"Tilted Arc" Destroyed*

Richard Serra*
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Abstract

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This article is dedicated to Gustave Harrow

It is not bad
to be pissed off
where there is any
condition imposed, by whomever, no
matter how close.
- Charles Olson, The Maximus Poems^1

I

The United States government destroyed "Tilted Arc" on March, 15, 1989. Exercising proprietary rights, authorities of the General Services Administration ordered the destruction of the public sculpture that their own agency had commissioned ten years earlier. The final desecration followed over five years of misrepresentation, false promises and show trials in the media and in the courtroom, deceptions which in the end not only allowed the government to destroy "Tilted Arc," but which established a precedent for the priority of property rights over free expression and the moral rights of artists. Even last-minute attempts to test the applicability of the Berne Convention (which Congress signed in the fall of 1988, and which went into effect March 1, 1989) proved futile. After an exhaustive analysis of the treaty, my attorneys concluded that the Berne Convention laws as abridged by the U. S. Congress were inadequate to protect my work.

Once my own say in the fate of the sculpture had been finally denied by the federal courts, William Diamond, the regional adminis-

** Richard Serra, born in 1939 in San Francisco, lives and works in New York City and Cape Breton, Nova Scotia.
2. See Appendix at 405-06 for photographs of Tilted Arc and its destruction, and of the Federal Plaza taken after Tilted Arc was destroyed.
turator of the GSA and the man most responsible for the campaign against “Tilted Arc,” acted immediately to have the sculpture removed. In a sinister all-night session on March 15, overtime work crews labored to dismantle “Tilted Arc,” brutally sawing and torching the piece. Finally, around 4:30 A.M., “Tilted Arc” was reduced to raw materials, to be carted off and stored in Brooklyn, reportedly pending relocation. “This is a day for the people to rejoice,” said Diamond, “because now the plaza returns rightfully to the people.”

Diamond has announced repeatedly that he plans to relocate “Tilted Arc” to an alternate site (though a blue-ribbon NEA panel expressly stated that “Tilted Arc” could not be relocated). But “Tilted Arc” was created for one site and one site only. I made this clear from the start. When I first learned of the efforts to remove “Tilted Arc” in December, 1984, I wrote to Diamond and to Donald Thalacker, then the director of the Art-in-Architecture program that originally commissioned the work. At that time, I said, “I want to make it perfectly clear that “Tilted Arc” was commissioned and designed for one particular site: Federal Plaza. It is a site-specific work and as such not to be relocated. To remove the work is to destroy the work.” This has been accomplished; “Tilted Arc” is destroyed.

II

In 1979 I was commissioned by the General Services Administration to build an urban sculpture for permanent installation at 26 Federal Plaza in Manhattan. Although permanency is implicit in the commission of any site-specific work, I explicitly raised this issue with Donald Thalacker and with the GSA project manager, Julia Brown. In response to my insistent questioning, Thalacker said simply, “You get one chance in your lifetime to build one permanent work for one federal building. There is one permanent Oldenburg, one permanent Segal, one permanent Stella, one permanent Calder, and this is your only opportunity to build a permanent work for a federal site in America.” Brown, who negotiated the GSA contract, later publicly attested to the fact that “in all stages of the decision-making process, it was under-

stood by Serra, and by the government, that Serra was making a permanent work for that specific space.” I felt that it was crucial for the issue of permanence to be fully understood, and I accepted the commission only after I had been assured repeatedly that my work would be, as stated in the GSA Manual, incorporated as “an integral part of the total architectural design.” I was told that the GSA did not want it any other way.

Although Diamond later alleged that the decision to install “Tilted Arc” was made in Washington without any input from New York, his statement was untrue. Representatives from the GSA New York were present at all important meetings in Washington and fully approved the aesthetic concept of “Tilted Arc.” The installation also had the support of representatives of the architectural firm that had originally designed the plaza and the office towers at 26 Federal Plaza. Furthermore, the contracting officer of the GSA New York went so far as to request a detailed environmental-impact study for the sculpture, which included answers to, among others, specific questions about its effect on existing pedestrian traffic patterns, about whether it would inhibit surveillance, about what additional lighting would be needed, about whether it would interfere with drainage, etc. The GSA office in New York also requested that I slightly change the location of the steel curve on the plaza, which I did. In 1981, as soon as the final location of the sculpture was agreed upon, “Tilted Arc” was installed and anchored into the existing steel-and-concrete substructure of the plaza. After “Tilted Arc” was dedicated, I was invited by the NEA to the White House and congratulated by then-President Jimmy Carter on my contribution to the cultural heritage of the United States.

During and immediately following the installation of “Tilted Arc,” the GSA received few complaints. However, Chief Judge Edward D.

5. Id. at 66, 67.
6. Id. at 84.
7. Although Joseph Colt of Jacobs-Poor-Eggers, the firm that designed the U. S. Customs Court, Federal Office Building and Federal Plaza, participated fully in the nominating process for Tilted Arc, senior members of the firm later wrote vociferous letters in opposition to the work and testified against it at the hearing. See the letters of Alfred Easton Poor, Albert Homere Swanke & Robert Jacobs, reprinted in LNK, Decision on The Tilted Arc, U.S.G.S.A. document, May 31, 1985, (Appendices M and O). Jacobs and his wife testified that Tilted Arc violated the architecture of the site; their testimony was cited frequently by officials arguing for removal. Cf. Letter from William Diamond, Regional Administrator, General Services Administration, Region 2, New York to Dwight Ink, Acting Administrator, General Services Administration, Washington, D.C. (May 1, 1985), reprinted in TILTARC, supra note 4, at 142.
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Re of the Court of International Trade (located at 26 Federal Plaza) developed a particular hostility toward the work. In July and August of 1981, while the installation was still in progress, he wrote letters to the GSA in Washington in an attempt to prevent the sculpture—which he characterized as a "rusted steel barrier"—from being "permanently fixed to the plaza." He pointed out that he was not alone in his disf

taste for the piece, noting that the New York Times art critic Grace Glueck had described "Tilted Arc" as "the ugliest outdoor work of art in the city."

