



GRANTMAKERS IN THE ARTS

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Freedom of Expression and Public Funding of the Arts

With this special summer edition, Grantmakers in the Arts (GIA) begins to consider more broadly how the national debate over the future role of federal arts support and the artist's right to freedom of expression is affecting the arts field and our own work. The GIA Board's recent meetings have focused on how our organization can best contribute to the national dialogue on these issues. Should we develop activities aimed to influence future directions in public policy? Or, should our activities examine the roles and relationships of private sector grantmakers with the arts field, and determine how the changing federal role affects our practices?

This newsletter is not intended, therefore, as a definitive statement of causes and effects or possible solutions, but rather serves as an initial exploration of issues and commentary on them. We have included several essays on artistic freedom, government policy, and foundation giving patterns from different perspectives. In addition, we asked a group of artists and administrators to address private sector grantmakers and to tell us how their thinking and their work is being affected by changing public policy.

"Who will fund the arts?" While at one time, many looked to the National Endowment for the Arts for leadership, the leadership appears now to be shifting to private sources. Are we, as a field, prepared to respond? What actions are the appropriate ones? These are questions that demand the greatest attention from individual grantmakers as well as from Grantmakers in the Arts.

*Sarah Lutman
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Memo to Arts Advocates:

Get off the Offensive, Start Making Linkages

By Gara LaMarche

May 28, 1992

The response to the wave of assaults directed at artistic freedom during the last few years has been spirited but inadequate. Explanations for this include:

- The censors are single-minded, well-organized, well-funded, and had a head start;
- Artists are by definition loners, and few of them, at least at the outset of the assault, were well-versed in the ways of politics and law;
- The challenges have arisen (no accident) mostly in the realm of public funding, where the censors have been able to keep the debate on the more favorable turf of sponsorship and (falsely, in most cases) have denied that any desire to restrict the basic rights of self-expression of the artists is at issue.

These excuses don't wash any longer, if indeed they ever did. It is time for the arts community to stop lurching from crisis to crisis ("Save the NEA!" "Protect PBS!") and develop a comprehensive approach to freedom of expression and the many assaults on it.

I believe that there are two essential aspects to such a new approach.

The Value of Dissent

First, a new approach should emphasize the value of dissent and provocation, not apologize for them. To date, the defense of art and institutions under attack has most often been to "accentuate the positive" — i.e., there were only six upsetting photographs out of dozens in the Robert Mapplethorpe show; the NEA brings you rural craft festivals; PBS brings your kids "Sesame Street," etc.

I was an unwitting participant in this approach recently when, along with several hundred other people, I accepted an invitation to go to the Metropolitan Museum of Art to meet Anne-Imelda Radice, the new Acting Chair of the

National Endowment for the Arts. When I got there, I realized I was at what amounted to a rally, sponsored by a well-intentioned blue ribbon group called "New Yorkers for the NEA."

Radice spoke for only a minute or two, and said nothing. The event's organizers implored the press to write about the "good things" the NEA does, and we were shown a short video montage of those good things narrated by Walter Cronkite, with Ray Charles singing "God Bless America" in the background. It practically moved me to tears, as it was meant to, but when it was all over, there was nothing about the occasion that Senator Jesse Helms or Rev. Donald Wildmon could not embrace. If those pesky*performance artists and fluid-wielding sculptors represent such an infinitesimal portion of the NEA's largesse, why not have content restrictions?

The shock of the new, the challenge to the existing order — this kind of work is supposed to be very difficult to defend, which is why most of the campaign materials prepared by arts advocates trumpets "safe" art like symphonies and eight-part TV history sagas. But I'm not so sure the case for the cutting edge can't be made to a mass audience. For example, in "Damned in the U.S.A.," a fine documentary about recent censorship battles, there is a scene in which Rev. Wildmon, the leader of the 1990s crusade against sex in music and on television, takes his interviewer to the birthplace of his personal idol — Elvis Presley, whose pelvic gyrations made him the number one target of Wildmon's 1950s antecedents! (Perhaps it was this revealing vignette, as much as anything else, that has brought Wildmon's lawsuit to block public showings of the film.)

Linkages

Second, a new approach to assaults on freedom of expression should stress the linkages between artists and other targets of censors, between the arts and other forms of communication. Among the linkages I have in mind are:

- **To other censorship issues.** Five or ten years ago, when I was working for ACLU state affiliates — and before there was enough "arts censorship" to constitute a trend — it was very difficult to get artists, arts institutions, or anyone else besides hard-core free speech defenders like the ACLU and those with a direct economic interest at stake to care or do anything about the constant assaults on so-called "pornography." Few believed us when we warned: "today it's a Hustler centerfold, tomorrow it's a nude in an art gallery." (I hardly believed it myself, yet just a few years later, Dennis Barrie was on trial in a Cincinnati courtroom.)

But if the last few years have demonstrated anything, it is the indivisibility of First Amendment rights. J. Carter

Brown and Larry Flynt, Joan Sutherland and Karen Finley are in the same leaky boat, whether they like it or not.

In fact, the boat is pretty crowded. It also contains reporters like Nina Totenberg and Peter Arnett, Klan groups wanting air time on cable access channels, flag-burners, grassroots environmental groups fighting "SLAPP" libel suits, student journalists censored by high school principals, and many others. Arts advocates cannot afford to ignore assaults on freedom of expression in other spheres, from the prosecution of flag-burners to the restrictions on press coverage of the Gulf War. This linkage was brought home most forcefully when Justice Department lawyers cited the Supreme Court ruling in *Rust v. Sullivan* (that the government could bar counselling about abortion in family planning clinics receiving Title X funds) to support the NEA's revocation of grants to performance artists.

– **To other constituencies.** Much has been made of the homophobia that is a constant theme in the attack on the arts, and gay people have been deeply involved in recent campaigns against censorship. Yet I think a stronger effort must be undertaken to identify the twin theme of racism that has also been common to these attacks — on Mapplethorpe's interracial lovers, Marlon Rigg's portrayal of black homosexual life, 2 Live Crew's in-your-face recitation of ghetto realities — and make the anti-censorship movement multi-racial as well as multi-issue.

– **To other speech and communications forms.** In the furor over "taxpayer dollars" for offensive art, why hasn't anyone made the link to other government-funded forms of expression like public schools and libraries? There is a broad consensus in this country on behalf of public support for such institutions, and none except a few on the lunatic fringe take the view that such support implies public endorsement of the contents of every book on a library's shelf or every course taught in a university. It is generally accepted that diversity is an important value in library collections and school curricula, and that professionals in the relevant fields should make selections free from political interference. What's more, the First Amendment case law (though barely, and from a pre-Reagan/Bush Supreme Court) supports that model. What's different about the arts?

– **To the experience of other countries.** Where freedom of expression is concerned, it is not always helpful to cite the practices of other nations, which are rarely as protective as the U.S. But most other developed countries have a stronger tradition of government patronage for the arts than the United States — and, it seems, a stronger hands-off approach. Like the U.S., Britain has gone through a period of conservative dominance, and the country lacks a written constitution or any significant statutory protections for freedom of expression. Yet in a recent *Financial Times* article, Peter Palumbo, the chairman of the nation's NEA counterpart, the Arts Council, wrote that the British system of arts funding provides a "buffer from political

interference" because "artists need freedom to experiment, and that freedom can be costly and controversial." Lord Palumbo is also a director of Index on Censorship, which is akin to having an NEA chair who is a card-carrying ACLU member. Maybe it is worth a closer look at how Britain, Germany, Japan, and other countries fund the arts, and what, if any strings they attach.

In the relatively brief period since mid-1989, the time of the first skirmishes in the national art wars — the Corcoran's cancellation of the Mapplethorpe show, John Frohnmayer's suspension of a grant to Artists Space — there has been a great deal of movement in the arts world toward the kind of approach I am urging. The community of arts funders, which includes many institutions and individuals with a solid history of support for freedom of expression, should use its considerable influence to encourage this trend to continue.

Gara LaMarche is Associate Director of Human Rights Watch and Executive Director of its Fund for Free Expression.

