum:

The fact of the matter was that we had a very strong constitutional case. I think the arts community gets up in arms when there is any form of censorship. You can censor under the Constitution. Obscenity has a meaning. The government has a right to censor obscenity. The problem in this case was that Congress did not define obscenity correctly. They made a number of boilerplate errors when they drafted the statute.⁹

The course of litigation had not occurred to any of the members of the Board.¹⁰ After an in-depth analysis of the constitutional questions involved in the certification requirement, the Board voted unanimously to file suit against the NEA at its regular meeting on August 30, 1990.¹¹ Maxine Gaiber released a

⁹ Selna interview.

¹⁰ Costello said that the senior staff disapproved litigation. Their feeling was that litigation would draw too much attention to the already beleaguered NEA and weaken the agency. They didn't want to cause a disturbance and sought to follow the course of other major arts institutions which was to take the money. Costello surmises that Consey and Schimmel, the departed director and curator, would have signed the pledge and not pressed for litigation.

Costello interview.

Maxine Gaiber, former public relations director at NHAM, disagreed. Since they had a profound and passionate interest in contemporary art and spoke out on important issues affecting the arts, Gaiber held that Consey and Schimmel would not have kowtowed and fought the statute.

Maxine Gaiber, 1997 interview by author, Newport Beach, California, 13 June.

Schimmel had moved to the Museum of Contemporary Art (MOCA) in Los Angeles. MOCA's board announced at the end of May 1990 that they would accept grants but send a letter of protest with each acceptance and issued this statement, "Art, by its very nature, often involves risk and challenge to the status quo. Federal support through the NEA is important to MOCA. It is crucial that the NEA continues as it has been--as an institution that honors our society through the arts."

Zan Dubin, "Newport Museum Board Protests Anti-Obscenity Pledge," *Los Angeles Times*, 28 May 1990, F2.

¹¹ The prospect of litigating without attorney fees appealed to the business members of the Board. Selna estimated that his firm spent \$55,000 worth of time and \$5,000 worth of expenses for this lawsuit.

Selna interview.

media advisory that on September 12, the NHAM would make a significant announcement, "unique among U.S. art museums," in response to the anti-obscenity requirement.¹² On Wednesday, September 12, 1990, the Newport Harbor Art Museum filed suit against the National Endowment for the Arts in U.S. District Court, Central District of California. Gaiber's press release contained comments from Selna and Nielsen.

James V. Selna, Senior Litigation Partner of the Newport Beach office of the firm O'Melveny & Myers and a member of the Museum's Board of Trustees, said, "The suit is meant to challenge the legality of the legislation, and should not be viewed as an attack on the National Endowment for the Arts. Our goal is to free the NEA from a restriction that hampers its ability to support the arts."

In announcing this action, Museum President Thomas H. Nielsen stated, "The certification requirement represents a form of government censorship that infringes on the freedom of the creative process inherent in all art. Having taken a position at the May Board meeting not to comply with the NEA's restrictions, the Museum is now taking the next logical step to test the NEA's position in the courts."

Nielsen further commented that in reaching the decision to file suit, "the Board felt strongly that any form of protest short of a complete rejection of the certification requirement would be a tacit endorsement of the censorship restrictions."¹³

The press release ended with a statement from Susan Hoffman, Executive Director, California Confederation of the Arts.

The California Confederation of the Arts applauds the courageous action taken by the Newport Harbor Art Museum in legally challenging the constitutionality of the National Endowment for the Arts' "anti-obscenity" requirement. The civil liberties of every citizen have been threatened by the far right's attack on our artistic and intellectual freedom. With this suit, Newport Harbor stands out as

¹² Maxine Gaiber, "NHAM Press Release," 10 September 1990.

Gaiber refused to reveal the exact nature of the announcement and tantalized the press saying only that "we are the first museum in the nation to react the way we are going to react."

Bob Van Eyken. "Newport facility won't take grant; plans to sue." *Orange Coast Daily Pilot*, (Newport Beach, California), 12 September 1990, A1.

¹³ Maxine Gaiber, "NHAM Press Release," 12 September 1990.

one of the few U.S. art institutions willing to fight in order to protect our civil rights.¹⁴

Another member of the Board, Sam Goldstein, told the press, "I think Rohrabacher and the others in Congress need to get a clear message from Orange County."¹⁵ Goldstein added that NEA funding was not totally necessary to the Museum's existence. "We get a nice sum from them, but it certainly doesn't pay our bills. If you have a shortfall, you ask the trustees to ante up to make up the difference."¹⁶

The *Los Angeles Times* and *Washington Post* briefly mentioned the initiation of the lawsuit. Meanwhile, a local newspaper, *The Orange County Register*, ran a scathing editorial, "Classical farce, " chiding the Board for its action.

Perhaps one could see it as guerrilla theater, or a surrealistic statement on the ever-uneasy relationship between the arts and politics. The Newport Harbor Art Museum is suing the National Endowment for the Arts . . .

This is considered a "friendly" suit--supported by other arts groups that consider themselves friends of the NEA. In fact, say some who brought or support the suit, it may help the NEA find its true self.

¹⁴ Gaiber, "NHAM Press Release," 12 September 1990.

¹⁵ Van Eyken, A1.

¹⁶ Van Eyken, A1.

Was this a self-aggrandizing comment on Goldstein's part? Eyken's article had a conspicuous insert:

A newspaper report Tuesday stated that the museum would be losing a big chunk of funding from another source, the California Arts Council. The report said the council had decided to reduce the museum's grant this year from \$59,396 to just \$9,479 because the museum had misrepresented the number of minorities on its board and staff. But Jo Ann Anglin, a spokeswoman for the council, said Tuesday that reduction in funding would be much less severe than was reported. She said she did not have an exact figure, but suggested the grant might be up to three times the \$9,479 figure reported.

Van Eyken, A1.

How can I help you? Sue me! Only politics could be so bizarre. However avant garde or surreal it may try to become, art can never approach this level of weirdness.

Suing the National Endowment wasn't the only course available to the museum. . . . It could have rejected the grant . . .

But NEA funding is nothing if not political, and everything political seems to end up in court. . . .

What seems to be the goal, however, is money rather than principle. In common with many artists and organizations, the museum seems to want to eat its cake and have it too. It wants money from the taxpayers without any strings, without any control, without any accountability, just because it's a duly certified institution of--bow down and worship--the Arts.

The museum will take the taxpayers' money, announce in advance that it will refuse to comply with the guidelines, then sue the agency passing out the money. And James V. Selna, a board member and lead attorney on the case, says: "It is a matter of principle. We're not going to reject a grant that we believe we're entitled to."

Entitled? Just who is entitled, as a matter of divine right, to take money by force or threat of force from taxpayers?¹⁷

This editorial relates the conservative attitude of Orange County. Selna fired back a response to the editorial which was published, "Standing for principle," September 24, 1990:

Our suit does not contend that government is required to provide support for the arts--either as a matter of "divine right" or constitutional law. Rather, when an arts organization qualifies for an NEA grant, . . . we believe that the government may not then condition funding on restrictions which violate the First Amendment. . . .

Your alternative suggestion that the Museum should simply have rejected the grants and done nothing is somewhat astounding, coming from an institution which owes its existence to the First Amendment's guarantees of a free press and freedom of expression.

I doubt that the *Register* would quietly acquiesce if a governmental entity tried to censor the paper's content as a pre-condition of circulating the paper to its subscribers.

¹⁷ Editorial, "Classical farce," *Orange County Register* (Santa Ana, California), editorial, 19 September 1990, B10.

At bottom, an institution is only as sound as the principles which it espouses and is willing to fight for. That is what the Museum's lawsuit is about.¹⁸

¹⁸ James V. Selna, "Standing for principle," *Orange County Daily Register* (Santa Ana, California, 24 September 1990, B12.

Chapter 6: Litigation

A lawsuit is a complaint. A Complaint For Declaratory and Injunctive Relief was filed in federal court September 12, 1990. A complaint is a document in which a claim is stated. The NHAM was the plaintiff and the defendants were the NEA and John Frohnmayer. Frohnmayer's name was given because he technically was the one who gave or did not give the grants solely in his capacity as administrator of the NEA. In the complaint, the Museum contended that an actual controversy existed between the Museum and the NEA with respect to the legality, constitutionality and enforceability of Paragraph Two of the NEA's General Terms. In the first claim for relief, the Museum contended that the required certification and its enforcement were in violation of the First Amendment for the following reasons:

1. The certification requires the Museum to submit to terms and conditions which substitute a prior restraint on the content of the Museum's protected First Amendment expression.
2. The certification constitutes a subterfuge for the imposition of prior restraints on freedom of expression which could not be accomplished directly through government censorship.
3. The certification requirement is vague and overbroad, and constitutes a chilling effect on creative expression.
4. Enforcement of the certification impermissibly places in the hands of the NEA the power to determine the acceptability of the content of artistic expression as viewed by the NEA, rather than in the hands of a judicial officer for determination in accordance with community standards as required by the First Amendment of the

United States Constitution and the decisions of the Supreme Court of the United States.¹

The second claim for relief stated that Paragraph Two was violative of the Fifth Amendment in the following respects:²

1. The certification requirement is vague and overbroad, and may subject the Museum to civil or criminal penalties without clear and fair notice of what duties and responsibilities the requirement imposes.
2. The certification requirement improperly compels the Museum to agree in advance that it will abide by the NEA's judgment as to what may be considered obscene.
3. The certification requirement improperly reposes in the NEA, rather than in a judicial officer, the authority to determine what may be considered obscene.
4. The certification requirement improperly permits the judgment of what may be considered obscene to be made without constitutionally-required standards and procedures, including notice and an opportunity to be heard in a fair and impartial forum.
5. The certification requirement is not limited to expression that satisfies the constitutionally-established standards regarding obscenity, as set forth in the opinions of the United States Supreme Court.³

The Museum requested judgment in its favor as follows:

1. For a declaration that Paragraph Two of the NEA's General Terms and [Section] 304 (a) were invalid and unenforceable in that they violate the First and Fifth amendments of the United States Constitution;
2. For a preliminary and permanent injunction enjoining the NEA from requiring the Museum to certify its acceptance of Paragraph Two as a precondition of receipt of funds under the Museum Grants;
3. For costs of suit herein, including reasonable attorneys' fees and expenses pursuant to 28 U.S.C. [Section] 2412; and

¹ *Newport Harbor Art Museum v. National Endowment for the Arts*, "Complaint For Declaratory and Injunctive Relief," SA CV 90-634 AHS, U.S. District Court, Central District of California, 12 September 1990, 10-11.

