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## Art, The First Amendment, and the NEA Controversy

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# Art, The First Amendment, and the NEA Controversy

Jesse Helms

## **Abstract**

America has been caught up in a struggle between those who support values rooted in Judeo-Christian morality and those who would discard those values in favor of a radical moral “relativism.”

# *Art, The First Amendment, and the NEA Controversy*

## Tax-Paid Obscenity

Jesse Helms\*

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America has been caught up in a struggle between those who support values rooted in Judeo-Christian morality and those who would discard those values in favor of a radical moral "relativism." As Congressman Henry Hyde has said, "the relativism in question is as absolutist and as condescendingly self-righteous as any 16th century [Spanish] inquisitor."

For my part, I have focused on the federal government's role in supporting the moral relativists to the detriment of the religious community. I confess that I was shocked and outraged last year when I learned that the federal government had funded an "artist" who had put a crucifix in a bottle of his urine, photographed it, and gave it the mocking title, "Piss Christ." Obviously, he went out of his way to insult the Christian community, which was compounded by the fact that Christian taxpayers had been forced to pay for it.

As one distinguished federal judge wrote in a personal letter to me,

when a federally-funded artist creates an anti-Christian piece of so-called art, it is a violation of an important part of the First Amendment which guarantees the right of all religious faiths to be free from governmentally-sanctioned criticism. When the National Endowment for the Arts contributes money to an artist for him to use to dip a crucifix in his own urine for public display, it is no different [in terms of church and state entanglement] from a municipality's spending taxpayers' money for putting a crucifix on the top of

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city hall."

The controversy over Andres Serrano's so-called "art" had hardly begun when it was disclosed that the National Endowment for the Arts also had paid a Pennsylvania gallery to assemble an exhibition of Robert Mapplethorpe photographs which included photos of men engaged in sexual or excretory acts. The exhibit also included photos of nude children. A concerned Borough President in New York City sent me a copy of an NEA-supported publication in New York, *Nueva Luz*, which featured photos of nude children in various poses with nude adults, men with young girls and young boys with adult women.

All of these "works of art" were offensive to the majority of Americans who are decent, moral people. Moreover, as any student of history knows, such gratuitous insults to the religious and moral sensibilities of fellow citizens lead to an erosion of civil comity and democratic tolerance within a society. Therefore, funding such insults with tax dollars surely is anathema to any pluralistic society.

This was the basis of my offering an amendment to the Interior Appropriations bill to prohibit the National Endowment for the Arts (NEA) from using tax dollars to subsidize or reward "art" which is blasphemous or obscene. Congress unwisely enacted only a severely weakened version of the amendment that does not even prohibit funding for such works as those by Mapplethorpe and Serrano — which created the controversy. Even so, this weakened amendment has been the target of unfounded and often absurd criticisms.

Opponents of the legislation often make the following unfounded and misleading allegations:

1. *Restrictions on federal funding for the arts constitutes direct censorship.*

This is a deliberate attempt to confuse censorship with sponsorship. Such deliberate misrepresentations are intellectually dishonest.

The Constitution gives Congress the responsibility and duty to oversee the expenditure of *all* federal funds — including funding for the arts. The amendment originally proposed, as well as the one passed, was intended to forbid the federal government from taking money from citizens by force and then using it to subsidize or reward obscene or blasphemous art. The amendment clearly limits the issue to the question of whether the government should use tax funds in the role of a patron (sponsor) for such "art." The legislation in no way "censors"

artists; it does not prevent artists from producing, creating, or displaying blasphemous or obscene "art" at their own expense in the private sector.

Therefore, sanctimonious comparisons between the amendment and communist dictatorships in Eastern Europe fall on their face. In communist countries everything is paid for by the government; therefore, if not approved by the government, it is not produced. Western democracies, on the other hand, rely on the private sector where ideas are left free to compete with minimal or no governmental participation.

Thus, it should be obvious to all that, despite the amendment, American artists who choose to shock and offend the public can still do so—but at their own expense, not the taxpayers'. *Censorship* is not involved when the government refuses to subsidize such "artists." People who want to scrawl dirty words on the men's-room wall should furnish their own walls and their own crayons. It is tyranny, as Jefferson said in another context, to force taxpayers to support private activities which are by intent abhorrent and repulsive.

The enormous response I have received from throughout the country indicates that the vast majority of Americans support my amendment because they were aghast to learn that their tax money has been used to reward artists who had elected to depict sadomasochism, perverted homoerotic sex acts, and sexual exploitation of children.

## 2. *Subsidizing some art forms but not others (obscene art) constitutes indirect censorship.*

If this is true—and it isn't—the NEA has been in the censorship business for 25 years, which means that the only way to get the government completely out of the "censorship business" is to dismantle the NEA.

By its very nature, the NEA has the duty to establish criteria for funding some art while not funding others. So, those who are crying "censorship" in this regard are ignoring the defect of their logic (or lack thereof). Do they not see that, following *their* logic, every applicant denied federal funding can protest that he has been "censored" by the *subjective* value judgments of the NEA's artistic panels?

