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Museum and Library Services Act of 2003 (H.R. 13): Using "Obscenity" and "Decency" Criteria in Selecting Grantees

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Summary

The Museum and Library Services Act of 2003, H.R. 13, 108th Congress, as passed by the House, reauthorizes funding for the Institute of Museum and Library Services. It requires the Director to deny funding to any project that has been found to be obscene by a court, and requires the Director, in making grants, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." The Spending Clause of the Constitution gives Congress broad power to appropriate funds, and the content standards in H.R. 13 appears to fall well within congressional prerogatives. They would appear to be vulnerable to challenge only upon a showing that the Institute was implementing them so as to suppress disfavored viewpoints. This report will be updated as circumstances require.[1]

On March 6, 2003, the House passed the Museum and Library Services Act of 2003 H.R. 13, 108th Congress, and the bill is now before the Senate Committee on Health, Education, Labor, and Pensions. The Institute of Museum and Library Services administers the federal library and museum projects that would be reauthorized under H.R. 13. In reauthorizing these programs, the bill would require that the Director of the Institute establish procedures to prohibit federal funding of projects that have been determined to be obscene by a court. The bill further requires the Director to ensure that applications for financial assistance be evaluated "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." This report examines the legal status of obscenity and the implications of Congress's imposing the "decency and diversity" guidelines as a condition to the exercise of its spending power.

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[1] This report was prepared under the general supervision of Larry Eig, Legislative Attorney. For additional information, see CRS Report 95-815, *Freedom of Speech and Press: Exceptions to the First Amendment*, and CRS Report 95-804, *Obscenity and Indecency: Constitutional Principles and Federal Statutes*, both by (name redacted), Legislative Attorney.

Obscenity. Obscenity is not protected speech under the First Amendment. The United States Supreme Court held in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), that "there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words,' those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." This list of speech categories has provided a source of free speech issues that have been litigated extensively since *Chaplinsky*. But while some types of speech singled out by *Chaplinsky* have subsequently been found to be protected under the First Amendment (lewd and profane), obscene speech remains unprotected.

In *Miller v. California*, 413 U.S. 15 (1973), the Court formulated a new definition of "obscenity," and this definition is expressly included in H.R. 13. The *Miller* definition requires an affirmative response to each part of a three-part test, which asks (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. These standards were further refined in *Pope v. Illinois*, 481 U.S. 497, 500 (1987), when the Supreme Court held that the first and second prongs of the *Miller* test – whether a work appeals to the prurient interest and describes sexual conduct in a patently offensive way – are questions of fact to be determined by applying contemporary community standards. The third prong – serious value – is determined under a reasonable person standard.

Anti-obscenity conditions on grants. It is settled law that Congress may place conditions on federal funding. The Constitution, Art. I § 8, cl. 1, provides: "The Congress shall have Power to ... provide for the common Defense and general Welfare of the United States...." The Supreme Court has examined the breadth of this power, known as the Spending Clause, on several occasions. The leading modern case is *South Dakota v. Dole*, 483 U.S. 203 (1987). In that case, the Supreme Court addressed the Spending Clause in the context of a provision that conditioned federal highway funding to the states on their adoption of a minimum drinking age. The Court upheld the condition after applying a three-part test. First, according to the Court, an exercise of the spending power must be in "pursuit of the general welfare," giving deference to Congress in making the determination as to whether a particular expenditure is intended to serve general public purposes.[2] Congress has determined that the activity authorized by H.R. 13 serves the national interest, and it is therefore unlikely that any court will strike down this exercise of the spending power for being outside of the national interest.

The second part of the test under *South Dakota v. Dole* is that conditions be clearly stated, another factor apparently met under H.R. 13.[3] The third requirement of the test is that a condition relate to the federal interest in particular national projects or program

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[2] 483 U.S. at 207, *citing* Helvering v. Davis, 301 U.S. 619, 640-641, 645 (1937).

