edited by **Clara Weyergraf-Serra and Martha Buskir**

introduction by **Richard Serr**

The Destruction of *Tilted Arc*: Documents

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The Destruction of *Tilted Arc*: Documents

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The Destruction of *Tilted Arc*: Documents

edited by Clara Weyergraf-Serra and Martha Buskirk
introduction by Richard Serra

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1979

The GSA (General Services Administration) requests the NEA (National Endowment for the Arts) to appoint an Artist Nomination Panel to suggest a sculptor able to conceive a sculpture for Federal Plaza, New York City.

The NEA panel's choices are presented to the GSA Design Review Panel, which recommends Richard Serra as the artist.

Richard Serra is officially commissioned to conceive a sculpture for Federal Plaza.

1980

Richard Serra's concept is approved by the GSA.

1981

Tilted Arc is installed in Federal Plaza.

Judge Edward Re begins a letter-writing campaign urging removal of *Tilted Arc*.

1984

William Diamond, the GSA's New York Regional Administrator, presses for a public hearing to decide whether *Tilted Arc* should be relocated.

1985

William Diamond appoints himself as chairman of the hearing and selects the panel which, based on the testimony, will make the decision whether or not to relocate *Tilted Arc*. The other panel members are Michael Findlay, vice-president of Christie's; Thomas Lewin, senior partner, Simpson, Thatcher and Barlett; Paul Chistolini, acting assistant regional administrator for the GSA's Public Buildings & Real Property division (a GSA employee and a subordinate of William Diamond); and Gerald Turetsky, acting deputy regional administrator for the GSA (also a GSA employee and a subordinate of William Diamond).

The public hearing is held from March 6 through March 8.

180 people speak at the public hearing. 122 testify in favor of retaining *Tilted Arc*; 58 testify for relocation or removal.

The panel recommends, by a four-to-one vote, to relocate *Tilted Arc.*

New York Regional Administrator William Diamond officially recommends that *Tilted Arc* be relocated.

The GSA's acting administrator in Washington, Dwight Ink, recommends in his "Decision on *Tilted Arc*" that the NEA form a panel to consider alternative sites for *Tilted Arc.*

1986

Richard Serra files a lawsuit to prevent the GSA from destroying *Tilted Arc.*

1987

The lawsuit is dismissed by Judge Milton Pollack, U.S. District Court, Southern District of New York.

The NEA *Tilted Arc* Site Review Advisory Panel reaches the conclusion that *Tilted Arc* is site-specific and ought to remain on its Federal Plaza site.

1988

Richard Serra files an appeal of the district court ruling in U.S. Court of Appeals for the Second Circuit.

The court of appeals affirms the district court's ruling to dismiss the suit.

President Reagan signs the Berne Convention Implementation Act.

1989

On March 15, at the instigation of Diamond, *Tilted Arc* is destroyed. Richard Austin, Administrator of the GSA, does nothing to prevent the destruction of this art work.

Introduction by Richard Serra

It is not bad
to be pissed off
where there is any
condition imposed, by whomever, no
matter how close.
—*Charles Olson,* The Maximus Poems

The United States government destroyed *Tilted Arc* on March 15, 1989. Exercising proprietary rights, authorities of the General Services Administration ordered the destruction of the public sculpture that their own agency had commissioned ten years earlier. The final desecration followed over five years of misrepresentations, false promises, and show trials in the media and in the courtroom—deceptions which in the end not only allowed the government to destroy *Tilted Arc*, but also established a precedent for the priority of property rights over free expression and the moral rights of artists. Even last-minute attempts to test the applicability of the Berne Convention (which Congress signed in the fall of 1988, and which went into effect March 1, 1989) proved futile. After an exhaustive analysis of the treaty, my attorneys concluded that the Berne Convention laws as abridged by the U.S. Congress were inadequate to protect my work.

Once my own say in the fate of the sculpture had been finally denied by the federal courts, William Diamond, the regional administrator of the GSA and the man most responsible for the campaign against *Tilted Arc*, acted immediately to have the sculpture removed. In a sinister all-night session on March 15, overtime work crews labored to dismantle *Tilted Arc*, brutally sawing and torching the piece. Finally, around 4:30 A.M., *Tilted Arc* was reduced to raw materials, to be carted off and stored in Brooklyn, reportedly pending relocation. "This is a day for the people to rejoice," said Diamond, "because now the plaza returns rightfully to the people."[1]

Diamond announced repeatedly that he planned to relocate *Tilted Arc* to an alternate site (though a blue-ribbon NEA panel expressly stated that *Tilted Arc* could not be relocated). But *Tilted Arc* was created for one site and one site only. I made this clear from the start. When I first learned of the efforts to remove *Tilted Arc* in December 1984, I wrote to Diamond and to Donald Thalacker, then the director of the Art-in-Architecture Program that had originally commissioned the work. At that

time, I said, "I want to make it perfectly clear that *Tilted Arc* was commissioned and designed for one particular site: Federal Plaza. It is a site-specific work and as such not to be relocated. To remove the work is to destroy the work."[2] This has been accomplished; *Tilted Arc* is destroyed.

In 1979 I was commissioned by the General Services Administration to build an urban sculpture for permanent installation at 26 Federal Plaza in Manhattan. Although permanency is implicit in the commission of any site-specific work, I explicitly raised this issue with Donald Thalacker and with the GSA project manager, Julia Brown. In response to my insistent questioning, Thalacker said simply: "You get one chance in your lifetime to build one permanent work for one federal building. There is one permanent Oldenburg, one permanent Segal, one permanent Stella, one permanent Calder, and this is your one opportunity to build a permanent work for a federal site in America."[3] Brown, who negotiated the GSA contract, later publicly attested to the fact that "in all stages of the decision-making process, it was understood by Serra, and by the government, that Serra was making a permanent work for that specific space."[4] I felt that it was crucial for the issue of permanence to be fully understood, and I accepted the commission only after I had been assured repeatedly that my work would be, as stated in the GSA Manual, incorporated as "an integral part of the total architectural design." I was told that the GSA did not want it any other way.

Although Diamond later alleged that the decision to install *Tilted Arc* was made in Washington without any input from New York, his statement was untrue. Representatives from the GSA New York office were present at all important meetings in Washington and fully approved the aesthetic concept of *Tilted Arc*. The installation also had the support of representatives of the architectural firm that had originally designed the plaza and the office towers at 26 Federal Plaza.[5] Furthermore, the contracting officer of the GSA in New York went so far as to request a detailed environmental-impact study for the sculpture, which included answers to specific questions about its effect on existing pedestrian traffic patterns, about whether it would inhibit surveillance, about what additional lighting would be needed, about whether it would interfere with drainage, and so forth. The GSA office in New York also requested that I slightly change the location of the steel curve on the plaza, which I did. In 1981, as soon as the final location of the sculpture was agreed upon, *Tilted Arc* was installed and anchored into the existing steel-and-concrete substructure of the plaza. After *Tilted Arc* was dedicated, I was invited by

the NEA to the White House and congratulated by President Jimmy Carter on my contribution to the cultural heritage of the United States.

During and immediately following the installation of *Tilted Arc*, the GSA received few complaints. However, Chief Judge Edward D. Re of the Court of International Trade (located at 1 Federal Plaza) developed a particular hostility toward the work. In July and August of 1981, while the installation was still in progress, he wrote letters to the GSA in Washington in an attempt to prevent the sculpture—which he characterized as a "rusted steel barrier"—from being "permanently affixed to the plaza."[6] He pointed out that he was not alone in his distaste for the piece, noting that *New York Times* art critic Grace Glueck had described *Tilted Arc* as "the ugliest outdoor work of art in the city."[7]

Washington officials responded politely to Judge Re, and after the installation of *Tilted Arc* was completed, the criticism died down. According to GSA officials, no further complaints were received until 1984.[8] For three years there were no protests whatsoever against *Tilted Arc*. Then, at the end of 1984, Judge Re resumed his letter-writing campaign to Washington. Not only did he reiterate "aesthetic distaste" for the sculpture; he also held *Tilted Arc* responsible for the plaza's accumulation of graffiti, waste, and litter.[9] He added the bizarre claim that *Tilted Arc* had caused the downtown rat problem. Let me quote: "We have never experienced a rodent problem of the present enormity in this area. Exterminators are called regularly, at considerable expense, to rid our courthouse of this hazard."[10] Judge Re equated *Tilted Arc* with garbage, and garbage, as we know, attracts rats. This false causality, which I can only construe as a smear tactic, initiated the government's anti-*Tilted Arc* campaign. I agree with the judge that the courthouse is overrun with rats, but they were not attracted by *Tilted Arc*. They are of the two-legged variety.

In January 1985, William Diamond, then newly appointed regional administrator for the GSA, appeared on the scene. He adopted Judge Re's position, until then unilaterally held, as part of his own political agenda. My sculpture had been approved, commissioned, and installed under a Democratic administration. A Republican administration decided that it should be destroyed. The governmental decree to remove and thereby destroy *Tilted Arc* is the direct outcome of a cynical Republican cultural policy that supports art only as a commodity. Relocation would, in fact, transform *Tilted Arc* into an exchange commodity in that it would annihilate the site-specific aspect of the work. *Tilted Arc* would become exactly what it was intended not to be: a mobile, marketable product.

Diamond, a Reagan appointee, introduced the relocation idea and engineered a full-scale public campaign in order to realize this policy. He was even able to use the *New York Times* to stir up the public. In an article by Grace Glueck, published in the *Times* (February 3, 1985), Diamond was quoted as saying: "Mistakes can be made in the placement of art. At the time the impact on the site wasn't really understood."[11] In the same article, Diamond stated that since the sculpture's installation, the GSA had been inundated with complaints. Glueck failed to note that these statements were inaccurate. In the same article Glueck claimed: "[Serra] had reservations about the plaza himself. . . . his hostility to the plaza and its complex seems evident, and perhaps it was a mistake to take it on." After I read the article, I immediately phoned Glueck and told her the statements were false. She replied that what she wrote was her interpretation. When I asked her to correct her fictional "interpretation," she refused.

Such distortions of fact in the press established a climate of misinformation that allowed Diamond to proceed with his plan to call a public hearing to decide the issue. Through flyers, posters, and personalized letters of invitation, Diamond announced that a hearing would be held at the Court of International Trade on March 6, 1985. The letters that Diamond sent out stated that "the purpose of the hearings is to decide whether or not the art work known as *Tilted Arc* currently on the east plaza of the Jacob K. Javits Federal Building in Manhattan should be relocated to increase public use of the plaza."[12] The announcement elicited a tremendous response, much of it in favor of *Tilted Arc*, particularly from the art community, and eventually the hearing had to be extended to three days to accommodate the 180 people who petitioned to speak (122 in favor of retaining the sculpture, 58 in favor of relocation).

Apparently convinced that the public hearing would yield a majority in favor of removal, Diamond had in the previous months been taking bids on the removal and relocation of *Tilted Arc*. In one instance, he tried to sell the work to Storm King Art Center. H. Peter Stern, president of Storm King, told me that Diamond had approached him on this subject in January 1985. Stern was, in fact, quite interested, and hoped to get his bid in early for the work (which he clearly understood was being offered to other institutions as well). But when he heard that I was opposed to relocation, Stern immediately terminated negotiations with Diamond. At the same time, Diamond was attempting to place *Tilted Arc* with the Cooper-Hewitt Museum and with the New York City Parks and Recreation Department.[13] In all, nearly a dozen institutions were approached about accepting the sculpture for relocation.

I asked Diamond who had given him the authority to sell my work. I also asked him if that was what he meant by being impartial. He did not reply.

Having already demonstrated his express desire to remove the sculpture, Diamond nonetheless appointed himself chairman of the hearing. Many critics questioned the propriety of such an arrangement. Senator Howard M. Metzenbaum, for instance, wrote to Ray Kline, the acting administrator of the GSA, to express his concern. Metzenbaum observed that "the convening of a hearing by an administrator who, according to news accounts, has already made up his mind about the art, appears to be a breach of proper procedures and violative of the explicit agreement with the artist as to the display of the sculpture."[14] This warning had no effect, however, and Diamond proceeded not only to place himself at the head of the panel, but also to choose as two of the four remaining panelists his own staff members.[15] Diamond acted as both prosecutor and judge in this case. He assembled what was in effect a vigilante group, without legal status, to overturn a binding contract that had been concluded three years earlier. In judicial terms, the hearing was a sham, a kangaroo court. It was a mockery of due process.

From the start, Diamond sought to secure majority support for his plan to remove *Tilted Arc*. He chose a twofold strategy. First, in order to avoid the accusations of censoring a work of art, he personally refrained from commenting on the aesthetic value of *Tilted Arc*, both in his statements to the press and in his letters of appeal for participation in the hearing. Instead, he concentrated on the destructive effects he claimed the sculpture was having on social functions in the plaza. But his second tactic, the campaign he waged within the Federal Building, was quite different in content. Signs, chairs, and tables were installed in the lobby of the Federal Building directing employees to sign petitions headed "For Relocation." Signers were encouraged to put an asterisk next to their names if they found "no artistic merit in the Serra art work."[16] Diamond was successful in inciting what amounted to a hate campaign against *Tilted Arc* and in urging federal employees to condemn the aesthetics of the sculpture. At the hearing they testified accordingly, using the pubic forum to air their newly hostile responses to the sculpture. In a remarkable litany of insults, they called *Tilted Arc* "a piece of nonsense or garbage," "an arrogant, nose-thumbing gesture," "the Berlin Wall," "the Iron Curtain," "a scar on the plaza," and "a mistake."[17] Several of the speakers complained about people pissing on the sculpture or about the obscene content of graffiti scrawled on its surface. Relocation suggestions ranged from scrap yards to the Hudson River. One speaker wanted all

those in favor of the sculpture to be taken to Bellevue Hospital and signed into a mental ward.

In the most grotesque testimony, there were those who insisted that *Tilted Arc* made Federal Plaza a dangerous place to be during political demonstrations. They claimed not only that the sculpture impeded local police surveillance, but also that it could serve as a blast wall for terrorists. A federal physical-security specialist employed by the GSA compared *Tilted Arc* to devices used by bomb experts to direct explosive forces. She pointed out that *Tilted Arc* was particularly well suited to function as a terrorist device because it would "vent an explosion both upwards and in an angle towards both buildings."[18] By labeling the sculpture a terrorist device, the government played upon the public's most basic fears, attempting to create an atmosphere of paranoia.

Doubtless, to some people *Tilted Arc* was an eyesore. But the same may be said about every other work of art. There will always be viewers who react negatively, and those who act aggressively. People are entitled to their opinions; but prejudice, even if it is shared by a majority, ought not to be the reason to destroy a work of art.

Although I firmly believe that art, including art in public places, cannot be decided upon by public-opinion polls, I cannot simply ignore Diamond's implied majority claim. He is as careless with numbers as he is with other facts. Very few of those who demanded that *Tilted Arc* be removed mentioned the impediment of social functions of the plaza as a cause for their complaint. However, after the hearing, in his removal recommendation to Dwight Ink (the acting administrator of the GSA at the time), Diamond wrote that he was "impressed by the statements of the federal agencies and employees . . . who passionately sought the return of the plaza to its original space and openness."[19] Diamond stressed that since *Tilted Arc* was installed the plaza could no longer be used as a place to hold public events such as military band concerts and art shows. Yet in the plaza's seventeen years of existence prior to the installation of *Tilted Arc*, there were fewer than twenty such events.

Diamond had an even bigger problem with numbers when it came to determining a majority viewpoint at the hearing. Of 180 people who spoke at the hearing, two-thirds testified in favor of retaining *Tilted Arc* in Federal Plaza. At the same time, letters opposing removal of the sculpture were received by the GSA at the rate of 100 to one.[20] Confronted with these overwhelming numbers in opposition to his cause, Diamond conceded in a letter to Ink: "One of the things

that became extraordinarily clear to me was that certain ground rules would have to be followed. First of all, I would have to avoid any reliance on a 'numbers' game."[21] With only minority support for removal of *Tilted Arc*, Diamond—abiding by his own ground rules—ignored the numbers and insisted in statements to the press that "the people" had demanded the sculpture's removal. To me, this was one of Diamond's most despicable misrepresentations, and it was definitely the most damaging.

A major issue in the *Tilted Arc* case involved the misuse of numbers. Therefore, I would like to set the count straight. During the three-day hearing (March 6–8, 1985), the GSA presented 3,791 signatures for relocation and 3,763 signatures against relocation. These nearly equal numbers were never mentioned in Diamond's statements to the press, nor did he ever bother to mention that approximately 10,000 people work in the federal buildings at 26 Federal Plaza. Given that population of workers, 3,791 signatures for removal do not constitute a majority of any kind. They represent neither a majority of the people working in the buildings at 26 Federal Plaza, nor a majority of the people working in the federal enclave in downtown Manhattan, nor a majority of the people living in the neighborhood.

The press, however, never questioned Diamond's claim that the public opposed *Tilted Arc*. Over 350 articles in the local and national press perpetuated Diamond's misrepresentation, and their writers felt compelled to take the side of "the majority" or "the people" against the artist. Even writers who supported the sculpture felt a populist need to align themselves with this imagined majority. After a very sensible description of *Tilted Arc* and its context, *New York Times* architectural critic Paul Goldberger went on to say: "After all this, was the piece worth keeping? Ideally, yes. Public art rarely achieves a total consensus of opinion. While the government should not bow to incidental pressure so far as public art is concerned, near total opposition is another matter."[22] Paradoxically, all those critics who sided with "the majority" failed to recognize (or were content to suspect) that what is perceived as majority opinion is often a cynical cover-up for the maneuvering of government. As a result, the impression that a majority of the public wanted *Tilted Arc* removed was perpetuated, and it persists.

Populist pandering to the masses took many forms in the media. When the CBS Evening News decided to cover the *Tilted Arc* controversy, they asked me if I would help them put together a profile on the subject. They told me that they were going to support the concept of site-specificity by showing other site-specific works, so

I spent a week helping them organize TV crews in Holland, France, Germany, and Japan. It seemed like a responsible project, and I was looking forward to the broadcast. When the segment was finally aired, I was stunned. For the first thirty seconds, the camera panned across abandoned, wrecked cars; cut to burnt-out buildings and urban rubbish; and then cut to *Tilted Arc,* with a voice-over stating: "New Yorkers have had enough of this." I'd been had once again. I should have known that television delivers people,[23] that all public opinion is manipulated opinion. The pragmatics of television do not admit rejoinders or resistance. There is no equal time.

Later, the issue of site-specificity that I had tried to clarify for CBS was grossly misrepresented by Diamond. In his removal recommendation, Diamond presumed to disqualify my concept of site-specific sculpture. He was careful to avoid any attempt to prove the "unspecificity" of *Tilted Arc.* Instead, he relied on a tactic of diversion based on misrepresentation of facts. Without referring to specific works, Diamond wrote: "I understand that both the Port Authority of New York, New Jersey, and the City of New York have relocated Serra pieces from downtown Manhattan. Accordingly, I have rejected claims proffered by the proponents of retention that the sculpture is site specific and can not be relocated."[24] Once again, Diamond distorted the truth. He was referring to *TWU* and *Rotary Arc*, works sited in lower Manhattan. But neither the Port Authority nor the City of New York actually owned these pieces, so it would not have been their prerogative to relocate them. Furthermore, neither piece *was* relocated. Both *TWU* and *Rotary Arc* were originally installed on the basis of temporary permits. After the permits expired, both sculptures were dismantled. During the hearing, Diamond voiced his admiration for *Rotary Arc*, and clearly he was aware that the work was still in place. In fact, *Rotary Arc* was dismantled only in 1987—two years after Diamond made his false statement about its removal and relocation.

