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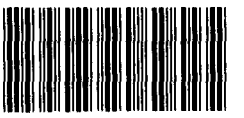

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National Endowment for the Arts' Compliance with Section 304(a) of the 1990 Interior Department Appropriation Act

Statement of
Henry R. Wray
Senior Associate General Counsel
Office of the General Counsel

Before the
Subcommittee on Postsecondary Education
House Committee on Education and Labor

Mr. Chairman and Members of the Subcommittee:

We appear before you, at your request, to discuss how the National Endowment for the Arts (NEA) has complied with section 304(a) of the 1990 Interior Department and Related Agencies Appropriation Act. As you know, section 304(a) prohibits fiscal year 1990 funds appropriated to NEA from being used to promote, disseminate or produce materials which in the judgment of NEA may be considered obscene and have no serious artistic value.

GAO has not undertaken an in-depth review of NEA's implementation of section 304(a). However, we have conducted a preliminary legal analysis of NEA's responsibilities under the statute and the legal sufficiency of the controls NEA has put in place to carry out its responsibilities. The attachment to my statement discusses our analysis in detail. With your permission, I would like to summarize our conclusions and recommendations, and submit the detailed attachment for the record.

While section 304(a) was the product of intense controversy, we think the effect of the law is clear on three basic points. First, the law leaves to NEA's judgment determinations about what materials violate the funding prohibition. Only NEA can determine, at least in the first instance, that a violation has occurred. Second, the NEA is to be accountable for its determinations. Third, NEA is to apply the test of obscenity prescribed by the Supreme Court in Miller v. California, 413 U.S. 15 (1973), when making its determinations under the statute.

According to NEA, it has incorporated the language of section 304(a) as an express term and condition of every fiscal year 1990 grant award. It also requires that the statutory language be made an express term and condition of all subgrants. In addition, the NEA Chairman or a senior official briefs all panels that review its grants on the requirements of section 304(a). NEA has installed a procedure whereby any grant application that, in the opinion of the panel, raises potential compliance issues is submitted for further review and, ultimately, for determination by the Chairman.

We believe that these controls at the grant making stage are appropriate. However, controls over grant awards cannot guarantee that funds will not be used in a manner inconsis-

tent with section 304(a). For example, it may not be possible at the grant award stage to make definitive judgments about materials that have yet to be produced. Therefore, even after a grant is awarded the grant funds could be used contrary to the statute. If NEA determines that a violation has occurred, recovery of the misspent funds would be required. The NEA's organic act provides, in this regard, that whenever the NEA Chairman finds, after reasonable notice and opportunity for a hearing, that grant funds have been diverted from their purposes, no further grants may be made to the recipient until the diverted grant funds have been repaid.

Based on our analysis of the information provided by NEA, we believe that NEA has met its legal obligation to adopt reasonable controls designed to prevent violations of section 304(a) and that it has the ability to seek recovery of any grant funds that may be used in violation of section 304(a). There are, however, several potential problem areas in which we believe NEA could enhance compliance with the statute by issuing additional guidance.

The first area involves the standards that govern the application of section 304(a). Concerns have been raised that the statutory language is vague and may even be unconstitutional. As noted previously, our reading of the

statutory language together with its legislative history suggests that Congress intended the NEA to apply the test of obscenity formulated by the Supreme Court in Miller v. California. Therefore, section 304(a) only prohibits the funding of materials that are actually obscene under Miller. We recommend that NEA formally issue a policy stating that it will apply the Miller test in order to respond to concerns over the alleged vagueness of the language.

The second area of concern is how to apply section 304(a) to so-called "seasonal support grants" which provide funding for the general operations of the recipient organization. It may not be obvious whether seasonal support grant funds are used "to promote, disseminate, or produce" particular materials with the application of the statute. For example, it may be difficult to determine whether or to what extent the use of grant funds to underwrite a portion of the administrative costs of a theater can be related to the specific performances offered by the theater. Again, this is an area in which we believe formal guidance by NEA would be useful.

The third concern relates to the difficulty of making determinations at the grant award stage on whether materials to be produced under the grant will run afoul of section 304(a). We recommend that NEA consider adopting a procedure

whereby grantees could seek advisory opinions from NEA at a later stage concerning whether they are in jeopardy of violating section 304(a). It might be possible in some cases for NEA, in response to a request from a grantee, to advise the grantee whether a potential use of grant funds would violate the statute.

We have discussed our three recommendations with NEA officials and they have agreed to consider them.

Mr. Chairman, that concludes my prepared statement. We would be happy to answer any questions.

