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May 24, 1985

Ms. Betty Brown
Acting Executive Director
Idaho Commission on the Arts
STATEHOUSE MAIL

RE: Request for Legal Guidance

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS PROVIDED SOLELY TO GIVE LEGAL GUIDANCE

Dear Ms. Brown:

Your letter of April 26, 1985, requests legal guidance regarding a proposed commission rule relating to funding. It is our understanding that Representative Ron Slater has presented two proposals. The language of the first proposed rule is as follows:

> Grants will be denied to either groups or individuals who present material which, when considered as a whole can be reasonably said to constitute a gross indignity to either a religious or ethnic interest. Such grant denial shall remain in effect for one (1) year after such presentation has been made.
>
> Appeals from any judgment made by the acting Commission executive will be heard by the Executive Board of the Commission. Public comment will be considered.

In the alternative, Representative Slater suggests that the first paragraph might read as follows:

> The board or a political subdivision shall not provide grants, loans or other forms of assistance to artistic activities which, taken as a whole, have the effect of defaming or inciting contempt against persons on the basis of race, color, creed, religion, or national origin.

QUESTION PRESENTED

You have requested that we review whether the proposed rules, if adopted, would survive constitutional scrutiny.

CONCLUSION

Your question involves complex areas of constitutional law, and court decisions on similar issues have produced nonuniform and sometimes contradictory results. However, we believe that the proposed rules may fail to pass constitutional muster in that a court might hold them to: (1) result in a pattern of discrimination impinging upon First Amendment rights; (2) impose an unconstitutional condition on the award of a governmental subsidy; (3) be impermissibly vague; and/or (4) be overbroad.

ANALYSIS

A. Pattern of Discrimination Impinging Upon First Amendment Rights

The First Amendment protects the rights of the viewers of productions.[1] The Constitution also appears to protect program producers, who occupy a position analogous to performers in auditoriums or speakers in public areas whose rights are clearly protected.[2] A content-based decision by a governmental

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[1] See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969).

[2] See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 56, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975).

agency may constitute an unlawful prior restraint upon a producer whose program cannot be produced and upon viewers who are unable to view it if the editorial judgment of the governmental agency is based on constitutionally impermissible factors.[3]

The fact that the commission is engaged in an activity involving editorial decision-making does not automatically violate the First Amendment. The commission necessarily must exercise an editorial function and be selective in what it funds. The state's possession of editorial power will not, however, foreclose inquiry into the method of its exercise.

In the case of Advocates for the Arts v. Thomson,[4] the Governor and Council of New Hampshire refused to approve an art grant for a literary magazine on the ground that it had published a poem which contained offensive language and imagery. The New Hampshire Commission on the Arts, created to administer the grants of the National Endowment for the Arts, routinely submitted grants of over $500.00 to the Governor and Council for review.

Several organizations and individuals sought federal judicial intervention, arguing that the Governor's action constituted a prior restraint in contravention of the First Amendment. The Court of Appeals for the First Circuit found the doctrine of prior restraint inapplicable:

> But public funding of the arts seeks "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge" artistic expression. A disappointed grant applicant cannot complain that his work has been suppressed, but only that another's has

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[3]See Note, "Freeing Public Broadcasting from Unconstitutional Restraints," 89 Yale Law Journal 719, 738 (1980).

[4]532 F.2d 792 (1st Cir. 1976), cert. denied, 429 U.S. 894 (1976) (citations omitted).

> been promoted in its stead. The decision to withhold support is unavoidably based in some part on the "subject matter" or "content" of expression, for the very assumption of public funding of the arts is that decisions will be made according to the literary or artistic worth of competing applicants. Given this focus on the comparative merit of literary and artistic works equally entitled to first amendment protection as "speech," courts have no particular institutional competence warranting case-by-case participation in the allocation of funds.[5]

The Thomson case thus appears to stand for the principle that the "disappointed grant applicant" cannot expect to have a federal court adjudicate the relative "literary or artistic worth of competing applicants." Nor will a federal court "require an objective measure of artistic merit as a matter of constitutional law."[6]

The First Circuit cautioned, however, that its decision did not countenance a pattern of discrimination. The court stated:

> A claim of discrimination would be another matter. The real danger in the injection of government money into the marketplace of ideas is that the market will be distorted by the promotion of certain messages but not others. To some extent this danger is tolerable because counterbalanced by the hope that public funds will broaden the range of ideas expressed. But if the danger of distortion were to be evidenced by a pattern of discrimination impinging

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[5] Id. at 795-796 (citations omitted).