Placing Arts Censorship within a Political Context

By Margaret C. Ayers

The coalition that elected Ronald Reagan in 1980 included republicans, conservatives, neoconservatives, members of the New Right, and religious fundamentalists. Broadly speaking, the republicans, conservatives, and neoconservatives were primarily concerned with the economy, national security, trade, and foreign policy. Health, education, and welfare received less attention and were believed to be the proper responsibility of the states. Cultural policy received virtually no attention at all. In fact, the new administration tried its best to delegate responsibility for the National Endowment for the Arts to the private sector, believing that government should not be involved in subsidizing the arts. In contrast to these supporters, representatives of the New Right and the evangelical Christian movement believed that cultural policy was of critical importance and that government had an essential role to play in shaping the culture of tomorrow. Proponents of this position began with the basic unit of social organization: the family. Concerned about what they perceived to be the disintegration of the nuclear family, they cast about to explain the rising incidence of out-of-wedlock motherhood, divorce, sexual promiscuity, teen

pregnancy, teenage drug use, a rising school dropout rate, and a variety of other societal problems. The culprits they identified included the weakness of organized religion, the strength of the women's movement, women in the workplace, day care, the availability of birth control and abortion, sex education, the social acceptability of "deviant sexual behavior", and the glorification of all these evils in educational programs, books, journals, movies, television, and in art.

Recognizing that they had no control over the social phenomena they were observing, representatives of the New Right and Christian fundamentalist groups began to study the role played by education and the media as contributors to patterns of behavior that they found abhorrent and that they believed to be destructive of "traditional family values". Concerned that people, particularly children, are highly suggestible, they began to advocate for content restrictions on various kinds of expression. Early on, many of the adherents to this world view began to be appointed to political office within the Justice Department, the Department of Education, and the Office of Management and Budget. It should come as no surprise therefore that in the early 1980s these executive branch agencies began to make use of regulations, administrative action, and the power of the government purse to try to control what is taught in our schools, what is broadcast by the media, and what is performed or shown in arts institutions throughout this nation.

It has been argued by some that the foot soldiers of the New Right are the rank-and-file followers of religious fundamentalists such as Focus on the Family's James Dobson, the Christian Coalition's Pat Robertson, the Traditional Values Coalition's Louis Sheldon, and the American Family Association's Donald Wildmon. Collectively, these organizations boast a following that numbers in the millions. Focus on the Family and the Christian Coalition both have operating budgets that exceed \$50 million annually. They are heard on thousands of radio stations and on television programs controlled by the Christian Broadcasting Network. They publish countless newsletters and periodicals. And their listeners and readers can be credited with the letter-writing campaigns that have, among other things, targeted the National Endowment for the Arts for elimination. It is no wonder that both the Reagan and the Bush Administrations have courted these organizations and their constituencies by appointing their representatives and followers to high political office and by adopting their "family values" agendas — agendas that denounce choice, contraceptive research, and sex education, and that would limit our access to information by controlling the content of libraries, books, curricula, visual arts presentations, movies, commercials, television, and the performing arts. The governments' position with regard to these matters is reflected in the Justice Department's recent arguments in *Finley v. National Endowment for the Arts*, *Bullfrog Films v. Wick* and *Gay Men's Health Crisis v. Sullivan*. In these cases, the government is

seeking to justify actions taken by the National Endowment for the Arts, the U.S. Information Agency, and the Department of Health and Human Services to control the speech expressed by recipients of government grants, contracts, or tax abatements. While it remains to be seen how these cases will ultimately be resolved, the government's intention is clear: federal funds should not be used to support organizations that promote ideology, speech, or behavior with which this administration finds fault. All of this represents a dangerous trend in our nation's governance — a trend that flies in the face of our First Amendment freedoms and that warrants the attention of this country's largest foundations.

To date, the foundation community has been silent of the issue of censorship and information control. The most recent edition of the Foundation Center's Grants Index reported that some 832 foundations, including the 300 largest in the country, made grant awards in 1990 totaling \$4.47 billion. Of this amount, only \$4.09 million, awarded to 72 grantees, was in support of work on First Amendment issues. This represents less than one tenth of one percent of total giving. In a questionnaire recently undertaken by the Robert Sterling Clark Foundation, the results were even more staggering. At the beginning of the year we contacted 50 organizations that were engaged in efforts to fight censorship. Collectively, these organizations spent only \$1.6 million in 1991 to fight censorship in the arts and humanities. Even more astonishing was the finding that the \$1.6 million was contributed by 25 foundations, only 9 of which were mentioned more than once by the respondents. Most of these funds were spent on public education, advocacy, and litigation. And virtually all of it was spent defensively in response to perceived crises. All of this provides ample evidence of our collective failure to respond effectively to the increasing number of encroachments on our First Amendment freedoms.

As grantmakers in a democratic society, we have a responsibility to consider providing support for organizations that are actively engaged in protecting these freedoms. Such work might include legal advocacy and representation for those whose First Amendment rights are violated. It might also include research to identify organizations that advocate censorship in any of its many forms. We need to know how these organizations relate to each other, who their constituencies are, and how they are financed. And we need to develop public education materials and programs that can effectively convey the free speech message to the American public. Most important of all, we need to monitor our government to ensure that the instruments of political power are not used to promote a culturally homogenized ideal that discriminates against those whose behavior, speech, or political expression does not conform to that ideal.

Margaret C. Ayers is Executive Director of the Robert Sterling Clark Foundation in New York.

A New Threat of Government Censorship

By Melanne Verveer

Remarks to the Conference of the Council on Foundations
April 27, 1992, Miami, Florida

Congress is considering legislation to reauthorize the Federal family planning program, Title X, and to try once again to remove the "gag rule" on health practitioners that was ruled constitutional by the Supreme Court in the *Rust v. Sullivan* decision.

While the debate surrounding the gag rule has, for the most part, focused on abortion counseling, the ruling in *Rust* has much wider implications.

The real issue in *Rust* is government censorship through use of the purse. As Anthony Lewis wrote in his *New York Times* column, the debate is about "whether Federal aid should be used as a lever to decide what Americans can say." He continued, "It is a profoundly important issue, for Federal money now goes to thousands of universities in this country, to museums, to scientific laboratories and so on. Our tradition of free speech will be mutilated if that money can be accompanied by censorship."

Lewis' statement pretty well sums up the implications of the *Rust* decision for the non-profit community, which receives direct government assistance in many forms, as well as certain tax advantages. This is why the Independent Sector testified during Senate hearings on the implications of *Rust*. The Independent Sector noted that the decision is about the rights of individuals and organizations to speak freely, even on matters supported by government funds.

Under longstanding First Amendment holdings, the Federal government cannot deny a person benefits on terms that infringe upon that person's freedom of speech. Government cannot bribe its citizens to give up their First Amendment Rights. *Rust*, however, seems to be at war with established law.

What does this mean, specifically, for the non-profit community?

If *Rust* is going to be read broadly to justify content and viewpoint restrictions on Federal grants (and, by extension, on other Federal funds and tax exemptions), government has the potential to control vast realms of speech,

given the pervasiveness of Federal spending.

- Will we see the imposition of limits on advocacy in all areas of a group's activity, even if its projects receive only a small amount of Federal funds?

- Will publicly-funded health practitioners be restricted from providing advice on lawful medical procedures that are too costly?

- Will Congress impose content restrictions on the National Endowment for the Arts, the National Endowment for the Humanities, and public broadcasting?

- Will public libraries be barred from providing books and articles on certain controversial topics? (The American Library Association testified before Congress that there are rumors that some libraries have been pressured to remove books on abortion because of *Rust*.)

- Will Legal Services lawyers be forbidden from offering information on referrals for certain kinds of representation, like representation in class action suits?

Is this alarmist?

Regrettably, the dangers are not theoretical.

Since *Rust* was decided, the government has attempted to apply the ruling beyond the abortion controversy. Professor Kathleen Sullivan, Harvard Law School professor and a critic of the broad application of *Rust*, characterized the government's position: "He who takes the King's shilling becomes the mouthpiece of the state." It is clear that some in the Department of Justice take this stance.

In his testimony before the Senate, a deputy Attorney General put it this way: "When the government funds a certain view, the government itself is speaking . . . it can constitutionally determine what is said." Indeed, a Department of Justice (DOJ) attorney told *Newsweek*: "There is no doubt that *Rust* provides us a powerful weapon."

Let's look at some examples of how this weapon is being wielded.