ATTACHMENT

LEGAL ANALYSIS OF SECTION 304(a) OF PUBLIC LAW NO. 101-121 AND NEA's ACTIONS UNDER SECTION 304(a)

I. Nature and Scope of Section 304(a)

Section 304(a) of the Interior Department and Related Agencies Appropriation Act, 1990, approved October 23, 1989, Pub. L. No. 101-121, 103 Stat. 701, 741, 20 U.S.C. § 954 note, provides:

> "None of the funds authorized to be appropriated for the National Endowment for the Arts or the National Endowment for the Humanities may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts or the National Endowment for the Humanities may be considered obscene, including but not limited to, depictions of sadomasochism, 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."

This language was the product of congressional concern over decisions made in prior years by the National Endowment for the Arts (NEA). In particular, calls for increased accountability in NEA's grant making process grew out of NEA's funding of exhibits of the works of Robert Mapplethorpe and granting of a fellowship to Andres Serrano.1/ The Senate adopted an amendment to the House-passed version of the Interior Department appropriation bill (H.R. 2788) that prohibited the use of any funds authorized by the bill to promote, disseminate, or produce materials that were obscene or indecent, denigrated a religion, or denigrated or debased a person or group on the basis of race, creed, sex, handicap, age or national origin.2/ At conference the language of section 304(a),

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1/ See the conference report on the legislation enacted as Pub. L. No. 101-121, H.R. Rep. No. 264, 101st Cong., 1st Sess. at 78 (1989).

2/ See 135 Cong. Rec. S8806-8809 (daily ed., July 26, 1989).

quoted previously, was adopted in lieu of the Senate-passed language.3/ While section 304(a) generated considerable debate on policy grounds, the purpose and effect of its provisions appear reasonably clear on three basic points.

First, the language of section 304(a) is explicit in committing to the judgment of NEA determinations concerning what materials violate the funding prohibition. This commitment of discretion to NEA is confirmed by the legislative history. Representative Yates, Chairman of the House Interior Appropriations Subcommittee and a conferee, stated during House consideration of the conference report:

> "[I]t was the conferees' intention to leave within the discretion of the . . . chairperson of NEA, the decision as to whether or not there was enough social merit . . . to justify overcoming the possibility of obscenity and approving the grant."4/

Representatives Rohrabacher and Yates then engaged in the following colloquy to the same effect:

> "MR. ROHRABACHER. So, Madam Speaker, the intent of the conference was not to set any standard that would prevent a Mapplethorpe exhibit; is that correct? And what the gentleman is suggesting is that the intent of the conference was not to prevent the refinancing and the resubsidization of an exhibit that was exactly the same as the Mapplethorpe exhibit?
>
> "MR. YATES. I am telling the gentleman that it was the intent of the conference to leave that decision within the discretion of the Chairman of the NEA . . . "5/

Likewise, there was general recognition during Senate consideration of the conference report that decisions concerning application of the funding prohibition would be

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3/ In addition to the funding restrictions enacted as subsection 304(a), the enacted version includes as subsection 304(b) provisions requiring the establishment of an independent commission to review and report to Congress on NEA's grant making procedures. 103 Stat. 741-742.

4/ 135 Cong. Rec. H6521 (daily ed., Oct. 3, 1989).

5/ Id.

left to NEA. For example, Senator Helms specifically referred to the Rohrabacher-Yates colloquy, quoted above, several times in expressing his disagreement with the conference language.6/ Senator Byrd, a proponent of the conference version, responded:

> "We are dealing with issues of judgment, and the responsibility for making that judgment must be assigned to an individual or agency. The language in the conference report does assign responsibility for making these judgments to the Endowments; and, in that respect, I believe it is superior to the language offered by the Senator from North Carolina."7/

Second, Congress clearly intended that NEA would be accountable for its judgments in applying section 304(a). The following exchanges typify a theme that runs throughout the House and Senate debates on the conference report:

> "MR. WALKER. So if in the future something would happen that would fall through the cracks here and we would end up with something that many people would regard as being egregious in the mode of Serrano and Mapplethorpe, we then, under this amendment, can hold the Chairman of the [NEA] directly responsible for having funded those projects? Is that right?
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> MR. REGULA. That is absolutely correct. . .
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> . . . . .
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> "MR. WALKER. The problem for some of us was that when we contacted the National Endowment early on about these exhibits, when I discovered it, for instance, and wrote letters, the letter I got back from the National Endowment basically said, 'We have no responsibility for this.'
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> "MR. REGULA. I think that will be different.
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> . . . . .
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> "MR. WALKER. If the gentleman will yield further, in other words, in the future, I am not going to

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6/ 135 Cong. Rec. S12967-68 (daily ed., Oct. 7, 1989).