² Selna said, "Actually the Fifth Amendment was a better argument. Under the Fifth Amendment you have a right to know what the statute means, what it is that you are not supposed to do."

Selna interview.

³ "Complaint For Declaratory and Injunctive Relief," 12-13.

4. For such other and further relief as the Court deems proper and just.⁴

The complaint was filed with the court clerk who then sent it to the Attorney General's office. The Government had sixty days to respond. The U.S. Department of Justice submitted a *pro forma* reply November 9, 1990, disputing none of the facts in the case put forth by the Museum but insisting that the certification was constitutional.⁵

On November 19, 1990, the Museum returned the "Request for Advance or Reimbursement" for the Cragg, "Typologies," and "Committed to Print" exhibitions.⁶ Under Section 12, the Museum trustees remarked:

The Newport Harbor Art Museum does not accept terms and conditions set forth in Paragraph 2 in the National Endowment for the Arts General Terms and Conditions, and the execution of this request for Advance or Reimbursement shall not be deemed as a certification of compliance or intent to comply with said Paragraph 2.⁷

Since there really were no disputed issues of fact and all the issues were legal ones, the plaintiff moved for Summary Judgment. As the Lewitzky case had

⁴ "Complaint For Declaratory and Injunctive Relief," 13-14.

⁵ The government was represented by Assistant Attorney General Stuart Gerson and Theodore Hirt, Michael Sitcov and Mark Batten, of the Justice Department's Civil Division. These attorneys prepared First Amendment cases routinely. Also representing the NEA were U.S. Attorney Lourdes Baird and Assistant U.S. Attorney Ian Fan of Los Angeles.

⁶ Unfortunately, the time to purchase the Fried and Kelley works had expired. Kathleen Costello sought to make up the \$100,000 shortfall, which represented 5% of the Museum's \$1.8 million budget, through applications for financial assistance to the Lannan Foundation, Andy Warhol Foundation and Robert Mapplethorpe Foundations. Her requests were denied. It would seem that the officials of the Mapplethorpe Foundation would have sympathized with the Museum, but they were not making grants at that time. The photographer's estate was not settled and the directors of the Foundation did not have the cash and did not view the time right to sell artwork in order to obtain cash for grant purposes.

⁷ "Evidentiary Appendix in Support of Motion For Summary Judgment," Appendix M, 283, Appendix N, 286, Appendix O, 289.

been filed first, the Museum asked to be consolidated with Lewitzky's case. Both cases were assigned to Judge John G. Davies.⁸ Davies was appointed by Ronald Reagan in 1986 and was formerly with Rosenfeld, Meyer & Susman, a Beverly Hills firm specializing in legal work for the entertainment industry.⁹

A hearing was set for December 17, 1990. In a hearing, both sides give their best oral arguments and submit written arguments with exhibits. The judge has the opportunity to ask any questions that he pleases. Davies listened to arguments from James Selna and Mark Batten, the government's trial attorney. Selna argued that the anti-obscenity clause violated the First and Fifth Amendments because it was impossible for Museum officials to determine how the NEA would decide whether something was obscene. Selna added, "We are required to certify to a vague and unconstitutional standard."¹⁰ He explained that "the government's motion failed to prove its case because the NEA clause is the first time a U.S. citizen has been required to sign a certificate to obtain a subsidy

⁸ There is something called the Low Number Rule. Each case is filed with a number, such as, 001, 002, etc. If a judge has a case that relates to a particular incident or subject matter and other similar cases come along, the plaintiffs of the other cases have an obligation to tell the court of the similarities. All of those cases are then decided by the judge who has the case with the lowest number.

⁹ Ninety percent of his caseload was civil while 10% was criminal. Davies remarked "that the transition from lawyer to judge was painless and easy. There is not anywhere near the stress of lawyering. The only thing that causes me worry is sentencing. That is a heavy responsibility."

Jeff Rowe, "Judge John G. Davies, U.S. District Court-Central," *The Daily Journal*, 17 December 1987, 37.

Dean Dunlavey, a Los Angeles attorney said, "He doesn't get bogged down in detail." Davies ran an efficient court and deplored attorneys who did not restrain their talking.

Rowe, 37.

In 1993, Davies presided over the trial of the four policemen charged with civil rights violations in the beating of Rodney G. King, in which Sgt. Stacey Koon and Officer Laurence Powell were convicted.

¹⁰ Laura Bleiberg. "Museum asks judge to reject NEA policy." *Orange County Register* (Santa Ana, California), 18 December 1990, A1.

from the government."¹¹ Batten argued that a federal agency can impose conditions on grant recipients. Even though the anti-obscenity guidelines may have a chilling effect on free speech, they are not unconstitutional because the Museum always has the option of getting money from the private sector.¹² "The museum is not restrained from speaking at all," Batten said.¹³ "Davies asked Batten if it was right for the government to provide a soap box for a speaker and then to impose restrictions on its use. Batten repeated his previous assertion that the speaker always has the option of not using the soap box."¹⁴ The whole session lasted for only an hour.¹⁵ Both sides filed motions for the judge to decide the issue without a trial by jury.

The thrust of the plaintiff's written arguments used the legal precedent of *Miller v. California* in which the Supreme Court set the essential framework for defining obscenity:

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic political or scientific value.¹⁶

¹¹ Bleiberg, A1.

¹² Bleiberg, A1.

¹³ Bleiberg, A1.

¹⁴ Bleiberg, A1

¹⁵ Selna summarized the performance of the defending attorneys. "Their arguments weren't very good. The argument for the broad powers of the government was not convincing."

Selna interview.

¹⁶ 1993 United States Supreme Court Reporter, *Miller v. California*, Sec. 2607-2611, 2615.

The defendant, Miller, was convicted of mailing unsolicited sexually explicit material coincidentally in Orange County. The current District Attorney of Orange County, Michael Capizzi, argued that case before the Supreme Court. In 1973,

The government was prohibited from regulating works that do not meet the Miller test as obscene. Plaintiff attorneys argued that Paragraph Two failed the Miller test in that it gave the power to judge that which "may be considered obscene" to the NEA rather than "the average person, applying contemporary community standards." Paragraph Two also failed to require any finding of "appeal to the prurient interest" and it failed to limit regulation to only that which "depicts or describes, in a patently offensive way" the conduct specifically defined. The attorneys stated that the certification requirement was impermissibly overbroad, it restrained the Museum's constitutionally protected creative expression and it had a chilling effect on the Museum's creative expression. Furthermore, the NEA's certification requirement was prohibited by the Fifth Amendment for it violated the due process clause.

The defendants argued that the certification requirement, a governmental decision not to subsidize the exercise of particular protected expressions, did not deny the plaintiffs their constitutional rights to freedom of speech and due process. The certification requirement was neither vague nor overbroad. The

Chief Justice Burger defined obscenity and held that the state may determine and regulate if work is obscene.

Prior to the Burger Court, Justice Brennan called for abandonment of attempts to define and suppress obscenity through law. He argued that obscenity could not be constitutionally defined as the term was "unconstitutionally overbroad." Many hold that Brennan's liberal views of obscenity in the sixties led to the spread of pornography resulting in the *Miller v. California* decision by the conservative Burger court. Brennan's doctrine, forged during the sixties to protect literature and art from the heightened repression of the fifties, was weakened by the Burger court and further eroded by the Rehnquist court. Whether Brennan's doctrine and First Amendment freedom "will hold fast under renewed tensions generated by the collision of works created by morally defiant artists and writers with values held by reactionary politicians and judges is today anything but a settled question."

Edward de Grazia, *Girls Lean Back Everywhere: The Face of Obscenity and the Assault on Genius* (New York: Random House, 1992) 688.

Museum had no constitutional right to a federal subsidy and could rely on other sources of funding.

Davies rendered a twenty-eight page opinion on January 9, 1991, regarding both the Lewitzky and NHAM suits. In his "Order Granting Plaintiffs' Motions For Summary Judgment," Judge Davis wrote that the NEA requirement was unconstitutionally vague.

Plaintiffs argue that unconstitutional vagueness arises because the determination of obscenity is in the judgment of the National Endowment for the Arts. Plaintiffs complain that they are left to speculate about how the NEA will assess obscenity. In response, the NEA argues that it has taken the policy position that it will rely on the well established standard of *Miller v. California* . . . when applying the obscenity ban found in the certification requirement. Further the NEA contends that the *Miller* definition cannot be vague as a matter of law. However, the Court finds that the adoption of the *Miller* standard by the NEA does not cure the vagueness arising from the fact that the obscenity determination has been left to the judgment of the National Endowment for the Arts.¹⁷

Davis also explained how chilling this pledge would be on creativity.

The chilling effect . . . is unmistakably clear. . . . the plaintiff Museum would have to continually moderate its selection decisions with a view toward steering clear of what might strike the NEA as obscene. The Court finds that because the certification requirement includes unconstitutionally vague provisions, it also violates grantees First Amendment rights by causing a chilling effect on their artistic expression.¹⁸

Davies held that the NEA grants lend prestige and legitimacy to projects and are critical to the artist's ability to attract private funding.

Plainly stated, the NEA occupies a dominant and influential role in the financial affairs of the art world in the United States. Because the NEA provides much of its support with conditions that require

¹⁷ *Bella Lewitzky and Newport Harbor Art Museum v. National Endowment for the Arts*, "Order Granting Plaintiff's Motions For Summary Judgment," CV 90-3616 JGD and CV 90-5142 JGD, U.S. District Court, Central District of California, 9 January 1991, 18.