- Four performance artists whose grants were denied (after approval by a peer review panel) filed a lawsuit charging that the NEA's denial was based on opposition to their political views. The DOJ tried to force the agency to argue in court that the NEA is empowered to make its decisions based on political and viewpoint grounds. This goes against the statutory requirements that the criterion for grantmaking is to be artistic merit and excellence.

John Frohnmayr, the embattled former chair of the NEA, fought off DOJ's efforts, saying that "meritorious projects should be funded without regard to the political message

or idea contained in them." The battle between the NEA and DOJ was brought to public attention when their correspondence was leaked to the press. A DOJ official had written to the NEA defending the position that, "the First Amendment does not prohibit government funding agencies from denying grants based on objections to the ideas or viewpoints expressed."

Frohnmayr had to appeal to the President's counsel to fight off the DOJ efforts. In the end, DOJ toned down its position but maintained a reference to *Rust* in the brief it filed in court. The case is pending, Frohnmayr is gone, and the battle for the agency continues.

(On June 9, 1992, a federal judge issued an important ruling rejecting many of the government's arguments and holding that despite *Rust*, public funding of art is entitled to First Amendment protection. The government is likely to appeal the decision. [Editor's note: See the next article in this issue.]

- In another case, Stanford University challenged the Administration's requirement that, as a condition of a National Institute of Health grant, the results of preliminary research would have to be submitted to the government for review before publication or discussion.

Here, the government went beyond *Rust*, which seemed to exempt "public forums and universities." In this case, the government's brief said that *Rust* allowed it to condition Federal grants and to curtail the program participants' First Amendment rights. The judge in DC Federal Court ruled in Stanford's favor. Judge Harold Greene declared that if *Rust* were interpreted this broadly, "the result would be an invitation to government censorship wherever public funds flow, and acceptance by the courts of the defendant's position would present an enormous threat to the First Amendment rights of American citizens and a free society."

- In yet another case, *Bullfrog Films v. Wick*, a Federal court had ruled against the Reagan Administration's interpretation of U.S. Information Agency rules that guide the certification of films as "educational, scientific, and cultural" thereby exempting them from certain export fees. During the Reagan years, the Administration had rejected "educational" certification for certain documentaries, some having to do with the environment and other policy positions with which the Administration disagreed. The filmmakers went to court, and the 9th Circuit ruled that the regulation violated the First Amendment because it penalized materials on the basis of content.

In the aftermath of *Rust*, the DOJ has asked the appeals court to reverse its decision, saying *Rust* allows the government to attach content-based restrictions to the granting of educational certification.

- Another case involves Federal funding of AIDS education materials. Government attorneys in this case are upholding a Health and Human Services (HHS) action in a suit filed by an AIDS awareness group. HHS regulations imposing content restrictions on education programs and materials were the basis for denying a grant to the Gay Men's Health Crisis. The court has taken the case to examine whether the content restrictions in the HHS rule bears a rational relationship to legitimate government purposes. (The lower court recently ruled that the HHS rules were unconstitutional without fully addressing the *Rust* argument. An appeal by the government is expected.)

Not too long ago, Senator Hatch, in a news interview, showed just how broadly the *Rust* logic might be applied.

The television interview had to do with the rights of a free press and tracking down the leak in the Anita Hill episode. With respect to NPR's Nina Totenberg, Hatch said, "The fact is, she's a government employee in the sense of a quasi-governmental employee, being paid out of public funds. Now I think you have to consider that in the law that might put a different twist on her obligation to divulge."

Although the courts have not yet permitted *Rust* to be used to curtail free expression, the cases discussed are pending. Even if Congress, by some miracle, is able to override another presidential veto of legislation to overturn the gag rule, the *Rust* decision will remain. A veto override, however, would send a strong message to those eager to adopt similar rules against free speech.

The non-profit community must be alert to the continuing campaign to restrict the First Amendment rights of funding recipients, and must fight against the unjustified, wholesale extension of *Rust*.

For its part, the People For the American Way Fund intends to battle such restriction in Congress, in the courts, in state legislatures, and wherever else such battles emerge.

Melanne Verveer is Executive Vice President of People For the American Way and works in its Washington DC office.

Federal Court Declares NEA "Decency" Requirement Unconstitutional

By David Mendoza

On June 9, 1992, Judge A. Wallace Tashima of U.S. District Court in Los Angeles handed down a ruling on the two motions filed in *Karen Finley, John Fleck, Holly Hughes, Tim Miller and National Association of Artists' Organizations (all plaintiffs) v. National Endowment for the Arts and John E. Frohnmayer* in his official capacity as NEA Chairperson (defendants).

A lawsuit on behalf of the four artists (the "NEA Four") was initiated by the National Campaign for Freedom of Expression (NCFE) in conjunction with the American Civil Liberties Union and the Center for Constitutional Rights. The four plaintiffs, applicants in the NEA Theatre Program's Solo Performance Artist category, had been recommended for grants by the peer review panel of the National Endowment for the Arts but were summarily denied by Frohnmayer without explanation. The suit was filed in United States District Court in Los Angeles in September 1990. In March 1991, the suit was amended to include NAAO (National Association of Artist Organizations) among the plaintiffs and to challenge the constitutionality of the language in the 1990 NEA re-authorization legislation requiring the NEA to take into account "general standards of decency" in making arts funding decisions.

Judge Tashima declared that the "decency" language is unconstitutional. In his 44-page ruling Tashima held that the statute violates the First and Fifth Amendments because it is so vague as to invite arbitrary decision making, and because it is overbroad in restricting artists' freedom of speech. "The right of artists to challenge conventional wisdom and values is a cornerstone of artistic and academic freedom," Judge Tashima wrote.

The Judge rejected the Bush administration's attempts to argue that the decency language was needed because the NEA has limited funds. Tashima wrote, "The fact that the exercise of professional judgment is inescapable in arts funding does not mean that the government has free rein to impose whatever content restrictions it chooses."

In addition to declaring the "decency" requirement unconstitutional, Judge Tashima sent to full trial the question of whether the four artists are entitled to the grants denied by ex-NEA chair John Frohnmayer. The trial to determine whether the grants were rejected on political rather than aesthetic grounds should begin later this year. Though he later denied the statement, Frohnmayer was reported to have explained, at the time of the rejections, that he had to

take "political realities" into account. Lawyers for the artists have obtained and filed with the court internal NEA documents that include candid comments about the likely political fall-out of funding these four artists.

For NCFE, the pro bono attorneys in this case are Mary Dorman (NCFE board member) and Ellen Yaroshefsky; for ACLU Foundation, the attorneys are Nan Hunter and Marjorie Heins (Director of the ACLU Arts Censorship Project); and for the Center for Constitutional Rights, the attorney is David Cole.

Justice Department attorney Mark Batten, representing the NEA, argued in court that the NEA was not using the "decency" standard directly, but rather was meeting this requirement by having diverse representation on its peer review panels. In a public statement about her veto of two grants in early May (to MIT's List Gallery and to the Anderson Gallery at Virginia Commonwealth University), NEA acting chair Anne-Imelda Radice said her decision was based on a determination that these two applications did not satisfy her criteria for artistic excellence. NCFE contends that the true motive for her decision was a concern for decency as mandated by congress.

Responding to the court's ruling, U.S. Representative Ralph Regula (R-OH), who sits on the House Interior Appropriations Subcommittee and is the author of the 1990 "decency" language, was quoted in the *New York Times* (6/10/92) saying, "the ruling will make little difference." He was quoted further saying that he thought Radice favored the decency standard and would continue to use it. He said, "I think that under the rubric of artistic excellence she will continue to apply that subjective judgment call." This is precisely what the court ruled unconstitutional. Essentially, Regula suggests that Radice is using "artistic excellence" as a thinly veiled attempt to enforce the decency standard, although the NEA and Radice deny this.

Judge Tashima's ruling should send a powerful message to Congress and the White House that decency and morality cannot be legislated through the disbursement of public dollars at the NEA. This is the second time a federal court has ruled that congressional attempts to draft language restricting freedom of expression are unconstitutional. The National Campaign for Freedom of Expression (NCFE) considers this a clear victory for artists in this country who are being used as the scapegoats in the current political battles over values. Attorney Dorman adds, "Artists are as diverse as the public, and their artistic expression reflects this diversity. Judge Tashima has taken the first step to insure that artists will be funded based on merit and not on extrinsic subjective criteria such as politics or 'decency.'"