7/ Id., at S12970.

> get another letter from the National Endowment for the Arts shrugging their shoulders and saying, 'I am sorry, there is nothing we can do about it. That taxpayers' money is gone?'
>
> "MR. YATES. The gentleman is correct."8/

Third, it appears that Congress intended NEA to use the three-prong obscenity test prescribed by the Supreme Court in Miller v. California, 413 U.S. 15 (1973), when making its determinations under section 304(a). The Miller test is: (1) whether the average person, applying contemporary community standards, would find the material in question, taken as a whole, to appeal to the prurient interest; (2) whether the material depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law as written or authoritatively construed; and (3) whether the material, taken as a whole, lacks serious literary, artistic, political or scientific value. 413 U.S. at 24.

Representative Yates explained that the Miller standards, complemented by NEA's basic statutory mandate to fund projects of substantial artistic and cultural significance,9/ would be applied under section 304(a):

> "Madam Speaker, the conferees agreed that obscenity is to be a factor in grant making in the future and that in the event that an application were judged to be obscene, then there were certain other factors that come into play, just as they did in the case of the Miller [decision], with which I am sure the gentleman is familiar.
>
> "Madam Speaker, my colleagues will remember that there were three qualifications in the Miller decision; one, whether it was prurient; two, whether or not it was antagonistic to what was the standard in the community; and third, whether or not it possessed literary, scholastic, political, or scientific merit; all of these factors, may I say, plus, the standard which is now in the law that requires artistic excellence and the highest quality of art to be in the applications that are approved. If the applications do not possess 'artistic and humanistic excellence,' whether they

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8/ 135 Cong. Rec. H6523-24 (daily ed., Oct. 3, 1989).

9/ See note 15, infra.

> are obscene or not, they ought not be approved. If they are obscene, then it was the conferees' intention to leave within the discretion of the . . . chairperson of NEA the decision as to whether or not there was enough social merit of the kind that are outlined in those four categories to justify overcoming the possibility of obscenity and approving the grant. Except for that, then the obscenity would take over."10/

Likewise, Senator Jeffords observed:

> "[T]he conferees agreed upon a more moderate version of the Helms amendment. They looked to the 1973 U.S. Supreme Court Miller standard for a definition of obscenity, and agreed that Federal funding should be denied to artistic work that 'when taken as a whole does not have serious literary, artistic, political, or scientific value.' Thus, the first amendment test is probably passed."11/

Indeed, the Senate rejected an amendment to the conference language in part because it was viewed as imposing new and possibly vague standards for judging obscenity.12/

The actual language of section 304(a) recites only the third prong of the Miller test. However, given the legislative history, it appears that the statutory phrase "may be considered obscene" was intended to incorporate the first two prongs of Miller.13/ In essence, therefore, section

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10/ 135 Cong. Rec. H6521 (daily ed., Oct. 3, 1989).

11/ 135 Cong. Rec. S12971 (daily ed., Oct. 7, 1989).

12/ Id. (remarks of Senator Byrd); id., at S12970 (remarks of Senator Gorton).

13/ The legislative history does not explain the phrase in section 304(a) that follows "may be considered obscene"--"including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts . . . " In the absence of any legislative history, we are inclined to interpret this phrase as merely providing examples of depictions that "may be considered obscene" depending upon whether the particular depiction meets the three-prong Miller test. We find no indication that this language was intended to supersede the

(continued...)

304(a) prohibits the use of fiscal year 1990 NEA appropriations to promote, disseminate, or produce materials that NEA determines to be obscene under the Miller test. Such materials "may be considered obscene" by NEA if NEA determines that, taken as a whole, they would appeal to the prurient interest and depict or describe in a patently offensive way sexual conduct specifically defined by law, applying the contemporary standards and law of the community where the material will appear. An NEA determination that materials "may be considered obscene" does not preclude funding of the materials under section 304(a), however, unless NEA also determines under that section and the third prong of the Miller test that the materials, taken as a whole, have no serious artistic value.

As noted previously, determinations concerning the application of section 304(a) are committed to NEA's discretion. Only the NEA can determine that a violation has occurred. At the same time, NEA retains accountability for how its funds are used. This, in turn, requires the agency to adopt controls designed to prevent violations of section 304(a) in the first instance and to assure that it can remedy any violations that might occur. The remainder of this analysis addresses the legal sufficiency of the controls NEA has put in place to fulfill these responsibilities.