Donald Thalacker, the head of the Art-in-Architecture Program of the GSA, defended *Tilted Arc* throughout the controversy. He testified at the public hearing against the removal of the sculpture. On May 9, 1985, Thalacker wrote an exhaustive memo to Dwight Ink, the administrator of the GSA, correcting factual errors, pointing out distortions in government documents pertaining to *Tilted Arc*, and warning of the effects of Diamond's mishandling of the hearing. Although he was seriously ill, Thalacker gave a lengthy deposition in support of my case and placed himself in an embattled, precarious position to defend not only my rights

but artists' rights in general. He continued to fight for the integrity of the Art-in-Architecture Program until he died in 1987.

In his memo to Ink, later made public, Thalacker noted "a widespread perception that the official GSA-sanctioned actions affecting the prehearing activities . . . have been manipulated."[25] Ink ignored Thalacker's admonitions, however, and, backing Diamond's recommendation, called for the relocation of *Tilted Arc*. Ink's decision was extraordinary in that he never stated why *Tilted Arc* should be relocated. The closest he came to providing a reason was his conclusion that "in the final analysis . . . the concerns of the many employees who work in the plaza buildings, the public they serve, and the people who reside in the area, have to be given greater weight than the views we received from members of the art community—most of whom do not live or work near the plaza—in determining whether efforts should be made to relocate the *Arc* (as contrasted with the far more drastic option of destruction)."[26]

The only other aspect of Ink's decision worth mentioning is his drastic misreading of site-specificity: "The *Arc* was planned very carefully and specifically by the artist for the plaza. In that sense it is site-specific. I am not persuaded, however, that it would be destroyed if it were moved to another compatible place with adequate viewing space."[27] Ink concluded: "Therefore, the regional administrator should seek a new location for the *Arc* where it would not suffer significant loss of integrity as an artwork."[28] Ink wanted it both ways. On the one hand, he admitted that *Tilted Arc* was site-specific, "carefully and specifically" planned for the plaza; on the other hand, he ordered the relocation to proceed. Fearful of calling for outright destruction, Ink instead created a new definition of site-specificity that allowed for relocation.

In his report, Ink asked the National Endowment for the Arts to establish a "relocation review panel" to judge the suitability of alternative sites for *Tilted Arc*. The NEA assembled a distinguished seven-member panel of artists, architects, and legislators to consider the matter.[29] The panel met in New York on December 15, 1987, and visited the Federal Plaza to see *Tilted Arc* in situ. At that time, I presented them with my arguments for the importance of the work's site-specificity, which precludes the possibility of relocation.[30]

As I pointed out, *Tilted Arc* was conceived from the start as a site-specific sculpture and was not meant to be "site-adjusted" or, as Diamond put it, "relocated." Site-specific works deal with the environmental components of given places. The scale, size, and location of a site-specific work are determined by the topography

of the site, whether urban, landscape, or an architectural enclosure. The work becomes part of the site, and it restructures, both conceptually and perceptually, the organization of the site. My works never decorate, illustrate, or depict a site.

The specificity of site-oriented works means that they are conceived for, dependent upon, and inseparable from their locations. The scale, the size, and the placement of sculptural elements result from an analysis of the particular environmental components of a given context. The preliminary analysis of a given site takes into consideration not only formal but also social and political characteristics of the site. Site-specific works invariably manifest a judgment about the larger social and political context of which they are a part. Based on the interdependence of work and site, site-specific works address their context, entering into a dialogue with their surroundings. Unlike modernist works that give the illusion of being autonomous from their surroundings, and which function critically only in relation to the language of their own medium, site-specific works emphasize the comparison between two separate languages and can therefore use the language of one to criticize the language of the other.

It is the explicit intention of site-specific works to alter their contexts. Le Corbusier understood this as early as 1932. He wrote in a letter to Victor Nekrasov:

> You have in Moscow, in the churches of the Kremlin, many magnificent Byzantine frescoes; In certain cases, these paintings do not undermine the architecture. But I am not sure that they add to it, either; this is the whole problem of the fresco. I accept the fresco not as something which gives emphasis to the wall, but on the contrary, as a means to destroy the wall violently, to remove any notion of its stability, weight, etc. I accept Michelangelo's *Last Judgment* in the Sistine Chapel, which destroys the wall; and I accept the Sistine Chapel's ceiling as well, which completely distorts the very notion of ceiling. The dilemma is simple: if the Sistine Chapel's wall and ceiling were intended to be preserved as form, they should not have been painted with frescoes; it means that someone wanted to remove forever their original architectural character and create something else, which is acceptable.[31]

This concept ought to be understood and protected. However, the contextual issues of site-specific works remain problematic. Site-specificity is not of value in itself. Works which are built within the contextual frame of governmental, corporate, educational, and religious institutions run the risk of being read as tokens of those institutions. One way of avoiding ideological cooptation is to choose a leftover site that cannot be the object of ideological misinterpretation. However, there is no neutral site. Every context has its frame and its ideological overtones. It is a matter of degree. But there are sites where it is obvious that an art work is being

subordinated to / accommodated to / adapted to / subservient to / useful to. . . . In such cases it is necessary to work in opposition to the constraints of the context, so that the work cannot be read as an affirmation of questionable ideologies and political power. I am not interested in art as affirmation or complicity.

In its recommendation to the GSA, the NEA panel concurred with my definition of site-specificity and said: "We have been presented with a statement by the artist about the site-specific nature of his *Tilted Arc* sculpture. Our visit to the Federal Plaza to review the actual relationship of the work to its site led us to conclude that there was merit in the artist's statement that relocation of the work would destroy it."[32] The panel further recommended that the GSA discontinue its search for alternative sites for *Tilted Arc*. After years of searching, Diamond had been able to present only two "alternative sites" at the NEA panel meeting. One of the two institutions was in fact not completely committed to accepting the sculpture, and was confused about the implications of relocation. The other institution, which had originally expressed interest in accepting *Tilted Arc*, withdrew its offer immediately following my presentation to the NEA panel.[33]

One would assume that the GSA, having failed so utterly to uncover a possible site for relocating *Tilted Arc*, would have adhered to the procedures established by its own administrator and given up. Instead, the GSA decided to ignore the NEA panel's recommendation. When the government did not get the recommendation it expected from the NEA panel, it ignored the recommendation. In its repugnant and cynical view of democracy, the government showed a total disregard for all processes and institutions that did not affirm its policies.

After it became clear to me that the GSA was not willing to respect the implications of the concept of site-specificity—even though Ink had admitted that *Tilted Arc* was site-specific—I took my case to court. The case that my attorneys brought against the United States Government in December 1986 addressed both the terms of my contract with the GSA and what I took to be abridgments of my constitutional rights. This suit attempted to prevent the government from removing or relocating *Tilted Arc*, and it sought to recover damages for breach of contract, trademark violations, copyright infringement, and violations of my First and Fifth Amendment rights. In a decision handed down on August 31, 1987, Judge Milton Pollack of the United States District Court dismissed all charges, disallowing the copyright issues and the contract claim as being outside his jurisdiction and striking down the constitutional questions for lack of merit.

An appeal was filed in the United States Court of Appeals on December 15, 1987,

calling for a reversal of the decision regarding the constitutional issues. My attorneys contended that insufficient weight had been given to the fact that *Tilted Arc* was created for one site and one site only, and to the fact that, since to remove the work would be to destroy it, the proposed "relocation" would violate my right to free expression. They argued that "once a medium of expression—be it writing, film, theater, painting, or sculpture—is publicly installed or displayed, First Amendment rights attach which prohibit the government from removing the expression on the basis of its content."[34] Cited as a precedent was the case of *Board of Education v. Pico* (1982). In that case, the board of education had ordered removed from school library shelves nine books that were deemed "anti-American, anti-Christian, anti-Semitic, and just plain filthy." The Supreme Court found for the plaintiff on appeal, ruling that the books could not be removed simply because the board disliked their contents. Applying this principle to the *Tilted Arc* situation, my attorneys noted that "dislike" was the only reason cited by Ink for removal of the sculpture. Following this logic, they concluded: "If the issue here were only *removal* of *Tilted Arc*, the authorities we have cited would preclude this result . . . [but this] result is put beyond question, we submit, when we recall that to remove *Tilted Arc* is to destroy it. It is no overstatement to say that we here deal with conduct akin to book-burning."[35]

United States District Attorney Rudolph Giuliani responded with a brief for the defendants, the GSA. The government argued against the applicability of both the First Amendment (free speech) and the Fifth Amendment (due process of law) in this case. In a remarkable (and unabashedly authoritarian) rebuttal, the government summarized its opinion as follows: "As a threshold matter, Serra sold his 'speech' to the government. . . . As such, his 'speech' became government property in 1981, when he received full payment for his work. . . . An owner's '[p]roperty rights in a physical thing have been described as the rights to possess, use and dispose of it.'"[36] This is a rather incredible statement by the government. If nothing else, it affirms the government's commitment to private property over the interests of art or free expression. It means that if the government owns the book, it can burn it; if the government has bought your speech, it can mutilate, modify, censor, or even destroy it. The right to property supersedes all other rights: the right to freedom of speech, the right to freedom of expression, the right to the protection of one's creative works.

The Court of Appeals upheld the government's position. Judge Jon O. Newman dismissed my appeal on May 27, 1988. He upheld the decision of the lower court on both questions, free expression and due process. Newman held that "the First

Amendment has only limited application in a case like the present one where the artistic expression belongs to the government rather than a private individual. . . . In this case, the speaker is the United States Government. *Tilted Arc* is entirely owned by the government and is displayed on government property. Serra relinquished his own speech rights in the sculpture when he voluntarily sold it to the GSA."[37] If I had known that the government would claim *Tilted Arc* as its own speech and destroy it, I would never have accepted the deal. *Tilted Arc* was never intended to—nor did it—speak for the United States Government.

A key issue in the case, as in all First Amendment cases, was the right of the defendant to curtail free speech on the basis of dislike of the content. Here the court stated that aesthetic dislike *is* sufficient reason to destroy a work of art: "To the extent that GSA's decision may have been motivated by the sculpture's lack of aesthetic appeal, the decision was entirely permissible. . . . GSA, which is charged with providing office space for federal employees, may remove from its buildings artworks that it decides are aesthetically unsuitable to particular locations."[38] Yet, on this very issue, Supreme Court Justice Oliver Wendell Holmes cautioned over eighty years ago that "it would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits. At the one extreme some works . . . would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their authors spoke."[39] Justice Holmes's warning should extend to all government officials, whether they be judges or administrators of governmental agencies.

With regard to the Fifth Amendment issue, the denial of my right to due process under the law in the *Tilted Arc* hearing, the court dismissed my claim. The decision did not even consider the substance of the claims about distortion and manipulation or the hearing. The court ruled that "accepting Serra's factual allegations as true for the purposes of this appeal, we conclude that his due process claim fails as a matter of law. . . . Serra was not constitutionally entitled to a hearing before the sculpture could be removed. The lengthy and comprehensive hearing that was provided was therefore a gratuitous benefit to Serra. Even if Diamond was not entirely impartial, Serra received more process than what was due."[40] This was a blatant trashing of democratic procedures.

In the end, I was left with a decision by the Federal Court of Appeals that protected a federal agency (the GSA) and exonerated a federal official (Diamond), even if he was "not entirely impartial." The court's decision merely rubber-stamped

the official's duplicitous conduct. And in the same sentence the court dismissed my due-process claim, saying I had received "more process than what was due"—as if I should be thankful for the gratuity of an admittedly manipulated hearing. This cynical decision by the appeals court needs to be challenged, if only by my own denunciation. I have no further protection under the law.

In a sense Judge Newman was correct when he said that my lawsuit was "an invitation to the courts to announce a new rule . . . that an artist retains a constitutional right to have permanently displayed at the intended site a work of art that he has sold to a government agency."[41] The "new rule" that I am asking for is moral rights legislation. Such coverage now exists in every other civilized country in the world. In the United States, this new rule would acknowledge a relationship between an artist and his or her work even after the work had been sold, and no matter to whom.

In the United States, property rights are afforded protection, but moral rights are not.[42] Until 1988, the United States adamantly refused to join the Berne Copyright Convention (1986), the first multilateral copyright treaty, now ratified by seventy-eight countries. The American refusal was based on the fact that the Berne Convention grants moral rights to authors. Such a policy was—and is—incompatible with U.S. copyright law, which recognizes only economic rights. Massachusetts, California, and New York have enacted moral rights statutes on the state level, but federal copyright laws tend to prevail, and those are still wholly economic in their motivation. Indeed, the recent pressure for the United States to agree (at least in part) to the terms of the Berne Convention came only as a result of a dramatic increase in the international piracy of American records and films.

In September 1986, Senator Edward Kennedy introduced a bill called the Visual Artists Rights Act (S. 2796). This bill attempts to amend federal copyright laws to incorporate some aspects of international moral rights protection. Kennedy's bill would prohibit the intentional distortion, mutilation, or destruction of works of art after they have been sold. Moreover, the act would empower artists to claim authorship, to receive royalties on subsequent sales, and to disclaim their authorship if the work is distorted. This legislation would allow the artist (or the artist's heirs) to sue to reverse or redress the alteration of any art work. In the past, such moral rights legislation would have prevented Clement Greenberg and the executors of David Smith's estate from authorizing the stripping of paint from several of Smith's later sculptures so that they would resemble his earlier—and more marketable—unpainted sculptures. Such moral rights legislation would have

prevented a Japanese bank in New York from removing and destroying a sculpture by Isamu Noguchi simply because the bank president did not like it. And such moral rights legislation would have prevented the United States Government from destroying *Tilted Arc*.

If Senator Kennedy's moral rights bill were enacted, it would be a legal acknowledgment that art can be something other than a mere commercial product. The bill makes clear that the basic economic protection now offered by U.S. copyright law is insufficient. The bill recognizes that moral rights are independent from the work as property and that they supersede—or at least coincide with—any pecuniary interest in the work. Moreover, the bill acknowledges that granting moral rights protection serves society's interests in maintaining the integrity of its art works and in promoting accurate information about authorship and art. And most important, under the proposed bill (still not passed), the destruction or mutilation of a work of art would be a federal crime.

On March 1, 1989, the Berne Convention Implementation Act (which President Reagan had signed in October 1988) became U.S. law. When I learned on March 13 that the government had started to dismantle *Tilted Arc*, I went before the United States District Court seeking a stay of the destruction so that my lawyers would have time to study the applicability of the Berne Convention to my case. I expected—as would be the case in other countries that became signatories to the treaty—to be protected by the moral rights clause, which gives an artist the right, even after a work is sold, to object to "any distortion, mutilation or other modification" that is "prejudicial to his honor and reputation." I learned, however, that for my case (and for others like it) the treaty ratified by Congress is a virtually meaningless piece of paper, because it excludes the key moral rights clause. Those responsible for the censorship of the treaty are the powerful lobbies of magazine, newspaper, and book publishers. Fearful of losing economic control over authors, and faced with the probability of numerous copyright suits, these lobbies pressured Congress into stating that the moral rights clause must not be enforced in the United States. Publishers can continue to crop photos; magazine and book publishers can continue to mutilate manuscripts; black-and-white films will continue to be colorized. And the federal government can continue to destroy art.

PART I

Correspondence and Documents Preceding the Public Hearing

Introduction

This part of the book is devoted to a series of documents produced prior to the public hearing that was held in March 1985. Although one memo does pertain to the time of the original commission, the emphasis here is on the letters and memos that chart the events immediately preceding the hearing.

Reflected in these documents are a number of key issues, three of which take on particular importance in light of material presented in later parts of this book: (1) the nature of the responses to *Tilted Arc* between the time of its initial erection in Federal Plaza in 1981 and the complaints voiced in 1984, (2) the attempts made by the GSA to find an alternative site for the work without Richard Serra's knowledge, and (3) the manipulation of public sentiment against the work immediately before the public hearing.

Although opponents of *Tilted Arc* spoke, during the hearing and in subsequent documents, of a continuous and ever-increasing public outcry against the work, beginning with its initial erection in the plaza and continuing up until the time of the hearing, the record does not support this construction of events. On the contrary, the record indicates that, after some initial negative responses (represented here by Judge Re's letter of August 18, 1981), there was a hiatus of some three years, during which there were very few negative outcries. In 1984, however, Judge Re resumed his lobbying efforts against the work. In response to his renewed complaints, the General Services Administration (the agency which originally commissioned *Tilted Arc*) decided to hold a public hearing on whether to remove the work from Federal Plaza.

A number of the documents included in this part also reflect the fact that the GSA did not keep Serra informed of its actions concerning his work. As the letters from Barbara Gerwin indicate, the GSA was considering possible alternative sites for *Tilted Arc* even before the public hearing—an inquiry about which Serra heard only indirectly. Serra's categorical response to the GSA's attempts to find an alternative location for the work is contained in his letter to Donald Thalacker dated January 1, 1985.

That the hearing which took place in 1985 was hardly the neutral forum William Diamond (the GSA's Regional Administrator in New York) claimed to be conducting comes across in a number of the documents included toward the end of this part. Not only were alternative sites already being considered, but Diamond was actively

soliciting responses which would support his own negative assessment of the work. In addition to published remarks quoted in an article by Grace Glueck in the *New York Times* of February 3, 1985, the letter from the Lower Manhattan Cultural Council indicates that Diamond presented his own personal views even in the context of a request for an official opinion on the work.[1]

Important too is the fact that both Diamond's general letter and the official announcement of the hearing contained an implied value judgment in the opposition they established between retaining *Tilted Arc* and relocating it in order to "increase public use of the plaza." Furthermore, workers in the Federal Building were encouraged, via anonymous leaflets, to sign a petition denouncing *Tilted Arc* and to speak out against the work at the public hearing.

General Services Administration Factsheet Concerning the Art-in-Architecture Program for Federal Buildings

HISTORY

In 1855, when Congress decided to decorate the interior of the Capitol with artwork, it commissioned Constantino Brumidi to paint frescoes for the House of Representatives committee rooms for $8.00 a day. During the Depression era, the New Deal art programs commissioned paintings and sculpture for the embellishment of newly constructed federal buildings, post offices, and courthouses nationwide, producing the first body of truly public American art.

The U.S. General Services Administration's (GSA) Art-in-Architecture Program continues this longstanding tradition of government support for the arts.

The genesis of GSA's present Art-in-Architecture Program can be traced to a report issued in 1962 by the President's Ad Hoc Committee on Federal Office Space titled *Guiding Principles for Federal Architecture.* The committee recommended that "where appropriate, fine art should be incorporated in the designs (of new Federal buildings) with emphasis on the work of living American artists."

As the head of the government agency responsible for the design and construction of federal buildings, GSA's administrator implemented the recommendations of the *Guiding Principles* in January 1963 with a direct policy order establishing an allowance for fine arts of one-half of one percent of the estimated cost of construction for new Federal buildings and buildings undergoing repair and alteration. Such works are intended to be an integral part of the total architectural design and enhance the building's environment for the occupants and the general public.

Due to rising inflation in the construction industry, the program (which is funded through the construction budget) was temporarily halted in 1966. It was revitalized in 1972 when GSA renewed its commitment to commission exceptionally talented American artists.

THE COMMISSIONING PROCESS

1. The project architect, aware that one-half of one percent of the estimated

construction cost is the amount set aside specifically for Art-in-Architecture projects, develops an Art-in-Architecture proposal as part of his overall architectural design services. The Art-in-Architecture proposal must include the location and nature of the artwork(s) to be commissioned.