The Department of Justice has not yet [7/17/92] indicated whether or not it will appeal.

David Mendoza is Executive Director of the National Campaign for Freedom of Expression.

A Proposal

In reaction to too many radical and unproven proposals for revision and adjustment of our national cultural policies, I would like to suggest some options which are more in line with the established fiscal policies of the current administration.¹

I. Eliminate the erratic and inequitable program of individual fellowships, to be replaced by enlistment in a national art corps. Rate of pay and advancement are to follow that of commissioned officers in the military service², including benefits, leave, R & R, retirement, hospitalization, rotation to foreign duty at government expense, and free burial in a national cemetery. Funding for this program is to come from the budget for military bands.³

II. The art market is often criticized for elitism, inflexibility, centralization, narrow range of taste, and domination by fashion trends. The only real problem is that the market is overwhelmed by the glut of work produced by millions of eager artists. Based upon standard policy established by the department of agriculture, artists will be paid NOT to produce art.⁴

III. Patterned after a White House proposal for divestment of the FHA, the US Government should sell the National Endowment for the Arts into private ownership as a public corporation. Every professional, amateur, and popular artist would own a piece of the rock for \$10 a share. This move would conflate the problematic divisions of public/private, artist/patron, administration/constituent into congruent entities. In mythic embodiment of the artist's dream, we would literally be working for ourselves.⁵

IV. Eliminate the word 'Excellence' from our lexicon forever. We don't need the marble pedestals, satin cushions, velvet ropes, gold frames, ivory towers, crystal palaces and armies of palace guards required by its enforcement.⁶

Jim Pomeroy
Montauk, NY
5/8/86

1. These are offered as provocative reflections of our contemporary social and cultural priorities.

2. Artists are 'commissioned,' too.

3. This is sort of an extended form of Artist-In-Residence, or rather, seeing the whole country as an Artist Colony. This seems to be a more appropriate form of colonialism than our government is currently exporting (and probably cheaper, too).

4. If these two propositions cover problems of individual support and the marketplace, then we can really concentrate on the functions, services, resources, and answerability of our major cultural institutions. Thus, proposition III.

5. A similar offer was recently made by the ACLU toward purchase of the Justice Department. They were told it had already been sold.

6. 'Nuff said.

This piece was written by Jim Pomeroy (1945-1992) during a conference, "Imaginary Needs - Creative Support for the Creative Artist," organized by the New York Foundation for the Arts and held at Montauk, New York in May 1986. Pomeroy was an artist whose work reached beyond art in many directions -- society, politics, technology.

What Do You Think?

Have recent events changed your understanding of the relationship between arts and government? If so, how does this change your own thinking, and will it change your work?

Grantmakers in the Arts Newsletter invited the following people to write a short response to this two-part question.

• • •

Maria Acosta-Colón

I am perhaps taking great liberty in defining "recent events." Initially, I tried to focus on the changes the field has experienced both economically and psychically as we witnessed the decline of artistic vision at the NEA. However, the changes at the Endowment are related to the economic crisis and identity crisis that seem to permeate the environment we work in. If by "recent changes" we include the national rage at the Rodney King decision, the abysmal level of education that our children are receiving, and the stagnating urban economy, then how all of this affects my own thinking and the work of The Mexican Museum takes on complex dimensions.

The once-held belief that art and politics are mutually exclusive has certainly changed, and I suggest that the arts community must become more politically involved and socially responsible in our work and in our daily lives. We can use these times to promote social change and serve the broadest possible audience. As a member of the museum field, The Mexican Museum is seeking new ways to promote change in public policy in both the political and cultural arenas that will benefit the arts community as well as our own institution. It will require our attention as individuals and as arts institutions.

Towards that effort in 1989, five artists and arts administrators met around my kitchen table and formed the San Francisco Arts Democratic Club — the most overtly partisan arts group in the nation. Since then, we have met with every one of our federal, state, county, and city elected officials; we have interviewed every candidate running for the school board, tax assessor, sheriff, community college board, state legislature, city council, congress, and mayor. We have impressed upon them the role of the arts in promoting economic development, racial harmony, self-expression, employment, tourism, and cross-cultural understanding. We have insisted that they support the First Amendment's guarantee of freedom of expression, and that they commit themselves to cultural equity in funding. As a result, the Democratic Party will be

presented with an arts platform that was created with the input of some of our club members.

But how does all this relate to the museum as an institution? Will the museum change what it chooses to exhibit as a result of the current political climate? I hope we can provide greater insight and introspection for our visitors, subtly and overtly. More to the point is the question of whether our boards and our audiences will support us as we look for ways to produce work that will provide a mirror of our nation's consciousness.

Peter Brooke, no doubt one of the greatest theater directors of our times, spoke to these concerns at a press conference in Washington D.C. last March. He said, and I paraphrase,

To make something that culturally and artistically touches reality will go against the thinking of social authority at some point. Contrary to cultural and artistic work, the force of social authority wishes for a nice, decent, convenient image that makes people feel everything is all right, when it isn't all right . . . This conflict has to be there. It is a basic conflict between official order and artistic order; the two don't serve the same aims.

I hope that artists, the organizations they work with, and also our funders will join us and, in the words of Spike Lee, "do the right thing." It will take great courage.

Maria Acosta-Colón is Executive Director of The Mexican Museum in San Francisco.

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Richard Andrews

Recent events, such as the NEA debates, abortion rights battles, LA riots, and the Rio World Environment meetings, seem to me to provide evidence of the transformation of our government from an instrument of positive social change to a system that maintains the status quo. The invocation of property rights and the claim that private enterprise is a cure for all ills makes government an accessory to change, not a leader. In this new world order the arts and humanities serve an ornamental rather than a substantive purpose. From this national perspective the arts are bit players in a political drama, and those of us who have committed our lives to the world of art and artists have every right to despair at the profound lack of vision. Yet we find hope, as we should, in the reality of what we accomplish on a daily basis. We know we do affect change, by offering an artist the opportunity to create new work, by making children aware of their own creativity, and by providing public access to the art of history and of today. I cannot say that better govern-

ment leadership will emerge tomorrow (although it is incumbent on us to make that happen), but I do know that my own sense of purpose and commitment is strengthened, not lessened, by the difficulty of these times.

Richard Andrews is the Director of the Henry Art Gallery at the University of Washington in Seattle.

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Theodore S. Berger

Ever since I got involved in this business, I accepted the dynamic tension that historically has existed between the Arts and Government. It comes with the territory.

I truly believed that in our country such tension, in fact, often generates a creative energy that helps both the arts community and government define themselves — individually and together.

Despite our differences, often like parent and child, we sensed that we could grow together if we worked at it; we could sometimes agree to disagree; we could establish trust.

And now, that fragile trust has been shredding. Maybe, like so many of my colleagues think, trust was never there. Perhaps I have been naively optimistic to believe that the public policy we were establishing could ever last.

But — despite the growing censorship clashes, the demagogic grandstanding, and the bigoted attacks which keep occurring when artists hold up a mirror to the society we have become — I know I cannot give in to despair. I cannot lose hope for an open and equitable cultural policy, one that is ever responsive to ever changing needs, a policy not just for the benefit of the arts, but for the people of this country.

Of course I know how vulnerable funding for the arts is in this climate. But this battle is about more than money; it's about how we're going to live, now and in the future.

Now, perhaps more than ever before in my life, I must keep fighting for cultural freedom within my generation. I must keep trying to reestablish trust between arts and government, a trust no future generation can ever take for granted.

Will this change my work? Of course not — there's too much to do. Let's get on with it.

Ted Berger is Executive Director of the New York Foundation for the Arts.

Steven Durland

It's easy to forget that there existed significant discontent with the NEA pre-Andres Serano. Disproportionate funding, peer panel cronyism, rescinding of funding for projects that questioned the government's party line, and more were some of the reasons.

The game was changing all along but most of us went blithely along applying for what we (quite pragmatically) thought would get funded and signing off on a host of clauses that existed long before the decency clause was introduced. Perhaps we were all fortunate that something happened that was so controversial that we began paying attention instead of being slowly led down the road to self-censorship completely unaware.

So recent events never really changed my understanding of the relationship between the arts and this particular government. What those events revealed, however, (and this does affect me very strongly) is the gulf that exists between the arts and the U.S. public. When artists went to the streets to protest their potential censorship, they turned around and discovered that they were out there all by themselves. This, to me, is much more frightening than the attitudes of Jesse Helms and his radical fringe.