II. The Grant Making Process

The NEA's organic act authorizes the agency to award direct grants to groups and individuals and to make block grants to state arts agencies.14/ Such grants are to fund projects and productions "which have substantial artistic and cultural significance."15/

According to the NEA, the grant process differs depending on whether the award is being made to a state agency or directly to a group or individual. For state block grants, the panels review the applications for compliance with the

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13/(...continued)
Miller test by listing categories of depictions that are to be regarded as per se obscene for purposes of section 304(a).

14/ See section 5 of the National Foundation on the Arts and Humanities Act of 1965, as amended, 20 U.S.C. § 954 (1988).

15/ See, e.g., 20 U.S.C. § 954(c)(1) and (4).

organizational and procedural requirements that the organic act imposes upon state agencies. The NEA panels do not review the grants made by the state agencies to groups and individuals from the NEA block grants; these reviews are conducted by the state agencies. The language of section 304(a) is incorporated verbatim into the terms and conditions of fiscal year 1990 grants made to the state agencies, and this language is required to be included in the state agencies' grants from their allocations of 1990 NEA block grants.

Applications made by a group or an individual for direct NEA grants are reviewed by NEA panels for their artistic merit. The panel's recommendations are forwarded to the National Council for the Arts which then makes its own recommendation to the Endowment's Chairman. The Chairman makes the final determination whether to approve these grants. The NEA has adopted a number of procedures and controls in its grant making process designed to comply with section 304(a). According to the NEA, all panel members are personally briefed by the Chairman or a senior aide on the funding restrictions. If the panel believes that a grant application may involve questionable materials, it "red flags" the application and sends it to the General Counsel. If further review is necessary, the application is reviewed by the Chairman and the Council. Again, the language of section 304(a) is incorporated verbatim into the terms and conditions of all direct NEA fiscal year 1990 grants and any subgrants from those grants.

In our opinion, these controls are legally appropriate as a means of complying with section 304(a) and provide an orderly procedure for making determinations under that section.

III. Recovery of Misspent Grant Funds

While we believe that the controls NEA has installed in its grant award process are appropriate under section 304(a), obviously they cannot guarantee compliance. There are two inherent limitations on the grant award process. First, as noted previously, specific projects funded from state block grants are reviewed and approved at the state level. While we have no reason to think that the state agencies will not scrupulously apply the section 304(a) requirements in their reviews, only NEA has authority to make final determinations under section 304(a). Second, and more fundamentally, it may not be possible for any reviewer at the grant award

stage to make definitive judgments about materials that have not yet been produced.

Recognizing that the mere grant award cannot immunize a final product or production from possible violation of section 304(a), NEA has properly included the statutory language as an express term and condition of every fiscal year 1990 grant and subgrant. This affords a specific contractual basis for enforcing section 304(a) in the event NEA determines that a violation has indeed occurred. The NEA may discover potential violations of section 304(a) in several ways, one of which is through its review of the final descriptive reports that all grant recipients, including state agencies, must submit to NEA.

If NEA determines that a violation of section 304(a) has occurred, the language of section 304(a) ("None of the funds . . . may be used . . . ") clearly requires NEA to seek recovery of the misspent funds. In this event, NEA's organic act, at 20 U.S.C. § 954(h), provides a remedy as follows:

> "Whenever the Chairperson, after reasonable notice and opportunity for hearing, finds that--
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> . . . . .
>
> "(3) any funds granted to a group or State agency under this section have been diverted from the purposes for which they were allotted or paid, the Chairperson shall immediately notify the Secretary of the Treasury and the group or State agency with respect to which such finding was made that no further grants will be made under this section to such group or agency until . . . the diversion has been corrected, or, if compliance or correction is impossible, until such group or agency repays or arranges the repayment of the Federal funds which have been improperly diverted or expended."

Given the language of section 304(a) and the fact that it is incorporated into each grant, any violation of section 304(a) necessarily would constitute a diversion of grant funds within the application of 20 U.S.C. § 954(h).16/ If NEA found such a violation, after notice and opportunity for a hearing in accordance with

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16/ While 20 U.S.C. § 954(h) refers only to diversions of grant funds by a group or state agency, we believe it could be invoked as well in the case of a violation of section 304(a) by the recipient of an individual grant.

section 954(h), the appropriate action would be recoupment. Unless the funds were repaid voluntarily, NEA would be required to suspend further grants to the grantee and pursue a money claim against the grantee under the procedures specified in the Claims Collection Act, 31 U.S.C. §§ 3701 et seq., and the implementing standards at 4 C.F.R. part 101 et seq.