2. GSA then requests the National Endowment for the Arts (NEA) to appoint art professionals, primarily from the region of the project, to meet with the design architect for the purpose of nominating three to five artists for each proposed artwork.

3. This artist-nominating panel meets at the project site and reviews visual materials of artists proposed by GSA, the NEA-appointed panelists, and the architect. Artists wishing to receive GSA consideration are requested to send a resume and 35mm slides of their work to the following address:

Art-in-Architecture Program
General Services Administration
Washington, DC 20405
(202) 566-0950

4. The artist nominations are transmitted to GSA by the NEA. The Administrator of GSA makes the final selection.

5. After the artist has been selected, a fixed price contract is negotiated. Contract award amounts negotiated for Art-in-Architecture projects include all costs associated with the design, execution, and installation of the artwork.

Memo from David R. Dibner

Assistant Commissioner, Office of Design and Construction, Art-in-Architecture Program

to the Contracting Officer

March 3, 1980

Re: Artist's Proposal for the U.S. Customs Court and Federal Building, New York, N.Y.

This is to advise you that the Art-in-Architecture Design Review Panel met today in Washington, D.C. The panel reviewed and approved the artistic expression of Richard Serra, the artist, for the U.S. Customs Court and Federal Building for an outdoor sculpture on the plaza. The voting panel members were the Commissioner of the Public Buildings Service, Mike Marschall, Karel Yasko, and myself. You are hereby authorized to process the appropriate paperwork for payment according to article 7a of his contract.

Letter from Edward D. Re

Chief Judge, U.S. Court of International Trade, New York

to Gerald P. Carmen

Administrator, General Services Administration, Washington, D.C.

August 18, 1981

Dear Mr. Carmen:

I apologize for not providing you with sufficient time to respond to my letter of July 27, 1981, pertaining to the rusted steel barrier in front of our courthouse. I want to share with you an article from the *New York Times*, which may not have been brought to your attention.

The article, as you will note, describes the rusted steel wall as "an awkward, bullying piece that may conceivably be the ugliest outdoor work of art in the city," and asks, "why despoil this spacious plaza?" I will not comment on the declared purposes of the artist, except to state that the barrier indeed "alters and dislocates the decorative function of the plaza." The 120-foot wall effectively destroys not only the beauty and spaciousness, but also the utility of the plaza, which has been used for ceremonies.

All the comments I have heard unanimously condemn this architectural barrier, not only for its stark ugliness, but also because of the taxpayers' dollars that were spent—we have heard estimates up to $200,000. This waste of funds seems particularly improper during a national movement toward reduced government spending.

Since this obstruction is destructive of the plaza, and despoils a beautiful landmark, may I ask what procedures need be followed for the purpose of preventing its being permanently affixed to the plaza, and its ultimate removal. All will agree that the cost of removal will be greatly offset by the restoration of the beauty of the plaza and its continued utility in this historic area in the City of New York.

I wish to thank you very much for your thoughtful consideration and response.

Cordially,

Edward D. Re

Chief Judge

cc: William E. Foley, Director, Administrative Office of the United States Courts, Washington, D.C.

Letter from Edward D. Re to Ray Kline

Acting Administrator, General Services Administration, Washington, D.C.

November 5, 1984

Dear Mr. Kline:

Three and one-half years have passed since the erection of the *Tilted Arc* in the Federal Plaza of our courthouse and the adjacent Jacob K. Javits Federal Office Building. The reaction of those who work in the area, who must look at this "work" on a daily basis, is uniformly negative. The Chief Judges of the United States Courts, the United States Attorney for the Southern District, and many other federal and state judges and public officials have repeatedly expressed their strong desire to me and to others that this steel wall be removed. Over thirteen hundred federal employees have signed petitions demanding its removal. Time has not mellowed this slab of iron, and the natural elements, assisted by would-be graffiti artists, have further desecrated the plaza to the point where it has become intolerable. I have been urged to take whatever steps are necessary to have it removed from its present site.

Even if one were to assume, for the sake of argument, that this "piece" once had some semblance of artistic "shock" value, this minimal value has long since dissipated, and we who work here are left with a once beautiful plaza rendered useless by an ugly, rusted, steel wall. Students of the urban development all agree that more open, humane spaces are essential in overly dense areas. Yet, this *Tilted Arc* completely ruins one of the rare open spaces in the most densely populated section in the entire country, lower Manhattan.

It is inconceivable that General Services Administration's Art-in-Architecture Program and its decision makers did not see fit to obtain the views of responsible members of this community before erecting this rusted steel barrier. We have gone to considerable expense to provide proper identification for the courthouse, and to generate respect for its symbol of justice. The *Tilted Arc* totally obstructs the architectural beauty of the Court, the Jacob K. Javits Federal Office Building, and detracts from the beauty of the fountain that is situated in the plaza.

The negative impact of this wall goes far beyond aesthetic distaste. The psychological impact on members of the community who wish to utilize the plaza has also been profound. Before the imposition of this rusted steel wall, the plaza served as a pleasant and humane open space for federal employees and the citizens

of New York. The plaza and fountain were designed for the benefit of the people who live and work in this area. Contrary to this purpose, the wall intimidates and prevents people from utilizing the plaza. For example, prior to its installation, concerts were often held in the plaza during warm weather. Since the installation of this steel wall, not a single concert has been held in the plaza. Instead, musicians now play on Broadway, obstructing traffic. By cutting the plaza in half, with a twelve-foot high brown steel wall, this piece has eliminated the utility as well as the aesthetic vista of the plaza for thousands of New Yorkers, many of whom toil in windowless offices. That the needs of the court, its employees and, indeed, the entire community can be ignored in this fashion constitutes insensitivity that ought to be remedied.

For your further consideration are the remarks which appeared in the *Daily News* and the *New York Times* when the *Tilted Arc* was installed. From Beth Fallon of the *Daily News*: "The line has to be drawn somewhere, and to me the Rusty Steel Thing is that somewhere." The editorial section of the *New York Times*: "It is ironical that today a government agency should try to achieve a posture of superiority over its fellow townspeople by shocking them with such expressions in art as the *Tilted Arc*, endowed with a federal grant of an unbelievable $175,000." And from a report in the *New York Times* on outdoor sculpture around New York: "The question here is: why despoil this spacious plaza? *Tilted Arc* is an awkward bullying piece that may conceivably be the ugliest outdoor work of art in the city."

As if all of the foregoing were not reasons enough for instant removal, one cannot overlook the damaging effects on the masonry in the plaza, the cost of removing graffiti, and the litter and waste which accumulate in the well dug to support this structure. We have never experienced a rodent problem of the present enormity in this area. Exterminators are called regularly, at considerable expense, to rid our courthouse of this hazard.

Finally, but by no means of minor importance, is the loss of efficient security surveillance. The placement of this wall across the plaza obscures the view of security personnel who have no way of knowing what is taking place on the other side of the wall.

Enclosed please find my prior correspondence on this matter. This letter as well as the enclosed letters are designed to make it clear that it is the firm desire of this court and the federal, state and city communities that the rusted steel wall erected on the plaza be removed.

I should like to know whether we can count upon the cooperation of the General Services Administration to have it removed as soon as possible. A prompt reply would be greatly appreciated.

Cordially,
Edward D. Re
Chief Judge

cc: Lester Mitchell, Commissioner of Public Buildings Service, General Services Administration, Washington, D.C.

Ted Weiss, Congressman, Washington, D.C.

William J. Diamond, Regional Administrator, General Services Administration, New York

Letter from Ray Kline to Edward D. Re

December 10, 1984

Dear Judge Re:

Thank you for your letter of November 5, 1984, concerning the sculpture *Tilted Arc* located on the plaza of the Jacob K. Javits Federal Building. In your letter you cite objections to the work and request its removal.

As background, *Tilted Arc* was commissioned on the advice of panelists in the private sector art profession appointed by the National Endowment for the Arts. After the work was installed, a petition signed by over thirteen hundred employees was sent to this agency requesting its removal as correctly noted in your letter. At the same time, we also received letters from the major art institution officials in New York City commending us for sponsoring what they viewed as a major and significant achievement in public art. Some of those letters are enclosed for your reference.

We have always desired to present a fair and balanced view with regard to each installation; and we have learned that initial reactions often result from the new and unfamiliar aspects of the artwork, not the inherent quality. The past three years seem to have mitigated the newness and the unfamiliarity of *Tilted Arc*.

We are certainly willing to explore possible courses of action. Therefore, we have decided to hold an open public hearing on the subject, allowing ample time to inform the local community, including the building occupants. Prior to the hearing for relocation of the sculpture, alternative options including cost, will be investigated.

We are sure you can appreciate our dilemma concerning the potential removal and relocation of this work of art. A great divergence of opinion is possible, even probable, in judging the merits of a particular work of art. Historically, initial reactions to new artworks are often negative while public acceptance takes time to develop. This was the case with the large Picasso sculpture in Chicago and the Calder sculpture in the center of Grand Rapids, both of which achieved landmark status after slightly more than four years.

It will take several months to set up the public hearing. As soon as we have established the time, date, and location of the hearing, we will let you know.

Sincerely,
Ray Kline
Acting Administrator

Memo from Lester L. Mitchell

Commissioner, Public Buildings Service

to William J. Diamond

Regional Administrator, General Services Administration, Region 2, New York

December 10, 1984

Re: Proposed public hearing on *Tilted Arc* sculpture

Enclosed is our response to Chief Judge Edward D. Re's letter dated November 5, 1984, a copy of which was sent to you, on the disposition of the subject sculpture.

As you will note, we are prepared to conduct a public hearing to allow the views of all interested parties to be heard. In anticipation of this hearing, it is important that we determine in advance the options and corresponding cost of the decisions we may wish to consider.

Specifically, we need to know if there are other Federal sites in the area where the sculpture could be appropriately sited. If not, we would be interested in learning if there are state or city-owned sites which might be appropriate. In either case, it would also be necessary to know the approximate cost of removing the sculpture from the plaza and relocating it to an alternate site.

The request for this information is not, and should not be construed to be, an endorsement of the sculpture's removal and relocation.

I would appreciate receiving the requested information not later than January 30, 1985.

Memo from William J. Diamond to Lester L. Mitchell

(no date)

Re: Proposed Public Hearing on 26 Federal Plaza Sculpture

As per your request of December 10, 1984 the following information is provided.

A public hearing has been scheduled for March 6, 1984 to allow the views of all interested parties to be heard on the future use of the east plaza at the subject building. Should the situation warrant we will poll federal agencies for possible relocation sites. Among these could be Liberty Island, Gateway National Park, Fort Totten, Fort Wadsworth, and various VA installations. In addition, the City Parks Commissioner has been alerted along with the State University of New York at Purchase, and the Storm King Art Center.

Our best estimates at this point indicate that if it is decided to undertake relocation it would cost $35,000 to dismantle the artwork and restore the plaza and $50,000 to ship and reerect it within one hundred miles.

Letter from Barbara G. Gerwin

Regional Counsel, General Services Administration, New York

to Henry R. Stern

Commissioner, New York City Department of Parks

December 7, 1984

Dear Henry:

As we discussed, I have enclosed a copy of a photograph of the *Tilted Arc* by Richard Serra, with the information you requested printed on the back.

All I need immediately is a letter from the New York City Department of Parks stating that you are interested in considering the placement of this sculpture in one of your facilities.

I conveyed your good wishes to Bill Diamond.

Sincerely,
Barbara G. Gerwin
Regional Counsel

Letter from Barbara G. Gerwin to Lisa Taylor

Director, Cooper-Hewitt Museum, Smithsonian Institution, New York

December 10, 1984

Dear Ms. Taylor:

Enclosed is the photocopy per our conversation today.

The ballpark figure for installing this sculpture in an "earth" area could cost as much as $50,000 depending upon the structural support and foundation required.

As I mentioned, all I need immediately is a letter from your institution or other governmental instrumentality indicating an interest in considering the placement of this sculpture on their premises.

Thank you for your courtesy and cooperation in this matter.

Barbara G. Gerwin
Regional Counsel

Letter from Randall Bourscheidt

Deputy Commissioner, Department of Cultural Affairs, City of New York

to William J. Diamond

December 17, 1984

Dear Bill:

It was very nice to meet you the other night at the Mayor's dinner. Bess and I are quite enthusiastic about your suggestion of finding a new location for the Richard Serra sculpture. Please let us know when you would like to discuss it.

Sincerely,
Randall Bourscheidt
Deputy Commissioner

cc: Bess Meyerson[2]

Letter from Barbara G. Gerwin to John C. Egan

Commissioner, State of New York Office of General Services, New York

December 21, 1984

Dear Commissioner:

As we discussed yesterday, I have enclosed a copy of a photograph of the *Tilted Arc* by Richard Serra, with some pieces of information printed on the back.

All I need immediately is a letter from the Office of General Services stating that you are interested in considering the placement of this sculpture in a state facility.

It was a pleasure talking with you.

Best wishes for the holidays.

Sincerely,
Barbara G. Gerwin
Regional Counsel

Letter from David R. Collens

Director, Storm King Art Center

to Barbara G. Gerwin

December 26, 1984

Dear Ms. Gerwin:

We understand from Karl Katz there is a chance the Richard Serra sculpture *Tilted Arc* might be given to a museum. We would be delighted to receive this piece for our sculpture garden.

Should you require any further information on the Art Center, we would be happy to provide additional materials.

With best regards,

Sincerely,
Storm King Art Center
David R. Collens
Director

Letter from Richard Serra to Donald Thalacker

Director, Art-in-Architecture Program, General Services Administration, Washington, D.C.

January 1, 1985

Dear Don Thalacker,

Since I understand that the GSA is already offering my piece for relocation, I want to make it perfectly clear that *Tilted Arc* was commissioned and designed for one particular site: Federal Plaza. It is a site-specific work and as such not to be relocated. To remove the work is to destroy the work.

Sincerely,
Richard Serra

Letter from John C. Egan to Barbara G. Gerwin

January 4, 1985

Dear Barbara:

We have made a careful review of the material you forwarded with your December 21, 1984 letter regarding possible availability of the outstanding sculpture work *Tilted Arc* by Richard Serra, and we find that we really don't have a location available at the moment.

However, if something does develop, I will get back to you.

Sincerely,
John C. Egan

Letter from H. Peter Stern

President, Storm King Art Center

to William J. Diamond[3]

January 21, 1985

Dear Bill:

This letter will confirm the conversation we had earlier this month. We are most anxious to have Richard Serra's *Tilted Arc* at the Art Center. We have a magnificent location for this work. However, we do not want to install any work of art against the wishes of its creator. We would accept the piece only with the artist's consent.

With very best regards.

Sincerely,
Storm King Art Center
H. Peter Stern
President

Letter from Frederieke S. Taylor

Executive Director

and Stephen S. Halsey

Chairman, Lower Manhattan Cultural Council

to William J. Diamond

January 23, 1985

Dear Mr. Diamond:

The Board of the Lower Manhattan Cultural Council has asked us to thank you for meeting with us and sharing with us your views on Richard Serra's *Tilted Arc*, and the Customs House. We found your observations to be enlightening and your candor refreshing.

We have discussed at some length your request for the Lower Manhattan Cultural Council to participate in the hearing relating to *Tilted Arc*, and have concluded that it would be inappropriate for us to be involved in such a forum.

Please understand that our decision in no way should be construed as approval or condemnation of Mr. Serra's work, nor of your proposal to find it another site. As you know, the Lower Manhattan Cultural Council has, over the years, played a pivotal role in fostering the arts and cultural activities in the lower Manhattan community, and it is not in our charter to pass judgment on the merits of artistic endeavors.

Again, please accept our appreciation for joining with us at our meeting and our trust that you will act in the best interests of the public and of public art in finding an appropriate course of action in reference to Mr. Serra's sculpture.

Sincerely,
Frederieke S. Taylor
Stephen S. Halsey

Memo from Ray Kline to the Regional Administrators, General Services Administration

January 30, 1985

Re: Delegation of Authority to remove and/or relocate artwork commissioned under GSA's Art-in-Architecture Program

There has been some discussion in the past about removal and/or relocation of artworks commissioned under GSA's Art-in-Architecture Program.

It is a very serious matter when artworks, commissioned under this program, are singled out for potential removal or relocation. At the few instances when such actions were considered, we have proceeded with utmost caution, calling for public hearings and accepting written arguments along with a full transcription of the testimony presented.

The authority to make the final decision concerning artist selections, artwork removals, and artwork relocations is with the Administrator. This authority is not redelegated.

I want to take this opportunity to reaffirm my support for the efforts and the objectives of our Art-in-Architecture Program. As you know, the Program's accomplishments have been singled out for a Presidential Award to be presented by President Reagan at the White House on January 30, 1985. This Program's achievements have been evaluated by private-sector professionals to be one of the very few Federal efforts in the past decade worthy of a Presidential Award.

Text of the First Presidential Award for Design Excellence, Awarded to the GSA's Art-in-Architecture Program on January 30, 1985[4]

Artists have been given aesthetic freedom and support, even when their works have been controversial. But when new works have sometimes met with puzzlement or hostility, they have usually come to be increasingly appreciated by their "using" public. . . .

The program is also to be commended for its intelligent willingness to sustain potential risks in the selection of artists through the solicitation of nominations from peer groups appointed by the National Endowment for the Arts.

Installations that may have been judged by the press, critics and others to be difficult to comprehend (or less than completely successful) are to be expected in such a courageous program and should be interpreted as an index of its continuing vitality.

This is a courageous program which has supported many stimulating and often controversial works of art in federal facilities across the nation. Indeed, the jury found several architectural submissions in which the artworks incorporated were more interesting and of a higher quality than the buildings. By supporting regional as well as nationally known artists, the program has helped to encourage and recognize local talent, while giving people an opportunity to experience outstanding works of art in their daily lives.

Letter from Senator Howard M. Metzenbaum to Ray Kline

February 25, 1985

Dear Mr. Kline:

I am concerned about the propriety of the recent action by the General Services administrator for New York in convening a public hearing to solicit views on the sculpture *Tilted Arc.*

The Art-in-Architecture Program is an established program with sound guidelines and procedures for the selection and siting of works of art.

In this case, however, the convening of a hearing by an administrator who, according to news accounts, has already made up his mind about the art, appears to be a breach of proper procedures and violative of the explicit agreement with the artist as to the display of the sculpture.

As you know, there have been many instances in the Art-in-Architecture Program where local objections have been heard. However, there are established procedures to ensure that local views are considered prior to the selection and siting of a work of art.

I believe that it constitutes an improper and unfortunate precedent to reopen the process after installation. I am concerned that this is a precedent which would severely hamper the vitality and perhaps the continuation of the Art-in-Architecture Program.

I do not claim to be an expert on sculpture. I do have a high regard for Richard Serra as an artist and for the integrity of the art selection process. The Art-in-Architecture Program is being threatened by the actions now being taken by the New York regional administrator. I urge you to assure that this work of art, and the program itself, not be harmed.

Sincerely,
Howard M. Metzenbaum
United States Senator

Letter from William J. Diamond to Announce the Public Hearings Concerning Tilted Arc

(no date)

Dear Friend:

I would like to extend a cordial invitation for you to attend or send a representative to a public hearing to be held by the General Services Administration on Wednesday, March 6, 1985.

The purpose of the hearing is to decide whether or not the art work known as *Tilted Arc* currently on the east plaza of the Jacob K. Javits Federal Building in Manhattan should be relocated to increase public use of the plaza.

Enclosed is a copy of the formal notice which appeared in the press with full details of the hearing.