Washington officials responded politely to Judge Re, and after the installation of "Tilted Arc" was completed, the criticism died down. According to GSA officials, no further complaints were received until 1984. For three years there were no protests whatsoever against "Tilted Arc." Then, at the end of 1984, Judge Re resumed his letterwriting campaign to Washington. Not only did he reiterate "esthetic distaste" for the sculpture, but he also held "Tilted Arc" responsible for the plaza's accumulation of graffiti, waste and litter. He added the bizarre claim that "Tilted Arc" had caused the downtown rat problem. Let me quote: "We have never experienced a rodent problem of the present enormity in this area. Exterminators are called regularly, it is considerable expense, to rid our Courthouse of this hazard." Judge Re equated "Tilted Arc" with garbage, and garbage causes rats. This false causality, which I can only construe as a smear tactic, initiated the government's anti-"Tilted Arc" campaign. I agree with the judge that the courthouse is overrun with rats, but they were not attracted by "Tilted Arc." They are of the two-legged variety.

In January 1985, William Diamond, the newly appointed regional administrator for the GSA, appeared on the scene. He adopted Judge Re's position, then unilaterally held, as part of his own political agenda. My sculpture had been approved, commissioned and installed under a Democratic administration. A Republican administration decided that it should be destroyed. The governmental decree to remove and thereby destroy "Tilted Arc" is the direct outcome of a cynical Republican cultural policy that only supports art as a commodity. Relocation would, in fact, transform "Tilted Arc" into an exchange commodity in that it would annihilate the site-specific aspect of the work. "Tilted Arc" would become exactly what it was intended not to be: a mobile, marketable product.

Diamond, a Reagan appointee, introduced the relocation idea and engineered a full-scale public campaign in order to realize this policy. He was even able to use the New York Times to stir up the public. In an article by Grace Glueck, Diamond was quoted as saying, "Tilted Arc" was a mistake which had been made because at the time the impact of the piece was not understood." In the same article, Diamond stated that since the sculpture's installation, the GSA had been inundated with complaints. As Glueck failed to note, these statements were inaccurate. Glueck claimed that "Serra had reservations about the plaza [and was] hostile to the plaza and its context." She concluded that "it was therefore a mistake to take the project on." After I read the article, I immediately phoned Glueck and asked her what gave her the right to make such false statements. She replied that what she wrote was her interpretation. When I asked her to correct her fictional "interpretation," she refused. In effect, Glueck became a mouthpiece for the Reagan administration's misguided cultural policy.

III

Such distortions of fact in the press established a climate of misinformation that allowed Diamond to proceed with his plan to call a public hearing to decide the issue. Through flyers, posters and personalized letters of invitation, Diamond announced that a hearing would be held at the Court of International Trade on March 6, 1985. The letters that Diamond sent out noted that "the purpose of the hearing is to decide whether or not the art work known as 'Tilted Arc' currently on the east plaza of the Jacob K. Javitz Federal Building in Manhattan should be
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8. Letter from Edward D. Re, Chief Judge, United States Court of International Trade, New York, to Gerald P. Carmen, Administrator, General Services Adminis-
tor, Washington D.C. (Aug. 18, 1981), reprinted in Tilted Arc, supra note 4, at 25-
26.
10. Letter from Ray Kline, Acting Administrator, General Services Adminis-
11. Letter from Edward D. Re to Ray Kline, acting administration, GeneralSe-
12. Id.
relocated to increase public use of the plaza." 14. The announcement elicited a tremendous response, much of it in favor of "Tilted Arc," particularly from the art community, and eventually the hearing had to be extended to three days to accommodate the 180 people who petitioned to speak (122 in favor of retaining the sculpture, 58 in favor of relocation).

Apparentiyly concerned that the public hearing would yield a majority in favor of removal, Diamond had in the months previous been taking bids on the removal and relocation of "Tilted Arc." In one instance, he tried to sell the work to Storm King Art Center. H. Peter Stern, president of Storm King, told me that Diamond had approached him on this subject in January 1985. Stern was, in fact, quite interested, and hoped to get his bid in early for the work (which he clearly understood was being offered to other institutions as well). But when he heard that I was opposed to relocation, Stern immediately terminated negotiations with Diamond. At the same time, Diamond was attempting to place "Tilted Arc" with the Cooper-Hewitt Museum and with the New York City Parks and Recreation Department. 18 In all, nearly a dozen institutions were approached about accepting the sculpture for relocation. I asked Diamond who had given him the authority to sell my work. I also asked him if that was what he meant by being impartial. He did not reply.

Having already demonstrated his express desire to remove the sculpture, Diamond nonetheless appointed himself chairman of the hearing. Many critics questioned the propriety of such an arrangement. Senator Howard M. Metzenbaum, for instance, wrote to Ray Kline, the acting administrator of the GSA, to express his concern. Metzenbaum observed that "the convening of a hearing by an administrator who, according to news accounts, has already made up his mind about the art, appears to be a breach of proper procedures and violative of the explicit agreement with the article as to the display of the sculpture." 19 This warning had no effect, however, and Diamond proceeded not only to place himself at the head of the panel, but to choose as two of the four remaining panelists his own staff members. 20 Diamond acted as both prosecutor and judge in this case. He assembled what was in effect a vigilante group, without legal status, to overturn a binding contract that had been concluded three years earlier. In judicial terms, the hearing was a sham, a kangaroo court. It was a mockery of due process.