¹⁸ "Order Granting Plaintiff's Motions For Summary Judgment," 21.

matching or co-funding from private sources, the NEA's funding involvement in a project necessarily has a multiplier effect in the competitive market for funding of artistic endeavors. . . . Grant applicants rely on the NEA well beyond the dollar value of any particular grant. As the NEA has made no showing to the contrary, the Court is inclined to agree.¹⁹

Davies continued that although the government is not obliged to give the plaintiffs the grants, the NEA may not place unconstitutionally vague restrictions on a grant once it has been approved.

Plaintiffs cannot, and do not, claim any "right" to an NEA grant. But once the plaintiffs were chosen for grants, on the basis of artistic merit, the government may not place restrictions on disbursement of those grants that require grantees to certify to obscenity provisions that are vague in violation of the Fifth Amendment, and which correspondingly cause a chilling effect in violation of the First Amendment. The facts before the Court go well beyond a simple decision not to subsidize obscene speech.²⁰

Davies concluded that artists not signing an oath might be worse off than if they had not applied for an NEA grant at all. "This is the type of obstacle in the path of the exercise of fundamental speech rights that the Constitution will not tolerate."²¹

Bella Lewitzky's said that it was "very heartening" that Davies agreed with virtually every argument advanced by the two arts organizations.²² "It's a great victory for the museum, it's a victory for the arts community and it's a victory for the NEA because it frees the NEA from a burden which has diverted it from its mission to support the arts," commented James Selna.²³ Thomas Nielsen

¹⁹ "Order Granting Plaintiff's Motions For Summary Judgment," 22.

²⁰ "Order Granting Plaintiff's Motions For Summary Judgment," 26.

²¹ "Order Granting Plaintiff's Motions For Summary Judgment," 27.

²² Allan Parachini. "NEA's Obscenity Pledge Voided." *Los Angeles Times*, 10 January 1991, B1.

²³ Roger Bloom, "Newport museum beats NEA." *Orange Coast Daily Pilot*, (Newport Beach, California), 10 January 1991, A1.

believed that the "ruling will free the museum to make artistic decisions without someone external making decisions for you."²⁴ Again the local newspaper, the *Orange County Register*, did not receive the news well and responded with another searing editorial, "Abstract reasoning":

Ouch! A federal judge in Los Angeles has just handed down some "logic" about art, subsidies, and free expression that amounts to intellectual fingerpainting. His decision is so, well, abstract, as to be positively embarrassing. . . .

Say what? We suspect James Madison and other authors of our fundamental law might be surprised to learn that they bequeathed taxpayers an obligation to fund photos of sexual cavorting, or some of the other controversial works that received NEA largesse before the advent of the anti-obscenity clause.

What's this about a "chilling effect"? Does the judge mean to imply that only where there's potential for federal support can an artist freely express himself? Doesn't His Honor know there were painters painting, potters potting, and dancers pirouetting in this land long before the NEA stepped on stage? . . .²⁵

Back in Washington, D.C., the NEA's chief critics were silent after the ruling. A spokesman for Sen. Jesse Helms did not respond to calls seeking Helms' comments concerning the Davies decision. John Frohnmayer wrote his reaction:

We lost, and I couldn't have been happier, since this was the judicial challenge to the Helms amendment I had provoked by including the "loyalty oath" in the NEA grant acceptance. The opinion was not a model of judicial clarity, since the judge had to accomplish a few mental gymnastics to reach the desired result. . . .

Our next job was to persuade the Justice Department not to appeal. Some of its lawyers were rabid in their desire to take the issue to a higher court, but ultimately the solicitor general's office, not the Justice Department, would make the decision. (The solicitor general handles appeals for the government.) We wrote a brief detailing why we thought the decision was fundamentally correct and why it would be contrary to the interests of the Arts Endowment to appeal it. . . .

²⁴ Bloom, A1.

²⁵ Editorial, "Abstract reasoning," *Orange County Register* (Santa Ana, California), " 11 January 1991, B10.

The administration finally announced that it would not appeal, ending a long, and for me arduous process. We had accomplished what I had hoped for from the beginning. First, Congress had superseded the Helms amendment by reauthorizing the Endowment in the fall of 1990 and had taken us out of the business of determining what was obscene; now the language had been declared unconstitutional (or close enough), so that it would no longer control those grants given during the year it was in effect; and finally, I could retroactively apply the reauthorization language to the grants given during 1990 and wipe the slate clean. It wasn't a tidy process; judicial proceedings seldom are. But it did rid us of the Helms amendment, we hoped forever.²⁶

The date of the Davies decision coincided with the advent of the Gulf War. Therefore, the ruling received less publicity than it should have.²⁷ In March 1991, the Museum received the long-awaited NEA grant funds.²⁸ James Selna made the following summary about the case:

I think two things are of interest. One, we are the only visual arts institution to challenge, which says an arts institution should be a place of values. If you are not willing to stand up and say what's right, you just toady under to get the money. I think that there is something wrong with the soul of [that kind of] an institution. You should have your soul in the right place in terms of artistic value. Fortunately, artistic, moral judgment has a legal basis. Otherwise, I would never take the case. Many things people think are morally or artistically wrong are perfectly legal. [In this case] the moral and artistic sensibilities lined up with the laws. Congress just got it wrong.

The other interesting thing is this challenge to an anti-obscenity pledge, which sounds like a radical, liberal, left-wing exercise, came from the heart of Orange County. The only thing that I could think to rationalize that is that it was a conflict of nineteenth and twentieth century liberalism in that it was a contest of freedoms--freedom of ideas and art. In a way it really wasn't inconsistent that this challenge would come from Orange County.²⁹

²⁶ Frohnmayer, *Leaving Town Alive*, 257-258.

²⁷ Indeed, there is scant commentary on the decision by art historians. Only journalists and those who write about public policy have concerned themselves with this decision and its implications.

²⁸ See Appendix H for a discussion of the evolution of the NHAM since the defeat of the Helms amendment.

²⁹ Selna interview.

Chapter 7: Aftermath

Davies' ruling, hailed as a victory for arts advocates, was anti-climactic since the NEA, under pressure from Congress, dropped the certification requirement from its FY 1991 application process.¹ Nevertheless, the ruling gave important legal backing to art groups who feared that the anti-obscenity requirement would intrude on artistic freedom--one of the underpinnings of freedom of expression. The decision had significant precedential value. The arts community was protected against any new "change in the winds that might see an effort to reimpose a certification requirement," and the censorship issue was legally laid to rest.²

The victory was short-lived. All the negative attention and publicity of 1989-1991 dragged the benign and quiet agency before the public's scrutiny. The NEA was slated to undergo the reauthorization process in 1993, but that never took place. Since 1993, the NEA has been operating without

¹ The FY 1991 grants would 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 diverse beliefs and values of the American public; and

(2) . . . that obscenity is without artistic merit, is not protected speech and shall not be funded. Projects, productions, workshops and programs that are determined to be obscene are prohibited from receiving financial assistance . . . from the National Endowment For the Arts.

de Grazia, 681

² Comment by James Selna, Parachini, "NEA's Obscenity Pledge Voided," B1.

reauthorization, although it has been receiving annual appropriations from Congress. In 1995, during its debate over the budget, Congress resurrected all the old arguments regarding the value of public subsidy of the arts. The newly elected conservative legislature began to streamline the government employing the business solution of the eighties and nineties--downsizing. In a reversal of fortune, the agency's funding shrank by 40%. Furthermore, the Republican majority targeted 1998 as the year for total elimination of the agency. At this very moment, the NEA fights for its survival.

As she began her NEA chairmanship, Jane Alexander faced congressional challenges to her agency. She explained the NEA's mission:

As we enter the 21st century, the National Endowment for the Arts is taking the lead in fostering a cultural legacy for future generations and nurturing the artistic traditions which define us as a nation. In light of recent cuts in public arts funding, the Endowment's challenge in this round of grants is to sustain support for projects which educate children in the arts, protect our diverse heritage, and ensure that the arts are readily available to Americans everywhere.³

Upon taking office, Alexander was determined to complete two unprecedented initiatives--visiting all fifty states and convening a first federal national arts conference. She criss-crossed the country, impressing Americans with the importance and value of public-supported arts, and expressed that the overwhelming majority of NEA funded projects were not at all controversial. Art 21: Art Reaches into the 21st Century, a conference of 7,000 artists, art administrators and government leaders, was convened "to examine issues that Alexander identified as critical to the future of the non-profit arts in America, the role of the artist in society, lifelong learning in the arts, the arts and new

³ National Endowment for the Arts, "Press Release," 16 December 1996.

technologies, public/private leadership, and our nation's cultural legacy."⁴ From this convention, Alexander gained the knowledge to reorganize the agency, improve the accountability in the NEA, change grantmaking and monitoring processes, develop twenty-five partnerships with other federal agencies and institute direct planning with all fifty state arts agencies to improve access to the arts.

The Arts Endowment has reduced grants to organizations in four categories: Heritage and Preservation, Education and Access, Creation and Presentation, and Planning and Stabilization. Grants for direct support and fellowships to individuals have ended.⁵ Grantees must file interim reports before full grant amounts are released and subgranting to third party organizations was abolished. The new criteria for reviewing an application are artistic excellence and merit, the impact of the proposed project and the ability to carry out the project. The staff of the agency has been halved.⁶ Only two full-time employees process applications which can only be submitted once a year.

The underlying objectives of the four new categories are multi-culturalism and an exposure to the widest possible audience.⁷ The category of Heritage and

⁴ National Endowment for the Arts, website, <http://arts.endow.gov>, "Jane Alexander Resigns," 9 October 1997.

⁵ In her lecture at the College Art Association Convention, February 14, 1997, Jennifer Dowley, NEA Director of Visual Arts, said that the public did not articulate a response to the decision by Congress and the NEA to provide grants only to organizations and institutions. Alexander and she did not receive one letter from the art world. In the past thirty years, over 4,000 artists received direct government support. The end of grants to individuals signifies to Dowley that artists are perceived as untrustworthy.

⁶ For example, Dowley's staff has been reduced from eighteen to only four people.

⁷ Robert Hughes refutes the importance of multi-culturalism and identity politics in his latest history, *American Visions*.