Please contact Michael Porter at (212) 264-4068 if you wish to appear or submit your written viewpoint on this matter. We look forward to hearing from you.

Sincerely,

William J. Diamond
Regional Administrator

United States General Services Administration, Notice of Public Hearing to Be Held March 6, 1985

The General Services Administration is contemplating relocating the artwork on the east plaza of the Jacob K. Javits Federal Building, 26 Federal Plaza, NYC to increase public use of the plaza. GSA welcomes comments from interested parties on the proposed action or suitable relocation sites.

A public hearing is planned for March 6, 1985, 10 a.m. till 4 p.m. at the U.S. Court of International Trade, 1 Federal Plaza, New York, NY.

Oral statements, limited to four (4) minutes and scheduled in advance, will be heard at that time. *Written statements will also be accepted.*

To schedule an oral statement call or write Mr. Michael Porter (212-264-4068) Room 2325, Utilization Branch, Real Estate Division, General Services Administration, 26 Federal Plaza, New York, NY 10278, no later than 4 p.m. March 5. *Written statements will be accepted no later than March 13, 1985.*

Text of Flier (Labeled "Speak Out!") Distributed in the Federal Building Before the Hearing

GSA will hold a public hearing on ways to more fully utilize the plaza on the Lafayette Street side of this building. This could include the relocation of the large metal sculpture known as the *Tilted Arc*. The public hearing will be held on Wednesday, March 6, 1985 at 10:00 AM at the Court of International Trade, 1 Federal Plaza (adjacent to the Federal Building). We would like to hear from you. Call *264-4068* to get more details and schedule a time to "*Speak Out*."

Text of Petition (Labeled "For Relocation") Distributed in the Federal Building Before the Hearing

We the undersigned feel the artwork called *Tilted Arc* is an obstruction to the plaza and should be removed to a more suitable location.

(The individuals whose names are listed with an asterisk (*) find no artistic merit in the Serra artwork.)

Form Letter Addressed to William J. Diamond, Distributed in the Federal Building before the Hearing

Dear Mr. Diamond:

I am pleased to hear that GSA is seeking public comments on the use of the plaza at 26 Federal Plaza.

I would like to express my opinion on the use of the plaza and more specifically the relocation of the artwork known as *Tilted Arc*.

I am for the relocation of the *Arc*. ☐

I am against relocation of the *Arc*. ☐

Comments:

Signature Agency

Press Release from
General Services Administration, Region 2, New York

March 5, 1985

REMARKS BY WILLIAM J. DIAMOND, REGIONAL ADMINISTRATOR, AT A PUBLIC HEARING ON THE *TILTED ARC* OUTDOOR SCULPTURE IN NEW YORK CITY ON WEDNESDAY, MARCH 6, 1985.

The administrator of General Services in Washington, D.C. has requested that this hearing be held in response to numerous public expressions as to the most effective use of the plaza located in front of the Jacob K. Javits Federal Building.

Members of the panel joining me on this occasion are Michael Findlay, vice-president of Christie's; Thomas Lewin, senior partner of Simpson, Thatcher, Bartlett; Gerald J. Turetsky, acting deputy regional administrator of the General Services Administration (Mr. Turetsky was GSA's regional administrator at the time of *Tilted Arc*'s installation); and Paul Chistolini, acting assistant regional administrator for GSA's Public Buildings & Real Property.

The oral testimony over the next few days will be heard by the panel and assessed, together with the letters and petitions we have received. The panel will then prepare a report for action by the administrator of GSA. We expect a decision on this matter to come from Washington in thirty to sixty days.

The panel will not make an aesthetic judgment as to the worth or value of *Tilted Arc* nor will it recommend that any precedent be established that would affect any other piece of art.

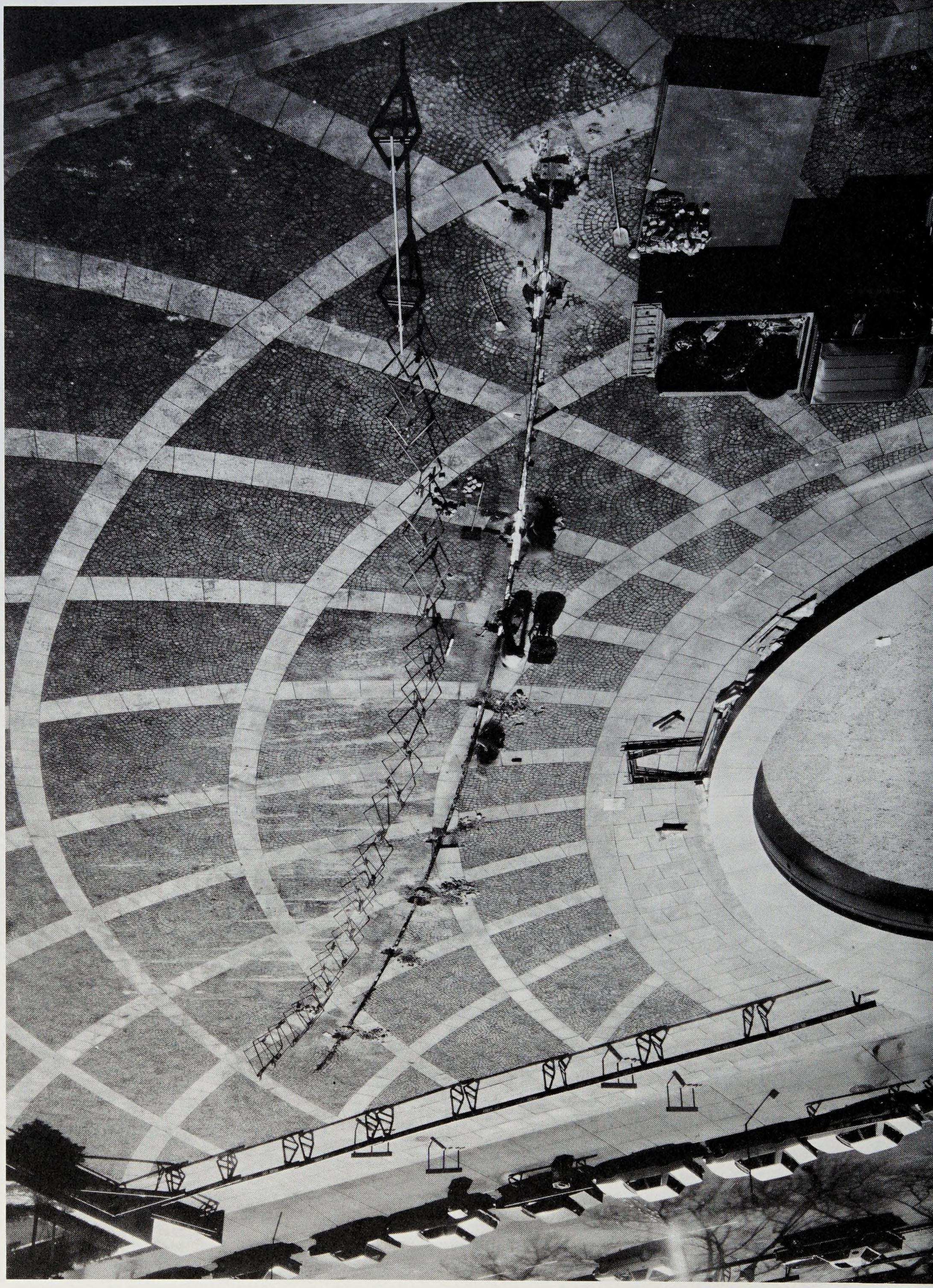
GSA is justifiably proud of its Art-in-Architecture Program, which was singled out recently by President Reagan for commendation. The Program has been responsible for commissioning many outstanding works of art which have enriched our daily lives and improved our awareness and our understanding of our life and times.

The most recent projects commissioned under the Art-in-Architecture Program have entailed a high degree of public participation. For example, we are currently involved in choosing artists for works at the Jamaica, Queens Social Security Building now under construction. We are confident that our consultations with the

public and community leaders will enhance the artistic statement which is ultimately produced.

The United States government paid $175,000 for the Richard Serra sculpture. We strongly believe that the public has a right to tell us how they feel about the way in which their government spends their money. We in government have the responsibility to provide that opportunity.

The fact that we are holding this hearing is evidence of our good faith in this effort. We trust that today's proceedings will further encourage future dialogue between artists and their audience. From the overwhelming response we have received, we believe that these hearings will be very meaningful, and we hope that all concerned will make their voices heard.



PART II

The Public Hearing

Introduction

Although the public hearing was originally scheduled for one day only, the tremendous number of people wishing to speak caused it to extend over three days—March 6–8, 1985. Each speaker was allotted 4 minutes. In all, 180 people spoke at the hearing: 122 in favor of retaining *Tilted Arc* in its original position and 58 for relocation or removal of the work.

The division between two-thirds positive and one-third negative among the 33 statements included in this part of the book thus reflects the overall proportions of pro and con at the hearing. Furthermore, the statements selected for inclusion were chosen to convey the diversity of opinions expressed, both for retention and for removal of the work.

Those arguing in favor of the work cited many reasons why *Tilted Arc* should not be removed. The primary reason, of course, was its site-specific nature, and many of the speakers emphasized the fact that any attempt to remove the work would destroy it. Following in this vein, a number of speakers used their time to explain the relationship between work, viewer, and space that *Tilted Arc* establishes—a relationship that is very different from that established by a traditionally figurative or abstract work. Serious concerns were also voiced about the issues of censorship, due process, and the precedent that would be established if the work were removed in response to this type of public pressure.

Most of the proponents of relocation focused on aesthetic dislike of *Tilted Arc*. A smaller number mentioned the function of the plaza and complained that *Tilted Arc* rendered the space of the plaza unusable for relaxation. It should be noted, however, that while many opponents of the piece felt that removal of *Tilted Arc* alone would be sufficient to establish their desired recreational space, others were equally unsatisfied with the original design of the plaza. The latter therefore called for the addition of benches and foliage, and for repairs to the fountain (which had been dry since well before the installation of *Tilted Arc*).

The individual statements included here are all rendered in their entirety, and every effort has been made to ensure their accuracy. In all instances where such were available, the official transcripts (which contain many mistaken and omitted words and phrases) were checked against audio tapes and against the speaker's own written text.[1] Where no independent confirmation was available, we have followed the text provided in transcript, except for correcting the punctuation and spelling.

List of Speakers Arguing in Support of Tilted Arc *at the Hearing*[2]

Edward A. Ames, President, New York City Art Commission
Stephen Antonakos, sculptor
Emile de Antonio, filmmaker
Bradley Arthur, sculptor
Alice Aycock, sculptor
Louise Bourgeois, sculptor
Martin Bressler, representing Visual Artists and Galleries Association
Diane Brown, art dealer
Julia Brown, Curator, Museum of Contemporary Art, Los Angeles; Project Manager for GSA when Richard Serra was commissioned to build *Tilted Arc*
Shale Brownstein, M.D., psychiatrist
Coosje Van Bruggen, art historian; former Curator, Stedelijk Museum, Amsterdam; partner of Claes Oldenburg
Benjamin H. D. Buchloh, Professor of Art History, SUNY Old Westbury
Robert Buck, Director, Brooklyn Museum
Scott Burton, sculptor
John Caldwell, Curator, Museum of Art, Carnegie Institute, Pittsburgh
Leo Castelli, art dealer
Ted Castle, art critic
Adele Chatfield-Taylor, Director, NEA Design Arts Program
Anita Contini, Director, Creative Time
Douglas Crimp, art critic; Editor, *October*
Mrs. E. Dannheisser, patron of the arts; President, Dannheisser Foundation
Steven Davis, painter
Judith Daykin, representing Brooklyn Academy of Music
Suzanne Delehanty, Director, Neuberger Museum, SUNY Purchase; member of the NEA panel that had selected Richard Serra to propose a work for Federal Plaza
Bert Diener, President, Artists Equity
Jenny Dixon, Executive Director, Public Art Fund, Inc.
Harriette K. Dorsen, representing Volunteer Lawyers for the Arts
Ron Feldman, art dealer
Debie Feiman, representing the Organization of Independent Artists

Harold Foster, art critic; Editor, *Art in America*
Victor Ganz, Chairman, Battery Park City Fine Arts Committee
Frank Gehry, architect
Philip Glass, composer
Leon Golub, painter
Peter Gordon, composer; musician
Rubin Gorewitz, Certified Public Accountant
Malcolm Graff, project engineer for *Tilted Arc*
Roberta Grandes-Gratz, writer on Urban Affairs; preservationist
Elyse Grinstein, architect; collector
John Guare, representing Municipal Art Society
Lynn Gumpert, representing New Museum of Contemporary Art, New York
Roy Gussow, painter
Michael Hall, sculptor
Dee Dee Halleck, filmmaker; producer of "Paper Tiger Television"
Keith Haring, painter
Daryl Harnisch, Director, Maeght Lelong Gallery
Gustave Harrow, counsel to Richard Serra
Kitty Carlisle Hart, Chairperson, New York State Council on the Arts
Michael Heizer, sculptor
Joseph Helman, art dealer
Jene Highstein, sculptor
Fred Hoffman, art historian
Nancy Holt, sculptor
Adam Hozella, artist
Sam Hunter, Professor of Art History, Princeton University; Curator of Contemporary Art, Princeton Museum
Peter Hutton, filmmaker
Barbara Jacobson, Trustee of Museum of Modern Art
Mrs. Marion Javits, speaking for Senator Jacob K. Javits
Mimi Johnson, representing Art Services
Joan Jonas, performance artist
Pam Joseph, artist
Donald Judd, sculptor
Virginia Kee, member of Community Board III; resident of Chinatown, lower Manhattan

Mrs. M. F. Keeler, public art patron
Mary Kilroy, Director, Redevelopment Authority of the Philadelphia Percent Program
Joel Kovel, M.D., psychiatrist
Rosalind Krauss, Professor of Art History, Hunter College, CUNY; Editor, *October*
Edward Leffingwell, representing Institute for Art and Urban Resources
Joyce Leighbowden
Jane Logeman, painter
Alvin Lucier, composer
Andrew Lyght, artist
Jessie McNabb, Curator, Metropolitan Museum of Art
Joel Martel, attorney
Jonas Mekas, filmmaker; Director, Anthology Film Archives, New York
Bess Meyerson, New York City Commissioner of Cultural Affairs
Annette Michelson, Professor of Cinema Studies, New York University; Editor, *October*
Joan Mondale
Tom Moran, Chairman, New Jersey State Council on the Arts
Elizabeth Murray, painter
Robert Murray, sculptor
Roger Laux Nelson, artist
John Newman, sculptor
David Novros, painter
Claes Oldenburg, sculptor
Jerald Ordover, attorney
Morris Ordover, Director, External Affairs, Social Security Administration, Federal Plaza, New York
Joseph Papp, Director, The Public Theater, New York; Producer, New York Shakespeare Festival
Robin Pearse, representing "Art, Culture and Religion"
Scott Pfaffman, sculptor
Lucio Pozzi, artist
David Rabinowitch, sculptor
Gerry Rosen, attorney
Halina Rosenthal, President, Friends of the Upper Eastside Historic Districts
Tony Rosenthal, sculptor

Courtney Ross, independent documentary producer
William Rubin, Director, Department of Painting and Sculpture, Museum of Modern Art
Robert Ryman, painter
Betty St. Clair, representing National Emergency Civil Liberties Committee
Irving Sandler, Professor of Art History, SUNY Purchase
Barry Savits, M.D.
Mrs. H. Schulhof, patron of the arts
Mark Schulhof, student
Joyce Schwartz, Director, Works of Art for Public Spaces
George Segal, sculptor
Harriet Senie, Associate Director, Princeton University Art Museum
Richard Serra, sculptor
Tony Shafrazi, art dealer
Valerie Shakespear, Director, Art Foundation
David Shapiro, poet; Visiting Professor of Architecture, Cooper Union; Member, International Art Critics Association
Roberta Smith, art critic
Holly Solomon, art dealer
Abigail Solomon-Godeau, art historian; photography critic
Frank Stella, painter
Marguerite Strop, consultant to GSA Art-in-Architecture Program
George Sugarman, sculptor
Donald Thalacker, Director, GSA Art-in-Architecture Program
John Weber, art dealer
Clara Weyergraf-Serra, art historian
Terry Wilcox, artist
Martha Wilson, Director, Franklin Furnace
Gil Winters, builder

List of Speakers Arguing for Removal of Tilted Arc *at the Hearing*[3]

Douglas Blazey, Regional Counsel, Environmental Protection Agency
Abraham Blucher, employee, Department of Health and Human Services
Gregory Carmen, Judge
Michael Chuisano, federal employee, 1 Federal Plaza
Frank Costa, Administrative Officer, U.S. Marshal, Southern District
Roberta Degnore, writer; filmmaker; Ph.D. candidate
Dominick Di Carlo, Judge
Steve Faust, city planner
Franklin Feldman, attorney
Ann Finestein
Ronald Fleming, urban planner; arts consultant
John Gattuso, attorney
Jason Gettinger, Regional Administrator, Securities and Exchange Commission
Paul Goldstein, Community Board #1
Don Gray, artist; critic
Jessie Gray, artist
Col. Griffiss, New York District Court of Engineers
Bert Haggerty, area employee
Peter Hirsch, immigration attorney
Mary Ann Jackson, Press Officer, Federal Emergency Management Agency
Margo Jacobs, physical anthropologist
Robert Jacobs, architect
Florence Janoff, employee, Health Care Financing Administration, Federal Building
Danny Katz, clerk, Federal Building
Bernard Kilbourn, Regional Director, Department of Health and Human Services
Philip La Basi, federal employee
Keith Lawrence, employee, Federal Plaza
Tommy Lazzara, employee, Federal Building
Harold Lehman, painter
Scott Levine, employee, Health Care Finance Administration, Federal Plaza
Joseph I. Liebman, attorney, International Trade Field Office
Joseph Lombardi, clerk, Court of U.S. International Trade

Jim McDonald, employee, GSA Design Construction Branch
Alan McGrath
Virginia Maksymowicz, sculptor
Lloyd Merrill, Chair, Civic Center Committee, Community Board #1
Joseph Monticciolo, Regional Administrator, Department of Housing and Urban Development
Donald Nawi, attorney
Bernard Newman, Judge
Vickie O'Dougherty, Physical Security Specialist, GSA
Shirley Paris, area employee
Hank Perveslin, area employee
Herman Philips, employee, Regional Office, Environmental Protection Agency
Paul Rao, Judge
Edward D. Re, Judge
Louise Reisman, Middle Income Housing Co-operative
Dennis Snyder, Regional Commissioner, U.S. Customs Service
Norman Steinlauf, employee, Federal Emergency Management Agency
Herbert Stupp, tenant in Federal Building
William Toby, Regional Administrator, Department of Health and Human Services
Bill Tucker, attorney, Environmental Protection Agency
Pete Wagner, GSA employee
Harry Watson, Supervisor, New York State Bureau of Investigations
Helen Weinberg, Professor of American Literature and Criticism, Cleveland Institute of Art
Theodore Weiss, Congressman
Michael Weyrboff, First Vice President, American Artists Professional League
Sally Williams, employee, Federal Building
Arthur Wolf, Vice President, Local 318, National Treasury Employee Union

Selected Statements Arguing in Support of Tilted Arc

RICHARD SERRA

My name is Richard Serra, and I am an American sculptor, an American artist.

I am going to open my talk by giving some background information about what I do, why I do it, how I build my sculpture, what site-specific sculpture means, and why site-specificity and permanence are inseparable.