From the start, Diamond sought to assure majority support for his plan to remove "Tilted Arc." He chose a twofold strategy. First, in order to avoid the accusation of censoring a work on pure aesthetic grounds, he personally refrained from commenting on the aesthetic value of "Tilted Arc," both in his statements to the press and in his letters of appeal for participation in the hearing. Instead, he concentrated on the destractive effects which he claimed the sculpture was having on social functions in the plaza. But his second tactic, the campaign he waged within the Federal Building, was quite different in content. Signs, chairs and tables were installed in the lobby of the Federal Building directing employees to sign petitions headed "For Relocation." Signers were encouraged to put an asterisk next to their names if they found "no artistic merit in the Serra art work." 21 Diamond was successful in inciting what amounted to a hate campaign against "Tilted Arc" and in urging federal employees to censor and condemn the esthetics of the sculpture. At the hearing they testified accordingly, using the public forum to air their newly hostile responses to the sculpture. In a remarkable litany of insults, they called "Tilted Arc" "a piece of nonsense or garbage," "an arrogant, nose-thumbing gesture," "the Berlin Wall," "the Iron Curtain," "a scar on the plaza" and "a mistake." 22 Several of the speakers com-

14. Letter from William Diamond sent out to announce the public hearing concerning "Tilted Arc," reprinted in TILTED ARC, supra note 4, at 47.

15. There is no clause in my contract which gives the government the right to sell and thereby destroy Tilted Arc. (The contract is reproduced in infra, supra note 5, at appendix J. Now that Tilted Arc has been destroyed and the government has once again announced that it wants to sell the remains (this was stated by Richard Schwartz, attorney for the GSA, at the March 13, 1989, hearing requesting a stay of destruction), I am considering the option of bringing a breach of contract suit before the United States Claims Court.

Letters from Barbara G. Gerow, regional counsel for the GSA, offering Tilted Arc to Storm King, the Cooper-Hewitt Museum, and the New York City Recreation Department, reprinted in TILTED ARC, supra note 6, at 34-35. 27


17. The panelists, in addition to Diamond, were Michael Findlay, vice president of Christie's; Thomas Lewin, a lawyer; Paul Chisolm, acting assistant regional administrator for the G.S.A.'s Public Buildings and Real Property division; and Gerald J. Tartesky, acting deputy regional administrator of the G.S.A. (Tartesky was the G.S.A. regional administrator—Diamond's job—at the time Tilted Arc was installed).

18. Diamond's "cordial invitation" to the hearing and the "For Relocation" petition are reprinted in TILTED ARC, supra note 4, at 47, 50.

19. A sampling of comments from those opposed to the sculpture is included in TILTED ARC, supra note 4, at 109-27.
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plained about people pissing on the sculpture or about the obscene con-

tent of graffiti scrawled on its surface. Relocation suggestions ranged

from scrap yards to the Hudson River. One speaker wanted all those in

favor of the sculpture to be taken to Bellevue Hospital and signed into

a mental ward.

In the most grotesque and sinister testimony, there were those who

insisted that "Tilted Arc" made Federal Plaza a dangerous place to be

during political demonstrations. They claimed that the sculpture not

only impeded local police surveillance, but that it could also serve as a

blast wall for terrorists. A federal physical security specialist employed

by the GSA compared "Tilted Arc" to devices used by bomb experts to

direct explosive forces. She pointed out that "Tilted Arc" was particu-

larly qualified to function as a terrorist device because it would "vent

explosive forces not only upwards but also in an angle towards both

buildings." By labeling the sculpture a terrorist device, the govern-

ment played upon the public's most basic fears and attempted to create

an atmosphere of paranoia.

Doubtless, to some people "Tilted Arc" was an eyesore; but the

same may be said about every other work of art. There will always be

viewers who react negatively, and those who act aggressively. People

are entitled to their opinion; but prejudice, even if it is shared by a

majority, ought not to be the reason to destroy a work of art.

Although I firmly believe that art, including art in public places,

cannot be decided upon by public-opinion polls, I cannot simply ignore

Diamond's implied majority claim. He is as careless with numbers as

he is with other facts. Very few of those who demanded that "Tilted

Arc" be removed mentioned the impediment of social functions of the

plaza as cause for their complaint. However, after the hearing, in his

removal recommendation of the GSA at the time, Diamond wrote that

he was "impressed by the statements of the federal agencies and open-

ness... and to its originally designed integrated serenity." Diamond

stressed that since "Tilted Arc" was installed, the plaza could no longer

be used as a place to hold public events such as military band concerts.

20. See the testimony of Vickie O'Dougherty, a physical-security specialist for

the G.S.A., reprinted in TILTED ARC, supra note 4, at 115, 116 (stating that the design

of "Tilted Arc" "is comparable to devices used by bomb experts to vent explosive

forces; for instance, they have bomb trucks designed for this purpose which are cylin-

derical in shape.

21. Letter from William Diamond to Dwight Ink (May 1, 1985), reprinted in

TILTED ARC, supra note 4, at 141-42.
plained about people pissing on the sculpture or about the obscene content of graffiti scrawled on its surface. Relocation suggestions ranged from scrap yards to the Hudson River. One speaker wanted all those in favor of the sculpture to be taken to Bellevue Hospital and signed into a mental ward.

In the most grotesque and sinister testimony, there were those who insisted that "Tilted Arc" made Federal Plaza a dangerous place to be during political demonstrations. They claimed that the sculpture not only impeded local police surveillance, but that it could also serve as a blast wall for terrorists. A federal physical security specialist employed by the GSA compared "Tilted Arc" to devices used by bomb experts to direct explosive forces. She pointed out that "Tilted Arc" was particularly qualified to function as a terrorist device because it would "vent explosive forces not only upwards but also in an angle towards both buildings." By labeling the sculpture a terrorist device, the government played upon the public's most basic fears and attempted to create an atmosphere of paranoia.

Doubtless, to some people "Tilted Arc" was an eyesore; but the same may be said about every other work of art. There will always be viewers who react negatively, and those who act aggressively. People are entitled to their opinion; but prejudice, even if it is shared by a majority, ought not to be the reason to destroy a work of art.