I think the arts are an essential element of a healthy culture. What is more important than fighting to save government funding or the NEA, is the fight to re-establish a trust with the people of this country. If they believe in the arts, we'll survive.

For our organization, the events have led to a major reevaluation and ultimately a renewed and enhanced commitment to strengthening the role of art in our culture. This means providing support and exposure where valuable examples of art's role in culture exist, and advocacy and encouragement where they do not. *High Performance* magazine has refocused its editorial mission on a more direct commitment to art rooted in community, education, and advocacy. The 18th Street Arts Complex has committed itself to bridging the gap between experimental, culturally concerned art and artists and the public they intend to serve (yet so seldom reach).

If we fail, it will be because we didn't serve our constituency, not because of government funding. On the other hand, if we and others succeed, we can hope for a recognition that art is indeed the soul of a culture and perhaps one of the more valuable activities to warrant taxpayer support.

Steven Durland is Executive Director, 18th Street Arts Complex, and Editor-in-Chief, High Performance, Santa Monica, California.

Martin Friedman

Given the current political climate, financially pressed museums, theater companies, and other artistic centers applying for federal support are increasingly obliged to submit proposals that steer clear of controversy and eschew aesthetic experimentation. And because commissioning new work, always a financial as well as an aesthetic risk, has now become a politically loaded one, the role of arts institutions as sponsors of new artistic thought is threatened. The domino effect is all too predictable, as many corporate sponsors, once happy to follow the government's lead in supporting innovative artistic projects, back off because of the possibility of controversy.

It is apparent that support for essential new artistic activities, including commissioning artists, writers, filmmakers, and performers to create new work, will have to come from other sources. In the early 1960s, the Ford and Rockefeller foundations, through well-funded pioneering programs, encouraged artists and art institutions to pursue lively new directions in addition to adding to their physical plants. Although those halcyon days of unlimited growth are over, the arts funding situation is so critical today that they and the other foundations which have since emerged as major sponsors of artistic projects could, perhaps as a national consortium, assume much-needed leadership in this area.

But, even if such a group of far-sighted foundations were to rally to the cause, this would not relieve museums, theaters, and opera and dance companies of the obligation to develop more persuasive cases for government support.

As recent funding crises in Washington have shown, arts organizations must greatly improve communication with their respective publics. Because public funding depends upon public response, the all-important first step for these organizations is to attract, through their offerings, broad new constituencies, which in their cultural, social, and geographic composition, truly reflect the community. The next step is to enlist these constituencies in expertly managed efforts to make local and state, as well as federal, representatives conscious of the essential educational, social, and economic roles the arts play in the daily life of communities in this country. Indeed, in these parlous times, the ability of arts institutions to rally public support is as essential as what is presented on their walls and stages.

Martin Friedman is Director Emeritus of the Walker Art Center in Minneapolis.

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"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

First Amendment to the Constitution of the United States of America

Wayne P. Lawson

The recent events of these past twelve months or more have not altered or changed my understanding of the relationship between government and the arts. The relationship has always been a precarious one. Those who bought into "the happy years" when public funding was increasing across the country and came to believe that the increases were due to an understanding on the part of government about the importance of the arts to a civilized society are now very depressed and leaving the field. Those of us who are arts administrators and believed in the politics of it all continue to work in the same manner we have always worked — advocacy first, second, and last.

We all must become more attuned to the political changes taking place and find a niche for ourselves in that change. These are turbulent times, both financially and politically, and the arts can play a vital role in assisting our city, state, and federal leaders to become more aware of what citizens want. Artists and arts organizations must change or at least become more politically involved in the system. From the promotion of arts education to the support of the individual artist, we must not back away. Too many times in the past ten years we have relegated ourselves to playing the role of entertainers and black tie party givers — nice when it worked, but it didn't, really.

My thinking has not changed at all. We must inform our constituents that they can play a role in this political process and that it is their right and responsibility to do so. They must question everyone who seeks a leadership position about their beliefs; they must work in whatever manner possible to support candidates and organizations who are sensitive to the arts; they must follow-up and monitor those same persons. It is about understanding the democratic process and becoming a part of it and making the arts a part of the whole. Thus far, we have not done it. We need to work on sharing the vision of a country where the arts become commonplace and understood. The arts must never be permitted to stand apart from the whole.

There is much to be done. It's a fantastic challenge and can be accomplished.

Wayne Lawson is Executive Director of the Ohio Arts Council.

Ruby Lerner

The debate of the past few years has not altered my thinking about the responsibility of government to support the arts one iota. The struggle is, of course, to maintain that posture in the midst of attack. The more interesting question to me is: What could be the response of the private sector arts grantmaking community to these changes?

In 1980, the Heritage Foundation suggested that only "treasure" institutions be funded by the National Endowment for the Arts. Currently, the Endowment appears to be headed in this direction. Increasingly, grants for living artists and for organizations that support artists are being called "controversial." Given this radical departure from previous public policy, what if private arts funders stated that their *primary* role in the future will be to support *only* small and mid-sized institutions and individual artists? What if private arts funders refused to fund operating support or match Challenge Grants for large traditional institutions?

Most importantly, I hope we can see this as a moment of opportunity for living artists, artists' organizations (it is, after all, these two constituencies most under attack), and foundations of conscience to come together to envision a new agenda for the future — with or without the NEA. If this does not occur, I feel certain that the enormous cultural gains made over the past fifteen to twenty years will be lost. Arts grantmakers could be a powerful force in this envisioning process.

Ruby Lerner is Executive Director of IMAGE Film/Video Center in Atlanta.

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Edward A. Martenson

The Guthrie's artists and audience work together to make the world a better place, and are deeply grateful to those who provide financial support for that work. In our experience, financial generosity most often is matched by generosity of spirit. Within this context, it is clear to us (as it must be to all fund-seekers) that some funders are "friendlier" than others.

The most "friendly" funder is one that is motivated by admiration for the Guthrie, and that therefore takes pride in supporting us. In short, this funder seems happy in its work, viewing each grant as an opportunity to do good.

The least "friendly" funder is one that is more concerned with how the grant makes the funder look than with helping to enhance the Guthrie's effectiveness. In

short, this funder is a grudging participant, viewing each grant as a potential liability.

Without diminishing in any way the current impact of National Endowment for the Arts grants to the Guthrie (at this time the NEA remains our largest single donor), it is possible to note that the institutional relationship has changed. For twenty five years the NEA was the paradigm of the "friendly" funder, but recent events have placed it so firmly on the defensive that it has become one of the least "friendly."

The majority of our communications with the NEA now are involved with rapid changes in funding policies and new technical requirements, both of which are designed to insulate the agency from criticism (but are unlikely to do so). Gone is the day when the NEA was the primary national forum for substantive overview of conditions in our field.

The outcome of this shift is even more subtle than the self-censorship of artists and arts organizations that many have feared. (I hope and believe that artists will be courageous in charting their own paths.)

What already has occurred is a change in the basic question posed by the NEA funding application. Once, it asked us "What is the most artistically exciting idea you can envision?" Now, it asks, "Among all the things you do, what is the activity least likely to expose the NEA to criticism?"

Consequently, while the NEA remains an important source of financial support, it no longer can function as a trusted critic and spur to artistic progress. The loss to our field is great.

Ed Martenson is Executive Director of the Guthrie Theatre in Minneapolis.

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Mark W. McGinnis

Recent events have changed my thinking about the relationship of the government and the arts in several ways. First, recent events at the NEA have clarified how easy it is for censorship to take hold. It is not a matter of ultimatums from the top, all it really takes is subtle threats, innuendo, and a few scapegoats, letting people know that their funding could be in jeopardy. It is true that many organizations, institutions, and individuals beat their chests and declared their defiance. But in reality, a chill set into the art world after the first round of the NEA controversy that will take the full decade of the 90s to thaw, and only if Congress comes to its senses soon. Censorship of the arts seems very easy to implement in a market system of limited resources for the arts.

Another area I have re-thought is even more fundamental to the relationship between the arts and government. For decades the avant-garde in the arts has served as a useful safety valve for the intellectual elements of society to blow off steam while causing no real damage to the system. A secondary but actually more important function of the "high" arts has been to generate creative thinking and new visual stimuli. This valuable "newness" can then be rapidly absorbed by the commercial world and help keep the wheels of the market system lubricated. Recent events have shown that this relationship can be threatened by a few tunnel-visioned politicians for their own political gain by manipulating the media. This seems to be a needless flaw in a relationship that has served the system well.