I don't make portable objects; I don't make works that can be relocated or site adjusted. I make works that deal with the environmental components of given places. Scale, size, and location of my site-specific works are determined by the topography of the site, whether it is urban, landscape, or an architectural enclosure. My works become part of and are built into the structure of a site, and often restructure, both conceptually and perceptually, the organization of the site.

My sculptures are not objects meant for a viewer to stop, look, and stare at. The historical concept of placing sculpture on a pedestal was to establish a separation between the sculpture and the viewer. I am interested in a behavioral space in which the viewer interacts with the sculpture in its context.

The Sculpture and Its Context

When I started working on the project for Federal Plaza, I made extensive studies of it. The plaza was essentially used only as a place of transit through which people passed from street to building. Therefore, *Tilted Arc* was built for the people who walk and cross the plaza, for the moving observer. *Tilted Arc* was constructed so as to engage the public in a dialogue that would enhance, both perceptually and conceptually, its relation to the entire plaza. The sculpture involved the viewer rationally and emotionally. A multitude of readings is possible.

My hope is that the viewer can learn something about a sculptural orientation to space and place. The work, through its location, height, length, horizontality, and lean, grounds one into the physical condition of the place. The viewer becomes aware of himself and of his movement through the plaza. As he moves, the sculpture changes. Contraction and expansion of the sculpture result from the viewer's movement. Step by step the perception not only of the sculpture but of the entire environment changes. The space can be experienced as compressed, foreshortened, or extended.

Two discrete sculptural volumes, concave and convex, are opened to the walking viewer. As you cross the plaza on the concave side, the sweep of the *Arc* creates an amphitheater-like condition. This newly created concave volume has a silent amplitude which magnifies your awareness of yourself and the sculptural field of the space. The concavity of the topological curve allows one to understand the sweep of the entire plaza. However, upon walking around the convexity at the ends, the curve appears to be infinite. Understanding the simple distinction between a plane leaning toward you that is curved and concave and a plane leaning away from you that is curved and convex, is crucial. This establishes new meaning among things.

Space becomes the sum of successive perceptions of the place. The viewer becomes the subject. One's identity as a person is closely connected with the experience of space and place. When a known space changes through the inclusion of a site-specific sculpture, one is called upon to relate to the space differently. This is a condition that can only be engendered by sculpture and nothing else. This experience of space may startle some people.

In order to achieve this effect, it was necessary to sink and tie the *Arc* into the concrete and steel structure of the plaza. It had to be built into the plaza.

I built *Tilted Arc* for the Federal Plaza not only because permanency is intrinsic to my site-specific works, but because I was asked by the GSA to build a permanent work. In response to the GSA request to build a permanent structure, I studied the Federal Plaza carefully and noted that half the plaza was given to a non-working fountain; and it was my concern not to interfere with this space and the paths leading to, from, and around the fountain. I also ensured that the remaining half of the space was left open for social functions of any kind. It is bogus and false to say that the social function of the plaza is destroyed, and it is false to say, as Mr. Diamond has, that "it is impossible for the public and the federal community to use the plaza." Also, the experience of art is in itself a social function. It is curious to me that people who are so concerned with function can't even put water in their fountain.

Some people are concerned with the sculpture blocking entrances to the Jacob K. Javits Building and the U.S. Court of International Trade. Months were spent building full scale mockups in the plaza. Finally, I laid the curve out on the ground with paint and chalk and observed people walking in and out of the buildings. It was clear to me that the placement of the sculpture did not interfere with access to the main entrances and exits of either building.

I went through a two-and-a-half year process of preparing my proposal. I was told that I had to pass a review board in New York and a jury in Washington, D.C. I said, "Look, what if this project does not get on? What assurances do I have that I will pass the final jury?" Donald Thalacker, the Director of the Art-in-Architecture Program, said to me, "Richard, don't worry about that. You get one chance in your lifetime to build one permanent work for one Federal building. There is one permanent Oldenburg, one permanent Segal, one permanent Stella, and one permanent Calder, and this is your one opportunity to build a permanent work for a federal site in America." I said, "Okay."

I did not make a dime on this project. The inducement was permanency. The GSA policy was, and still is, to build permanent works by nationally recognized artists for federal sites. That was their promise to me, and that pledge has been made to upwards of 250 artists in the United States.

The Inducements Offered by the Government and My Reliance on Them

When the government invited me to propose a sculpture for the plaza, it sought and asked for a "site-specific" sculpture. As this phrase implies, a site-specific sculpture is one which is conceived and created in relation to the particular conditions of a specific site, and only to those conditions. To remove *Tilted Arc*, therefore, is to destroy it.

The final decision to install *Tilted Arc* was based upon GSA's full knowledge of the sculpture and the commitment to install it permanently. It was agreed, through explicit commitments, that the work would not be removed or dismantled.

The Contract

These commitments were made with specific reference to Article 6 in the contract, the sole provision which can be construed as related to the issues of dismantling or relocation. It is one which refers to "Ownership" (Article 6). This provides that "all designs, sketches, models, and the works . . . shall be the property of the United States" and that "all such items may be conveyed . . . to the National Collection of Fine Arts–Smithsonian Institution for exhibiting purposes and permanent safekeeping."

I explicitly discussed Article 6 with the director of the program and the project officer for this sculpture. I asked, "What does the language mean?" They said, "In times of disaster they want the authority to move their bronze and marble sculptures

to the basement of the Smithsonian." I said, "What about *Tilted Arc*?" They said, "It doesn't apply."

Nevertheless, the *New York Times* recently reported that offers have been received by GSA to relocate *Tilted Arc*, including one from Storm King. While these offers are clearly responsive to Mr. Diamond's initiatives, they, incredibly, proceeded without knowledge on my part. These actions were taken in violation of the terms of the contract. The effort to relocate the work in Storm King has resulted in a letter from the Director saying he would not accept it without my consent.

The Program and Process

It has also been suggested that the "*public*" did not choose to install the work in the first place. In fact, the choice of artist, approval of the sculpture, and decision to install it permanently in the plaza were made by a public entity, the GSA. Its determination proceeded on the basis of national standards, carefully formulated procedures, and a jury system to ensure impartiality and the selection of art of lasting value. The selection of the sculpture therefore was made by, and on behalf of, the public. The question, then, is whether this public decision can be reversed by this hearing after the fact. This is a quite different question than whether a local community should have input into the process prior to selection and installation.

The Process

A summary of the selection process which led to installation of my sculpture, *Tilted Arc*, is necessary for a clear understanding of the issues. At the request of GSA, the National Endowment for the Arts designated a panel of experts to nominate artists. After a thorough screening of the nominees, the GSA Director invited me to submit a proposal. I was assured that consideration of my proposal would involve objective, nonreversible procedures, and agreed to participate in the process.

My site-specific proposal for a permanent sculpture was accepted after a jury evaluation in Washington, D.C. The art officer of the Agency in New York participated in this process.

The Program

My understanding was that I was involved in a national program, one that was designed to express and represent the extent of our national cultural achievement. The idea, I thought, was to invite artists to create art worthy of being permanently installed at federal sites. I thought the idea was to strive toward excellence. I

understood this to mean that this program would not be subject to political currents, prejudices, ephemeral tastes, or bureaucratic pressures.

What This Hearing Signifies

In 1981 the GSA permanently installed the sculpture.

The officially stated purpose of this hearing is to further assess local reactions to the sculpture, and particularly its effect on the plaza. However, this hearing generates an issue of fundamental importance, which cannot be resolved by this ad hoc procedure.

This issue is whether a national decision, formulated through procedures designed to ensure impartiality and excellence, can be reversed after the fact in order to rescind the government's commitments and contract.

The Agency gave its commitments and signed a contract. If a reversal should result in response to subsequent pressures from specific sources outside the process, it would fundamentally undermine confidence in the program. An objective, binding process will have been substituted by a public hearing, convened by a local administrator, to reverse the outcome. From the perspective of *administrators* in the Art-in-Architecture Program, this would mean that commitments could not be made in good faith. From the perspective of participating *artists*, it would mean that commitments, exchanged for their involvement in time, effort, and creativity, could not be relied upon. From the *public*'s perspective, officials yielding to such pressures will be perceived as an assault on freedom of artistic expression at a time when its protection ought to have a priority which is second to none. If this can be done, integrity in governmental programs related to the arts will be compromised, and artists of integrity will not participate. If government can destroy works of art when confronted with restrictive pressures, then its capacity to foster artistic diversity, and its power to safeguard freedom of creative expression, will be in jeopardy.

The Presidential Citation

One additional point must be made. *Tilted Arc* was selected and installed as part of GSA'S Art-in-Architecture Program. On January 30, 1985, this program was one of the few selected to receive one of the first Presidential Awards for Design Excellence. In presenting the award, President Reagan observed, "The Federal Government is the nation's single largest builder, printer, and user of design services; what we build, print, or cause to be manufactured for Federal use directly

affects every citizen. We must ensure that these investments are cost-effective, well planned, and reflect the standards of excellence which we all expect from our government." At a time of cost-effective consciousness, it would cost the government $50,000 to destroy my work.

Most significantly, in describing the Art-in-Architecture Program, the award in part stated: "Artists have been given aesthetic freedom and support even when their works have been controversial. . . . Installations that may be judged by the press, critics, and others to be difficult to comprehend (or less than completely successful) are to be expected in such a courageous program and should be interpreted as an index of its continuing vitality. . . . This is a courageous program which has supported many stimulating and often controversial works of art in Federal facilities across the nation."

To achieve this level of independence in artistic judgement, rigorous procedural mechanisms were devised to ensure an invulnerable process for selecting artists of achievement and art of enduring qualities. The objectives were specifically to institute safeguards against the insistence of transitory fads, or the personal predilections of politicians, or of changing administrations and governmental administrators.

What This Hearing Signifies

The program would have no meaning unless it effectuated, as well as signified and symbolized, freedom of creative expression. This implies that once the artist is selected, through objective procedures, the artist's work must be uncensored, respected, and tolerated, although deemed abhorrent, or perceived as challenging, or experienced as threatening. To realize this when art is funded or governmentally supported, it is essential to institute guarantees which ensure the independence of any panel or jury which selects artists or works of art. This implies the competence and impartiality of such a jury or panel. It also means selections arrived at through preexisting rules and policies. These are the basic elements of due process—particularly needed when government affects areas of free expression.

To enable artists to function and work freely, and to avoid governmental or institutional, or donor-sponsored dictates of art, artists ought first to be selected objectively and impartially; and then their artistic expression ought to be insulated from censorship, suppression, and destruction.

GUSTAVE HARROW

I speak as counsel to Richard Serra, and . . . I have a serious question to raise as to the legitimacy of the convening of this panel.

The Art-in-Architecture Program of the U.S. Government, which implemented the installation of *Tilted Arc*, has articulated carefully considered policies, guidelines, and rules to realize the objective of inducing our nationally prominent artists to create art of enduring qualities for permanent installation in public places.

These rules, guidelines, and procedures contain no provision which authorizes or anticipates this hearing. This hearing is a purely ad hoc, after-the-fact device, never contemplated by any of the parties involved in selecting and contracting for *Tilted Arc* and its installation. As a result, the act of convening this meeting was unauthorized, if not illegal; it violated the program's due process in its administration; it was convened in order to reach a foregone conclusion, not an informed one; and the manner in which it was constituted is an effort to mask its illegitimacy.

The convening of this hearing may be illegal because it was called by an official to consider breaching a binding contract between the government and an individual; and, ironically, its impetus comes from those charged with administering justice in government. As to the due process: convening this hearing violates the meaning and spirit of due process, since it entails an effort to change the rules after the game has been played.

As to the prejudging of the issue: that this hearing was convened in order to reach and support a prior conclusion is clear, since the Regional Director, Mr. Diamond, who is responsible for convening it, had already prejudged the issue, publicly and in the press, urging that the sculpture be removed. It is equally clear that, if this hearing could appropriately be called, this official should have disqualified himself from participation in every respect if it were to be cleansed of its impairment of due process. Instead, he will participate in evaluating it.

The hearing was improperly constituted. The reason it is improperly constituted involves the entire panel presiding at this hearing, since the official who has himself chosen, designated the panel, and did so, should have been disqualified, and his choice of the panel therefore renders it disqualified. These acts, in my opinion, disregard the responsibilities of public office and violate the terms of its trust.

I have just one concluding statement to make, and it reaches a level, I think, of importance that goes beyond the issues with us today. I believe we largely judge and measure our society by how it relates to creativity, to creative persons and artists. This, I think, reflects the way we relate to ourselves—to our creative urges

and need to find expression after an internal struggle, and not in response to the imposition of external pressures and forces. If this matter and this proceeding illustrate and signify the extent to which the meaning of due process is integrated into the administration of governmental policy, and the manner in which we relate to artistic creativity, then I feel we must judge ourselves poorly in terms of the fundamental need for justice and the liberating power of creativity.

In conclusion, I urge this panel to recommend that it should not have been convened, and that in the future this kind of ad hoc, after-the-fact failure of due process be precluded from governmental administration, and most particularly as it relates to creativity and the arts.

DOUGLAS CRIMP

My name is Douglas Crimp. I would like to read a statement. At the end of this statement I will, in fact, refer to the *Tilted Arc* as a wall. I am someone who has followed sufficiently the development of contemporary sculpture to know that a wall indeed can be a work of sculpture.

I am an art critic and editor of the cultural journal *October*, but I want to speak here not as a professional but simply as a member of the public, and specifically as a member of the community who lives and works in the vicinity of *Tilted Arc*. When I look out the window of my apartment I am confronted by the Federal Office Building, which looms over the rooftops of the mostly Victorian buildings nearer to me. The stark ugliness of the Federal Building is underscored by its juxtaposition in my view with the beautiful cupola of the Municipal Building, built at a time when governments commissioned great architecture instead of bleakly functional and cheap buildings. But confronted with the Federal Office Building, I am somewhat consoled by the fact that one-half of one percent of the price of its ugliness paid for what I experience as the most interesting and beautiful public sculpture in my neighborhood.

But my experience evidently differs from that of many other people who live and work near *Tilted Arc*, and I cannot easily dismiss this difference of opinion. Nor can I easily change this difference of opinion. What I *can* do is say how I think this difference of opinion is being used. For I believe that this hearing is a calculated manipulation of the public of *Tilted Arc* in which we are asked to line up as enemies: on the one side those who love it, and on the other those who hate it and wish to destroy it. This hearing does not attempt to build a commonality of interest in art in the public realm. Although *Tilted Arc* was commissioned by a program devoted to placing art in public spaces, that program seems now to be utterly uninterested in building a public understanding of the art it has commissioned. This is not a hearing about the social function that art might have in our lives; rather, it is a hearing convened by a government administrator who seems to believe that art and social function are antithetical, that art has no social function.

What makes me feel so manipulated is that I am forced to argue for art as against some other social function. I am asked to line up on the side of sculpture, against, say, those who are on the side of concerts, or perhaps picnic tables. But of course all of these things have social functions, and one could name many more. It is a measure of the meager nature of our public social life that the public is asked to fight it out, in a travesty of democratic procedure, over the crumbs of social

experience. I believe that we have been polarized here in order that we not notice the real issue: the fact that our social experience is deliberately and drastically limited by our public officials.

The view of us—the public—that is really held by those who have convened this hearing can be discerned from a passage in a letter from Chief Judge Edward Re, who has been leading the fight to remove *Tilted Arc* since the day it was erected. After a long list of complaints against *Tilted Arc* that includes the absolutely surreal claim that it causes rat problems, Judge Re writes, "Finally, but by no means of minor importance, is the loss of efficient security surveillance. The placement of this wall across the plaza obscures the view of security personnel who have no way of knowing what is taking place on the other side of the wall." Well, I would submit that it is we—the public—who are on the other side of the wall, and it is we whom Judge Re so fears and despises that he wants that wall torn down in order that we may be properly subjected to surveillance. It is no small measure of the success of *Tilted Arc* that it has elicited this repugnant view of the public and brought it into the public realm. I urge that we keep this wall in place and that we construct our social experience in relation to it, that is, out of the sights of those who would conceive of social life as something to be feared, despised, and surveyed.

ABIGAIL SOLOMON-GODEAU

My name is Abigail Solomon-Godeau, and I am a critic and historian.

When I first resolved to speak at this hearing, I did not know exactly in which capacity I would speak. In the limited time allotted for these statements, I wondered whether I should speak as an art historian and talk about the incomprehension and outrage that have historically accompanied the productions of modern artists—productions which have later been accepted and, indeed, canonized by the public that initially excoriated them. I wondered whether I should speak as a critic and talk about the quality and importance of *Tilted Arc*. Still later, I thought that perhaps it would be more useful to talk about the way the notion of "the public" was itself a problematic one, and could be manipulated to mask other agendas. Still later, I wondered whether I shouldn't speak simply as a member of the public myself: a native New Yorker for whom the existence and survival of a work of art in an environment progressively diminished and violated by the rapacity of real estate and corporate interests was especially precious.

Last night, however, I decided it made no sense to talk about any of those things. Last night, Mr. Diamond appeared on a cable news program and announced—midway through the hearings—that the GSA had obviously made a mistake in commissioning *Tilted Arc*, that something was wrong with the commissioning process, and that the plaza should be restored to its original empty state and made available to other purposes.[4] Mr. Diamond refused to appear at the same time with Richard Serra on this program, stating that as a public official it was not his position to take part in a debate. Mr. Diamond's mind is clearly made up. Nothing that has occurred, nothing that has been said, has, on the evidence, had the slightest effect.

What, I would like to ask Mr. Diamond, is the purpose of this hearing? Now in the third day of testimonials, Mr. Diamond, you have heard impassioned and eloquent statements from experts and laymen, from public servants, from museum curators, from public sculpture foundations, from artists, from critics, from doctors, from lawyers. Overwhelmingly, these people have spoken and addressed—passionately—every conceivable issue relating to *Tilted Arc*. Overwhelmingly, the great majority have spoken in support of this work.

Mr. Diamond, I came in good faith to talk about *Tilted Arc*. You, however, have been sitting there and not listening to what anyone has said. The decision has evidently already been made. I notice that the independent panel members have not even appeared today. You do not care what I have to say, you do not care what anyone else has to say. Last night you proved what others have said: this is not an

open hearing, it is a show trial. I refuse to be party to this mockery—this parody of the notion of a public forum. You, Mr. Diamond, have in your statements revealed the utter bankruptcy and the total fraudulence of these proceedings.

CLAES OLDENBURG AND COOSJE VAN BRUGGEN

Oldenburg:

I am Claes Oldenburg, a sculptor, and this is my partner, Coosje van Bruggen, an art historian and writer, who has worked with me on large-scale projects starting with the *Batcolumn* in Chicago in 1977, which was also a GSA commission.

In our opinion, this hearing and the moves surrounding it violate the contract between Richard Serra and the government by setting up a vigilante-type group without legal status to try and overturn a legal process concluded three years earlier by an appointed committee of specialists whose decisions were exhaustively reviewed before approval—all in a proper way prescribed by public law.

It is well known to everyone that, since the work in question is contextual, relocation is impossible and removal amounts to destruction.

If this parochial revolution is allowed to influence the procedures of the GSA Art-in-Architecture Program, the program will decay into insignificance. Better artists will no longer trust the government and will avoid the program. Needless to say, contracts are not the only binders in these compacts—the artist depends a great deal on the unwritten good faith and cooperation of the government representatives.