Although I firmly believe that art, including art in public places, cannot be decided upon by public-opinion polls, I cannot simply ignore Diamond's implied majority claim. He is as careless with numbers as he is with other facts. Very few of those who demanded that "Tilted Arc" be removed mentioned the impediment of social functions of the plaza as cause for their complaint. However, after the hearing, in his removal recommendation of the GSA at the time, Diamond wrote that he was "impressed by the statements of the federal agencies and openness...and to its originally designed integrated serenity." Diamond stressed that since "Tilted Arc" was installed, the plaza could no longer be used as a place to hold public events such as military band concerts.

20. See the testimony of Vickie O'Dougherty, a physical-security specialist for the G.S.A., reprinted in TILTED ARC, supra note 4, at 115, 116 (stating that the design of "Tilted Arc" is comparable to devices used by bomb experts to vent explosive forces; for instance, they have bomb trucks designed for this purpose which are cylindrical in shape...)

21. Letter from William Diamond to Dwight Ink (May 1, 1985), reprinted in TILTED ARC, supra note 4, at 141-42.

art shows and so on. Yet, in the plaza's 17 years of existence prior to the installation of "Tilted Arc," there were fewer than 20 such events.

Diamond had an even bigger problem with numbers when it came to determining a majority viewpoint at the hearing. Of 180 people who spoke at the hearing, two-thirds testified in favor of retaining "Tilted Arc" in Federal Plaza. At the same time, letters opposing removal of the sculpture were received by the GSA at the rate of one hundred to one. Confronted with these overwhelming numbers in opposition to his cause, Diamond conceded in a letter to Ink, "One of the things that became extraordinarily clear to me was that certain ground rules would have to be followed. First of all, I would have to avoid any reliance on a 'numbers' game." With only minority support for removal of "Tilted Arc" Diamond—abiding by his own ground rules—ignored the numbers and insisted in statements to the press that "the people" had demanded the sculpture's removal. To me, this was one of Diamond's most despicable misrepresentations, and it was definitely the most damaging.

A major issue in the "Tilted Arc" case involved the misuse of numbers. Therefore, I would like to set the record straight. During the three-day hearing (March 6-8, 1985), the GSA presented 3,791 signatures for relocation and 3,761 signatures against relocation. These nearly equal numbers were never mentioned in Diamond's statements to the press, nor did he ever bother to mention that approximately 12,000 people work in the Federal buildings at 26 Federal Plaza. Given that population of workers, 3,791 signatures for removal do not constitute a majority of any kind. They represent neither a majority of people working in the buildings at 26 Federal Plaza, nor a majority of people working in the federal enclave in downtown Manhattan, nor a majority of people living in the neighborhood.

The press, however, never questioned Diamond's claim that the
public opposed "Tilted Arc." Over 350 articles in the local and national press perpetuated Diamond's misrepresentation, and their writers felt compelled to take the side of "the majority" or "the people" against the artist. Even writers who supported the sculpture felt a populist need to align themselves with this imagined majority. After a very sensible description of "Tilted Arc" and its context, New York Times architectural critic Paul Goldberger went on to say, "After all this, was the piece worth keeping? Ideally, yes. Public art rarely achieves a total consensus of opinion. While the government should not bow to incidental pressure so far as public art is concerned, near total opposition is another matter."24 Paradoxically, all those critics who sided with "the majority" failed to recognize (or were content to suspect) that what is perceived as majority opinion is often a cynical cover-up for the maneuverings of government. As a result, the impression that a majority of the public wanted "Tilted Arc" removed was perpetuated, and persists.

Populist pandering to the masses took many forms in the media. When the "CBS Evening News" decided to cover the "Tilted Arc" controversy, they asked me if I would help them put together a profile on the subject. They told me that they were going to support the concept of site-specificity by showing other site-specific works. So, I spent a week helping them organize TV crews in Holland, France, Germany and Japan. It seemed like a responsible project, and I was looking forward to the broadcast. When the segment was finally aired, the camera panned across abandoned, wrecked cars; cut to burnt out buildings and urban rubbish; cut to "Tilted Arc" with a voice-over stating: "New Yorkers have had enough of this." I'd been had once again. I should have known that television delivers people, that all public opinion is manipulated opinion. The pragmatic of television do not admit rejoinders or resistance. There is no equal time.

IV

Later, the issue of site-specificity that I had tried to clarify for CBS was grossly misrepresented by Diamond. In his removal recommendation, Diamond presumed to disqualify my concept of site-specific sculpture. He was careful to avoid any attempt to prove the "un-specificity" of "Tilted Arc." Instead, he relied on a tactic of diversion based on misrepresentation of facts. Without referring to specific works, Diamond wrote, "I understand that both the Port Authority of New York, New Jersey and the City of New York have relocated Serra pieces from downtown Manhattan. Accordingly, I have rejected claims professed by the proponents of retention, that the sculpture is site specific and cannot be relocated."26 Once again, Diamond distorted the truth. He was referring to TWU and Rotary Arc, works sited in Lower Manhattan. But neither the Port Authority nor the City of New York actually owned these pieces, so it would not have been their prerogative to relocate them. Furthermore, neither piece was relocated. Both TWU and Rotary Arc were originally installed on the basis of temporary permits. After the permits expired, both sculptures were dismantled. During the hearing, Diamond voiced his admiration for Rotary Arc, and clearly he was aware that the work was still in place. In fact, Rotary Arc was dismantled only in 1987—two years after Diamond made his false statement about its removal and relocation.

Donald Thalacker, the head of the Art-in-Architecture program of the GSA, defended "Tilted Arc" throughout the controversy. He testified at the public hearing against the removal of the sculpture. On May 9, 1985, Thalacker wrote an exhaustive memo to Dwight Ink, the administrator of GSA, correcting factual errors, pointing out distortions in government documents pertaining to "Tilted Arc" and warning of the effects of Diamond's mishandling of the hearing. Although he was seriously ill, Thalacker gave a lengthy deposition in support of my case and placed himself in an embattled, precarious position to defend not only my rights but artists' rights in general. He continued to fight for the integrity of the Art-in-Architecture program until he died in 1987.