[6] Id. at 797.

> on the basic first amendment right to free and full debate on matters of public interest, a constitutional remedy would surely be appropriate.[7]

The court then noted that distribution of art grants on the basis of such extrinsic considerations as the applicants' political views, associations, or activities would violate the Equal Protection Clause, if not the First Amendment, by penalizing the exercise of those freedoms.[8]

In the Thomson case, the New Hampshire authorities had not adopted a written regulation regarding the appropriate content of projects eligible for funding. By contrast, if the Idaho commission were to adopt Representative Slater's prepared regulations, it would formalize by codification rules requiring the commission to temper its otherwise subjective judgment regarding the artistic merit of a proposal by consideration of issues extraneous to artistic merit such as whether a project constitutes a "gross indignity to either a religious or ethnic interest" or "incites contempt against persons on the basis of race, color, creed, religion, or national origin." Such codification may give rise to the very type of a pattern of discrimination which the Thomson case proscribed.

In short, while adoption of concise and clear standards may be impractical in the present context, the commission may not adopt a regulatory framework which inhibits its review of a project's artistic merit and clearly implicates the First Amendment rights of producers and consumers of artistic projects. The Idaho Legislature created the commission to stimulate and encourage the arts and assist freedom of artistic expression.[9] The proposed regulations would instead require the commission to review issues extraneous to artistic merit in making its funding decisions. Should the commission adopt such regulations, litigation is likely. In any such litigation, the commission would be in a position of defending a rule which

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[7] Id. at 798 (citations omitted).

[8] Id. at 798, n.8.

[9] See Idaho Code § 67-5605.

restricts the freedom of artistic expression which the commission is statutorily charged with encouraging.

B. Unconstitutional Condition

The United States Supreme Court has long held that the government may not deny a valuable governmental benefit on a ground that infringes upon a constitutional right.[10] Denial of a benefit on such a basis requires an individual to forego a constitutional right to receive a governmental benefit, thus placing an unconstitutional condition on the benefit.

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly."[11]

Theatrical productions and other forms of live artistic expression supported by the commission are protected by the First Amendment.[12]

The proposed rules would require the commission to condition its grant of the benefit of funding upon the content

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[10] Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

[11] Id. (emphasis added) (citations omitted).

[12] Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65, 101 S.Ct. 2176, 2180, 68 L.Ed.2d 671 (1981).

of the material presented by individuals or groups. Because fundamental First Amendment rights are involved, an extremely strong showing is necessary to support a finding of constitutionality. The proposed rules would have to "survive exacting scrutiny" by a court.[13] In a challenge, the state would bear the burden of justifying the rule.[14] Furthermore, the state must show a weighty state interest underlying the rule.[15] The state must also show that the rules represent the least drastic means of protecting the governmental interest involved.[16]

Finally, while the government must necessarily make a content-based decision when it seeks to promote free expression in areas such as public broadcasting and subsidization of the arts,[17] a court will "review with particular care any claim that the governmental body is actually attempting to suppress controversial, political, or other forms of expression, rather than attempting to promote certain limited forms of entertainment."[18] In face of such a claim, the court will examine whether the commission has employed a "clear, precisely drawn, objective standard" in choosing the productions it wishes to promote.[19] The Ninth Circuit has stated:

> [T]he more subjective the standard used, the more likely that the category will not meet the

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[13] Buckley v. Valeo, 424 U.S. 1, 64, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

[14] Rosen v. Port of Portland, 641 F.2d 1243, 1246 (9th Cir. 1981).

[15] Id.

[16] Id.

[17] Advocates for the Arts v. Thomson, 532 F.2d 792 (1st Cir. 1976), cert. denied, 429 U.S. 894 (1976).

[18] Cinevision Corp. v. City of Burbank, 745 F.2d at 575.

[19] Id.