Van Bruggen:

There are legal ways to oppose an artist's proposal before the contract is concluded. We have several times gone through such a process of rejection, which we have had to accept because we had agreed to respect the rules laid down. These one percent and two percent regulations—a very small amount when compared to the cost of the architecture—exist all over the world to encourage art and culture. Problems exist too, but nowhere to our knowledge does the government fail to support the works commissioned against local action or quarrel within itself about the justness of doing so. In Europe art works commissioned by the government are permanent by law.

None of our public sculpture has been free of controversy. In 1977, the *Batcolumn* for Chicago received the annual "Golden Fleece" award for conspicuous government waste from Senator William Proxmire, among other attacks. Despite this, there was no wavering on the part of the government in support of the work. We regard controversy as positive and a necessary part of the GSA Art-in-Architecture Program, which does not seek to maintain a status quo of dead art but to inspire the community with change and new experience. A good sculpture is

true and critical and with an edge, uncensored and unregimented, and is an example of free expression. Its acceptance by the community is mainly an educational problem, one of overcoming established prejudices of "beautiful" and "useful" as they apply to art.

Oldenburg:
If the action to remove the *Tilted Arc* succeeds, art in the GSA program will become compromising in an effort to ward off controversy and please all pressure groups. We shall have mediocrity and decoration instead of integrity. The program of the GSA will become a source of embarrassment rather than the source of pride and the international example that it now is.

In a letter to the GSA, Judge Re, one of those urging the removal of the *Tilted Arc*, has spoken of wanting to provide "proper identification for the courthouse and to generate respect for its symbol of justice." We think that, as far as symbolism goes, the *Tilted Arc* has more integrity than the allegorical works, academic figures of justice, or old cannons or cannonballs used to adorn most courthouses. In fact the problem with the *Tilted Arc* is that it's *too* honest. Isn't honesty something the government and its courts ought to aspire to? If the *Tilted Arc* is removed, the space it leaves will symbolize the giving-in to escapist motives and notions of inoffensive "beauty" such as Judge Re sees in what to most other people appears a poorly designed building before a mess of a plaza. The empty space would be the symbol of a broken contract. We doubt if any artist could be found who would offer his work to fill such a space.

Van Bruggen:
As often happens—and especially in commissions by the GSA, which is not known so much for the quality of its architecture as its art—the sculptor is asked to rescue the situation. Serra's sculpture gives the plaza a strong identity and sweeps the prosaic and uninspired open space into a dramatic conception.

Contrary to Judge Re, and some others, we consider the *Tilted Arc* "beautiful," though it is an unconventional beauty which upsets fixed habits of perception. Even rust has its beauty. Moreover, Cor-Ten steel has long been an accepted material for outdoor sculptures because of its capacity to protect itself. One thinks for example of Barnett Newman's obelisks in Cor-Ten, one of which is located in the garden of the Museum of Modern Art.

Judge Re complains that the *Tilted Arc* is difficult to maintain, but this is true of all outdoor works which decay in the corrupted atmosphere of big cities and inevitably attract graffiti, pigeonshit, and messages of affection.

Oldenburg:

We know that you cannot make a sculpture that pleases everybody. Life in an imperfect city such as New York requires much tolerance of diversity. There are so many things we prefer not to see, such as certain billboards advertising cigarettes, certain wall paintings of dubious religiosity and evident egomania, certain trucks half a block long proclaiming fresh killed chickens, etc. But we would rather put up with the things that bother us than have a sanitized environment censored by someone else's notion of "good taste."

Neither in this time nor any time in the past can art be defined by everybody. One must insist on the uniqueness of the artist's invention and his training, an expertise to which he has devoted his whole life. Judge Re and Mr. Diamond may state their opinions about art, but we question their authority on the subject. And if it must be a contest of petitions, we believe that in this sophisticated community we can come up with as many willing to risk daily exposure to the sculpture as those who will not. But taking a poll is no way to judge whether a work of art should survive.

Van Bruggen:

It has been said, finally, that the *Arc* disrupts the space to such a degree that concerts and performances are no longer possible on the site. As the sculpture only occupies thirty square feet of floor space, a fraction of the area, this is clearly not true. In fact there is an application pending right now for a performance. And the *Arc*'s division allows the presentation of two separate concerts simultaneously if so desired. It is only necessary to plan *with* the sculpture rather than against it, to involve the *Tilted Arc* in the "increased public use" contemplated by its opponents. Art is, among other things, recreational, and the *Arc* is already a performer on the plaza.

Because sculptures are relatively small and seemingly less functional, thoughts of removing them come easily. But what if plans for increased public use of the plaza were to include the removal of the building, which almost everyone agrees is an eyesore of the first magnitude and a considerably more massive obstacle to recreation and performance than the *Tilted Arc*?

Even Judge Re admits that thousands of New Yorkers in the area, in his words, "toil in windowless offices." The Federal office building has passed through several city committees—so what? A member of the bureaucracy sets up a hearing to remove it. He succeeds and soon all over town, other local committees are formed and follow suit. As a consequence, most of the city is torn down. But each building that is removed is replaced by another which is, in its turn, opposed and torn down. So it goes, while the wrecking and construction businesses flourish.

We leave you with this *reductio ad absurdum* vision of the removal contemplated in this hearing, while we strongly urge the panel to recommend the preservation of Richard Serra's *Tilted Arc*.

ROSALIND KRAUSS

I am Rosalind Krauss, professor of art history at the City University of New York, and an art critic.

As I understand it, this hearing has been convened to discuss the various uses—the term I think is "alternate uses"—to which Federal Plaza might be put. This is to imply that the use to which it is largely committed at present is a nonuse. However, I wish to contest this notion. For I think it is important when speaking of alterative uses to consider the existing one, and to begin with the simple fact that the presence of Richard Serra's *Tilted Arc* invests a major portion of its site with a use we must call aesthetic.

Far different from the intermittent activities of band concerts or summer picnics, this aesthetic use—and presumably this was the thinking of the GSA when it initially made its percent-for-art ruling—this aesthetic use is open to every person who enters and leaves the buildings of this complex, and it is open to each and every one of them every day.

Given this premise, I think it is important to understand the specific operations of this use as it is brought into being by *Tilted Arc*. And this means that we should try to grasp something of *Tilted Arc*'s meaning as a work of art, as an extraordinary work of modern sculpture.

Let us start with the premise that sculpture has always taken as its subject the representation of the human body. Bodies sitting, standing, riding horseback, raising flags, extending blessings—it has been the task of sculpture to produce these bodies. During the modernist art of this century these bodies took on an increasingly abstract and geometricized form, a simplification which nonetheless carried on the idea that bodies occupy the space around us and that we experience these bodies from the outside, looking at them in order to master them, to take their measure, to calculate their mass and form. In contrast to this, the sculpture that evolved in this country in the 1960s and 1970s, a sculptural movement called Minimalism, of which Richard Serra is a preeminent figure, was conceived in relation to a different premise. Bodies were still to be represented by sculpture, but bodies now, in their aspect as inhabited, the human body not as it is understood from without, but as it is lived from within. In order to carry out this aesthetic intention, these sculptors understood that the-body-as-lived would necessarily involve them in an abstract level of representation. For if I extend my arm to reach to pick up something or to catch an object before it falls, I do not think of my hand, my arm, my shoulder; I think of the space that must be bridged between me and

the object I am reaching for. These gestures and movements are thus more representable as vectors and trajectories through space than they are as bone and muscle and skin.

The kind of vector *Tilted Arc* explores is that of vision, more specifically what it means for vision to be invested with a purpose, so that if we look out into space it is not just a vacant stare that we cast in front of us, but an act of looking that expects to find an object, a direction, a goal. This is the purposiveness of vision, or to use another term, vision's intentionality. For the spectator of *Tilted Arc*, this sculpture is constantly mapping a kind of projectile of the gaze that starts at one end of Federal Plaza and, like the embodiment of the concept of visual perspective, maps the path across the plaza that spectator will take. In this sweep which is simultaneously visual and corporeal, *Tilted Arc* describes the body's relation to forward motion, to the fact that if we move ahead it is because our eyes have already reached out in order to connect us with the place to which we intend to go. Like vision, its sweep exists simultaneously here and there—here where I am sited and there where I already imagine myself to be. In the beauty of its doing this, *Tilted Arc* establishes itself as a great work of art.

SUZANNE DELEHANTY

My name is Suzanne Delehanty, and I'm the director of the Neuberger Museum of the State University of New York at Purchase. My own background begins with ancient art and stretches to the twentieth century.

I am really here to speak on behalf of Richard Serra; and, as one of the panelists invited to nominate artists for the commission under discussion this week, I thought it might be helpful to describe some of the criteria that the members of the panel used back in 1979 when the selection took place.[5]

All of us, I believe, recall the weight of that decision. We had been asked to help select an artist for an important public commission for a significant court of law. The sculpture was permanent, so our decision would not only serve our own generation, but would serve future generations of Americans.

We were really guided by a principle that has guided public art since antiquity—the spirit of place. This concept embraces not only the visible aspects of an urban site, but also the invisible attributes of the location. In the case of New York City, we obviously had to nominate artists whose work would not be overwhelmed by a city of skyscrapers and such miracles of engineering as the Brooklyn Bridge, which can be seen for miles around.

No less formidable were the invisible attributes of the city. The artist would have to be capable of reflecting New York's role as a great world capital and as the international center for the arts. In addition, the work would have to capture the energy, enterprise, and fast movement of the city's inhabitants.

Thirdly, and with the greatest of concentration, we focused on the physical and symbolic dimensions of the specific site—that is, the then new Federal Courthouse and Plaza in Foley Square. With all due respect, the design of the courthouse and plaza was not distinguished. It was, no doubt, the result of zoning regulations based on budget savings—rather than architectural integrity and the public's benefit. Thus, the artist would have to be talented enough and courageous enough to transform the entire site.

Fourthly, and equally important, we considered the human activity and the invisible function of the place. A widely used courthouse at Foley Square required a work of art that expressed the dignity and democratic principles upon which our judicial system is founded.

Serra met all the criteria. He was an eminent artist and is still today. He has international stature, and he is a master of his craft. He had pioneered site-specific sculpture and, furthermore, his works invited public participation and engaged us,

the viewers, in the creative process in a way that no sculpture of an equestrian figure can. As much as these monuments are objects of our affection, they reflect a time when cities were made of buildings three stories high. So I suspect the critics of Mr. Serra's work are, in fact, expressing first the nostalgia we all feel for an irretrievable past, for those cities with three story high buildings. I think that people are expressing the loss we all share because the arts, as a rule, are given little importance in the American system of education. And I believe that the critics are all expressing the outrage invoked by the architecture of the courthouse itself.

To remove and thereby destroy Serra's sculpture will not solve these problems. And I wish this hearing was really about ways to find creative solutions to these problems. Its removal, however, will destroy our belief in the government's commitment to the arts as an essential part of a civilized society.

JULIA BROWN

My name is Julia Brown. I am a senior curator of the Museum of Contemporary Art in Los Angeles. I worked for five years as project manager for the GSA Art-in-Architecture Program and was responsible for the administration of the project that resulted in the *Tilted Arc* commission.

I was present as GSA staff representative at the original nominating panel made up of art professionals, appointed by the National Endowment for the Arts and including representatives of the architect of the building, that nominated Serra and four other artists from among hundreds of possible choices from around the country. I was also present at the GSA Art-in-Architecture panel that recommended Serra for final selection for the commission by the GSA Administrator. I negotiated the contract between the government and Serra for the work, and was present at the GSA Art-in-Architecture panel at which Serra first presented his proposal for the site. At this time questions were raised regarding placement of the work on the plaza in terms of public access, lighting, maintenance, etc. Serra addressed these questions in his design, resubmitted his proposal, and the proposal was approved by the GSA.

I go through these steps to illustrate the process of the Art-in-Architecture Program—a process that has been operated for a national program developed over a long period of time and very rigorous and deliberate in terms of its responsibilities in making the choices and decisions in a review and selection process. At each stage in this process, Serra was chosen and asked to make a work for this space on the basis of a thorough knowledge of his past work and his proven ability to make a work of high quality that would be of a size, scale, and presence that could be meaningful in this plaza and with the surrounding architecture.

In all stages of the decision making process it was understood by Serra, and by the government, that Serra was making a permanent work for that specific space. That principle is one of the foundations of the GSA Art-in-Architecture Program. It is a national program that seeks to commission works of art of the highest quality for federal buildings across the country that will be, to as large an extent as possible, integral to the sites and spaces in question.

To remove the work would undermine a program and a process that has been important to the cultural life of cities around the country, and which has served as a model for countless programs of public art on the state and local level. These programs have developed in large part because of the significance and contributions of the GSA Art-in-Architecture Program. To remove this work would also

counter an agreement that was made between the artist and the government, which was entered into in every stage with careful and responsible deliberation.

The public for this work, as for all the work commissioned by the GSA Art-in-Architecture Program, is not only the employees of the building, but all the visitors who do business with the government, the immediate community of the building, and the City of New York. This work is not made only for the present, but for future audiences. *Tilted Arc* was responsibly commissioned for this space. Out of respect for this process, in the light of the large audience, and in terms of the work being there over time, *Tilted Arc* should not be removed.

MALCOLM GRAFF

My name is Malcolm Graff. I am a professional engineer with an office in New York City. I have been a consultant to Richard Serra for over ten years and have worked with him on sculpture projects throughout the world. In the past ten years I have come to know and understand Richard Serra and his work.

I have been involved on the *Tilted Arc* sculpture since Richard Serra was selected as the artist for Federal Plaza in late 1979. As such, I felt it was important to set things in perspective today, as I have first-hand knowledge as to the selection process used in choosing Richard as the artist and *Tilted Arc* as the permanent work of art for Federal Plaza.

I was also directly involved in the scrupulous review and monitoring process that was carried out by the Region 2 GSA professional staff during the technical design and installation of the piece, until the final acceptance of the completed work by GSA in December of 1981.

Submitted with the written copy of this statement will be copies of correspondence between GSA and myself concerning this project. This correspondence documents the following key points:

First, the selection of Richard Serra as the artist for Federal Plaza under the Federal Art-in-Architecture Program was done after a careful and prolonged review process. The New York City Region 2 office was involved at the beginning with a meeting in New York with the Region's technical staff in February of 1980.

Second, the final approval of the *Tilted Arc* sculpture was made by Mike Marschall, Commissioner of the Public Buildings Service of the General Services Administration, at a meeting I attended in Washington, D.C. in March 1980. The approval was given after a detailed presentation indicating the artistic concept of the piece, and it included photographs of the model of the sculpture located on the plaza showing clearly how it would appear in relation to the plaza and the surrounding buildings. Region 2 had a representative at that meeting who gave input as to several concerns the local region had about the sculpture.

Third, Region 2 GSA, in a letter of March 1980, transmitted seven items of concern that were to be addressed and resolved before any work was to begin on the sculpture. The items were both technical and practical. There followed a lengthy process whereby every concern was addressed and resolved to the satisfaction of the Region 2 GSA staff.

Fourth, the installation of the sculpture required major alteration of the structure of the plaza in order that the sculpture could withstand the severest conditions that

might be imposed upon it as a permanently installed work of art. The sculpture itself was permanently anchored to the structure of the plaza, to this end.

Fifth, in June of 1981 the project was finally approved for installation and a detailed installation schedule submitted to the GSA that month. The extent of the work involved clearly shows that all parties clearly intended this sculpture to be a permanent part of the plaza. For this reason, instructions for the permanent maintenance of the sculpture were submitted to GSA in September of 1981.

Sixth, in December of 1981 the work was completed. It was inspected and approved by GSA that month and final photographs were delivered. The contractual obligations of Richard Serra had been satisfactorily completed.

And that brings us to this public hearing of March 1985, over three years after the completion of the project. As I have documented above, Richard Serra's *Tilted Arc* sculpture was intended and installed as a permanent piece of art under the Art-in-Architecture Program. Every step along the way was given intensive review, from the head of the Public Buildings Service in Washington down to the head of maintenance at the Federal Plaza. All parties involved had adequate opportunity to have their concerns heard. Richard Serra satisfactorily answered all concerns of GSA to their complete satisfaction. *Tilted Arc* was created by Richard Serra for this site and this site only.

The issues raised here today were addressed and resolved during the review process I have outlined. The public hearing should have been held in 1979, at the beginning of the selection process for this project. Richard Serra has faithfully carried out his obligations under this contract with the Federal Government. The Federal Government must now faithfully honor its contract with Richard Serra.

CLARA WEYERGRAF-SERRA

I am Clara Weyergraf-Serra. I am married to Richard Serra and, as his wife, have witnessed his involvement with the General Services Administration from 1979 up to today.

It has not been a thrilling experience. I am sick and tired of worrying about one or another government bureaucrat: first being anxious about whether they would accept Richard's proposal for the Federal Plaza, now being anxious about whether they will destroy the sculpture; first worrying about juries and review boards, now worrying over prejudiced regional administrators.

I was always against artists accepting government commissions. *I* had reservations about the Federal Plaza—not Richard. Richard felt honored when the GSA approached him and offered him a site in New York. I always thought that art was being used as a sign to advertise liberalism—a sign which would be ripped down when liberalism went out of political fashion. This sign is being torn into pieces right now.

When in 1981 *Tilted Arc* was finally installed, I put my doubts to rest. Even when Judge Re started to suffer from psychological oppression and blamed it on sculpture and, instead of presenting his case to a psychiatrist, took it to Washington, I thought I could ignore his psychological problems.

My doubts have come back and, during the last four weeks, turned into outright furor. In spite of my general mistrust in government—which can be sufficiently explained by my being German and having to cope with the fascist past of my country—I cannot believe the manipulations and malicious tricks which have been used by governmental officials to achieve the goal of tearing down a work of art.

To perform this show trial is in itself an act of lawlessness. Inquisition-like procedures are being instituted under the guise of democracy. Where is "direct democracy" used other than to get rid of art? A petition is circulating in the Federal Building asking those who work there to vote on the artistic merit of *Tilted Arc*. Are we really back to a situation where the "healthy instincts" of the people are going to decide upon what is art and what isn't? Book burning, I thought, was part of German history. The smell of burning books is in the air right here, right now. Ironically enough, a lot of those whose books were burned immigrated to this country. Richard and I have been seriously thinking about leaving America if *Tilted Arc* is destroyed. Is that what this government wants—to reverse this kind of cultural immigration? To then be able to turn America into one big Disneyland?

I heard that one of the slogans used by regional bureaucrats to convince people to join in their campaign to destroy *Tilted Arc* is that it is art by government dictate. We are psychologically distressed by government dictate. I understand that that does not matter to those who want to get rid of the sculpture. They have treated the artist like an object, a piece of governmental property, a piece of furniture. You don't have to tell a piece of furniture when and why you want to get rid of it.

We never received a letter by the GSA informing us that a hearing would take place, how it was structured and manipulated, where it would be held. We never received one of those five thousand letters sent out by the GSA addressed to "Dear Friends" to solicit their support to tear down the sculpture. We were being told, though, that the hearing was to be impartial. Once again, who would believe government? Richard did—up to December 29, when Mr. Diamond made it public in the *New York Times* that he had received offers by the City Parks and Recreation Department and the Storm King Art Center to take *Tilted Arc* off his hands. How can he receive offers without having offered the work in the first place?

Mr. Diamond went further than that in announcing in the *New York Times*, February 3, in an extremely biased article written by Grace Glueck, that to place *Tilted Arc* on Federal Plaza was a mistake. This man is now presiding over the hearing and part of the panel which is to decide over the destruction or nondestruction of the sculpture. This same man announced to our counsel, Gus Harrow, that we will have some fun here. Well, if he is having fun, I am not. It is rather difficult to be deceived and humiliated and have fun at the same time.

