

NEW SCHOOL FOR SOCIAL RESEARCH

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OFFICE OF THE PRESIDENT

February 21, 1991

MEMORANDUM TO THE UNIVERSITY COMMUNITY

I am very pleased to tell you that the New School for Social Research has reached an extremely favorable agreement with the National Endowment for the Arts in its lawsuit challenging the constitutionality of the "obscenity condition" the Endowment placed on 1990 grants. The agreement achieves the fundamental objectives of the New School's suit. It removes the obscenity condition from 1990 grants and makes clear that obscenity determinations must be made by the courts, not by the NEA. 1990 grant recipients will not have to attest to a condition of dubious constitutionality in order to receive their funds.

You will recall that the New School was awarded a \$45,000 NEA grant in 1990 to support a redesign of the 12th Street courtyard. In order to receive the funds, the New School, and all 1990 grant recipients, had to agree that "...none of the funds authorized to be appropriated for the National Endowment for the Arts...may be used to promote, disseminate or produce materials which in the judgement of the National Endowment for the Arts...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." The New School contended that this condition violated its First and Fifth Amendment rights.

Under the agreement, that provision has been deleted in its entirety and a paragraph substituted, stating: "The National Endowment for the Arts intends to enforce Section 304(a) of the Department of the Interior and Related Agencies Appropriation Act of 1990 after a grantee has been convicted of violating a criminal obscenity or child pornography statute and all appeal rights have been exhausted." This means that only after a grant recipient has been convicted of obscenity in the courts and has exhausted all appeals will the NEA try to recover its funds. It also means that the definition of what constitutes obscenity will adhere to the standard established in Miller v. California and not the broader definition that the obscenity condition contained. The New School has always acknowledged that obscenity is illegal, and the new provision merely reiterates that understanding.

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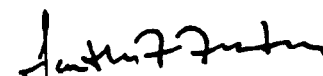
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As a result of the agreement, the New School terminated its lawsuit against the NEA and will now receive its grant monies. Since the agreement was reached out of court, Judge Louis Stanton, before whom the case was argued, will not issue a decision regarding the obscenity condition's constitutionality. However, parallel cases were brought against the NEA by the Bella Lewitzky Dance Foundation and the Newport Harbor Art Museum in U.S. District Court for the Central District of California. These lawsuits made essentially the same arguments as did the New School's litigation and, in fact, relied heavily upon the New School's legal brief. In a consolidated decision in the California cases, Judge John Davies did declare the obscenity condition unconstitutional, stating that "the NEA certification requirement is unconstitutionally vague because it leaves the determination of obscenity in the hands of the NEA" [a Fifth Amendment violation] and "that because the certification requirement includes unconstitutionally vague provisions, it also violates grantees' First Amendment rights by causing a chilling effect on their artistic expression." He concluded his opinion by saying: "This is the type of obstacle in the path of the exercise of fundamental speech rights that the constitution will not tolerate."

The New School agreement, combined with the California decision, confirms that the obscenity condition and the Congressional action that led to its imposition were misguided from the start. The outcome negates an action by the NEA that contradicted the NEA's own responsibility to promote, and not inhibit, artistic expression. The case demonstrates the constitutional dangers involved when government grants contain conditions meant to suppress unpopular speech. We believe our litigation had a constructive influence on the Congressional debate that led to the NEA's reauthorization without the language that was contained in the obscenity condition and the subsequent deletion of the oath from its 1991 grants.

We should all be proud of the university's role in the controversy over the obscenity condition. The leadership we have exercised is very much in the tradition of the New School's commitment to freedom of inquiry and expression. We owe much to the extraordinarily able representation we have received from our outside legal counsel, Floyd Abrams and Susan Buckley, as well as to the support given our case by organizations that filed amicus curiae briefs, the Rockefeller Foundation and the ACLU, New York Civil Liberties Union and Center for Constitutional Rights. We also deeply appreciate the help in defraying legal costs provided by the Andy Warhol Foundation and the Albert List Foundation.

Now that the case is closed, I hope that the arts and education communities can turn their efforts to healing the rift that has occurred between the National Endowment for the Arts and the artists and institutions it is meant to support. It is in the interest of all those dedicated to the arts to help restore the NEA to its place as a defender and nurturer of art and of the free expression that is at the heart of our country's democratic values.


Jonathan F. Fanton