As I sit here in my comfortable studio surrounded by emerging green fields of wheat, it doesn't seem that follies of the "Rude Right" could reach me on these pastoral plains, but they have. During the 80s my inter-disciplinary projects dealing with history, politics, and economics grew in complexity and scale. The concurrently growing alternative art world provided a system for presenting my work. The beginning of the 90s and the NEA controversy put an end to the growth of that presentation venue. In the past several years, I have been consciously scaling my projects down in an effort to make them less expensive to present. This is a direct result of the new relationship between arts and government.

Mark W. McGinnis is a sculptor who lives and works in Warner, South Dakota, and who teaches at Northern State University.

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Joseph V. Melillo

In response to your question, I must be honest and state publicly that I am conflicted, mid-process, attempting to clarify all the issues and their implications. I believe in artists and the creative process of art-making in all artistic disciplines. The individual artist is essential to the society that I want to believe is my culture. As a worker and resident, I pay taxes to federal, state, and municipal governments. I want a percentage of my taxes to go to individual artists and the organizations that support their artistic efforts. These governments have the right to establish policies for distributing tax monies. This is where my simple belief gets called into question. The fact is that, as a whole, society in the United States has not yet defined "who is an artist" and "what is art." Therefore, we find ourselves re-inventing the wheel (to use a cliché) every time a governmental legislature votes to allocate public tax dollars to any agency that distributes those dollars to the arts. We are placed in positions where we must validate art in society, legitimize it, establish its

worth to the collective whole while protecting an artist's freedom of expression. Maybe it is time to answer fundamental questions about art in this society, or maybe it is time to walk away from governmental support of the arts. Wasn't there important art produced in this country prior to the establishment of the NEA, and of state and city arts councils?

Joseph V. Melillo is Producing Director of the Brooklyn Academy of Music, Brooklyn, New York.

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Ellen Sebastian

*"In Brueghel's Icarus for instance; how everything turns away
Quite leisurely from the disaster; the ploughman may
Have heard the splash, the forsaken cry,
But for him it was not an important failure; the sun shone
As it had to on the white legs disappearing into the green
Water; and the expensive delicate ship that must have seen
Something amazing, a boy falling out of the sky,
Had somewhere to get to and sailed calmly on."*

W. H. Auden

For the artist what is an important failure? The white legs of the NEA struggling in the fading money green waters? The sun does shine! Because it has to! And the wealthy elite watches in amazement. But has somewhere to get to and most of WE are not invited.

I'm scared. My work is confused. I'm having some problems with story and structure. But I'm happy to be LIVE!

Has my work changed because of funding changes? Of course my work has changed, but not because of or in spite of funding. My work changes because my work is a part of my life. And my life at best must be a conscious endeavor. My work changed with the '89 Bay Area Earthquake, People's Park Riots, '91 Oakland Fire, Sickness and Death of those I love and those I have not known but have admired, and this is just in my neighborhood.

My work changed after two days of rage on April 29 and April 30. Only to wake up May 1 to the images of people in South Central lined up at a make-shift post office to receive welfare checks.

Yes, I am changed. Yes! I shout I am changed because I am alive. And very conscious of being alive.

What is an important failure?

Ellen Sebastian is a theater artist and an artistic director at Life on the Water in San Francisco.

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Ella King Torrey

I thought it was all about money.

Probably, like many people who are reading this, I came of age professionally in the 1970s. Critical values that have historically informed our culture seemed to be at a quintessence — the premium was on experimentation, on pushing limits, on change (sometimes only for change's sake). Anything was possible. The arts of this period, the organizations that were spawned and flourished to support the art, and the individuals (in increasing numbers) who dedicated their lives to these enterprises were committed to and reflected these values. The act of art itself, with its basis in originality, seemed the very expression of the tenor of the times.

This was the same period of enormous growth in government support for the arts. On the local, regional, and federal levels, arts budgets multiplied exponentially. If the art really did reflect the values of the time, governments appeared eager to embrace the values of risk and optimism. Additionally, directors of arts agencies and departments had learned politics well; through bargaining, cajoling, and playing-the-game, budgets were expanded.

For those of us in the arts, funding defined the relationship of arts and government. In our minds, the increases in budgets were simply validations of our activities, not the products of political maneuvering. The events of the last few years have jolted me from my limited understanding about art and government. Today, the arts of our times may still reflect the values of the moment, but these are not optimistic times. The society — and the arts — are not without hope, but more evident is fear, confusion, retrenchment, and greed. As manifested in the almost wholesale abandonment of the arts (and the cities, social programs, preventive health services, preschool education ...), many of our government bodies do not seem to be interested in grappling with these timely issues in a very direct way. Governments give or retract money, but that is merely the crude expression of a much larger set of policies that involve issues of control, freedom of expression, image vs. reality, and the promotion (or not) of the free exchange of ideas.

Has all of this affected my work? Yes and no. The Artists' Fellowship Program I currently direct was developed during the last several years. In response to the swirling crisis around public funding of the arts, great care was taken to distance the program from potential political (in the broadest sense of the word) influence. In an effort to combat the frequently-articulated perception that the arts and artists are isolated from the rest of society, we incorporated an outreach/educational component into

our expectations of all of our grant recipients. These things in place, we simply do our job, but, because our job is providing significant funding directly to artists, in the current environment, this is a statement in itself.

Personally, the events of the last several years have affected me dramatically. In addition to feeling tired and overwhelmed (we couldn't just go to a few marches and call a few senators and make this go away), I have begun to think seriously about what I/we "did wrong." I believe the mistakes were not of practice, but of assumption. I am suspicious now (I hope not cynical, but certainly wary) of government funding of art — of its motivations, of its terms. I have begun to volunteer my time and services more broadly than ever before, I have worked to be a better "citizen" of the arts. I have accepted the fact that we are facing a very long process of education and rebuilding in our culture, and, if we are both diligent and lucky, the arts will be recognized for their capacity not only to reflect and address, but also to structure society. The outcome is unclear, but fortunately there is art and therefore we can always hope.

Ella King Torrey is Executive Director of Pew Fellowships in the Arts and President of Grantmakers in the Arts.

"The Congress hereby finds and declares ... [that] it is necessary and appropriate for government to help create and sustain not only a climate of encouraging freedom of thought, imagination and inquiry, but also the material conditions facilitating the release of this creative talent."

Declaration of Purpose, National Endowment for the Arts, 20 U.S.C. 951

Is There Life after the Supreme Court?

By Ira Glasser

When I came to work for the ACLU 25 years ago, it was the heyday of the Warren Court. The mood here was buoyant: The U.S. Supreme Court was finally working the way it should, we felt, and rights long denied were being recognized at what seemed like a dizzying pace. Nearly every time we set foot in court, we expected to win. Much more often than not, we did.

The Supreme Court was our trump card. When the majority exceeded constitutional limits, we trumped it. When any branch of government strayed beyond the boundaries drawn by the Bill of Rights, we went to court and obtained an order reversing the trespass. Those were heady days.

Of course, there were many who attacked the Warren Court. "Impeach Earl Warren" billboards sprouted along the highways that cut through Middle America. Less crude but potentially more damaging attacks emanated from Congress, where politicians proposed legislation to prohibit the Court from hearing certain kinds of constitutional cases. None of the bills passed.

The most sophisticated attacks came from so-called judicial conservatives, who argued that the Court was encroaching on legislative turf. The Court, said these critics, should defer to legislatures. "Judicial restraint" became their goal and "judicial activism" their code word for everything they hated about the Warren Court. But in reality, the debate was never about activism versus restraint. That was a smokescreen. The real issue was the content of the Warren Court's decisions. The rights were what the conservatives opposed, not the process of securing those rights.

From its very inception, the U.S. Supreme Court has been an activist body. From 1803, when the Court extended the reach of its power to strike down a federal statute for the first time; through the 19th century, when it validated slavery and stripped the post-Civil War constitutional amendments of much of their force; through the 1930s, when it blocked New Deal economic programs in deference to property rights — through all those times, the Supreme Court has been activist. The activism of the Warren Court, then, was in the tradition.