In his memo to Ink, later made public, Thalacker noted "a widespread perception that the official GSA-sanctioned actions affecting the pre-hearing activities, the hearings themselves, and the post-hearing activities have been manipulated."26 Ink ignored Thalacker's admonitions, however, and, backing Diamond's recommendation, called for the relocation of "Tilted Arc." Ink's decision was extraordinary in that he

25. Letter from William Diamond to Dwight Ink (May 1, 1985) reprinted in Tilted Arc, supra note 4, at 145. Diamond also attempted to make extensive use of resisting of Clara-Clara in Paris to forward his arguments for relocation of Tilted Arc; unfortunately for him, that case was entirely different, that Clara-Clara was specifically created for a temporary site.
26. In, supra note 7, at 156-76 (Appendix R); See also memo from Donald Thalacker to Dwight Ink, reprinted in Tilted Arc, supra note 4, at 150, 152.
public opposed “Tilted Arc.” Over 350 articles in the local and national press perpetuated Diamond’s misrepresentation, and their writers felt compelled to take the side of “the majority” or “the people” against the artist. Even writers who supported the sculpture felt a populist need to align themselves with this imagined majority. After a very sensible description of “Tilted Arc” and its context, New York Times architectural critic Paul Goldberger went on to say, “After all this, was the piece worth keeping? Ideally, yes. Public art rarely achieves a total consensus of opinion. While the government should not bow to incidental pressure so far as public art is concerned, near total opposition is another matter.”24 Paradoxically, all those critics who sided with “the majority” failed to recognize (or were content to suspect) that what is perceived as majority opinion is often a cynical cover-up for the maneuverings of government. As a result, the impression that a majority of the public wanted “Tilted Arc” removed was perpetuated, and persists.

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never stated why “Tiled Arc” should be relocated. The closest he came to providing a reason was his conclusion in which he stated:

In the final analysis, however, I believe the concerns of the many employees who work in the Plaza buildings, the public they serve, and the people who reside in the area, have to be given greater weight than the views we received from members of the art community—most of whom do not live or work near the Plaza—in determining whether efforts should be made to relocate the Arc [as contrasted with the far more drastic option of destruction].

The only other issue worth mentioning in Ink’s decision is his drastic misreading of site-specificity: “The Arc was planned very carefully and specifically by the artist for the Plaza. In that sense it is site-specific. I am not persuaded, however, that it would be destroyed if it were removed to another compatible place with adequate viewing space.”

Ink concluded, “Therefore, the Regional Administrator should seek a new location for the Arc where it would not suffer significant loss of integrity as an artwork.” Ink wanted it both ways. On the one hand, he admitted that “Tiled Arc” was site-specific, “carefully and specifically” planned for the Plaza; on the other hand, he ordered the relocation to proceed. Fearful of calling for outright destruction, Ink instead created a new definition of site-specificity that allowed for relocation.

In his report, Ink requested the National Endowment for the Arts to establish a “relocation review panel” to judge the suitability of alternate sites for “Tiled Arc.” The NEA assembled a distinguished seven-member panel of artists, architects and legislators to consider the matter. The panel met in New York on Dec. 15, 1987, and visited the Federal Plaza to see “Tiled Arc” in situ. At that time, I presented them with my arguments for the importance of site-specificity in the case of “Tiled Arc,” since it is that issue which precludes the possibility of relocation.

As I pointed out, “Tiled Arc” was conceived from the start as a site-specific sculpture and was not meant to be “site-adjusted” or, as Diamond put it, “relocated.” Site-specific works deal with the environmental components of given places. The scale, size and location of site-specific works are determined by the topography of the site, whether it be urban or landscape or architectural. The works become part of the site and restructure both conceptually and perceptually the organization of the site. My works never decorate, illustrate or depict a site.

The specificity of site-oriented works means that they are conceived for, dependent upon and inseparable from their location. Scale, size and placement of sculptural elements result from an analysis of the particular environmental components of a given context. The preliminary analysis of a given site takes into consideration not only formal but also social and political characteristics of the site. Site-specific works invariably manifest a value judgment about the larger social and political context of which they are a part. Based on the interdependence of work and site, site-specific works address the content and context of their site critically. A new behavioral and perceptual orientation to a site demands a new critical adjustment to one’s experience of the place. Site-specific works primarily engender a dialogue with their surroundings. Every language has a structure about which one can say nothing critical in that language. There must be another language, dealing with the structure of the first but possessing a new structure to criticize the first.

It is the explicit intention of site-specific works to alter their context. Le Corbusier understood this as early as 1932. He wrote in a letter to Victor Nekrasov:

You have in Moscow, in the churches of the Kremlin, many magnificent Byzantine frescoes. In certain cases, these paintings do not undermine the architecture. But I am not sure that they add to it, either; this is the whole problem of the fresco. I accept the fresco, not as something which gives emphasis to the wall, but on the contrary as a means to destroy the wall violently, to remove any notion of its stability, weight, etc. I accept Michelangelo’s Last Judgment in the Sistine Chapel, which destroys the wall; and I accept the Sistine Chapel’s ceiling as well, which completely distorts the very notion of ceiling. The dilemma is simple: if the Sistine Chapel’s

27. Ink, Decision on The Tiled Arc, reprinted in TILED ARC, supra note 4, at 156-73. Diamond dismissed Ink’s directive not to destroy “Tiled Arc” when he ordered workmen to saw and torch the piece during its removal on March 15.
28. Id. at 170.
29. Id. at 173.
30. The NEA “Tiled Arc” Site Review Advisory Panel included James Ilgo Freed, architect; Sam Hunter, art historian; Theodore Kheel (panel chair), legal arbitrator; Brenda Richardson, museum administrator; Jacquelin Robertson, architect; Robert Ryman, painter; and Joel Wachs, councilman from Los Angeles.
31. When Diamond was asked during a television interview to comment on the assertion that Tiled Arc was a site-specific work, he replied, “Well, that’s his opinion. That’s not so.” The Freeman Reports, CNN broadcast, May 7, 1985.