[3] 483 U.S. at 207.

being conditioned.[4] H.R. 13 authorizes appropriations to the Institute of Museum and Library Services, established in 1996 by Public Law 104-208, and amended by Public Law 105-128. The requirement under the Act that projects found to be obscene be denied funding is related to the federal interest in this national program: the Institute of Museum and Library Services is the federal mechanism for making grants to individuals and state library administrative agencies, and the condition imposed specifically relates to what those grants may directly support. Therefore it is unlikely that a court will invalidate this conditioning of federal funds by Congress on the basis that such conditions are unrelated to the federal interest in this particular national program.

The congressional spending power is thus very broad. Also, though conditions on spending may be vulnerable to legal attack if they are exercised in a way that raises concern about disfavored viewpoints, *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1997), the requirement imposed by H.R. 13, that denial of funding to those projects which are found to be obscene, is directed solely against speech that has already been found without First Amendment protection. Furthermore, the Supreme Court has characterized Spending Clause legislation as "much in the nature of a *contract*: in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (emphasis added). Therefore, if grant applicants are awarded a grant and agree to accept federal funds, they essentially contract not to use those funds to create obscenity.[5] Anyone applying for grants from the Institute therefore has no rights outside of those given under the Act, since the "contract" would be governed by the terms of the grant application and the internal agency regulations.

The Act itself provides additional evidence of the limited possibilities a grant applicant would have to challenge the obscenity condition. For example, the Act states that "[t]he Director shall establish procedures for reviewing and evaluating such applications. Such procedures shall not be subject to any review outside of the Institute."[6] Further, disapproval of an application under the Act is explicitly disclaimed as a finding of obscenity: "[D]isapproval of an application by the Director shall not be construed to mean, and shall not be considered as evidence that, the project for which the applicant requested financial assistance is or is not obscene."[7]

Decency and diversity guidelines. In exercising its spending power, Congress may prescribe criteria that distinguish among otherwise protected speech.

In *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), the Supreme Court upheld the constitutionality of a federal statute (20 U.S.C. § 954(d)(1)) requiring the NEA, in awarding grants, to "take into consideration general standards of decency and

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[4] *Id., citing* Massachusetts v. United States, 435 U.S. 444, 461 (1978).

[5] Presumably, the primary way that the anti-obscenity provision would come into direct play would be an instance in which an already-funded project is cut off after it has been found to be obscene in the context of a criminal prosecution.

[6] H.R. 13, 108th Cong. § 103(g)(2) (2003).

[7] H.R. 13, 108th Cong. § 103(3)(C) (2003).

respect for the diverse beliefs and values of the American public," the identical language found in H.R 13. In upholding the language of the statute, the Court observed:

> Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding. The NEA has limited resources . . . . The agency may decide to fund particular projects for a wide variety of reasons, "such as the technical proficiency of the artist, the creativity of the work, the anticipated public interest in or appreciation of the work, the work's contemporary relevance, its educational value, its suitability for or appeal to special audiences . . . , its service to a rural or isolated community, or even simply that the work could increase public knowledge of an art form." . . . "[I]t would be impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected expression." The "very assumption" of the NEA is that grants will be awarded according to the "artistic worth of competing applicants," and absolute neutrality is simply "inconceivable."[8]

Nonetheless, the Court did acknowledge that, if the statute were "applied in a manner that raises concern about the suppression of disfavored viewpoints," then such application might be unconstitutional. For example, the Court indicated that it would be impermissible to "leverage . . . power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints" or to otherwise use a grant program to aim at the suppression of "dangerous ideas."[9]

In summary, obscenity is not protected speech under the First Amendment. Congressional spending powers are very broad, and courts are loathe to invalidate exercises of those powers unless they are clearly outside the public interest. Conditions on appropriations must be related to the federal interest in a particular project or program. Requiring the Institute of Museum and Library Services to deny or curtail funding to projects that have been determined to be obscene by a court of competent jurisdiction appears to meet this "relatedness" test and be a valid exercise of congressional spending power. In addition, the decency and diversity guidelines that H.R. 13 would impose have been held not to violate the First Amendment as long as they are not applied in a manner so as to suppress disfavored viewpoints.

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[8] 524 U.S. at 585 (citations omitted).

[9] *Id.* at 587.