Where the Warren Court departed from the tradition, what it did that no Supreme Court had done before, was to

invoke the Bill of Rights systematically to protect the rights of the vulnerable and powerless: African Americans at the mercy of racist Southern states; people whose religious or political beliefs were unorthodox and unpopular; people accused of crimes; poor people denied fundamental legal rights because of their poverty. What was unique about the Warren Court was not its activism, but the beneficiaries of its activism.

The effectiveness of the Warren Court in protecting civil liberties prompted many of us to believe that the judicial system was the only sure route to securing rights. We labored under that illusion for a long time, through the twilight of the Warren era and well beyond. We largely ignored opportunities to influence legislators, so confident were we that the courts would block any legislation that damaged rights. And, certain that we could always trump majoritarian excess through litigation, we made virtually no serious effort to educate the public or to influence public opinion. As a result, our opponents encountered little opposition in public forums and steadily gained ground there.

Take, for the best example, the controversy surrounding the right of a woman to decide whether to bear a child. In 1973, we thought that right was secure when the Supreme Court recognized it in *Roe v. Wade*. But the fight wasn't over; it was just beginning.

Our opponents marched out of the courtroom into the arena of public opinion and into the offices of the politicians. At first, we paid little attention to them as they organized their constituents, coined catchy phrases like "right to life" and leaned on the politicians. We thought we could always stop them in court, if it came to that. But their tactics were quite successful, especially their pressure tactics. A lot of politicians came to believe that our adversaries' viewpoint on reproductive issues was the only public opinion that mattered. Our opponents' organizing changed politics, and politics changed the Court.

Now, like Sisyphus, we are almost back at the bottom of the hill, about to lose the right to choose and facing a long, upward struggle to exercise influence in legislatures across the land.

While we're waging this long battle to take back reproductive rights — a fight we will win eventually — many women, especially poor and young women with no one to turn to for help, will be hurt.

Perhaps if we had not relied solely on the Supreme Court, but had worked harder on mobilizing public opinion to defend the rights whose legal recognition was won in the '50s, '60s and '70s, we would not be where we are today.

Apparently, it slipped our minds that the Warren Court was an historical aberration. For most of the 200 years

since the Bill of Rights was passed, the Supreme Court has not protected liberty and, indeed, has often been an antagonist of liberty.

When the Court struck down a federal law prohibiting slavery in the territories in 1857, litigation did not overturn that infamous decision; the Civil War did. When women were finally enfranchised in 1920, it was not due to any action by the Court, but because women organized for years until they had created enough pressure to force a constitutional amendment that guaranteed them the right to vote. Working people who wanted to form labor unions in the 1930s won recognition of their First Amendment rights to free speech and peaceful assembly the same way: through political struggle and organizing. Their efforts forced passage of the National Labor Relations Act and, thus, altered the climate in which the Supreme Court viewed freedom of expression.

Even during the Warren Court era, most civil rights were won, not in the Justices' chambers, but through political struggle in the South by people who risked life and limb to turn principles that had existed for years on paper into practice. And today, gay men and lesbians understand very well that rights are won as often in the streets as in the courts. Women will learn that lesson again if the Court overturns *Roe v. Wade*, as most observers expect it will.

Losing the Supreme Court is a good reason to be alarmed and angry. But don't despair — there is life after the Supreme Court, even if it won't be easy. History shows that rights come to those who fight for them, with or without the Supreme Court's help.

Ira Glasser is Executive Director of the ACLU. This article was first published in the winter 1991-92 issue of Civil Liberties, and is published here with the permission of the ACLU.

Supporting and Conducting Lobbying

*In the spring 1992 issue of this newsletter, we reported on the availability of a new booklet, "Supporting and Conducting Lobbying: An Overview for Foundations." Since this special issue of the newsletter, with its emphasis on freedom of expression and public funding, reveals the importance of advocacy on behalf of artists and the arts, we have obtained permission to excerpt a few sections from this publication. The booklet, prepared by Thomas Asher, is available for \$5 from the Alliance for Justice, 1601 Connecticut Avenue, N.W., Washington D.C. 20009.**

Preface

The Alliance for Justice, through its Advocacy Forum Project, commissioned this [publication] in response to inquiries from foundations about what they may and may not do to support advocacy, both as funders and on their own. This piece and the two accompanying charts address, in light of the 1990 IRS lobbying regulations, the basic questions asked by foundations — private and community — about whether they can support lobbying or other public policy-oriented initiatives.

As the John D. and Catherine T. MacArthur Foundation's Chair, Elizabeth McCormack, stated: "Not only is advocacy central to democracy, it is key to solving some of society's most severe problems." Because of the power of advocacy to address root causes of pressing social issues, it is important for foundations to understand that they are generally free to support and engage in activities that influence public policy.

Nan Aaron and Carol Seifert
Alliance for Justice/Advocacy Forum
July 1991

How can foundations make their views known on public policy issues?

While private foundations may not lobby either on their own or by paying another person or entity to lobby for them, they may conduct or fund a wide range of policy-oriented activities (excluding, of course, electoral advocacy). If a foundation does lobby, substantial penalty taxes may be imposed against the foundation and its managers.

Are community and other "public" foundations permitted to lobby?

Yes. As public charities, community foundations may lobby if doing so is not a "substantial part" of their activities. Or they may "elect" statutory lobbying limits, which generally give them greater clarity, flexibility, and lower penalties. See Chart Two.

Note: As used here, the term "community foundations" includes all grantmaking public charities. [A footnote adds: A "public charity" is an organization that the IRS has ruled (a) to be tax exempt under IRC 501(c)(3) and (b) not to be a private foundation under IRC 509(a)(1), (2), or (3).]

What nonelectoral policy-oriented activities fall outside the definition of lobbying?

Lobbying does not include:

- influencing administrative (such as agency rule-making), executive branch, or judicial decisions;
- communications with non-legislative government employees, if the primary purpose is not to influence legislation;
- statements, reports, analyses, and positions on issues, in contrast to "specific legislation" [*clarifying footnote in original*];

Also excluded are the following communications, which have a legislative focus:

- grassroots messages, such as media ads or mailings, without a "call to action" [*exception noted in original*];
- comments on proposed legislation at the written invitation of a legislative body;
- self-defense lobbying (such as opposing a bill that would deny tax exemption for foundations);
- non-partisan study, analysis, or research that contains no "call to action" and is publicly distributed;
- studies of broad social issues.

[*Chart One in original gives further clarification.*]

May private foundations make grants to public charities that lobby?

Yes, so long as the grants are not "earmarked" for lobbying, as explained below.

When will a private foundation's grant be deemed earmarked for lobbying?

If grantor and grantee have an oral or written agreement that the grant will be used for lobbying.

Are the private foundation earmarking rules different for general support and specific project grants?

Yes. For general support grants, no grantee projection of lobbying expenses is required to preclude earmarking.

However, a project-specific grant will be deemed earmarked for lobbying to the extent it exceeds the amount

budgeted by the grantee for the project's nonlobbying expenses for the year of the grant. If lobbying is not identified in a grantee's project budget, the foundation may assure itself by obtaining a signed statement from the grantee's officer or Director confirming the project's intended lobbying and nonlobbying expenses.

The foundation may rely on a grantee's budget or signed statement of lobbying intentions unless it has some reason to question its accuracy.

Must a private foundation avoid grants to charities that lobby or require that its grants not be spent for lobbying?

The IRS, by providing the "safe harbors" outlined above, explicitly sought to reassure foundations that they may safely support public charities that lobby.

Thus, in most cases, a foundation grant agreement that prohibits expenditures for lobbying is not required. Also, such an agreement imposes unnecessary recordkeeping burdens on the grantee and perhaps on the foundation.

However, circumstances may warrant a "no-lobbying-use" restriction — e.g. an "expenditure responsibility" grant or perhaps a project-specific grant to a charity known to have substantially underbudgeted its prior lobbying expenses.

Are the same grantmaking rules applicable to community foundations?

No. Community foundations are public charities that have more flexibility, largely because they themselves may lobby (within limits) and are not subject to the penalty taxes imposed on private foundations for lobbying expenditures.

In the course of obtaining permission to reprint the above excerpts, we learned from Carol Seifert that additional questions have arisen since the guide was released. These questions are:

May community foundations award grants to ad hoc coalitions that do not have fiscal sponsors?