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wall and ceiling were intended to be preserved as form, they should not have been painted with frescoes, it means that someone wanted to remove forever their original architectural character and create something else, which is acceptable.\textsuperscript{32}

This concept ought to be understood and protected. However, the contextual issues of site-specific works remain problematic. Site-specificity is not of value in itself. Works which are built within the contextual frame of governmental, corporate, educational and religious institutions run the risk of being read as tokens of those institutions. One way of avoiding ideological co-optation is to choose leftover sites which cannot be the object of ideological misinterpretation. However, there is no neutral site. Every context has its frame and its ideological overtones. It is a matter of degree. But there are sites where it is obvious that art work is being subordinated to/accommodated to/ adapted to/subservient to/required to/useful to... In such cases it is necessary to work in opposition to the constraints of the context, so that the work cannot be read as an affirmation of questionable ideologies and political power. I am not interested in art as affirmation or in art as a manifestation of complicity.

In its recommendation to the GSA, the NEA panel concurred with my definition of site-specificity and said,

We have been presented with a statement by the artist about the site-specific nature of his “Tilted Arc” sculpture. Our visit to the Federal Plaza to review the actual relationship of the work to its site led us to conclude that there was merit in the artist’s statement that relocation of the work would destroy it.\textsuperscript{33}

The panel further recommended that the GSA discontinue its search for alternative sites for “Tilted Arc.” After years of searching, Diamond had only been able to present two “alternative sites” at the NEA panel meeting. One of the two institutions was in fact not completely committed to accepting the sculpture, and was confused about the implications of relocation. The other institution, which had originally expressed interest in accepting “Tilted Arc,” withdrew their offer immediately following my presentation to the NEA panel.\textsuperscript{34}

One would assume that the GSA, having failed so utterly to uncover a possible site for relocating “Tilted Arc,” would have adhered to the procedures established by its own administrator and given up. Instead, the GSA decided to ignore the NEA panel’s recommendation. When the government did not get the results it expected from its initial hearing, it manipulated the record. When the government did not get the recommendation it expected from the NEA panel, it ignored the recommendation. In its repugnant and cynical view of democracy, the government showed a total disregard for all processes and institutions that did not affirm its policies.

After it became clear to me that the GSA was not willing to respect the implications of the concept of site-specificity—even though Ink had admitted that “Tilted Arc” was site specific—I took my case to court.\textsuperscript{35} The case that my attorneys brought against the U.S. government in December 1986 addressed both the terms of my contract with the GSA and what I took to be abridgments of my constitutional rights. This suit attempted to prevent the government from removing or relocating “Tilted Arc.” and it sought to recover damages for breach of contract, trademark violations, copyright infringement and violation of my first and fifth amendment rights. In a decision handed down on August 31, 1987, Judge Milton Pollack of the U.S. District Court dismissed all charges, disallowing the copyright issues and contract claim as being outside his jurisdiction, and striking down the constitutional questions for lack of merit.

An appeal was filed in the United States Court of Appeals on December 15, 1987, calling for a reversal of the decision regarding the constitutional issues. My attorneys contended that insufficient weight had been given to the fact that “Tilted Arc” was created for one site and one site only, and since to remove the work would destroy it, the proposed “relocation” would violate my right to free expression. They


\textsuperscript{33} This quotation from the conclusion of the panel as summarized by Chairman Theodore Kheel is taken from a letter from Frank Hodoss, chairman of theNEA, to Terence C. Golden, administrator of the GSA (Jan. 5, 1988) reprinted in \textit{Tilted Arc, supra note 4, at 193-96}.

\textsuperscript{34} The two institutions originally interested in accepting Tilted Arc were Clemson University and Long Island University (C. W. Post Campus). Clemson withdrew outright when it was clear that I would not participate in site selection on their campus. Long Island University presented a litany of questions which remained unresolved, and the panel members concluded that their participation was “at best, tentative.” As Hoddell noted in his letter, “The unanimous conclusion of this discussion was that both sites were inappropriate.” \textit{Tilted Arc, supra note 4, at 194-95}.

\textsuperscript{35} Mr. Serra was represented by Gustave Harrow. See Harrow, \textit{The Role of Creativity in Social and Political Processes}, 14 \textit{NOVA L. REV.} 545 (1990).
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argued that "once a medium of expression—be it writing, film, theater, painting or sculpture—is publicly installed or displayed, first amendment rights attach which prohibit the government from removing the expression on the basis of its content." 36

Cited as a precedent was the case of Board of Educ. v. Pico. 37 In that case, the board of education had ordered removed from school library shelves nine books that were deemed "anti-American, anti-Christian, anti-Semitic, and just plain filthy." The Supreme Court found for the plaintiff on appeal, ruling that the books could not be removed simply because the board disliked their content. Applying this principle to the "Tilted Arc" situation, my attorneys noted that "dislike" was the only reason cited by Infor removal of the sculpture. Following this logic, they concluded,

If the issue here were only removal of Tilted Arc, the authorities we have cited would preclude this result [but this] result is put beyond question, we submit, when we recall that to remove Tilted Arc is to destroy it. It is no overstatement to say that we here deal with conduct akin to book burning. 38

U. S. District Attorney Rudolph Giuliani responded with a brief for the defendants, the GSA. The government argued against the applicability of both the first amendment (free speech) and the fifth amendment (due process of law) in this case. In a remarkable (and unabashedly authoritarian) rebuttal, the government summarized its opinion: "As a threshold matter, Serra sold his 'speech' to the government . . . . As such, his 'speech' became Government property in 1981, when he received full payment for his work . . . . An owner's 'property rights in a physical thing have been described as the right to possess, use and dispose of it.' 39 This is a rather incredible statement by the government. If nothing else, it affirms the government's commitment to private property over the interests of art or free expression. It means that if the government owns the book, it can burn it, if the government has bought your speech, it can mutilate, modify, censor or even destroy it. The right to property supersedes all other rights: the right to freedom of speech, the right to freedom of expression, the right to the protection of one's creative works.