It is a very short step from the 1960s idea that the personal is political to the 1990s belief that the personal should be submerged

Preservation makes visible those artists and forms of artistic expression that reflect the make up of the nation, preserve artistic cultural accomplishments and conserve important works of art for future generations. Education and Access guarantee that Americans should have opportunities to experience the arts as learners, as makers and as audience members. The Endowment seeks projects that will broaden the understanding and appreciation of our heritage. Through Creation and Presentation, the Endowment assists the creation of new artistic works and encourages their presentation, exhibition and performance for the public. Planning and Stabilization support organizations to clarify and strengthen their identities and missions, to build their capacity and resources for the execution of such missions, to build resilience and disciplined flexibility as they adapt to today's funding circumstances, to sustain the arts in an era of constant

in the tribal. Identity does not mean individuality; it is a means of framing public conformity and proclaiming what the writer Leon Wieseltie called a foolish worship of origins: "If the differences between individuals and groups were as thick as multiculturalists think, then not even multiculturalism would be possible." Everyone would be shut up in subjectivity. There would only be total silence or total war.

Every assertion of identity is also an exclusion of others. Yet this may not be the best thing for an artist or a writer to feel. The desires that go into the making of a work of art can be very complex and conflicted, and may have nothing to do with "belonging." (Much of the story of modernism is one of exile and deracination.) One makes art to allow the unknown self--unknown to others, but also to the artist--to speak; the work gropes its way to the light of such a resolution, and identity slogans may trip it up. Identity says nothing about deep esthetic ordering; such ordering is conscious and existential, and identity is an accident. The multicultural society is certainly an end in itself, in terms of ethical tolerance for others. However, multiculti [sic.] guarantees absolutely nothing about the merits--the quality, to use a much-disparaged word--of the writing, painting, music, and architecture made in it. What counts in art is the multicultural *person*, the individual who is more complex than his or her origins, and who can speak to the complexities of others.

Hughes, *American Visions*, 617-8.

and profound change, to build partnerships which strengthen the arts infrastructure and to develop new partners and resources (including new private and/or public money) to support the arts.⁸

The NEA has implemented very detailed guidelines for review.⁹ Under "Excellence and Merit of the Proposed Project," the applicant organization relates the artistic significance of the proposed project and gives evidence of direct payment to participating artists and arts professions. "Impact of the Project" includes the significance of the proposed project to America's artistic and cultural heritage, the potential to broaden public appreciation of and access to the arts, the urgency of the need for proposed conservation projects and the potential to reach underserved populations such as those in rural areas, culturally-diverse or ethnically-specific communities and individuals with disabilities.¹⁰ The applicant must demonstrate the ability to carry out the project and readiness to accomplish the project with the inclusion of the appropriate artistic, cultural and technical expertise in the planning and execution of the project, the effectiveness of the proposed plan, the appropriateness of the budget for the proposed activities and the organizational stability and fiscal responsibility of the project.¹¹

⁸ National Endowment for the Arts, *1998 Grants to Organizations*, 21.

⁹ At the CAA lecture, Dowley admitted that there have not been any troublesome applications. A new conservatism and self-censorship are evident in the applications the agency has received. Dowley's goals are to assure excellent artistic practices in the U.S. and facilitate a strong and fair review process. The agency wants its image turned from the symbols of Serrano and Mapplethorpe and its perception of helping only those who live in a major city. She challenged educators to improve the image of the NEA.

¹⁰ *1998 Grants to Organizations*, 13.

¹¹ *1998 Grants to Organizations*, 13.

Currently, it appears that the NEA will halt its descent toward extinction.¹² Jane Alexander has been exemplary in her efforts to remove the issue from partisan politics and has steered the agency away from tarnished associations with obscene works.¹³ In his State of the Union Address, February 4, 1997, President Clinton affirmed his support of the NEA and announced that "instead of cutting back on our modest efforts to support the arts and humanities, I believe we should stand by them, and challenge our artists, musicians, and writers, our museums, libraries and theaters."¹⁴ Clinton proposed a \$37 million boost to the NEA's \$99.5 million budget of 1997. The public's blame of the Republican Party for the government shutdown during the budget negotiation in the winter of 1996 weakened the zeal of the Republican revolution of 1994. In the beginning of 1997, it appeared that the Republican leadership softened its confrontational stance to one of conciliation. At the first formal hearing of the NEA's proposed

¹² When queried about the future of the NEA at his April 19, 1996, lecture at Santa Clara University, John Frohnmayer answered that Republican controlled legislative and executive branches would kill the agency. Clinton's re-election prevented such a combination.

¹³ Jennifer Dowley, CAA lecture.

On October 8, 1997, Jane Alexander resigned after four years as head of the NEA and related plans to return to her acting career. She announced her confidence that the embattled agency would survive. Her supporters say that Alexander's diplomacy and determination saved the agency. Rep. Peter Hoekstra (R-Michigan) stated he "didn't have a problem" with Alexander but believed that the agency was poorly run and urged for a successor to be someone with management experience.

Mary Otto and Maria Recio, "Alexander resigns NEA post, says assailed agency will survive," *San Ramon Valley Times* (San Ramon, California), 9 October 1997, F2.

Roberto Bedoya, head of the National Association of Artists, comprised of 700 experimental artists and arts groups, "wondered whether, in the process of helping the agency survive, she had helped soften its message and made too many concessions to its foes."

Otto and Recio, F2.

¹⁴ Susan Ball and Katie Hollander, "Positive Trends for 1997," *College Art Association News*, 22, no 3 (May/June 1997): 11.

appropriation for 1998, HR 2107, on March 13, 1997, once-avowed opponent, Rep. Zach Wamp (R-Tennessee), said that he was changing his mind about killing the agency. At the same time, House Speaker Newt Gingrich invited a group of celebrity NEA supporters to a "genuine discussion of arts funding."¹⁵ House Majority Leader Richard Armey admitted that he did not think he had the 218 votes needed to end funding. However, by mid-year the political tone in the House changed, and the NEA's future status was decided by a cliffhanging vote. On July 9, 1997, the House Rules Committee ruled out any amendment to increase NEA funding and this motion barely passed in a close vote of 217-216 on July 10. This procedural vote was a de facto vote on whether members favored the NEA's elimination and "offered representatives with a choice between eliminating the NEA entirely or giving \$80 million in the form of state block grants for the arts. Critics complained loudly that the GOP had forced the restrictive vote in response to political agreements made during the appropriations process two years ago."¹⁶

Despite strong opposition from the House, there are enough supporters in the Senate to save the NEA.¹⁷ On July 17, 1997, the Senate Interior Appropriations Subcommittee debated its version of HR 2107 and provided the agency with \$100,060,000, the FY 1997 amount plus a small addition for inflation. The Interior Appropriations Bill reached the Senate floor, September 11, with a warning from the Executive Office of the President that the President would veto an Interior Appropriations Bill that did not fund the NEA. The Senate debated

¹⁵ "GOP Leaders Stay NEA's Execution," *San Francisco Chronicle*, 14 March 1997, A3.

¹⁶ Blair Winn, "CAA Advocacy Team Update," *College Art Association News*, 22, no. 5 (September 1997): 8.

¹⁷ Austin Kiplinger, *The Kiplinger Washington Letter*, 74, no. 19 (9 May 1997): 2.

from September 15-18. Four amendments were proposed to eliminate or substantially restructure the NEA and all were defeated:

1. 23-77, Jesse Helms, R-North Carolina/John Ashcroft, R-Missouri, eliminate the NEA.
2. 26-73, Spencer Abraham, R-Michigan, decrease the NEA's funding by one-third and transfer those funds to the Smithsonian Institution, the NEH and National Park Services, which was defeated 26-73.
3. 37-62, Tom Hutchinson, R-Arkansas/Jeff Sessions, R-Alabama, eliminate the NEA and blockgrant 99% of funds to state governors for art purposes and 1% to the U.S. Treasury for administration.
4. 39-61, Kay Bailey Hutchinson, R-Texas, devote 75% of NEA funds to state arts agencies in the form of block grants, retain 20% for national grants and 5% for administrative costs.¹⁸

Two amendments concerning the NEA were adopted by voice vote in which NEA funding would be debated before the full Senate and priority would be given to projects in underserved populations. On September 18, the Senate passed FY 1998 Interior Appropriations Bill, 93-3.

On September 30, 1997, the FY 1998 Interior Appropriations Conference Committee met to reconcile the differing provisions of the House and Senate Interior Appropriations Bills. In the House, Sidney Yates' (D-Ohio) motion to instruct the Interior Appropriations conferees to follow the Senate's funding level of \$100,060,000 passed by voice vote. By October 1, the conference committee of senators and congressmen agreed to fund the NEA for \$98 million for the next fiscal year as part of the FY 1998 Interior Appropriations Bill. It is expected that both the House and Senate will vote and pass the Interior Appropriations Bill and the President will sign it. Reauthorization is another matter. The Senate Labor and Human Resources Committee will not consider the issue in 1997. In the

¹⁸National Endowment for the Arts, website, <http://arts.endow.gov>. "Legislative Update," 9 October 1997.

House, no commitment to moving for reauthorization or phasing-out the agency is expected in 1997.

Although it may only be a mere shadow of its former self, it appears that the NEA, the grand experiment of public funding of art, will survive. The Republican plan of 1995 to zero-out all funding for the NEA by October 1997, and phase-out the agency in 1998 has not come to fruition. Since the NEA's funding depends upon the decisions of politicians, it is problematic to predict the agency's longevity. Whatever the ultimate fate of the agency is--restoration to former glory, continuation of \$100 million funding levels, slow or sudden death--the NEA's mortality will reflect the congressional and presidential perceptions of what the voters want.

APPENDIX A: Summary of Appropriated Funds 1966-1997
 Compiled by the National Endowment for the Arts, website,
<http://arts.endow.gov>.