> requirements of the First Amendment; for, when guided only by subjective, amorphous standards, government officials retain the unbridled discretion over expression. That is condemned by the First Amendment.[20]

The two standards proposed in this case may be too amorphous to satisfy the First Amendment. What constitutes "a gross indignity to . . . a religious or ethnic interest" or has "the effect of defaming or inciting contempt against persons on the basis of race, creed, religion, or national origin" is necessarily a subjective judgment which could be held to place "unbridled discretion" in the commission's hands.

In addition, when the decision will be made by a body subject to political pressures, the court will scrutinize it most carefully because "at times the will of the majority may for the moment run contrary to the protections that the First Amendment affords political and other controversial forms of expression."[21] The attempt in the proposed rules to involve the public in such decisions may only serve to politicize the process and thus exacerbate rather than cure the problem.

In summary, the commission cannot condition a governmental benefit upon forfeiture of a First Amendment right. Because a fundamental right is involved, the state must meet a heavy burden to support the proposed rule. A reviewing court would subject the proposed rule to strict scrutiny--especially in light of the commission's duty "to encourage and assist freedom of expression."[22] It is our opinion that the proposed rule would probably not withstand judicial scrutiny.

C. Vagueness and Overbreadth

The United States Supreme Court has stated that "it is a basic principle of due process that an enactment is void for

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[20] Id. (emphasis added).

[21] Id.

[22] Id.

vagueness if its prohibitions are not clearly defined."[23] Vagueness in the First Amendment area must be strictly curtailed because ambiguity may have a "chilling effect" by inhibiting citizens from exercising their fundamental constitutional rights.[24] A greater degree of specificity is therefore demanded when a regulation impinges on the First Amendment.[25] The complementary doctrine of overbreadth is based on the principle that a "clear and precise enactment may nevertheless be overbroad if in its reach it prohibits constitutionally protected conduct."[26]

The standard used in determining whether a challenged rule is vague is whether "men of common intelligence must necessarily guess at its meaning."[27] The proposed rules are both vague. Men of common intelligence would not necessarily agree as to what constitutes "a gross indignity to either a religious or an ethnic interest." Similarly, men of common intelligence would likely disagree regarding what "has the effect of . . . inciting contempt against persons on the basis of race, color, creed, religion or national origin." In addition, both alternatives can apply to cover constitutionally protected expression. For example, even the works of Shakespeare and Mark Twain are periodically assailed as "inciting contempt" or presenting "a gross indignity" to various religious and ethnic groups.

In the Seventh Circuit case of Collin v. Smith, an ordinance which prohibited dissemination of material "which promotes and incites hatred against persons by reason of their

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[23] Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

[24] Id. at 108-09.

[25] Smith v. Goguen, 415 U.S. 566, 572-73, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974).

[26] Grayned v. City of Rockford, 408 U.S. at 114.

[27] Broadrick v. Oklahoma, 413 U.S. 601, 607, 93 S.Ct. 2908, 2913, 37 L.Ed.2d 830 (1973).

race, national origin or religion, and is intended to do so" was struck down as unconstitutional based on the doctrine of overbreadth and to a lesser degree on the doctrine of vagueness.[28] As one of the proposed commission rules is almost identical to that ordinance, the Collin case offers compelling authority for the proposition that the proposed rule would be held overbroad and vague.

In summary, the Constitution requires that administrative rules, like laws, have sufficient clarity to allow for uniform interpretation and application. In addition, a rule must not be overbroad so as to prohibit protected expression in an attempt to reach unprotected expression. It is probable that both formulations of the proposed rule would fall short of the constitutional requirements.

SUMMARY

It is the opinion of this office that if the proposed rules were subjected to a constitutional challenge they would likely be held to: (1) result in a pattern of discrimination impinging upon First Amendment rights; (2) impose an unconstitutional condition on the award of a governmental subsidy; (3) be impermissibly vague; and/or (4) be overbroad.

Very truly yours,

Sheila Glusco Bush
Deputy Attorney General
Administrative Law and Litigation
Division

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[28] Collin v. Smith, 578 F.2d 1197, 1207 (7th Cir. 1978), cert. denied 439 U.S. 916 (1978).