The decision of the court of appeals upheld the government's position. Judge Jon O. Newman dismissed my appeal on May 27, 1988. He upheld the decision of the lower court on both questions, free expression and due process. Newman held that "the First Amendment has only limited application in a case like the present one where the artistic expression belongs to the Government rather than a private individual . . . . In this case, the speaker is the United States Government. 'Tilted Arc' is entirely owned by the Government and is displayed on Government property. Serra relinquished his own speech right in the sculpture when he voluntarily sold it to the GSA." 40

If I had known that the government would claim "Tilted Arc" as its own speech and would consequently claim the right to alter and destroy it, I would never have accepted the deal. "Tilted Arc" was never intended to—or did it—speak for the United States Government.

A key issue in this case, as in all first amendment cases, was the right of the defendant to curtail free speech based on dislike of the content. Here the court stated that "esthetically dislike is sufficient reason to destroy a work of art: "To the extent that GSA's decision may have been motivated by the sculptor's lack of aesthetic appeal, the decision was entirely permissible . . . . GSA, which is charged with providing office space for federal employees, may remove from its buildings artworks that it decides are aesthetically unsuitable to particular locations." 41 Yet, on this very issue, Supreme Court Justice Oliver Wendell Holmes cautioned over 80 years ago that

it would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits. At the one extreme some works . . . . would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. 42

Justice Holmes's warning should extend to all government officials, whether they be judges or administrators of government agencies.

With regard to the fifth amendment issue, the denial of my right

36. Appeal filed by Richard Serra, Serra v. General Services Administration, cite needed, reprinted in Tilted Arc, supra note 4, at 225, 243 (arguing that summary judgment dismissing the first amendment claim must be reversed).
37. Id. (citing Pico, 457 U.S. 963 (1982)).
38. Tilted Arc, supra note 4, at 246.
41. Id. at 1051.
42. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).
argued that "once a medium of expression—be it writing, film, theater, painting or sculpture—is publicly installed or displayed, first amendment rights attach which prohibit the government from removing the expression on the basis of its content."36 Cited as a precedent was the case of Board of Educ. v. Pico.37 In that case, the board of education had ordered removed from school library shelves nine books that were deemed "anti-American, anti-Christian, anti-Semitic, and just plain filthy." The Supreme Court found for the plaintiff on appeal, ruling that the books could not be removed simply because the board disliked their content. Applying this principle to the "Tilted Arc" situation, my attorneys noted that "dislike" was the only reason cited by Ink for removal of the sculpture. Following this logic, they concluded,

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dismissed my claim. The decision did not even consider the substance of
the claims about distortion and manipulation of the hearing, but ruled
that "even accepting Serra's factual allegations as true for the purposes
of this appeal, we conclude that his due process claims fail as a matter of
law... Serra was not constitutionally entitled to a hearing before
the sculpture could be removed. The lengthy and comprehensive hear-
ing that was provided was therefore a gratuitous benefit to Serra. Even
if Diamond was not entirely impartial, Serra received more process
than what was due." 43 This was a blatant trashing of democratic
procedures.

In the end, I was left with a decision by the federal court of ap-
peals that protected a federal agency (the GSA) and exonerated a fed-
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court's decision merely rubberstamped the official's duplicious con-
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claim saying I had received "more process than what was due"—as if I
should be thankful for the gratuity of an admittedly manipulated hear-
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if only by my own desperate and useless denunciation. I have no fur-
ther protection under the law.

In a sense, Judge Newman was correct when he said that my law-
suit was "an invitation to the courts to announce a new rule... that
an artist retains a constitutional right to have permanently displayed
at the intended site a work of art that he has sold to a government
agency." 44 The "new rule" that I am asking for is moral rights legis-
lation. Such coverage now exists in every other civilized country in the
world. In the U.S., this new rule would acknowledge a relationship
between an artist and his work even after the work had been sold, and
no matter to whom.

In the United States, property rights are afforded protection, but
moral rights are not. 45 Until last year, the United States adamantly
refused to join the Berne Copyright Convention (1886), the first multi-
lateral copyright treaty, now ratified by more than seventy five coun-
tries. The American refusal was based on the fact that the Berne Con-
vention grants moral rights to authors. Such a policy was—and is—incompatible with U.S. copyright law, which recognizes only eco-
nomic rights. Three states—Massachusetts, California and New
York—have enacted moral rights statutes on the state level, but federal
copyright laws tend to prevail, and those are still wholly economic in
their motivation. Indeed, the recent pressure for the U.S. to agree (at
least in part) to the terms of the Berne Convention came only as a result
of a dramatic increase in the international piracy of American
records and films.

In September 1986, Senator Edward Kennedy introduced a bill
called the Visual Artists Rights Act (S. 2796). This bill attempts to
amend federal copyright laws to incorporate some aspects of interna-
tional moral rights protection. Kennedy's bill would prohibit the in-
tentional distortion, mutilation or destruction of works of art
after they have been sold. Moreover, the act would empower artists to
claim authorship, receive royalties on subsequent sales and to disclaim
depth's if the work is distorted. This legislation would allow
the artist (or the artist's heirs) to sue to reverse or redress the alter-
ation of any art work. In the past, such moral rights legislation would
have prevented Clement Greenberg and the executors of David Smith's
estate from authorizing the stripping of paint from several of Smith's
later sculptures so that they would resemble his earlier—and more
marketable — unpainted sculptures. Such moral rights legislation
would have prevented a Japanese bank in New York from removing
and destroying a sculpture by Isamu Noguchi simply because the bank
president did not like it; and such moral rights legislation would have
prevented the U.S. government from destroying "Tilted Arc."