Year	Grant Making* Funds	Administrative Funds	Total Funds
1966	\$2,534,308	\$364,000	\$2,898,308
1967	7,965,692	510,000	8,475,692
1968	7,174,291	600,000	7,774,291
1969	7,756,875	700,000	8,456,875
1970	8,250,000	805,000	9,055,000
1971	15,090,000	1,330,000	16,420,000
1972	29,750,000	1,730,000	31,480,000
1973	38,200,000	2,657,000	40,857,000
1974	60,775,000	3,250,000	64,025,000
1975	74,750,000	5,392,000	80,142,000
1976	82,000,000	5,455,000	87,455,000
1976T**	33,937,000	1,364,000	35,301,000
1977	94,000,000	5,872,000	99,872,000
1978	114,600,000	9,250,000	123,850,000
1979	139,660,000	9,925,000	149,585,000
1980	142,400,000	12,210,000	154,610,000
1981	146,660,000	12,135,000	158,795,000
1982	132,130,000	11,326,000	143,456,000
1983	131,275,000	12,600,000	143,875,000
1984	149,000,000	13,223,000	162,223,000
1985	148,078,000	15,582,000	163,660,000

1986	143,999,732	14,822,508	158,822,240
1987	149,181,000	16,100,000	165,281,000
1988	150,591,000	17,140,000	167,731,000
1989	150,650,000	18,440,000	169,090,000
1990	151,405,000	19,850,000	171,255,000
1991	152,485,734	21,595,003	174,080,737
1992	153,106,244	22,848,436	175,954,680
1993	150,125,848	24,333,534	174,459,382
1994	145,662,000	24,566,000	170,228,000
1995	137,512,000	24,799,000	162,311,000
1996	80,734,000	18,736,000	99,470,000 (1)
1997	82,514,000	16,980,000	99,494,000
	\$3,213,952,724	\$366,490,481	\$3,580,443,205

* Grant-making funds include program funds, treasury funds and challenge funds.

** In 1976, the Federal government changed the beginning of the fiscal year from July 1 to October 1, hence the 1976 Transition ("T") Quart

(1) This is the amount appropriated in the "Omnibus Appropriations Bill. Administrative funds includes \$2.5 million for "agency downsizing," the preponderance of which is for one-time costs of paying severance pay to former NEA personnel whose employment was discontinued as as result of a Reduction in Force (RIF).

APPENDIX B: NEA Chairmen

Roger Stevens	1966-1970	Johnson appointee
Nancy Hanks	1970-1978	Nixon appointee
Livingston Biddle	1978-1982	Carter appointee
Francis Hodsell	1982-1989	Reagan appointee
Hugh Southern	1990	interim
John Frohnmayer	1990-1992	Bush appointee
Anne Imelda Radice	1992-1993	interim
Jane Alexander	1993-1997	Clinton appointee
Scott Shanklin-Peterson	1997	interim

APPENDIX C: NEA Organization Chart of 1992
From Frohnmayr, *Leaving Town Alive*, 62.

Presidential appointee

1992 - 275 employees

APPENDIX D: Summary of NEA Grants to NHAM 1972-1990
From "Evidentiary Appendix in Support of Motion For
Summary Judgment," Appendix B, 22-24

1972-77	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	TOTAL (56)
66,600	206,150	14,000	36,850	15,000	27,390	26,370	0-	80,000	53,900	433,560	91,300	111,900	100,000	1,263,020
FUNDING SUMMARY														
PROJECT/PROGRAM	NUMBER	AMOUNT REQUESTED	AMOUNT COMMITTED	DATE AWARDED	PROJECT DATES	YR	EXH	COLL	OTHER	TOTAL				
Rogeland Marsh	A72-0-590	6,000	6,000	4/19/72	7/1/72-6/30/73	1972	6,000			6,000				
Purchase 2pcs for PC	A40-20367	5,000	5,000	1/20/74	9/1/74-8/31/75	1974		5,000		5,000				
Installation of PC	R50-20-85	7,500	7,500	12/6/74	12/1/74-12/31/76	1974		7,500		7,500				
Purchase for PC		10,000	0-	78-77						10,000				
3 Competitive Sensibil	R70-20-58	5,350	5,350	11/12/76	10/18/76-10/18/77	1976	5,350			5,350				
Purchase 2pcs for PC	R70-20-367	20,000	20,000	7/12/77	7/1/77-6/30/78	1976		20,000		20,000				
William Bazilotes	R70-20-459	22,750	22,750	9/16/77	1/1/78-1/1/79	1977	22,750			22,750				
Photo Survey		15,000	0-	78-79						15,000				
Frank Stella		6,000	0-	78-79						6,000				
Purchase for PC	R80-20-476	20,000	20,000	5/23/78	7/1/78-8/31/79	1978		20,000		20,000				
Challenge	08-5660-078	190,000	150,000	7/1/78	7/1/78-12/31/81	1978			150,000	150,000				
Rooms: Moments Reman.	92-2022-182	6,800	6,800	11/14/78	10/15/78-4/15/79	1978	6,800			6,800				
Amer. Pigs of '70s	92-2022-180	6,350	6,350	11/29/78	12/1/78-4/15/79	1978	6,350			6,350				
Hester Gallery	92-2022-181	9,000	9,000	11/29/78	10/1/78-9/1/79	1978	9,000			9,000				
Docent Education	92-2011-032	14,000	14,000	12/5/78	10/1/78-1/30/79	1978			14,000	14,000				
Shakers: Gift to be Simple		25,000	0-	78-80						25,000				
Christo		12,000	0-	78-80						12,000				
Our Own Artists		8,000	0-	78-80						8,000				
George Herms		14,000	0-	78-80						14,000				
Docent Education	92-2011-574	14,000	14,000	9/11/79	10/1/79-9/30/80	1979			14,000	14,000				
Self Beyond Likeness		25,000	0-	80-81						25,000				
Interactive Video		26,583	0-	80-81						26,583				
Artists in Residence		2,000	0-	80-81						2,000				
Purchase for PC		20,000	0-	80-81						20,000				
Vija Celmins	02-4442-193	9,850	9,850	2/1/80	10/1/79-4/1/80	1980	9,850			9,850				
Aid to Hester	02-4442-192	12,000	12,000	2/1/80	10/1/79-9/30/80	1980	12,000			12,000				
(Introducing New Artists)														
Aid to Hester	12-4442-265	15,000	15,000	11/14/80	10/1/80-9/30/81	1980	15,000			15,000				
---(Masches, Ashley, Hagan)														
Aid to Hester		10,225	0-	81-82						10,225				
Wider Avail/lectures		2,710	0-	81-82						2,710				
Wider Avail/video prod		22,500	0-	81-82						22,500				
Purchase for PC		25,000	0-	81-82						25,000				
Neueberg		50,770	0-	81-82						50,770				
Twombly		7,775	0-	81-82						7,775				
Videotapes	12-4443-065	30,000	15,000	1/29/81	10/1/80-9/30/81	1981			15,000	15,000				

FUNDING SUMMARY

Project/Program	number	amount request	amount received	date awarded	project dates	year	exh	sell	educ/ other	TOTAL
Alan Saret Shift: L/NY	22-4442-171 32-4442-00123	38,500 -unk-	17,390 10,000	7/22/82 11/1/82	10/1/81-9/30/82 10/1/82-9/30/83	1982	17,390 10,000			27,390
Action/Precision	42-4442-00160	70,000	26,370	10/23/83	10/1/83-9/30/84	1983	26,370			26,370
Conservation Collection Maint Visiting Spec/Library Sign/Symbol/Object/Metaphor		11,900 13,150 9,510 37,890	-0- -0- -0- -0-	84-85 84-85 84-85 84-85						
Visual Artists Forums Artists in Education PC Cat/Ucll.Mus.Res. Collection Maint Conservation Inter Arts (Amirkhanian/Law; Marshall/Bengston) Interpretive Link		5,000 18,000 28,065 12,000 13,000 12,920 50,000	-0- -0- 15,000 7,000 8,000 10,000 40,000	85-86 85-86 2/25/85 6/19/85 6/19/85 9/9/85 12/6/85		1984		15,000 7,000 8,000 10,000		-0-
Flemish Expressions Inter Arts (Mannen/Longo) Conservation Collection Maint Music (Lucier) Biennial		75,000 20,000 18,000 15,000 25,000 30,000	-0- 5,000 12,000 9,000 2,900 25,000	85-87 4/14/86 8/27/86 9/30/86 9/18/86 8/21/86	10/1/85-5/30/87 6/1/86-5/31/88 4/1/86-8/1/87 4/1/86-3/31/88 9/1/86-8/31/87 7/1/86-6/30/87	1985	40,000	12,000 9,000	5,000 2,900	80,000
Conservation Collection Maint Chris Burden Figurative 50s Registration Intern Education Intern Challenge Partners Art in Schools		9,000 14,000 75,000 75,000 13,000 19,718 750,000 18,980 18,000	-0- -0- 50,000 80,000 6,000 10,000 300,000 7,560 -0-	87-88 87-88 8/19/87 8/11/87 9/8/87 9/22/87 10/87 9/1/87-9/30/90 9/30/87 12/87	7/1/87-11/30/88 7/1/87-4/30/89 10/1/87-9/30/88 10/1/87-9/30/88 9/1/87-9/30/90 10/1/87-9/30/88	1986	25,000		6,000 10,000 300,000 7,560	52,500
						1987				432,560