## 3. *Is there such a thing as obscene art?*

The vast majority of taxpayers would first ask themselves whether something is obscene—and if it is, then it's not art. However, some

verbose art experts—and the NEA—do just the opposite: Anything they regard as “art” cannot be obscene no matter how revolting, decadent, or repulsive. As NEA’s Chairman John Frohnmayer told a California newspaper, “If an [NEA art] panel finds there is serious artistic intent and quality in a particular piece of work, then by definition that is not going to be obscene.”

4. *Federal funding restrictions must use the obscenity definition outlined by the Supreme Court in Miller v. California?*

It is important to remember that the Supreme Court has never established an obscenity definition for the purposes of restricting government funding. But Chairman Frohnmayer and the “arts community” erroneously assert that the Constitution requires that the definition in *Miller v. California* be used in both restricting federal funding and banning obscenity. However, refusing to subsidize something does not “ban” it. In order to BAN obscenity, *Miller v. California* requires the government to prove that materials: 1) appeal to a prurient interest; 2) depict in a patently offensive manner sexual or excretory activities or organs; and 3) lack serious artistic or scientific value.

Numerous cases show that the Court does not apply the same standards to government’s refusal to fund First Amendment activities as it does to the government’s efforts to ban such activities.

For example, in *Maher v. Roe*, the Court stated that merely because one has a Constitutional right to engage in an activity, he or she does not have a Constitutional right to federal funding of that activity. As long ago as 1942, in *Wickard v. Filburn*, the Court stated that, “It is hardly lack of due process for the Government to regulate that which it subsidizes.” And as recently as 1983, in *Regan v. Taxation With Representation*, a unanimous Court reiterated a litany of cases holding that restrictions on the use of taxpayers’ funds, in the area of expressive speech, do not violate the First Amendment and need not meet the same strict standards of scrutiny.

Thus, it is unlikely that the Supreme Court would require Congress to use the *Miller* test in its entirety in order to prohibit the NEA from funding obscenity. In fact, I believe the Court would uphold a Congressional prohibition on funding for any patently offensive depictions or descriptions of sexual or excretory activities or organs regardless of the presence or absence of artistic merit.

It would be interesting if Congress should decide to adopt the *Miller* test in its entirety because *Miller* allowed a jury of ordi<sup>4</sup>

nary citizens to decide if something is or is not obscene. The 1989 amendment approved by Congress, on the other hand, effectively grants the NEA and its elitist arts panels *sole* authority to decide what is or is not obscene *for purposes of government funding*.

Thus, the legal effect of the current law is to prohibit nothing. The NEA can cloak even the most patently offensive depictions of sexual or excretory conduct with "artistic merit" simply by deciding to fund the work, thereby making it *legally* non-obscene. This was precisely what the current amendment's drafters intended since they wanted to deceive the public into assuming that federal funding for obscenity had been prohibited—when, as a legal matter, it has not. Since last fall, Chairman Frohnmayer has asserted that he would and could fund the Mapplethorpe exhibit under the language passed by Congress.

#### 5. *The original Helms amendment is not enforceable.*

This is nonsense, and those who say that *know* that it's nonsense. There was nothing vague about it—and the Federal Communications Commission is having no problem making the determination that various broadcasts are indecent and/or obscene. The Postal Service is able to do the same thing concerning obscene or indecent mail. The Justice Department's National Obscenity Task Force has been able to determine what is obscene under the federal criminal statutes.

If the FCC, the Postal Service, and the National Obscenity Task Force can handle *their* responsibilities in this regard, why cannot the National Endowment for the Arts do likewise?

#### 6. *The amendment chills artistic expression.*

The "arts community" is fond of asserting that prohibiting NEA funding of obscene art will either "destroy art in America" or, at best, "lead to art which is bland." On the other hand, they also argue that the NEA has funded only about 20 controversial works out of 85,000 grants over the last 25 years. (This, by the way, is statistical manipulation, but that's an argument for another day.)

The point is this: The "arts community" cannot have it both ways. Either the NEA is funding so many controversial works that eliminating such funding will devastate the arts community—or the NEA has funded so few (20 in 25 years) that an obscenity restriction could have no more than a negligible impact.

My response to the first argument is that if art in America is so

dependent on obscenity in order to be creative and different, then Congress has a duty to the taxpayers to shut the NEA down completely, thereby slowing America's slide into the sewer. My answer to the second argument is that if so few offensive works have indeed been subsidized by the NEA, why all the fuss from the "arts community"?

In summary, the National Endowment for the Arts has always had the responsibility and the duty to decide what is and is not suitable for federal funding of the arts—and that has been precisely the problem. The NEA has defaulted upon that responsibility. It has been insulated from mainstream American values so long that it has become captive to a morally decadent minority which delights in ridiculing the values and beliefs of decent, moral taxpayers.

It should therefore be evident that as long as the NEA is given the *sole* authority to decide what is artistic—and thus not obscene—the agency intends to continue to fund obscenity under the pretense that it is "art"—even when the taxpayers disagree. Congress, at a minimum, should use the entire *Miller* test by allowing a panel of lay citizens—and not the self-appointed elitists at the NEA—to decide whether patently offensive works merit taxpayer funding.

Or Congress could just adopt my original amendment, and let the "arts community" continue to howl.