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CULTURAL VALUES AND GOVERNMENT

Walter E. Dellinger III[*]

In January 1996, the Ninth Circuit decided *Finley v. National Endowment for the Arts*.[1] I was acting Solicitor General at the time, and the issue came quickly to my desk, along with a visit from the Director of the National Endowment for the Arts (NEA), the excellent actress Jane Alexander. The case involved the constitutionality of the Helms Amendment, which required that the NEA take decency into account in choosing who should be awarded artistic grants.[2] Karen Finley was one of those whose expected grant did not get renewed after the decency criteria had been invoked.

The Ninth Circuit decision ruling against the NEA was, as you might imagine, welcomed with great enthusiasm by the NEA. They did not care for the Helms Amendment, and when the director came to me, she said happily, "We have this wonderful loss in the Ninth Circuit, and as your client, we'll be happy for this matter to end there. There will be no need to seek review in the Supreme Court." My response was that she and I were both employees or officers of the United States; that my client was the United States; the Congress spoke for the United States; and that we had an obligation to defend acts of Congress if they were defensible grounds for doing so. There were defensible grounds indeed, almost certain to prevail—and indeed, correctly so, in my view.

To the question whether this is governmental censorship and offense to the First Amendment, my response was it may well be, but that the problem is that, if the Helms Amendment is an unconstitutional imposition of government values, then so is the NEA itself. What they do all day long, every day, is censor. And if government cannot take values into account in making awards, then we have got a much bigger problem for the Endowment than the Helms Amendment. But what we cannot do is say that because we prefer Karen Finley's art to Norman Rockwell's art, Congress cannot have

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[*] Hon. Walter E. Dellinger III is Chair of the Appellate Practice at O'Melveny & Myers and is the Douglas B. Maggs Professor of Law at Duke University. Mr. Dellinger served as acting Solicitor General for the 1996–1997 Term of the United States Supreme Court. Mr. Dellinger originally delivered these remarks during Showcase Panel IV, entitled *The Role of Government in Defining Our Culture*, at the Federalist Society's 2006 National Lawyers Convention, on Saturday, November 18, 2006, in Washington, D.C.

[1] 100 F.3d 671 (9th Cir. 1996), *rev'd*, 524 U.S. 569 (1998).

[2] Act of Oct. 23, 1989, Pub. L. No. 101-121, § 304(a), 103 Stat. 741 (1990), *amending* 20 U.S.C. § 954.

the reverse presumption and say we like Norman Rockwell better than Karen Finley.

Now, I raise this case because it brought into sharp focus the fact that we all want government to impose cultural values as long as they are our values. In fact, one of the moves we all are tempted to make is to define our cultural values as something other than cultural values, which is what immediately transpires in this kind of discussion. The Director of the NEA, like most people in that community, would say, of course, "That is a mistake. The Helms Amendment imposes cultural values imposed by the government; our people judge on artistic merit, and that is a different category." To which my response was, "Look, I may agree with your notion of artistic merit." In Karen Finley's act, she smears her body with chocolate and gives a paean to feminism. "But I cannot believe that if you have some equally effective actor who smeared his or her body with chocolate and made an impassioned cry to index capital gains for inflation that they would have gotten the award. It cannot be. You do not make these awards on weakness of application."

So, I came away from that experience with the thought that I actually find it quite troublesome that the government funds the arts at all; that while the Helms Amendment could well be problematic, so is the funding. I find myself dismaying my friends who, like I, enjoy government-funded art, wondering about National Public Radio and National Public Television. I do not see how we get out of this box. The one thing I knew was that we could not say, "It is okay to prefer Karen Finley to Norman Rockwell, but not vice versa," however artistically merited that position might be. We all are drawn by this tension. I come at it, I think, from the Cato Institute perspective. Roger Pilon would say that I am a soft Catoite, a squishy Catoite, who still thinks *Lochner*[3] was wrongly decided, in spite of his pounding. But I want to raise it in the context that I think is quite salient; that is, the role of government in shaping religious values and opinions of the population.

Since we do not really know what the new Chief Justice or Justice Alito's views will be, I believe eight of the nine Justices on the previous Court got this wrong on one principle or another. In other words, that we have a group of Justices who are comfortable with having the government impose its religious values directly by having government views of religion, government endorsement, and government promotion. And there are four other Justices—Stevens, Ginsburg, Souter, and often Breyer—who would have the government take cognizance of religion in a negative way, denying the use of funding by religious groups or individuals—when government funding is itself neutral. Anybody may use an interpreter for the deaf to go to school; anybody may use the school premises, first come first serve; anyone may have a student club. All of these are areas where there is govern-

[3] Lochner v. New York, 198 U.S. 45 (1905).

ment funding. And those who would exclude—including vouchers—religious people from being able to participate also miss the notion that what ought to be controlling is the critical right of private choice.

There ought to be private choice about religion, and I believe that only Justice O'Connor, who has been underappreciated in this area, got it consistently right. By the magic of five to four, the Court, I think, got every religious decision right for almost the entire time of the Rehnquist Court, because of her consistent voting on a very simple principle: government religion, bad; private religion, good.[4] Her view of religion was robust private choice. That is to say, where government provided resources for citizens to decide how to use those resources, you were free to make an intervening private religious choice: robust private choice with government itself having no role. Only she got it right in terms of shaping the religious culture.

[4] *See, e.g.*, County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (O'Connor, J., concurring).