FUNDING SUMMARY

Project/program	number	amount requested	amount received	date received	project dates	year	educ/ other	total
PC Cataloging	88-4444-0074	22,300	12,000	1/7/88	1/1/88 - 6/1/89			
Music Presenters	88-3147-0569	17,000	3,000	2/3/88	10/1/88 - 9/30/89			
Conservation	88-4431-0216	9,500	9,500	4/20/88	4/1/88 - 3/30/89		3,000	
Collection Maint	88-4432-0259	12,800	8,000	4/20/88	4/1/88 - 3/30/89		9,500	
Purchase for PC	88-4433-0294	25,000	15,000	4/20/88	4/1/88 - 3/30/89		15,000	
Inter-Arts	88-5441-0153	18,000	6,400	4/20/88	4/1/88 - 6/30/89			
New Sculpture	88-4442-0527	4,900	4,900	(6/88)	7/1/88 - 12/31/89		4,900	
Berry Le Va	88-4442-0419	12,500	12,500	(6/88)	7/1/88 - 12/31/89		12,500	
Biennial	88-002232	50,000	-0-	7/8/88	7/1/88 - 12/31/89			
California Pop	88-001844	60,000	-0-	6/21/88	7/1/88 - 12/31/89			
Education Intern	88-008578	14,000	-0-	8/28/88	10/1/88 - 9/30/89			
Curatorial Intern	88-4412-0600	14,000	10,000	8/8/88	10/1/88 - 9/30/89		10,000	
Regis/Ops Intern	88-4412-0601	14,000	10,000	8/8/88	10/1/88 - 9/30/89		10,000	
Arts in Education	88-009-88	18,305	-0-	9/28/88	10/1/88 - 9/30/89			
PC Cataloging	88-015508	15,000	-0-	11/14/88	1/1/89 - 12/31/90	1988		91.21
Conservation	89-4431-0223	19,000	4,000	4/24/89	4/1/89 - 3/31/91		4,000	
Collection Maint	89-4432-0259	4,900	4,900	3/17/89	4/1/89 - 3/31/91		4,900	
Purchase	89-4433-0159	25,000	20,000	2/2/89	4/1/89 - 3/30/90		20,000	
Amer. Landscape Video	89-4442-0437	40,000	15,000	9/15/89	7/1/89 - 6/30/90		15,000	
L.A. Pop in the '80s	89-002249	50,000	-0-	7/10/89	7/1/89 - 12/30/90			
OBJECTIVES	89-4442-0508	75,000	50,000	6/18/89	7/1/89 - 9/30/90		50,000	
Bulatov/Mebakov	89-4442-0434	30,000	18,000	6/31/89	7/1/89 - 12/30/90		18,000	
Education Intern	89-007748	14,000	-0-	8/7/89	10/1/89 - 9/30/90			
Curatorial Intern	89-007756	14,000	-0-	8/7/89	10/1/89 - 9/30/90			
Regis/Ops Intern	89-007743	14,000	-0-	8/7/89	10/1/89 - 9/30/90			
UMR/Ed: aud survey	89-016025	25,000	-0-	10/30/89	1/1/90 - 6/1/91			
UMR/Ed: research 50	89-016033	25,000	-0-	10/30/89	1/1/90 - 6/1/91	1989		111.99
Conservation	89-017895	10,000	-0-	2/7/90	4/1/90 - 3/31/91			
Purchase	90-4433-0275	25,000	20,000	3/28/90	4/1/90 - 3/31/91		20,000	
Committed to Print	90-4442-0359	10,000	5,000	7/31/90	7/1/90 - 10/31/90		5,000	
Tony Cragg	90-4442-0346	87,000	50,000	8/7/90	7/1/90 - 12/13/91		50,000	
Typologies	90-4442-0348	45,000	25,000	7/31/90	7/1/90 - 12/30/92	1990	25,000	109.00
Curatorial Intern	90-007133	15,000	-0-	8/27/90	10/1/90 - 9/30/91			
Technical Intern	90-007134	15,000	-0-	8/27/90	10/1/90 - 9/30/91			
Purchase	90-007134	25,000	77	(3/91)	4/1/91 - 3/31/92			
Jackie Minear	90-007134	25,000	77	(8/91)	7/1/91 - 6/30/92			
Biennial	90-007134	50,000	77	(8/91)	7/1/91 - 6/30/92			
TOTAL						1991		
						TOTAL	511,160	188,000 563,860 1,263,020

APPENDIX E: Summary of 1988 Grants to NHAM

From the personal (unpublished) notes of Kathleen Costello, former NHAM grants officer

DATE FUNDING REQUESTED	ORGANIZATION SOLICITED	JUSTIFICATION FOR FUNDING	AMOUNT REQUESTED	AMOUNT GRANTED	DATE FUNDS RECEIVED
02/01/88	CAC	GOS	\$108,650	\$28,249	09/02/88
02/01/88	Lannan Foundation	LA Pop in the '60's	\$50,000	\$15,000	03/07/88
02/16/88	NEA: Interns	curatorial	\$14,000	\$10,000	08/08/88
02/16/88	NEA: Interns	operational/registration	\$14,000	\$10,000	08/08/88
03/30/88	CAC	presenters/touring	\$900	\$900	unknown
06/06/88	Edwards Cinemas	gift-in-kind/event	\$1,800	\$1,800	06/00/88
06/06/88	Royal Viking	gift-in-kind/event	\$7,500	\$7,500	06/00/88
06/06/88	Sharper Image	gift-in-kind/event	\$5,000	\$300	06/00/88
06/10/88	Sitmar	gift-in-kind/event	\$7,500	\$7,500	06/00/88
08/09/88	Beacon Bay Enterprises	admission free on Tue.	\$50,000	\$50,000	10/00/88
08/19/88	New York Times	event underwriting	\$50,000	\$35,000	09/00/88
08/29/88	German government	shipping: Forg	\$13,000	\$10,000	09/00/88
08/31/88	Dr. Konrad Weis	Forg	\$1,000	\$1,000	unknown
09/06/88	Pacific Mutual	Business Council events	\$5,000	\$2,500	02/23/89
09/19/88	NEA	collection maintenance	\$4,900	\$4,900	03/17/89
09/19/88	NEA	conservation	\$19,100	\$4,000	04/24/89
09/29/88	Irvine Company	LA Pop in the '60's	\$100,000	\$100,000	07/00/89
09/29/88	Lannan Foundation	video exhibition	\$50,000	\$15,000	11/18/88
10/10/88	NEA	purchases	\$25,000	\$20,000	02/02/89
01/14/88	NEA	video exhibition	\$40,000	\$15,000	09/05/89
11/14/88	NEA	OBJECTives	\$75,000	\$50,000	08/18/89
11/14/88	NEA	Bultaov/Kablkov	\$30,000	\$18,000	08/31/89
12/01/88	Boston Compay	distinguished lecturers	\$15,000	\$10,000	12/00/88

**APPENDIX F: Resume of Thomas H. Nielsen
From the "Evidentiary Appendix in Support of Motion for
Summary Judgment, "10.**

**The Irvine Company
Thomas H. Nielsen
Vice Chairman**

Thomas H. Nielsen is vice chairman of The Irvine Company, which is developing the nation's largest master planned urban environment on 64,000 acres of land it owns in Orange County, California.

As vice chairman, Nielsen is active with various efforts to address major issues of community, regional and statewide concern.

Nielsen was elected vice chairman of The Irvine Company in September 1986, following four years as president of the Irvine Company and four years as senior vice president in charge of the Community Development Division. Nielsen, who was also a Certified Public Accountant, came to The Irvine Company from the San Diego Area where he was active in residential building.

Among his public service distinctions are two years of service in Washington, D.C., as assistant secretary of the U.S. Air Force for Financial Management.

Nielsen is chairman of the California Economic Development Corporation, is a member of the California Business Roundtable and serves on the Boards of Directors of the Irvine Company and the California Chamber of Commerce.

His public and civic service affiliations include memberships on the Boards of Directors of the Orange County Performing Arts Center, the Orange County Business Committee for the Arts, the Orange County Council of the Boy Scouts of America, the Regional Institute of Southern California, the Advisory Council for the Stanford University Graduate School of Business, the Board of Councilors of University of Southern California's School of Public Administration, the California Community College Foundation, the National Conference of Christians and Jews and the Newport Harbor Art Museum.

Nielsen holds a master's degree in business administration from Stanford University's Graduate School of Business, and a bachelor's degree in civil engineering from the University of Washington.

Nielsen makes his home in Newport Beach with his wife Marilyn. They have three children.

07/90

APPENDIX G: Grant Application Questions

If the museum plans to purchase a work of art a supplementary information sheet must be completed. The following questions are asked:

1. Please describe specific works of art that might be acquired with the purchase funds. If you are unable to identify the works you might purchase, please describe the types of works and submit a list of artists you are considering. This list should be selective and indicate priorities.
2. Please describe your acquisition policy with regard to contemporary art. Indicate how the specific works and artists you are considering may help your institution meet long-term goals for developing your collection.
3. What recent exhibitions of contemporary American art have been organized by your museum. Please send sample catalogues.
4. Please list a number of the most important works by contemporary artists acquired by your museum within the last three years. Please indicate which were purchased and which were acquired by other means (gift, bequest, etcetera).
5. Please describe plans for the future display of works to be purchased.
6. Who will be responsible for selecting works purchased under this plan. Please describe his/her qualifications in the space below.¹

If the application is for a special exhibition, the following supplementary information is required:

1. Please provide the title and dates of the exhibition.
2. How does the exhibition fit into your exhibition policies and direction? Why is it important that your institution organize or participate.
3. What contribution will this exhibition make to knowledge of the subject? What other exhibitions have been done on this subject? If additional space is needed, one additional sheet may be attached.
4. Who will organize the exhibition? In the space below, please describe briefly his/her qualifications as related to this exhibition. Resumes should be submitted.

¹ "Evidentiary Appendix in Support of Motion For Summary Judgment," Appendix B, 25-30.

5. Please identify lenders and enclose a checklist of works to be included or works that are being considered and indicate the degrees of commitment of lenders. Approximately how many works will be in the exhibition? Representative slides or photographs must be submitted with your application.

6. If the exhibition is to be circulated, please list exhibitors, their degree of commitment, and dates of tour as far as known. How will costs be shared by participating museums? If the exhibition is available on a rental basis, what will the fee be (a) if this exhibition is assisted by the Arts Endowment? (b) if it does not receive Arts Endowment assistance? If you are borrowing this exhibition, list costs such as rental fees to be paid to the institution organizing the exhibition.

7. Please describe any special methods that will be employed to enhance public response to the exhibition, including education programs.

8. Please list all anticipated revenues for this exhibition. If some anticipated revenues will not be used to offset costs of this exhibition, please briefly explain why in the space below on the right

9. Exhibition publications:

a) Please describe the publication(s) you are planning in conjunction with the exhibition. Who will write them?

(Please provide brief biographical information, if different from Question 4. Resume(s) should also be submitted.)

b) What other publications--catalogues, books, comprehensive articles--have been produced during the past few years on the same subject? If material has been published, in what ways will your publication differ?

c) For what audience is the publication intended?

d) Publication format, cost, and revenues:

e) Please provide a breakdown of catalogue costs--such as design, photography, printing, etc.

f) How will the publication be distributed? Who will hold copyright?

