

Supreme Court upholds arts censorship

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The series of decisions issued Thursday and Friday, completing the Supreme Court's actions for the 1997-98 term, represented, with a few important exceptions, a continuation of the attacks on democratic and civil rights which have characterized the high court's trend for the past two decades.

The court upheld two laws in which Congress sought to exercise powers of censorship, the 1990 legislation which required the National Endowment for the Arts to award grants to artists "taking into consideration general standards of decency," and the 1996 Military Honor and Decency Act, which forbids the sale of sexually explicit magazines and videos on US military bases.

In both decisions the Supreme Court used legal technicalities to overturn Appeals Court rulings which had struck down the laws as violations of the First Amendment protection of free speech. In the NEA case, the court majority held that the law was "advisory" rather than mandatory, and therefore did not constitute an explicit ban on NEA funding of allegedly indecent art. In the military case, the court found that base stores were not "public forums" where free speech rights had to be observed.

The NEA decision was particularly tortuous, given that the 1990 law was clearly intended to impose censorship on the arts agency. It was passed in the midst of a hysterical campaign by right-wing Republicans and Christian fundamentalists against NEA funding of homoerotic photographs by Robert Mapplethorpe. Since then federal financial support for the NEA has been slashed and the agency has had to give most of its grants to local arts agencies, rather than to individual artists.

The two most right-wing justices, Antonin Scalia and Clarence Thomas, filed a separate opinion concurring with the 8-1 vote to uphold the law, but at the same time denounced the interpretation that the law did not ban funding of certain artistic works. Scalia and Thomas stated explicitly that the government has the right to encourage certain views and discourage others, and that it is entitled to use its control of funding for that purpose. "It

is the very business of government to favor and disfavor points of view on innumerable subjects," they wrote, concluding that what amounts to government censorship is perfectly constitutional.

The other six justices signed O'Connor's opinion, which held that because the process of awarding funding to those seeking government grants involved subjective judgments about artistic merit, it was legitimate to take "local community standards of decency into consideration."

Only one justice, David Souter, adhered to the once-accepted judicial position that the First Amendment bars "viewpoint discrimination" by the federal government, whether this involves a direct prohibition or the "chilling effect" of a decision not to fund certain kinds of expression.

The Clinton administration filed a brief supporting the law and the NEA itself hailed the ruling because it did not go as far as the Christian right had demanded. Many arts organizations denounced both the ruling and the NEA's acquiescence. Karen Finley, the performance artist who brought the lawsuit, said she was "stunned and saddened."

In its final decision of the year on criminal procedure, the court held that double jeopardy does not apply to sentencing procedures, upholding California's "three strikes" sentencing laws which require doubling sentences for second felony convictions and mandate sentences of 25 years to life for third convictions.

The law was challenged by a California man convicted of selling marijuana after the state sought to retry a lower-court decision that an earlier conviction could not be used to double his sentence. The prisoner, Angel Jaime Monge, charged that such a retrial on a sentencing matter would violate his constitutional right not to be tried twice for the same offense. The Supreme Court rejected his appeal by a 5-4 margin.

In two decisions which rebuffed attempts to further erode due process and democratic rights, the court upheld attorney-client privilege and ruled that people infected with HIV, the virus which causes AIDS, are protected against discrimination under the Americans with

Disabilities Act.

The decision on attorney-client privilege was a significant defeat for Independent Counsel Kenneth Starr, who had sought a court ruling that the confidentiality of lawyer-client discussions ends with the client's death. Starr was seeking notes taken by lawyer James Hamilton of a discussion he held with White House aide Vincent Foster nine days before Foster's suicide. His subpoena was opposed by the American Bar Association, the National Association of Criminal Defense Lawyers, the American Hospice Association, and other advocates of the rights of the terminally ill.

The six-member majority, in an opinion written by Chief Justice William Rehnquist, cited more than a century of precedents that attorney-client privilege survives the death of the client. Rehnquist said that Starr's argument that Hamilton's notes might contain evidence of a crime--alleged perjury by some White House aides about the firing of personnel in the travel office--was based "largely on speculation," and had "little empirical evidence" to back it up.

Even the three justices who would have ordered Hamilton's notes turned over to Starr were not willing to overturn attorney-client privilege in the sweeping fashion sought by the independent counsel. They favored a narrow exception that would apply only in certain criminal cases, and require Starr to prove a "compelling law enforcement interest" in the notes.

The 5-4 decision on the rights of those infected with HIV was remarkable mainly for the fact that it was so close. The four most right-wing justices--Rehnquist, O'Connor, Thomas and Scalia--pandered to right-wing hysteria against the victims of AIDS.

The case involved Sidney Abbott, a woman carrying the HIV virus, who was refused treatment by her dentist. The court majority rejected the claim by the dentist, Dr. Randon Bragdon, that the judgment of whether there was any risk in treating Ms. Abbott should be left entirely to him, regardless of the consensus of medical opinion that there is no significant risk. There is no evidence that a dentist has ever contracted HIV from treating an infected patient.

Abbott was supported by gay and lesbian groups and other advocates of the HIV-infected. Employer groups supported the dentist, since they sought to restrict the scope of the disability law, which bars most employment-related discrimination against those classified as disabled.

In another major decision, the court by a 6-3 vote found unconstitutional the line-item veto passed by the

Republican Congress in 1996 and endorsed by the Clinton administration. The Line Item Veto Act had been drafted with an eye to evading the clear constitutional separation of powers between Congress and the White House, under which Congress has the sole power to legislate and the president may sign or veto an entire bill, but may not pick and choose portions of a bill to reject.

The law permitted the president to veto parts of appropriation or tax bills selectively, returning them to Congress where his action could be overridden by a two-thirds majority. Six members of Congress filed suit against the law as soon as it took effect, but the Supreme Court last year refused to hear their suit because Clinton had not yet vetoed any legislation.

Thursday's decision came on suits filed by Idaho potato growers, New York City, the Greater New York Hospital Association and two health care unions, which had been harmed by Clinton's vetoes of provisions awarding disputed Medicaid funding to New York City hospitals and giving the potato growers a tax break.

The Supreme Court majority ruled that there was a flagrant conflict between the law and Article III of the Constitution. Justice Stevens, in his written opinion, said the court could express "no opinion about the wisdom of the procedures authorized by the Line Item Veto Act." But he added that if Congress wished to give the president such powers, it must amend the Constitution.

The substantive effect of both the legislation and the Supreme Court decision is not great. Clinton used the line-item veto 82 times, but mainly on small items in appropriations bills. The power was to expire in 2005 or in any year the federal budget was in balance, whichever came first. The projected surplus during the current fiscal year meant that the line-item veto power would have expired September 1.

The decision is nonetheless politically significant. The line item veto has long been sought by Republican presidents desiring greater powers to slash spending on domestic social programs. Ronald Reagan unsuccessfully campaigned for it, and the measure was one of the first major components of Newt Gingrich's "Contract with America" to become law.



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