Aside from being witness to the ugliest witch hunt, being Richard's wife I have also had the pleasure of witnessing the reception of his work all over the world, be it France, Germany, Japan or Spain. That Richard is alive and working as an artist is definitely not to the credit of America. It is a sad fact that his work is accepted and well received all over the world, but that his home town can't even live with *Tilted Arc*. It's not my home town, and never will be after this experience.

BENJAMIN H. D. BUCHLOH

My name is Benjamin Buchloh. I am an assistant professor of art history at the State University of New York.

As an art historian and critic I would not want to be so presumptuous as to argue in legal terms here, even though it seems obvious that we face a blatant attempt to break a contract. Nor would I feel confident to judge the public's taste. The public's dislike of and discomfort with Serra's sculpture might well exist, even though I would like to know more specific figures, and to know the criteria that were applied when this "public" was polled, and how the verdict was determined. It might well be the case that a large number of individuals who work in the federal administration insist on an instant removal; possibly even a larger number from the greater New York area, confronted with the sculpture, would have the same response.

As an art historian, it is not in the field of my competence to judge the tastes of these people, and I believe that everybody should have the right to detest contemporary art—especially art like that of Richard Serra that addresses the conditions of alienation that make people detest art in the first place. While this prejudice is private, its transformation into public judgment and political action confronts us with a totally different set of questions. At least until recently we had reason to believe that self-appointed guardians of law and order, vigilantes of moral and ethical codes and the lynch mob, were specters of the dark past.

The successful operation of the institutions and democratic boards of our society depends on the competence and specialization of its members in all fields. We trust that it is this competence, based on knowledge and experience certified by the examining and controlling institutions of the state, that qualifies, for example, judges and attorneys to make decisions concerning our physical well being. If an individual stands up in court ridiculing the professional competence of a judge we speak of contempt of court. If an individual claims fraudulently to have the competence of a member of the medical profession we speak of a quack. When these professional standards are abandoned on a large scale throughout society, we would speak of chaos and anarchy.

Only once in the history of the twentieth century was the domain of art and culture officially removed from the competence of its producers and the professional judgment of its academic and administrative supporters, and handed over to the spontaneous "practice of the collective prejudice." That was the moment when the fascist demagogues of the German Nazi Party encouraged populists to destroy

the culture of which the bourgeois capitalism had deprived them all along. At that time the public acquisitions and collections by progressive museum directors and art historians were at first denounced as fraud and deceit of the public, and subsequently they were destroyed. Fortunately some of them were at least sold, and they entered international collections such as that of the Museum of Modern Art in New York.

The works that were removed included, among others, those of Picasso, Brancusi, Schwitters, Tatlin and Lissitzy. In many respects these were the antecedents of the works of Richard Serra, whose work, as most art historians and critics throughout the world now unanimously agree, places him in line with the most complex definition of sculpture and makes him simply the most important sculptor of the postwar period. Yes, his work is even more relevant to American history than that of David Smith.

Before art liberates our vision and develops our judgment, it unleashes our prejudices—acts of violent contempt with which we defend the loss and absence of vision of which art so painfully reminds us. Freud calls this phenomenon identification with the aggressor. To defend the prison house architecture of Federal Plaza against the intrusion of Serra's sculpture is a manifest case of that symptom.

The pathology of prejudice appears to be consistent throughout history. What the German fascists decried as the product of deviance, madness, hubris, and venereal disease, and as a threat to the "pure" culture of the Aryan race—that is, the art of the avant-garde—reemerges now as the threat of crime and terrorism hiding behind Serra's rusty wall, as well as the mounds of garbage and packs of rats it supposedly attracts.

If this pathology of prejudice becomes policy, even if only in one single case, you might as well start purging the contents of the Museum of Modern Art. Its contents, just as Serra's work, could easily attract the scorn and prosecution of a mobilized mass of prejudice that has not allowed itself, or has not been allowed by our institutions, to learn to become competent.

EMILE DE ANTONIO

My name is Emile de Antonio. By way of introduction, I was the only film director on Mr. Nixon's enemies list. May I ask you, Mr. Diamond, if you are an appointee of President Reagan? May I ask you that?
Diamond: Just, please, testify.
de Antonio: Can you answer the question?
Diamond: No questions. The panel is not answering questions.
de Antonio: You are above answering questions?
Diamond: Please testify.
de Antonio: God has spoken.

Tilted Arc and the GSA: trust is the bond between people and a government. Our present government in this present hearing is as trustworthy as the Soviet Union—no more, no less. Freedom is not a Madison Avenue package. Presidents may be. Freedom exists or doesn't exist only when it is tested. It is now being tested by Mr. Diamond and the GSA.

Mr. Reagan has with great enjoyment and advantage quoted President Roosevelt, who helped bring public art to America. Mr. Diamond's proposed destruction of *Tilted Arc* is far removed from FDR.

New art, particularly good new art, lives at the edge of human experience and feeling. It is a challenge to old ways of seeing and living. This is why Stalin destroyed a great Soviet art, and it is why the French middle class sneered at Cézanne; it is why Hitler destroyed decadent art, and it is why the yahoos of the GSA propose to move *Tilted Arc.*

There is only one more point. It has nothing to do with art. The contract between Richard Serra and the GSA. The GSA bureaucrats propose to demolish law, the word and the intention, as well as sculpture. This is wholly in keeping with the present acts of this administration everywhere, including Nicaragua and space.

JOEL KOVEL

My name is Joel Kovel. I am a writer, a professor at the Albert Einstein College of Medicine and at the New School for Social Research; therefore, I do not represent the artistic community or the local work force.

I cannot comment on the contractual situation between Richard Serra and the government, nor from within the aesthetic tradition, yet I would like to make in my own words as strong a case as I can for the preservation of *Tilted Arc* as a work of art in this space. The general principle is that we need the defense, an active defense of the space, public space, within which art can take place in our society. The value of art can never be determined by popularity contests or immediate concerns of taste. Every lesson from the history of art tells us that.

The history of art tells us that, from the Renaissance onward, an increasing tension exists between genuine art and the state, beginning most clearly with the struggle between Michelangelo and Pope Julius. In the twentieth century, this tension necessarily grows with the growth of bureaucratic forms of state operation and the amplification of the state into a realm of total administration which tries to deny all oppositions.

Serra's work challenges that homogenization of contemporary bureaucracy. It challenges the loss of critical function which is contained in bureaucracy and retains the critical function which is essential to any genuine art. It represents the space of this plaza as divided instead of homogenized. It stands outside of the homogenization of bureaucracy, forcing an active relationship between the passerby and the space of the plaza, and necessarily the space of the building behind the plaza. The space is no longer vacant, but occupied, organized. There is an opposition in the space of the plaza. This opposition reflects the true oppositions in our society which bureaucracies work to deny; therefore, it has a critical function. The *Tilted Arc* is, I must admit, subversive, and this very hearing proves its subversiveness and hence its value.

Its very tilt, and the rust, both represents and opposes the building before it. It reminds us of the temporality of those forms. It reminds us that the gleaming and heartless steel and glass structures of the state apparatus can one day pass away also, therefore creating an unconscious sense of opposition and hope. This opposition is itself a creative act, as, indeed, this hearing is a creative act. I would submit that it is the true measure of a free and democratic society that it permits opposition of this sort; and that, therefore, it is essential for this hearing to result in the preservation of Serra's work as a measure of the value of opposition which this society can tolerate.

ANNETTE MICHELSON

My name is Annette Michelson, and I have been in a position to follow the entire trajectory of Serra's work, for my own work as a critic of the arts extends over twenty-five years. It includes five years as the art editor of the European edition of the *New York Herald Tribune*, ten years as an associate editor of *Artforum*, an internationally distributed magazine, and the last eight years as the cofounding editor of *October*, a journal dedicated to the theory and criticism of the arts within their social context. I am also Professor of Cinema Studies at New York University.

Although I have followed the entire trajectory of Serra's work from his initial exhibitions in this city in the late sixties, I shall not address its aesthetic particularities, nor shall I address the niceties involved in the violation of a contractual situation. I wish to speak, in a way which perhaps has been somewhat neglected, of the notion of public interest as it relates to the situation at hand. I therefore begin by calling attention to the fact that Serra's work has always been public—that he is a premier representative, an exceptionally distinguished representative of a generation responsible for the renewal, from the 1960s on, of sculptural enterprise in our country. Together with Robert Morris, Sol LeWitt, Carl Andre, and a few others, Serra remade and redefined sculptural practice and its theorization. A number of this generation turned in the 1960s to the production of large-scale, publicly oriented and publicly challenging works. Serra, however, is singular—in his background, first of all. As we all know, most artists in our society are recruited from the middle class, and the list of artists cited just a few moments ago as represented in this federal program confirms that knowledge. Serra is exceptional in that he is a product of the working class, and I would want to present as more than interesting, as truly significant evidence, a statement published in issue number ten of *October*, Fall 1979, by Serra. It is part of a long interview:

> As a kid I worked in steel mills. I worked when I was 17, 18, 19, and 24, 25. And my work could have something to do, on a very personal level, with the fact that my father was a factory worker all his life. So I began to think about his relationship to his work in order to understand what that had meant, to understand what a worker's life is about. If you ask me why I decided at one point in my life to investigate the fact that people's, working people's efforts were going into building my work, well, when you go to a steel supplier in America, you don't trace the product back to its origins, to where that steel was poured in Akron. You simply accept the fact that labor has afforded you a product that you as a sculptor can then remanipulate and offer to another class for another kind of consumption. And I had an interest in following the product from its inception, through the making, pouring, and forming of the material, steel, and in observing the workers' relation to all those facts. The

source of the need is very hard to define. I didn't think of making a political point of it. It just seemed to me that all the luxuries or commodities that we have are produced by workers.[6]

What I wish to stress in the very brief time allotted to me is the conjunction in Serra of a real concern for his own practice as related to and emerging from that of working people in this country. The sculpture now in question attests to his desire that people working or living near the site be confronted with an art that challenges, that does not necessarily confirm, their beliefs or tastes. He has wished, above all, not to impose upon them art of second-class or third-rate quality. We see in *Tilted Arc* the resolution to present working men and women with the same order of challenge that the middle and upper classes have found so interesting.

I therefore want to suggest that, if this particular work were to be relocated—and to relocate it is, as we know, for a site-specific work, to destroy it—if indeed it were then to be destroyed, there would be more than a drastic irony involved. There would be the sense, within the artistic community, that a blow had been struck at the attempt to conjoin, within a single work, publicly oriented, a concern with the nature of labor, of process, of materials, with an articulation of the public interest.

MARION JAVITS, SPEAKING FOR JACOB K. JAVITS

Thank you for this opportunity to be heard from. Both my husband and I feel very strongly about it, and if the Senator were not still in the hospital, believe me, he would have made every effort to be heard from himself. He has written and asked for me to read for him the following statement:

Dear Mr. Administrator:

Following your kind invitation of February 25 to testify at the public hearing on March 6 on the subject of the possible relocation of the sculpture known as the *Tilted Arc* in the plaza of the federal building named for me, the following is my statement:

First, let me express my understanding of and sympathy with those judges, officials, and federal employees who work in the Federal Building and for whom it was intended that the Federal Plaza complex be a place of recreation and pleasure. It is, of course, a matter of importance to them to be concerned with their work environment. If this question, which is posed by the hearing, could be resolved solely on these considerations, the answer would be self-evident; but we are dealing here, not with the question of decoration, but with a basic policy of our country.

As it is addressed by the Art-in-Architecture Program and by the issue of artistic integrity, the purpose of the program, as I understood it when I voted as a member of the United States Senate to authorize it, was essentially to express the commitment of our country to artistic expression as a vital element of our culture through the utilization of a part of the monies appropriated for public buildings for this purpose. History certainly teaches us that art, to be a valid expression of our culture, requires freedom for the artist to make his statement about the life and times in which the artist lives and works. Art, therefore, is distinguished in this way from decoration or design. It is an expression of the deepest values of our society.

Hence the selection process for the Serra sculpture was structured very carefully under the applicable statute, as is the case with the whole program. When the piece was installed, it was the result of a balanced judgment in which the National Endowment of the Arts, the General Services Administration, and other elements of the public and federal establishment were joined in agreement. The artist made a declaration in his work which was considered acceptable by all these elements, even though some might not like it or agree with it, and this some might indeed be many.

Let us never forget that one of the greatest works of art mankind has ever produced, Picasso's *Guernica*, is neither likable nor pleasing, but is a denunciation

of civil war. Let us never forget, too, that the enslavement of Soviet art for political purposes is condemned by us, not because it may not be pretty or pleasing, but because it is false.

I have thought long and hard about what ought to be done in this case. May I say, with all respect to those who may disagree, that the trouble with removal of Serra's work, quite aside from whether there are any legal or contractual issues involved, which must be decided in another forum, is that it runs contrary to the very basic premise upon which the Art-in-Architecture Program was designed in 1962 and compromises the kind of integrity which makes art in our society the symbol of what freedom means in the world.

It is only three and a half years since this sculpture was installed, and it has hardly had an opportunity to make its point. I have myself made speeches in this very plaza and it seems to me, too, to be an inhospitable place. My feeling is that much can be done to add warmth and hospitality to the plaza, and it is my understanding that, in this effort, the artist himself would help. Insofar as those who work in the building and our country's policy in artistic integrity are concerned, it is this direction in which we should move, rather than to perform an act of removal which can only be discreditable to the United States, the future of the Art-in-Architecture Program, to the development of serious artists here, and to the cause of freedom of expression.

As Mrs. Javits will be reading my statement, through whom I have learned about modern art, and which she is highly authoritative over the last thirty-five years, I add her deep feelings that the removal of this work would result in a very serious diminution, among modern artists, of interest in the Art-in-Architecture Program, and a grave shock to their confidence in the attitude of our government towards the advance of culture and artistic freedom here.

Sincerely, Jacob K. Javits.

VIRGINIA KEE

I am Virginia Kee, a resident of Chinatown. I am a member of Community Board #3. I am not here representing any group or numerous boards which I serve on, but I am here as a person from the neighborhood who frequently walks back and forth on these streets on the way to the subway.

I am not here to criticize a work of art—there are critics for that. History has shown that what may be valued in one time, or beautiful in one time to one group of people may be an outrage or an offense to others. Genius and beauty is always perception and, though I may not fully appreciate the *Tilted Arc* at Federal Plaza or the sculpture at Police Plaza, I defend their right to be there.

Art enhances the quality of life for all of us, and we should not be removing sculpture. In these times artists have had to tighten their belts as federal funding has been cut down to all areas of art, and we are feeling it as people who walk the streets and enjoy what we see.

To remove a work of art based on perceived public pressure may be a dangerous precedent. Such action requires careful analysis on whether or not this is really appropriate action for government.

FRANK STELLA

Good afternoon. Thank you for allowing me to speak.

In the matter under discussion the government and the artist Richard Serra have acted in good faith and have executed their responsibilities in exemplary fashion. The objections to their efforts are without compelling merit. The objections are singular, peculiar, and idiosyncratic.

The government and the artist have acted as the body of society attempting to meet civilized, one might almost say civilizing, goals—in this case the extension of visual culture into public spaces. The attempt to reverse their efforts serves no broad social purpose and is contrary to honest, searching efforts which represent the larger and truer goals of the whole society.

Satisfaction for the dissenters is not a necessity. The continued cultural aspirations of the society are a necessity, as is the protection of these aspirations. In this case the dissenters have accomplished enough by having their objections heard, discussed, and publicized. Whatever merit their case may have is now part of the public record and will have its proper influence in future decisions involving matters of this kind.

To destroy a work of art and simultaneously, in that effort, to incur greater public expense by moving it, would disturb the status quo for no gain. Furthermore, the precedent set can only have wasteful and unnecessary consequences. There is no reason to encourage harassment of a union of government and artists working toward a public good.

There are no circumstances here to warrant further administrative or judicial action. If the matter stands as it is no one will experience any serious harm or duress, and one more work of art will be preserved.

This dispute should not be allowed to disrupt a successful working relationship between government agencies and its citizen artists. Finally, no public dispute should force the gratuitous destruction of any benign, civilizing effort.

WILLIAM RUBIN

My name is William Rubin and I am Director of the Department of Painting and Sculpture at the Museum of Modern Art. That, in our opinion, Richard Serra is one of the major sculptors on the scene of world art is indicated by the fact that he will shortly have a large retrospective exhibition of his work at the Museum of Modern Art. This said, the observations that follow must be understood as personal.

Richard Serra's *Tilted Arc* is a powerful work of great artistic merit. Like many creations of modern art since its beginnings in the nineteenth century, *Tilted Arc* is also a challenging work that obliges us to question received values in general, and the nature of art and art's relation to the public in particular. It was chosen carefully by art professionals and others who have the responsibility to make such choices. Now, as I understand it, a number of people working at Federal Plaza are petitioning for its removal, which, since it is a site-specific work, effectively means its destruction. Their objections to the work involve negative judgments about it as art, as well as complaints that it obstructs free movement in the plaza. This last would, of course, be equally true of fountains, gardens, and other forms of enhancing and articulating architectural space.

About a hundred years ago the Impressionist and Post-Impressionist artists Monet, Gauguin, Cézanne, for example—artists whose works are today prized universally—were being reviled as ridiculous by the public and the established press. At that time the Eiffel Tower was being conceived and constructed, only to be greeted by much the same ridicule. Leading architects of the day, as well as writers and philosophers, to say nothing of the man on the street, condemned it, the tower, as a visual obscenity.

Although the tower was mounted with the understanding that it would be dismantled fifty years after its realization for the World's Fair of 1889, calls were heard for its immediate destruction. By the end of the fifty-year period in 1939, however, the Impressionists and Post-Impressionists had long since been accepted by our culture as great voices of the Western tradition, and the Eiffel Tower had become so popular that all the school children of Paris contributed pennies to the fund which made possible this monument's preservation.

I tell this story because it illustrates a truth that seems to me very relevant in the present situation: namely, that truly challenging works of art require a period of time before their artistic language can be understood by a broader public. I am not familiar with whatever legal arguments might attend the destruction of *Tilted Arc*, but even posing this question now seems to me inappropriate and unethical. By

this I do not mean to say that an owner of a work of art, be it architecture, sculpture or painting, can never ever, under any circumstances, contemplate the removal-cum-destruction which is at issue here, but that it is such a grave decision, and should certainly not even be contemplated until the work and its public can pass through a period of time required for the artistic language of the work to become familiar, so that this larger public can at least have a more informed opinion.

I must say that I have never heard of the removal of a public monument having been settled by popular vote. If that is what is being contemplated here, it seems to me a most dangerous precedent. Moreover, the decision should, it seems to me, involve the sentiments of a much wider circle than simply those who work in its immediate neighborhood. The society as a whole has a stake in such works of art, but certainly the consideration of any such move should not be responsible to pressure tactics and, above all, should not take place before the sculpture's artistic language can become familiar.

I therefore propose that consideration of this issue be deferred for a period of at least ten years. I am convinced that, a decade from now, many of *Tilted Arc*'s critics will have very different opinions. In any event, any question of destroying this sculpture could then be approached in a calmer, more philosophical, and certainly more informed and equitable spirit.

ROBERTA SMITH

My name is Roberta Smith. I am an art critic. I have written for *Art in America*, *Artforum*, and the *Village Voice*. I speak here today as a citizen of New York City, a member of the art world, and also as a resident of downtown Manhattan who lives and works within five minutes of Richard Serra's *Tilted Arc*.