10. Please describe measures that will be taken to protect works in the exhibition.

a) Security measures:

b) Fire protection system:

c) Atmosphere control system:

11. Describe briefly the qualifications of personnel supervising and handling, packing, and installing (please limit response to space provided).

12. If the works to be shown are of a particularly fragile nature, describe any special precautions that will be taken to protect them.²

² "Evidentiary Appendix in Support of Motion For Summary Judgment," Appendix C, 60-67.

APPENDIX H: Evolution of the NHAM Since Overturning the Helms Amendment

Once mired in financial difficulty without administrative and artistic leadership and facing the prospect of dwindling NEA support, the NHAM transformed itself through reliance on the business solution of the eighties and nineties--the merger. In 1992, all four of the NHAM's applications to the NEA were denied and layoffs of staff began.¹ This rejection was not so much as a backlash against the Museum for its litigation, but it was the result of the California Arts Council's low ratings of the Museum. How could the Museum pull out of its slump? The first necessity was to hire a director and curator. Michael Botwinick became the NHAM's director in 1991, and Bruce Guenther filled the curatorial position in 1992. To improve the Museum's finances, the Board began to talk as early as 1991 of a possibility of a merger with the Laguna Beach Art Museum. The thought was that a larger operation could be run for less cost leaving more money for programs and educational services for the community. The impetus was more product for less total income. The business-minded Board understood the concept behind the many mergers in the late eighties in which the merging partners foresaw that they could combine their activities, have greater sales and lower costs, need fewer people and offer more services. Art institutions are no different. The only problem was Laguna's reception of the merger.

¹ Costello expounded,

The lawsuit made more of an impact on the museums and arts community nationally, but it had little impact in the Newport community which is conservative. When we didn't have dollars or leadership, we had to scale down. The arts community, in general, took a hit from this NEA debacle. We relied very much on the NEA and state arts councils to prove the merit of the arts to civic life.

Costello interview.

The city of Laguna Beach lies just south of Newport. At the turn of the century, *plein air* California Impressionists flocked to Laguna for its landscape and ocean reminiscent of the Cote d'Azur and Mediterranean. Today, Laguna remains an artistic enclave with its many galleries and annual production of *tableaux vivants*, the Pageant of the Masters. Laguna's artistic heritage is enshrined in its museum founded in 1917.² The Laguna Art Museum (LAM) was organized as a membership charity corporation in which the membership controls the governance of the institution.³ The community of Newport was indifferent to the merger, while the Laguna community was in an uproar during the merger vote. The initial merger plan was to consolidate the activities of both museums in the NHAM facility, because the Laguna site had no parking, required heavy maintenance and had no commercial value. Since NHAM and LAM were perceived by the county-at-large to be somewhat insular institutions serving only local affluent communities and not the community-at-large, the consolidated museum would be renamed the Orange County Museum of Art (OCMA)--a county-wide institution. In the spring of 1996, the membership of Laguna approved the merger, however, one group, Save Laguna Art Museum (SLAM), protested. This group's goal was to have a continued presence of a museum in Laguna. Before the merger was consummated, Laguna's board entered into agreement with the SLAM voters and became incorporated as Laguna Heritage. LAM entered into agreement with Laguna Heritage to keep the museum and fund one-third of the operation of the museum at the LAM site for eight years. This decision was not acceptable to Newport's board who did not want to be shackled

² The Laguna Art Museum also came out against the NEA's restriction on artistic content, but the museum's board did not refuse any NEA grants.

³ The NHAM is not a membership organization and is controlled by a Board of Trustees. Structurally, the members of the NHAM do not have financial control.

for eight years. The compromise was to renegotiate Laguna Heritage into five year increments and adopt proxy voting. The merger was completed on July 16, 1996. Another group, Motivated Museum Members, more radical than Laguna Heritage, filed suit and petitioned to recall the members of LAM's board. The lawsuit was settled by giving the LAM site to Laguna Heritage.

The OCMA purports to serve the whole county of 2.5 million people which continues to grow. The new museum's board hopes that the broader base the OCMA reaches will entice corporations to be more receptive to contribute financially.⁴ With the merger accomplished, the only problem was finding enough space for the permanent collections of both NHAM and LAM. As luck would have it, adjacent to the NHAM was the Newport Beach City Library, housed in a large building conveniently leased from NHAM's most generous patron, the Irvine Corporation. When the library found a need to expand, it vacated the space, and Donald Bren generously donated the old library site to the NHAM. in 1995. Both the old library and museum were renovated into a space 2,000 square feet larger than the design conceived by Renzo Piano. The statistical achievements of the new building conceived by architects Charles Froom and Benjamin Kracauer of

⁴ Kathleen Costello laments the trend of offering corporations anything and everything for just subsistence and thereby relieving government of its obligations. My personal view is not a popular one in Orange County. Arts organizations have had to become retailers. The enabling legislation [of the NEA] under Kennedy was very moving and about the importance of the arts to civic life. It was a philosophical commitment to the arts which doesn't exist any longer. I have seen what public support can do. Without it the arts become a commodity and we have to appeal to only those that can afford it. It becomes a luxury for the affluent rather than property of the public. It changes the tenor, the ownership and the stability [of the institution]. Whatever is in favor at the moment will have the backing.

Costello interview.

Archimuse in New York are staggering. The new museum of 22,500 square feet contains 16,000 square feet of exhibition space (up from 6,670 square feet as NHAM), housing fourteen separate galleries and an enlarged sculpture garden, plus a catering kitchen, restrooms and a small, properly positioned museum store. Next door to OCMA is the Museum Education Center (the former library) which boasts 14,400 square feet with climate controlled art storage, two art studios, a classroom, a community meeting room, the 108-seat Leon and Molly Lyon Auditorium and twenty-one fully networked staff work stations. The construction cost just under \$1.7 million and took only four months to complete.

Curator, Bruce Guenther, boasts that the renovation is "probably the best cosmetic surgery in Orange County in decades. It's the face-lift that will forever change the county's art complexion."⁵ Guenther adds, "What plays with your senses is that rush of newness, the unexpected twist. It's being able to feel the shift from regional art establishment to national institution."⁶ The space in the museum flows naturally creating a figure-eight traffic pattern in which the viewer instinctively returns to a familiar point of reference unlike the maze-like configurations of older edifices. The new OCMA has nearly as much exhibition space as the Los Angeles Museum of Contemporary Art. The merged permanent collection of over 6,500 works tells the unique story of California's contribution to American art from *Plein Air* and Early Modernism (1900-1950) through Conceptual and Object Art (1985-1995) in six permanent collection galleries.

For its Jan. 25, 1997, public opening, the Dr. James Pick and Dr. Rosalyn Laudati Gallery hosted the photography exhibit, "Gifts from the Smith/Walker

⁵ Lauri Mendenhall, "New Look--New Era," *Coast Magazine*, 23 January 1997, 8.

⁶ Mendenhall, 10.

Foundation"; the adjacent Glass, Ceramic and Small Sculpture Gallery included a dazzling glass piece from Dale Chihuly and a quirky Viola Frey ceramic piece; Bill Viola's "Theater of Memory" was unveiled in the Installation Gallery, one of only two West Coast galleries devoted to full-scale, multi-media environments; and the outdoor Sculpture Garden showcased the works of Robert Graham, Peter Shelton, Louise Nevelson and Stephen de Staebler.

The flexible design of the new museum better serves OCMA's broad mission which is to educate the public.⁷ An entire building devoted to education offers the community opportunity for research, lectures, performances and demonstrations. The exhibitions offer various themes for docents to tie their tours together from object to object and gallery to gallery. Possible themes include the following:

1. Art is a reaction to social, scientific, industrial, technological and urban changes and as such is constantly changing and evolving.
2. The quality of California light has attracted artists throughout the state's history leading to a variety of distinctive styles and movements.

⁷ The 1992 American Association of Museums' report, *Excellence and Equity: Education and the Public Dimension of Museums*, mandates that the objective of the museum is to encourage learning and appreciation of the visual arts.

"Museums perform their most fruitful public service by providing an educational experience in the broadest sense: by fostering the ability to live productively in a pluralistic society and to contribute the resolution of the challenges we face as global citizens." No longer, it [the report] argues, can museums "confine themselves simply to preservation, scholarship, and exhibition independent of the social context in which they exist." They must "help nurture a humane citizenry equipped to make informed choices in a democracy and to address the challenges and opportunities of an increasingly global society."

James Cuno. "A Range of Critical Perspectives: Money, Power, and the History of Art," *Art Bulletin*, 79, no. 1 (March 1997): 7.

3. Art is about ideas. Artists share their ideas of the changing times through their art.⁸

From its darkest days in 1990, the NHAM with its metamorphosis into the OCMA has ascended like a phoenix through shrewd and clever business decisions by its Board of Trustees. The OCMA's rise severely contrasts the descent of the NEA.

⁸ 1997 Orange County Museum of Art Docent Handbook , 135.

Bibliography

The American Assembly, Columbia University, May 31 to June 3, 1964. *The Arts and Public Policy in the U.S.* Englewood Cliffs, N.J.: Prentice Hall, Inc., 1984.

Arian, Edward. *The Unfulfilled Promise: Public Subsidy of the Arts in America.* Philadelphia: Temple University Press, 1989.

Atkins, Robert. "A Censorship Time Line." *Art Journal*, 50, Fall 1991, 33-37.

Baker, Kenneth. "The Unkindest Cuts of All? Who Gets NEA Grants in San Francisco?" *San Francisco Chronicle*, 27 August 1995.

Ball, Susan and Katie Hollander. "Positive Trends for 1997." *College Art Association News*, 22, no. 3, May/June 1997, 11.

Barrie, Dennis. "The Scene of the Crime." *Art Journal*, 50, Fall 1991, 29-32.

Bella Lewitzky and Newport Harbor Art Museum v. National Endowment for the Arts. "Order Granting Plaintiffs Motions For Summary Judgment." CV 90-3616 JGD and CV 90-5142 JGD, U.S. District Court, Central District of California, 9 January 1991.

