TAXPAYER-FUNDED ART DOESN'T HAVE TO BE DECENT

December 4, 1996 by: *Phyllis Schlafly*

A new federal court decision is sufficient to prove the thesis of Robert Bork's new book that we are "Slouching Toward Gomorrah." The decision also provides Congress with more than adequate reason to hurry up and abolish the National Endowment for the Arts, and the Senate with ammunition to reject confirmation of any more liberal judges.

In a 2-to-1 ruling, the Ninth U.S. Circuit Court of Appeals held that it is unconstitutional for a government agency to consider "decency and respect" for American values when it doles out the taxpayers' money. The decision itself is an assault on decency and respect for American values.

The winners in this case are Karen Finley, who made her fame by parading on stage dressed in nothing but a layer of chocolate, and three others whose nude performances centered on homosexual themes, plus, of course, the American Civil Liberties Union. The losers are the American taxpayers and especially those foolish people who thought they could pass legislation in 1990 to "reform" the out-of-control National Endowment for the Arts.

After the American public was outraged over the N.E.A.'s awarding of taxpayer grants for Robert Mapplethorpe's homoerotic images and Andres Serrano's photograph of a crucifix immersed in his own urine, Congress tried to ban the flow of money to projects that are obscene, sadomasochistic or homoerotic. The Democratic-controlled Congress watered that down to a legislative plea to the N.E.A. to observe "general standards of decency," but that didn't satisfy the federal court.

The 1990 law required the N.E.A. to ensure that "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for diverse beliefs and values of the American public." That's the language that Judge James Browning held violates the First and Fifth Amendment rights of artists who apply for taxpayer grants.

The New York Times gave the "chocolate-smeared woman" space on the Op-Ed page to whine that the case (even though she won) has had a "chilling effect" on art. If she would put on some clothes, maybe she wouldn't find the atmosphere so chilly.

Judge Browning looked to the legislative history to interpret the new law and discovered that it "was specifically designed to prevent the funding of similar [e.g., Mapplethorpe and Serrano] art works." He quoted the law's author, Rep. Paul Henry (R-MI), as telling Congress, "Works which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds."

Henry thought he was making a reasonable argument. But Judge Browning expressed judicial horror at such narrow-mindedness!

In reality, N.E.A. officials took the new law with a large grain of salt. Instead of actually applying "general standards of decency," N.E.A officials merely instructed the advisory panels

(which are made up of you-scratch-my-back-and-I'll-scratch-your-back friends of the grant seeking "artists") to bring their own definitions of these terms "to the table" and make them "part of the deliberative process."

But even that didn't satisfy Judge Browning! He expressed his constitutional worry that the "decency and respect" standard is "vague" because it raises "the danger of arbitrary and discriminatory application." The dissent replied that the statute is every bit as "vague" in specifying that "artistic excellence and artistic merit are the criteria by which applications are judged."

The federal court majority, however, ruled that it isn't "arbitrary" for the N.E.A. to claim that nude and sexual on-stage performances have "artistic excellence," but it is "arbitrary" to say that they are indecent. It takes a smart lawyer to wheedle his way out of such inconsistency, but the Circuit Court Judge was equal to the challenge.

Judge Browning ruled that, since the litigants didn't challenge the "artistic excellence" language, he didn't need to deal with it. Furthermore, he asserted, the N.E.A. advisory panels have "expertise" in determining "artistic excellence," but have "no corresponding expertise in applying such free-floating concepts as 'decency' and 'respect.' " He's probably right about that.

Dissenting Judge Andrew Kleinfeld argued that government art grants are not "entitlements" (like Social Security or tax exemptions), or at least they shouldn't be. In fiscal 1994, only 88 out of 5,168 applicants for Visual Artists Fellowships received grants of the type contested by the "N.E.A. Four," so it's obvious that arbitrary and subjective decisions were made.

The dissent stated what should be a clear principal of law: "That offensive or indecent expression cannot be censored does not mean that the government has to pay for it." That is the main argument of those who oppose funding for the N.E.A.

The case of Karen Finley et al v. National Endowment for the Arts should be the final nail in the coffin of the N.E.A. Having a federal Ministry of Culture is bad enough, but forcing the taxpayers to finance one that is forbidden to observe standards of decency, is downright obscene.