If Senator Kennedy's moral rights bill were enacted, it would be a
legal acknowledgment that art can be something other than a mere
commercial product. The bill makes clear that the basic economic pro-
tection now offered by U.S. copyright law is insufficient. The bill rec-
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43. Serra, 847 F.2d at 1060.
44. Id. at 1051.
45. For facts on the Berne Convention and moral rights legislation, I have relied
on an unpublished paper by Veronique Heim titled America Moves Toward Front
Moral Rights Legislation. For a recent update, see Migang, Old Copyright Trust.

to due process under law in the “Tilted Arc” hearing, the court dismissed my claim. The decision did not even consider the substance of the claims about distortion and manipulation of the hearing, but noted that “even accepting Serra’s factual allegations as true for the purpose of this appeal, we conclude that his due process claim fails as a matter of law . . . . Serra was not constitutionally entitled to a hearing before the sculpture could be removed. The lengthy and comprehensive hearing that was provided was therefore a gratuitous benefit to Serra. Even if Diamond was not entirely impartial, Serra received more process than what was due.” This was a blatant trashing of democratic procedures.

In the end, I left with a decision by the federal court of appeals that protected a federal agency (the GSA) and exonerated a federal official (Diamond), even if he was “not entirely impartial.” The court’s decision merely rubberstamped the official’s duplicitous conduct. And in the same sentence the court dismissed my due process claim saying I had received “more process than what was due”—as if I should be thankful for the gratuity of an admittedly manipulated hearing. This cynical decision by the appeals court needs to be challenged, if only by my own desperate and useless denunciation. I have no further protection under the law.

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In a sense, Judge Newman was correct when he said that my lawsuit was “an invitation to the courts to announce a new rule . . . that an artist retains a constitutional right to have permanently displayed at the intended site a work of art that he has sold to a government agency.” The “new rule” that I am asking for is moral rights legislation. Such coverage now exists in every other civilized country in the world. In the U.S., this new rule would acknowledge a relationship between an artist and his work even after the work had been sold, and no matter to whom.

In the United States, property rights are afforded protection, but moral rights are not. Until last year, the United States adamantly refused to join the Berne Copyright Convention (1886), the first multilateral copyright treaty, now ratified by more than seventy-five countries. The American refusal was based on the fact that the Berne Convention grants moral rights to authors. Such a policy was—and is—incompatible with U.S. copyright law, which recognizes only economic rights. Three states—Massachusetts, California and New York—have enacted moral rights statutes on the state level, but federal copyright laws tend to prevail, and those are still wholly economic in their motivation. Indeed, the recent pressure for the U.S. to agree (at least in part) to the terms of the Berne Convention came only as a result of a dramatic increase in the international piracy of American records and films.

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If Senator Kennedy’s moral rights bill were enacted, it would be a legal acknowledgment that art can be something other than a mere commercial product. The bill makes clear that the basic economic protection now offered by U.S. copyright law is insufficient. The bill recognizes that moral rights are independent from the work as property and that they supersede—or at least coincide with—any pecuniary interest in the work. Moreover, the bill acknowledges that granting protection to moral rights serves society’s interests in maintaining the...
tegrity of its art works and in promoting accurate information about authorship and art. Most important, under the proposed bill (still not passed after over two years), the destruction or mutilation of a work of art would be a federal crime.

On March 1, 1989, the Berne Convention Implementation Act (which President Reagan signed in October 1988) became U. S. law. When I learned on March 13 that the government had started to dismantle "Tilted Arc," I went before the United States district court seeking a stay of the destruction so that my lawyers would have time to study the applicability of the Berne Convention to my case. I expected—as would be the case in other countries that became signatories to the treaty—to be protected by the moral rights clause which gives an artist the right, even after a work is sold, to object to "any distortion, mutilation or other modification" that is "prejudicial to his honor and reputation." I learned, however, that for my case (and for others like it) the treaty ratified by Congress is a virtually meaningless piece of paper in that it excludes the key moral rights clause. Those responsible for the censorship of the treaty are the powerful lobbies of magazine, newspaper and book publishers. Fearful of losing economic control over authors, and faced with the probability of numerous copyright suits, these lobbies pressured Congress into stating that the moral rights clause must not be enforced in the United States. Publishers can continue to crop photos, magazine and book publishers can continue to mutilate manuscripts, black-and-white films will continue to be colorized; and the federal government can continue to destroy art.
Moral Rights

Edward J. Damich

I. Introduction

The Visual Artists Rights Act of 1989 (hereinafter Kennedy Bill), in general, amends the Copyright Act of 1976 to recognize the moral rights of authors of certain works of visual art such as paintings, drawings, sculptures, prints, multiple cast sculptures of a limited edition of 200 or fewer, and photographs produced for exhibition purposes only. The moral rights that are recognized include the right of attribution and the right of integrity. The right of attribution in the Kennedy Bill includes: (1) the right to claim authorship (2) the right to prevent the use of an author's name as author of a work he or she did not create and (3) the right to prevent the use of an author's name as author of a work when that work has been altered or destroyed so as to

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* This article is based on my testimony of June 20, 1989, before the Subcommittee on Patents, Copyrights, and Trademarks of the Committee on the Judiciary of the United States Senate on the Visual Artists Rights Act of 1989 (S. 1198) sponsored by Senator Edward Kennedy.


3. It is unclear whether works other than multiple cast sculptures and prints are limited to a single copy or to a limited edition of 200 or fewer. Section 2 of the Kennedy Bill provides: "A work of visual art does not include—(1) any version that has been reproduced in other than such limited edition prints or cast sculptures" (emphasis added).