Benedict, Stephen, ed. *Public Money and the Muse: Essays on Government Funding for the Arts.* New York: W.W. Norton, 1991.

Berman, Ronald. *Culture and Politics.* Lanham, Maryland: University Press of America, Inc., 1984.

Biddle, Livingston. *Our Government and the Arts: A Perspective From the Inside.* New York: ACA Books, 1988.

Bleiberg, Laura. "Museum asks judge to reject NEA policy." *Orange County Register* (Santa Ana, California), 18 December 1990.

Bleiberg, Laura. "Judge says NEA's anti-obscenity rule unconstitutional." *Orange County Register* (Santa Ana, California), 10 January 1991.

Bleiberg, Laura. "Court ruling frees NEA funds for Newport museum." *Orange County Register* (Santa Ana, California), 11 January 1991.

Bloom, Roger. "Newport Museum beats NEA." *Orange Coast Daily Pilot* (Newport Beach, California), 10 January 1991.

Bolton, Richard, ed. *Culture Wars: Documents from the Recent Controversies in the Arts*. New York: New Press, 1992.

Boyer, Peter J. "Mean for Jesus." *Vanity Fair*, September 1990, 225-228.

Cembalest, Robin. "Corn for Porn." *Art News*, 91, March 1992, 27.

Cembalest, Robin. "Who Does it Shock? Why Does it Shock?" *Art News*, 91, March 1992, 32-34.

Costello, Kathleen. "Memorandum to Thomas Nielsen," 24 May 1990.

Costello, Kathleen. 1997 interview by author, tape recording, Fullerton, California, 12 June.

Cuno, James. "A Range of Critical Perspectives: Money, Power, and the History of Art." *Art Bulletin*, 79, no. 1, March 1997, 6-9.

Curtis, Cathy. "U.S. Files Reply to Museum Suit." *Los Angeles Times*, 15 November 1990.

de Grazia, Edward. *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius*. New York: Random House, 1992.

Dowley, Jennifer. 1997 interview by author, New York, New York, 14 February.

Dubin, Zan. "Newport Harbor Trustees Reject Anti-Obscenity Contract." *Los Angeles Times*, 26 May 1990.

Dubin, Zan. "Newport Museum Board Protests Anti-Obscenity Pledge." *Los Angeles Times*, 28 May 1990.

Editorial, "Abstract reasoning." *Orange County Register* (Santa Ana, California), 11 January 1991.

Editorial, "Classical farce." *Orange County Register* (Santa Ana, California), 19 September 1990.

Editorial, "A Fighter for the Arts." *San Francisco Chronicle*, 9 October 1997.

"Federal Funding of the Arts." *Congressional Digest*, 70, no. 1, January 1991, 4-10.

Frankenthaler, Helen. "Did We Spawn an Arts Monster." *New York Times*, 17 July 1989.

Friedman, John. "A Popular Shift in Federal Cultural Support." *New York Times*, 13 May 1979, Sec. III.

Frohnmayr, John. *Leaving Town Alive: Confessions of an Arts Warrior*. Boston and New York: Houghton Mifflin, 1993.

Frohnmayr, John. *Out of Tune*. Golden, Colorado: North American Press, 1995.

Gaiber, Maxine. 1997 interview by author, Newport Beach, California, 13 June.

Gaiber, Maxine. "NHAM Press Release," 10 September 1990.

Gaiber, Maxine. "NHAM Press Release," 12 September 1990.

Gamarekian, Barbara. "House Panel Favors Restricting Arts Grants." *New York Times*, 30 June 1989.

Gamarekian, Barbara. "Legislation Offered to Limit Grants by Arts Endowment." *New York Times*, 21 June 1989, Sec. III.

Garchik, Leah. "Personals." *San Francisco Chronicle*, 5 May 1997.

Glueck, Grace. "Border Skirmish: Art and Politics." *New York Times*, 19 November 1989, Sec. III.

"GOP Leaders Stay NEA's Execution." *San Francisco Chronicle*, 14 March 1997.

Heilbrun, James and Charles M. Gray. *The Economics of Art and Culture: An American Perspective*. Cambridge: Cambridge University Press, 1993.

Hoekema, David A. "Artists, Humanists and Society." *Art Journal*, 50, Fall 1991, 45-48.

Hoffman, Barbara. "The Thought Police Are Out There." *Art Journal*, 50, Fall 1991, 40-44.

Hoffman, Barbara. "A Tribute to Justice Brennan." *Art Journal*, 50, Fall 1991, 6-11.

Hughes, Robert. *American Visions: The Epic History of Art in America*. New York: Alfred A. Knopf, 1997.

Hughes, Robert. *Nothing If Not Critical*. Harmondsworth, England: Penguin Books, 1990.

Hughes, Robert. "Pulling the Fuse on Culture." *Time*, 7 August 1995, 61-68.

Janowitz, Barbara. "Court Rules Against NEA Obscenity Pledge." *American Theatre*, March 1991, 35.

Kiplinger, Austin. *The Kiplinger Washington Letter*, 74, no. 19, 9 May 1997, 2.

Klass, Michelle E. "Bella Lewitzky Dance Foundation v. John Frohnmayr and Newport Harbor Museum v. National Endowment for the Arts." *Legal Times*, 21 January 1991, 13.

Marquis, Alice Goldfarb. *Art Lessons*. New York: Basic Books, 1995.

Masters, Kim. "NEA Obscenity Pledge is Ruled Out." *Washington Post*, 10 January 1991.

Mendenhall, Lauri. "New Look--New Era." *Coast Magazine*, 23 January 1994, 8-10.

National Endowment for the Arts. *1965-85 A Brief Chronology of Federal Involvement in the Arts*.

National Endowment for the Arts. *1998 Grants to Organizations*.

National Endowment for the Arts. *NEA Introduction to the Arts*, May 1982.

National Endowment for the Arts. Press Release, 16 December 1996.

National Endowment for the Arts. Website: <http://arts.endow.gov>, 9 October 1997.

Netzer, Dick. *The Subsidized Muse*. Cambridge: Cambridge University Press, 1978.

Newport Harbor Art Museum. "Memorandum to Members and Supporters of the Arts from Friends of Newport Harbor Arts Museum," 24 May 1990.

Newport Harbor Art Museum v. National Endowment for the Arts. "Evidentiary Appendix in Support of Motion For Summary Judgment." CV 90-5142 JGD(BX), U.S. District Court, Central District of California, 17 December 1990.

Newport Harbor Art Museum v. National Endowment for the Arts. "Complaint for Declaratory and Injunctive Relief." SA CV 90-634 AHS, U.S. District Court, Central District of California, 12 September 1990.

Newport Harbor Art Museum v. National Endowment for the Arts. "Notice of Motion and Motion For Summary Judgment: Memorandum of Points and

Authorities. SA CV 90-5142 JGD(BX), U.S. District Court, Central District of California., 17 December 1990.

Orange County Museum of Art Docents Handbook, 1997, 135.

Oreskes, Michael. "Senate Votes to Bar U.S. Support of Obscene or Indecent Artwork." *New York Times*, 27 July 1989.

Otto, Mary and Maria Recio. "Alexander resigns NEA post, says assailed agency will survive." *San Ramon Valley Times* (San Ramon, California), 9 October 1997.

Parachini, Alan. "Choreographer Rejects NEA's \$72,000 Grant." *Los Angeles Times*, 15 June 1990,

Parachini, Allan. "NEA's Obscenity Pledge Voided." *Los Angeles Times*, 10 January 1991.

Rice, William Craig. "I Hear America Singing." *Policy Review*, March/April 1997, 37-45.

"President Bush Reaffirms Support for the NEA Without Restriction." *American Council for the Arts Update*. March/April 1990, 3.

"The Real Obscenity Was the Oath; Court Concurs With Newport Harbor Art Museum and Bella Lewitzky Dance Company." *Los Angeles Times*, 11 January 1991.

Rohter, Larry. "Governments, Censorship and the Arts." *New York Times*, 13 1989, Sec. II.

Rosenthal, Andrew. "Bush's Balancing Act Over Financing of Arts." *New York Times*, 19 June 1990.

Rowe, Jeff. "Judge John G. Davies, U. S. District Court-Central." *The Daily Journal*, 17 December 1987.

Schlesinger, Jr., Arthur. "America, the Arts, and the Future: The First Nancy Hanks Lecture on the Arts and Public Policy." In *The Future of the Arts: Public Policy and Arts Research*, eds. David B. Pankratz and Valerie B. Morris. New York: Praeger, 1990.

Selna, James V. 1997 interview by author, tape recording, Rancho Santa Fe, California, 15 June.

Selna, James V. "Standing for principle." *Orange County Daily Register* (Santa Ana, California), 24 September 1990.

Stark, Ellen. "Which Charities Merit Your Money." *Money*, November 1996, 100-103.

Storr, Robert. "Art, Censorship, and the First Amendment." *Art Journal*, 50, Fall 1991, 12-13.

Tony Cragg Sculpture, 1975-1990. Newport Beach, CA: Newport Harbor Art Museum, 1990.

Typologies: Nine Contemporary Photographers. Newport Beach, CA: Newport Harbor Art Museum, 1991.

1993 United States Supreme Court Reporter. Miller v. California, Sec 2607-2611.

Van Eyken, Bob. "Newport facility won't take grant; plans to sue." *Orange Coast Daily Pilot* (Newport Beach, California), 12 September 1990.

Winn, Blair. "CAA Advocacy Team Update." *College Art Association News*, 22, no. 5, September 1997, 9.

Wye, Deborah. *Committed to Print*. New York: The Museum of Modern Art, 1988.

Wyszomirski, Margaret Jane, ed. *Congress and the Arts: A Precarious Alliance?* New York: American Council for the Arts Books, 1988.

Yardley, Jonathan. "When Art Goes on the Dole." *Civilisation*, 2, no. 5, 10 September 1995, 31-35.

Young, Gary M. "As the Arts Contribute More to the Economy, They Must Be Protected." *New York Times*, 28 May 1989, Sec. XXIII.

Zeigler, Joseph Wesley. *Arts in Crisis*. Chicago: Chicago Review Press, 1990.