IV. Conclusions and Recommendations

Based on the foregoing analysis, we conclude that the procedures and controls NEA has adopted are, on their face, legally sufficient to comply with section 304(a). Subject to the inherent limitations discussed previously that no pre-award review process could eliminate, NEA has established controls and procedures to make section 304(a) determinations in awarding 1990 grants. Further, inclusion of the language of section 304(a) in each fiscal year 1990 grant and subgrant, coupled with the provisions of 20 U.S.C. § 954(h), provides a basis for recovery of any funds that NEA later determines to have been used in violation of section 304(a). At the same time, we believe there are several potential problem areas with respect to section 304(a) in which NEA could enhance its efforts to implement the statute.

The first potential problem area relates to the standards NEA is to apply in determining what materials would violate the funding restrictions. Concerns have been raised that the language of section 304(a), particularly the phrase "may be considered obscene," is vague and may even be unconstitutional. We believe that NEA should respond to these concerns by formally issuing a policy statement that it will adhere to the three-prong obscenity test prescribed in Miller v. California, supra, when making its determinations under section 304(a). As discussed previously, we believe that Congress intended NEA to apply the Miller test, so that the funding restrictions extend only to materials that NEA determines to be obscene under Miller. Even if NEA concluded that it was not required to adopt the Miller test, it certainly could do so in the exercise of its discretion under section 304(a).

The second problem area concerns the application of section 304(a) to so-called "seasonal support grants." These grants generally are intended to defray operational expenses incurred by a grantee such as a theater over the course of its performance season. Typically, the grant can be used to fund expenses shown on the grantee's budget as submitted to

NEA, such as salaries and wages, supplies, equipment, artists' fees, mortgage payments and insurance.

Seasonal support grants generally do not fund any specific project or performance directly, but arguably they contribute indirectly to every project or performance sponsored by the recipient.17/ The question that seasonal support grants present under section 304(a) is whether and to what extent such grant funds are used "to promote, disseminate, or produce" materials subject to its restrictions. While the relationship between the use of grant funds and the promotion, dissemination, or production of particular materials may be fairly clear in some cases, in other cases it may be too attenuated to permit application of section 304(a). The language of section 304(a) does not purport to subject all of a grant recipient's activities to the funding restrictions, and probably could not do so constitutionally. Cf., Federal Communications Commission v. League of Women Voters, 468 U.S. 364 (1984), in which the Supreme Court struck down a statutory provision forbidding recipients of Corporation for Public Broadcasting grants from using their own private funds to engage in editorializing.

We recognize that there are no easy solutions to the problem of applying section 304(a) to seasonal support grants. NEA has advised us that it will require certain grantees to provide it with information specifying how grant funds are to be used prior to actual release of the funds, and it has imposed this requirement for one recipient of a 1990 seasonal support grant, the Kitchen Theater. However, it appears necessary to have some method of identifying the circumstances under which the funding restriction in section 304(a) will attach to specific projects or performances sponsored by a seasonal support grant recipient. Again,

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17/ This problem is illustrated by the controversy surrounding the performance of Ms. Annie Sprinkle in January 1990 at the Kitchen Theater in New York City. Ms. Sprinkle claimed that her performance, which many persons considered to be obscene and pornographic, was federally funded. The Kitchen Theater did receive a fiscal year 1989 seasonal support grant covering the period of Ms. Sprinkle's performance. This grant was made for the purpose of defraying the Kitchen's operational expenses; however, according to NEA, all of the grant funds had been disbursed well before Ms. Sprinkle's performance. The current NEA Chairman has stated that Ms. Sprinkle's performance would not have been funded from fiscal year 1990 appropriations.

this is an area where we believe NEA needs to develop formal guidance and procedures.

The third area relates to the difficulty of making definitive judgments concerning the application of section 304(a) at the time grants are awarded when, in most cases, the material to be funded by the grant does not yet exist. As discussed previously, the grantee necessarily remains subject to the restrictions of section 304(a) as the grant funds are used and would be required to repay the funds if NEA later determined that the funds had been used in violation of section 304(a). Therefore, we believe that NEA should consider adopting a procedure whereby grantees could, if they wished to do so, seek advisory opinions from NEA at post-award stages concerning whether potential uses of grant funds--for example, to support a particular performance--would, in NEA's judgment, violate section 304(a).

If NEA had sufficient information to express an opinion that the proposed use would not violate section 304(a), it could so advise the grantee and agree not to invoke section 304(a) later if the actual use of grant funds was consistent with the information on which NEA based its opinion. On the other hand, if NEA concluded that the proposed use would or might violate section 304(a), the grantee would be forewarned. We note that this approach is similar to the advance clearance process NEA has imposed on at least one seasonal support grant recipient. We think that all grantees should have the opportunity to seek such advance clearance.