Are community foundations permitted to support groups with 501(c)(4) tax status? What about private foundations?

What additional responsibilities does a foundation assume when it makes a "controlled grant?"

The Alliance for Justice plans to address these questions at a conference organized by the Fund for Southern Communities on July 16 and 17.

Reading Recommended by ...

• Joan Shigekawa (Nathan Cummings Foundation) recommends **Culture Wars: Documents from the Recent Controversies in the Arts** edited by Richard Bolton and published in May 1992 by the New Press in New York. This book documents the two-year battle between politicians and artists over the budget and reauthorization of the NEA. This battle reveals deep divisions among people in this country, and as editor Bolton writes in the introduction, "The clash over government funding was much more than an argument over art." He continues, "It was a debate over competing social agendas and concepts of morality, a clash over the present and the future condition of American society. This anthology aims to describe the struggle as broadly as possible, providing both an understanding of the battle over the NEA and the larger context of the fight." The book covers the period from 1989 to 1991 and contains a broad selection of magazine articles, artist statements, mass mailings by fundamentalist groups, Congressional testimony, correspondence, and op-ed pieces. It includes writings by Dennis Barrie, Patrick Buchanan, Karen Finley, John Frohnmayer, Allen Ginsberg, Grace Glueck, Senator Jesse Helms, Holly Hughes, Robert Hughes, Garrison Keillor, Hilton Kramer, Samuel Lipman, Tim Miller, Rep. Dana Rohrabacher, Kathleen Sullivan, Carole S. Vance, Rev. Donald Wildmon, and many more.

• Shigekawa also recommends **Culture Wars: The Struggle to Define America** by James Davison Hunter, and published in 1991 by Basic Books, a division of Harper Collins Publishers. Subtitled, "Making Sense of the Battles over the Family, Art, Education, Law, and Politics," this book provides a careful analysis of the sources of the moral and cultural conflicts in U.S. society today. "Abortion, funding for the arts, women's rights, gay rights, court-packing — the list of controversies that divide our nation runs long

and each one cuts deep. This book shows that these issues are not isolated from one another but are, in fact, part of a fabric of conflict that historically divided the nation, the contemporary culture war is fought along new and, in many ways, unfamiliar lines. Its foundation is a profound realignment in American culture which cuts across established moral and religious communities." [from the book jacket] Hunter is Professor of Sociology and Religious Studies at the University of Virginia.

Robert N. Bellah, coauthor of *Habits of the Heart*, says, "Hunter makes an indispensable contribution to the understanding of the sad state of public argument in America and gives us valuable suggestions for its improvement. He is at his best in explaining why our public discourse is so polarized, why both ends of the spectrum are partly to blame, and why there is more basis for common ground than the extremists imagine."

Free Expression Network

In early October 1991, the National Campaign for Freedom of Expression, working with the Media Coalition, sponsored the first meeting of the Free Expression Network, a coalition of groups working on issues surrounding free expression and representing both the non-profit and for-profit sectors. The first meeting, hosted by The Andy Warhol Foundation for the Visual Arts in New York, brought together thirty-five representatives of national organizations. Among the participants were the Recording Industry Association of America, American Booksellers Association, American Library Association, National Gay and Lesbian Task Force, Motion Picture Association of America, United Church of Christ, National Writers Union, Gay and Lesbian Alliance Against Defamation (GLAAD), National Coalition Against Censorship (which includes the Directors Guild of America and the Writers Guild of America, among others), National Alliance of Media Art Centers, National Association of Artists' Organizations, People for the

American Way, ACLU, and College Art Association.

At the first meeting, the participants agreed to the urgency of establishing a more formal network for collaboration and communication. A network is needed, they believe, to fight the widespread attacks on free expression and U.S. culture by the fundamentalist far right. The participants concurred in an understanding that these attacks, which are increasing at both national and local levels, are not isolated, unconnected incidents. They see the targets of these attacks ranging from rap music recordings and women's reproductive rights, to artists, the NEA, and the Corporation for Public Broadcasting.

Since the first meeting, the group has expanded. New participants include the National Council of Churches, Theatre Communications Group, Association of American Publishers, Literary Network, National Cultural Alliance, Association of Independent Video and Filmmakers, and Volunteer Lawyers for the Arts, among others.

Meetings serve as a forum for the participants, allowing them to increase their understanding of each other's issues and to work collaboratively in specific instances. The regular meeting agenda includes updates on proposed federal and state legislation, reports on pending litigation from all levels of the court system (from local courts to the Supreme Court), and information about education and public awareness activities on the subject of the First Amendment and censorship. Guest presentations on topics of interest are added to the agenda on a regular basis. Free Expression Network members issue fax alerts for advocacy purposes. Efforts are also underway to develop local free expression networks in communities modelled on the national Network membership. Such local efforts have begun to be organized in Los Angeles, Portland, Seattle, Boston, and central Florida.

For more information about the Free Expression Network, contact David Mendoza at the National Campaign for Freedom of Expression, at 206-340-9301.

News from Grantmakers in the Arts

Grantmakers in the Arts Seventh Annual Conference

The Seventh Annual Conference of Grantmakers in the Arts will be held in Phoenix, Arizona October 28-31, 1992. Titled "Challenging Assumptions," the conference features keynote speakers Athol Fugard, playwright, and Robert Garfias, anthropologist, musician, and member of the National Council on the Arts. Detailed conference information and registration forms are available from Myra Millinger, Associate Director, The Flinn Foundation, 3300 North Central Avenue, Suite 2300, Phoenix, Arizona, (602-274-9000).

NEA Update Additional Pre-conference Roundtable

Joan Shigekawa (Nathan Cummings Foundation) will moderate a special pre-conference session on the latest developments surrounding the National Endowment for the Arts. She will be joined by Melanne Vermeer, Executive Vice President of People for the American Way, and Susan Wyatt, an independent consultant who closely monitors the activities of the NEA. The session will be held at 12:30 p.m. on Wednesday, October 28.

Breakfast Roundtables

Conference participants are encouraged to develop topics for roundtable discussions scheduled for Friday morning, October 30. Anyone interested should contact Myra Millinger by September 1, 1992.

Reminder:

To ensure that you remain on the newsletter mailing list, join Grantmakers in the Arts now.

An Invitation to Join

Founded in 1985, Grantmakers in the Arts (GIA) is inaugurating a national membership program to better serve both the funding community and the arts.

Now, more than ever, the arts need the informed and active support of all those individuals and institutions that value what the arts contribute to society. At formal and informal meetings, in publications and papers, GIA discusses philosophical and day-to-day issues facing the arts-related funding community and its grantees. GIA is designed to help arts funders make more informed decisions. Members have access to a variety of information and individuals that help provide a better understanding of issues confronting the arts today.

Members of GIA will enjoy the following benefits:

- Preferential registration and reduced fees to annual conferences and other GIA programs
- Exclusive subscription to the GIA newsletter
- Reduced rates for GIA-sponsored publications
- Access to reports generated by member organizations
- Membership directory
- Voting privileges at the GIA annual meeting.

There are two categories of membership: Institutional and Affiliate. All memberships are open to both staff and trustees.

Annual fees for Institutional Members are based on a current year arts grants budget and range from \$100 to \$500. Up to ten individuals may participate in a single Institutional Membership. Annual fees for Affiliate Members are \$50.

Membership forms are available from the Membership Committee Chair, Myra Millinger, at the Flinn Foundation, 602-274-9000.

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The newsletter is published twice a year. The deadline for the Fall issue will be August 15, 1992. News items will be edited and included in the newsletter on a space-available basis. Two copies of each submission should be sent to:

Sarah Lutman, Chair, GIA Newsletter Committee, c/o The Bush Foundation, E-900 First National Bank Bldg., St. Paul, MN 55101

Grantmakers in the Arts (GIA) is a national membership organization of primarily private sector grantmakers interested in the arts and arts-related activities. GIA's purpose is to strengthen arts philanthropy and its role in contributing to a supportive environment for the arts nationwide. GIA is incorporated as a non-profit 501 (c)3 organization and is an affinity group of the Council on Foundations.

Grantmakers in the Arts, c/o Ella King Torrey, Chair, Pew Fellowships in the Arts, The University of the Arts, 250 S. Broad Street, Suite 400, Philadelphia, PA 19102

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