The *Tilted Arc* is a work of art I want to defend in terms of civic pride, aesthetic quality, and local illumination. New York is a town in which many good and often great buildings have been torn down to be replaced by ugly ones. It is a city which consumes the best of its past and consequently ignores the best of its present. Instead of the late, great Pennsylvania Station we have the truly dehumanizing abomination of Madison Square Garden. Instead of the perfectly decent Bonwit Teller Building we now have the glitzy vastness of Trump Tower. Our city fathers, as they are called, are presently overseeing the destruction of Fifty-seventh Street and its vicinity by permitting dozens of big, undistinguished skyscrapers—far more than the traffic will bear—to be thrown up. There is a very real chance that within the next fifteen years New York City will look as if it had been built entirely within the last thirty, and, as often as not, these new buildings are adorned with equally mediocre public sculpture sitting passively in anonymous plazas, saying nothing to anyone about anything.

Although the Javits Building conforms to this tendency toward mediocrity, Richard Serra's *Tilted Arc* is the exception which proves the rule. Serra is a great artist in what is often called the Minimalist style—a style that has yielded some of the best sculpture of the twentieth century and that is currently out of fashion, as the lukewarm support this piece has received from the *New York Times* and the *Village Voice* has revealed.

The piece he has made for Federal Plaza is an excellent example of Minimalism, which has already been watched by the influential. The Vietnam Veterans' Monument, which has been such a hit in Washington, is a result of someone working with Serra's idea. So now we have the real thing, the original, genuine article right in our midst. It is one of the two best public sculptures in New York City. I also happen to love the Dubuffet, one of the very few which can be claimed by the New York art world, which brings so much prestige and so much business to this town, as a credible symbol of its presence.

This is a confrontational, aggressive piece in a confrontational, aggressive town, in a part of the city where confrontations in court are particularly the order of the day. Serra wanted a piece you could not ignore, like a statue on a pedestal, but that

you had to look at and think about every time you came near it. It is not wide entertainment and it is not an escape from reality, but it does ask you to examine its own reality, its scale, its material, its tilted sweep, and so the other things around it; and it is, as Serra has said, open to a multitude of readings.

Serra has taken the sweeping gesture traditional to conventional figurative monuments—look at our Statue of Liberty or the Statue of Columbus—and magnified and purified that sweep with a curving, tilted plane of steel. He has also magnified the implicit exhilaration of such a gesture. Sometimes the *Tilted Arc* has for me the velocity and grandeur of a train coming around the bend. Sometimes it stands stock still, the most solid, stable thing in sight. Sometimes it seems to me, as Donald Judd has said, like a fragment of a great, invisible cone that it is up to me to complete. It manifests before my eyes a portion of the earth's curve and manifests and enhances the illusion of the sky's dome. It is not made in aestheticized marble or bronze, but in raw steel, strong and undiluted. It acknowledges generations of American steel workers and the basic fact that American industrial life is in its very materials.

When you really look at and think about the Serra it tends to cast everything about it in a bad light. Its strengths point up the weaknesses of the awful buildings around it. To ask for the removal of the Serra amounts to shooting the messenger for the news it brings. The news delivered by the *Tilted Arc*, the fact it brings out, is that the buildings behind it should be the real target of public outrage.

This city and this nation are sinking in a rising tide of visual pollution which this piece vigorously opposes. It is not an easy work. It is disconcerting, but it takes years of schooling before you can read the classics of literature, and many of them are extremely disconcerting too. I ask you gentlemen—and it should be pointed out that these are all gentlemen on this panel, there are no women represented here—to look and think and work again, and to think not only about the plight of this piece, but also about the plight of culture in this country.

BERT DIENER

I speak in favor of the Richard Serra sculpture, *Tilted Arc*, remaining in its place in Federal Plaza.

My name is Bert Diener, and I'm president of New York Artists Equity Association, one of the largest organizations of its kind in the city. We are an unaffiliated, independent group of artists, painters, sculptors, printmakers, and others involved with the arts and deeply committed to promoting and protecting the economic and cultural interests of all visual artists.

In the area of legislation we cooperate by initiating and fostering bills affecting artists. An excellent example of this was our working, on and off for over eleven years, with the State Attorney General on the newly enacted, in 1983, Artists' Authorship Rights Law, also known as the Droit Moral. The records will reveal that a great many of our suggestions were integrated into it.

Accordingly, this law clearly states that it is prohibited to alter or modify an artist's work on public display without their consent. Therefore, as the creator of the *Tilted Arc*, Richard Serra must first give his approval before anything can be done about its removal. He is the arbiter, not the owner.

If as a result of these hearings, however, the General Services Administration decides to run counter to the Droit Moral Law, then we envision far-reaching repercussions. The ripple effect will not only disrupt Art-in-Architecture Programs, but it will also play havoc with all public arts projects. Few artists will knowingly place themselves in the undesirable position of being at the mercy and whim of anyone or group who dislikes what they see. If a contract is not bona fide, there would be no recourse, and the powers that be would fall back on this precedent.

Everyone familiar with this situation knows that there was a legitimate contest and the selection was made by accredited agencies and individuals; that the winning design was created just for the Plaza; that never at any time prior to its installation was the quality questioned; and that an understanding existed regarding removal which isn't applicable.

In our opinion, likes or dislikes about *Tilted Arc* are not the issue, and certainly outside pressures should be ignored. What is at stake is principle; what is of prime import is the integrity of the contract; and what is a deciding factor is the meaning of the law.

BETTY ST. CLAIR

My name is Betty St. Clair. I am associated with the law firm of Rabinowitz, Boudin, Standard, Krinsky and Lieberman; and we represent the National Emergency Civil Liberties Committee, which was founded in 1951. ECLC's purpose is to promote human and civil rights and to protect civil liberties.

ECLC believes that artistic expression, no less than religious freedom or political expression, is entitled to full and complete constitutional protection, and that our critical judgments of the merit of a particular artistic piece cannot justify, in constitutional terms, the government's action with respect to a particular piece of art. And, with respect to the First Amendment, this principle is very well established in our law.

The expression of particular ideas or emotional expressions cannot be shut off to protect an unwilling viewer or a hearer who is displeased with the expression in question without some kind of showing, a legally sufficient showing, that the privacy interests of the viewer are invaded, and in the public sphere the whole privacy interest just doesn't exist. Once a piece of sculpture is erected in the public sphere there is no longer any privacy interest, so what the Constitution would require is that people who are offended by a particular piece of artwork simply avoid looking at it. There are many, many cases in our law, including many Supreme Court cases, which detail this doctrine. The Constitution says that it is improper for government to decide, because a piece of artwork offends some people, that it cannot exist.

ECLC believes that the effort to destroy Richard Serra's work is the visual arts equivalent of book burning. Because some people have decided that they do not like this piece of art, they want to get rid of it. Exactly the same thing has happened many, many times in history with respect to all sorts of expressions that are protected by the First Amendment, and it's no less offensive here because it's a piece of sculpture rather than some book.

There is also much support in New York State law for these principles. In the preamble to the Artists' Authorship Rights Act, which was recently passed by the New York State Legislature, the legislature made some very explicit findings that New York State is the home of many artists of international reputation and that the physical state of a work of fine art is of (and this is the legislature's words) enduring and critical importance to the artists and also to the community. The legislature further found that there were many cases where artwork was altered, defaced, mutilated and/or modified, thereby creating a loss in the arts and, ECLC also

believes, a loss in the community. This is a somewhat new and growing area of New York State law, and ECLC believes that the protection of artists' rights and law will continue to grow beyond what already exists in the Constitution.

HARRIETTE DORSEN

I am the Chairman of the Board of Volunteer Lawyers for the Arts, a nonprofit organization which provides free legal services and legal education to indigent artists and arts organizations. Many of our clients are experimental or avant-garde artists who gain their first recognition through government programs of support for the arts. As such, VLA and our clients in New York and throughout the country are intensely interested in the integrity of the procedures by which public art is chosen and evaluated.

I think we all recognize the obvious fact that the experience of a work of art is a most subjective one. What some of us may find beautiful, interesting, or compelling may be abhorrent to others. In addition, a work of art does not have to be pleasing in the ordinary sense of that word to make a significant contribution to the way we look at our world and the objects in it. Different works of art may have different meanings and different perspectives, each of which makes different contributions to the public environment. Thus our views of the quality of Mr. Serra's work are irrelevant to these proceedings.

I see a great danger to the arts in general, and particularly to the artists who are constituents of VLA, by hearings such as this which seek to second-guess a decision made by the duly constituted panels of art experts which selected Mr. Serra's sculpture after the review of the work of many artists and hundreds of slides. The Serra work was not selected casually, but was carefully evaluated in the proposal stage, with scale mock-ups and thorough questioning of the artist as to its structure and maintenance. Both the General Services Administration and the National Endowment for the Arts had appointed panels of art experts who reviewed the many submissions and Mr. Serra's proposal. In choosing works for new federal office buildings, these government panels sought works which were not only specifically suited for the particular sites on which they would be installed, but would also reflect the artistic diversity and energy of our culture and all of the forms and traditions of contemporary sculpture.

This selection process must be protected and insulated from the shifting winds of popular taste if government support for the arts is to reflect our country's diversity and avoid a situation where the only works found suitable for selection are the conventional, the uninspired, and the uncontroversial, those which can withstand popular referendum. I fear that hearings such as this, which review, after the fact, the value or wisdom of a particular work of art, will not stop at the reconsideration of a particular piece of public sculpture in the Art-in-Architecture Program, but

could spread, if allowed to go unchecked, to the reconsideration of any government grant or commission which some may find objectionable. This would be a disastrous result for public support of the arts.

The public policy of New York State provides an additional reason for the support of the Serra work. The recently passed Artists' Authorship Rights Law, the so-called moral rights law, prohibits the public display of an artist's work in altered form without the artist's consent. Clearly a sculpture designed specifically for a particular building site will be altered significantly if it is moved to another location; for instance, surroundings, scale, perspectives, and light all change and alter how a particular work is seen.

President Reagan, in a proclamation praising the Art-in-Architecture Program this winter, particularly approved the program's courageous decisions to support the aesthetic freedom of artists by sometimes selecting works which are controversial, recognizing that certain of such works will be met with hostility by some or will not be understood by others. But the President recognized that a vital democracy must support such decisions.

I urge you to join in supporting the integrity of this important and vital program and to decline to dismantle the Serra sculpture.

Selected Statements Arguing for Removal of Tilted Arc

NORMAN STEINLAUF

My name is Norman Steinlauf, and I have been a tenant in this building since 1971. I am pleased to note that GSA has done its utmost to help make this facility and the environs more attractive. Hardly a week goes by that there isn't some exhibit or presentation taking place in the lobby. The regional administrator of GSA, and all those responsible, are to be commended.

Much has been said the past two days both pro and con relocation of the rusted steel object that stands in the plaza. I'll not refer to it as art because I am not a very good judge of what is and what isn't art, and I think the jury must still be out on this one.

My credentials in art, unlike some of the previous speakers, are limited to recognizing the difference between a Rodin and a Moore sculpture, and between a Van Gogh and Monet, sometimes; but I keep trying because I appreciate what has come to be accepted as art, and I do my level best to understand it and to honor it and the contribution it has made, and continues to make, to the human spirit.

Heaven knows we need more, not less, art in our lives to blunt the harsh, often severe realities of life—especially in a great, but challenging city like New York—and the government and Art-in-Architecture Program have made significant contributions to this end.

In this way I believe art transports us, if only for a brief moment, and for each of us has some personal meaning. It is here in this very personal, individual experience that art is at its very best and has so much to offer, and why it makes life richer and more tolerable.

But the wall of steel in the front yard of this building does nothing for me, and, from what I hear from people in this building and the community, nothing for them, except represent an irritant and impediment.

I am speaking about thousands upon thousands of people who come to this building each day to work or to seek assistance. These are the people whose lives are affected by what goes on here. They are the ones concerned with an improved environment in which to conduct their daily affairs. These are not the people, many of them experts, self-proclaimed and otherwise, who live and work in far off places,

who often say there is too much interference by big government in their lives, but who suggest that removing the wall in the plaza is another manifestation of a most undesirable practice.

I am employed by a small but important agency—the Federal Emergency Management Agency—and I believe I speak for most of my colleagues in supporting relocation of this piece.

In our special area of expertise, we are keenly aware of the inviolate role played by the local community as to which programs will be implemented. No one wants anything forced on them from on high; rather, they prefer to have an opportunity to review, consider, negotiate, alter and, maybe, accept it.

But federal employees, and more important the residents of surrounding communities, were not consulted regarding the *Arc*. Granted, most of us may not be experts in judging art, but we know when someone or something intrudes upon our environment, and that is cause for concern.

It was a committee of experts in Washington, D.C. that decided to acquire the *Tilted Arc* for 26 Federal Plaza. No one asked those of us who "live" here for an opinion; that I believe is the democratic process—the missing element until this hearing.

In my view utilization of the plaza is now severely limited, preventing use by the occupants, and the neighboring community, for ceremonies, cultural attractions, and other recreational activities.

At a time when our national administration talks increasingly about reducing the imposition of the federal government in the affairs of the people and their communities, I am pleased to see the initiative taken here today, and I sincerely hope it will result in a decision to restore the plaza to its original appearance and use.

JOSEPH I. LIEBMAN

My name is Joseph I. Liebman; I am the Attorney in Charge of the International Trade Field Office, Civil Division, U.S. Department of Justice, with offices located at 26 Federal Plaza.

I appreciate the opportunity to express my personal views on a question which impacts on many people, especially those who have daily contact with 26 Federal Plaza. Those of us who work there probably spend more time in the vicinity of the plaza than any other place. Our working environment affects our creativity, productivity, and our physical and mental well being, which impacts on our personal lives.

I have worked at 26 Federal Plaza since 1969. While the plaza never fulfilled all my expectations, at least until 1980 I regarded it as a relaxing, reflective space where I could walk, sit, and contemplate in an unhurried manner. Every now and then rays of sunshine bathed the plaza, creating new vistas and moods for its vibrant but unchallenged space.

I remember those moments. I remember the cool spray of the fountain misting the hot air. I remember the band concerts. I remember the musical sounds of neighborhood children playing on the plaza, while their mothers, sheltered under the courthouse, rocked baby carriages, still minding their children at play. I remember walking freely in the plaza, contemplating the examination of a witness, undisturbed by the presence of other people engaged in conversation or young lovers holding hands. I also remember my dreams of additional seating areas, of more cultural events, temporary outdoor exhibits of sculptures and paintings, ethnic dance festivals and children's shows.

All of those things are just memories now, ending with the installation of the *Tilted Arc*. Regardless of the thoughtfulness and artistic accomplishment of its creator, it fails to add significant value to the plaza. The *Arc* has condemned us to lead emptier lives; the children, the bands, and I no longer visit the plaza. Instead, the *Arc* divides space against itself.

Whatever artistic value the *Arc* may have does not justify the disruption of the plaza and our lives. The *Arc*, a creation of mortal hand, should yield. Relocate it on other land; reprieve us from our desolate condemnation.

REPRESENTATIVE THEODORE WEISS

Let me thank you for inviting me and for allowing me to participate in these hearings this morning. Let me start out by telling you that the neighborhood in which we are is not an unfamiliar one to me. For approximately twenty-five years prior to being elected to Congress, this neighborhood was my professional home. I spent four years just south of here as an Assistant District Attorney working in the Criminal Court Building, then fifteen years at City Hall as a member of the City Council, and for about a decade in the sixties while these buildings were being put up I had my office at 305 Broadway, directly across from all of the pounding and riveting and construction demolition that was going on, so that I have not only a personal familiarity with it, but a deep interest in what happens in this community and in this area. I want to express my appreciation to you and GSA for convening this hearing and for giving us an opportunity to take a fresh look at *Tilted Arc* and to explore possible courses of action for it.

The controversy that the placement of the sculpture has engendered warrants reevaluation at this time. *Tilted Arc* is the result of the Federal Government's Art-in-Architecture Program, an outstandingly effective program conceived by President Eisenhower and implemented by President Kennedy in 1963. It seeks to enhance the image of America through its government buildings by placing distinctive works of contemporary American art in public view. By devoting to it one-half of one percent of the cost of construction or major repairs of federal buildings, this program, under the General Services Administration, has commissioned over two hundred works of public art for federal facilities throughout the country.

The Art-in-Architecture Program has been a major demonstration of our government's commitment to the American artist and their work. It has contributed to public awareness of the arts, has provided a steady enrichment to public places, and has strengthened the fragile partnership between artists and government. It has brought important works of art out of the museums into urban settings and made them accessible to large numbers of Americans. As one of the most active supporters of the arts in the Congress, I have supported this program in debate and discussion of the floor of the House of Representatives, and I will continue to do so regardless of what budget cuts may be threatened in the future. Whatever controversies have resulted over works with this program in the past and in the present, they should not be interpreted by anyone as a signal that the program ought

to be eliminated. Rather, they testify to the vitality of the program and its importance to a significant number of Americans.

As might be expected from such an ambitious and far-reaching program, not every selection of artwork or location has been as fortunate as others. In 1981 a public artwork commissioned by the internationally known urban sculptor Richard Serra resulted in *Tilted Arc* being placed squarely in the open courtyard at 26 Federal Plaza in lower Manhattan. Imagine, if you will, this curved slab of welded steel, 12 feet high, 120 feet long, weighing over 73 tons, bisecting the street in front of your house, and you can imagine the reaction of those who live and work in the area. Adding to the shock effect is the natural oxide coating, which gives it the appearance of a rusted metal wall. Many who first viewed *Tilted Arc* regarded it as an abandoned piece of construction material, a relic perhaps too large and cumbersome to move.

The artist is said to have intended, with this piece, to "alter and dislocate the decorative function of the plaza." If that was the intent, one may conclude from its harsh, disorienting effect that the artist has eloquently succeeded in executing his concept. But what of those who live and work within its confines? The sculpture cuts a huge swath across the center of the plaza, dividing it in two, and acting as a barrier to the building's main doorways. Access to the building is awkward and confusing, and the normal walking patterns of those who enter and exit the building are disrupted. *Tilted Arc* rends the serenity of the plaza and obliterates its vistas, and I—just to be sure that my impressions were not misplaced—I took another look at it as I walked in here, and truly you must look at that again if you think that it fits into this location.

Ever since this work became visible it has been the subject of intense controversy. I do not wish to comment on its worthiness or its artistic merit. Undoubtedly the very existence of *Tilted Arc* has raised the aesthetic consciousness of everyone who has participated in discussions about it, whether pro or con; however, I believe that in the three years that it has been sited in Federal Plaza the public has had sufficient time to ponder its artistic statement and contemplate its aesthetic virtues. The time has come to find a new location for *Tilted Arc*.

Mr. Serra argues that, because his work is site-specific, just to move it to another location would destroy it. It has, he maintains, a proprietary claim upon the plaza just as real as that of a painting to its canvas. But I suggest that there are other valid claims upon the plaza that conflict with Mr. Serra's, and that the scales tip in their favor. The community—those thousands of people who live and work in the area—have the right to reclaim this small oasis for the respite and relaxation for which it

was intended. This precious, small, open space is too rare an amenity in lower Manhattan to be violated in this fashion. *Tilted Arc* was imposed upon this neighborhood without discussion, without prior consultation, without any of the customary dialogue that one expects between government and its people. The National Endowment for the Arts panel of three selected the artist and a three-person group from the General Services Administration in Washington, D.C., approved the design. No one else—not from the community or its representatives, not the architects, not even the Regional Administrator—was ever consulted. These panels, no matter how expert or how well-intentioned, are not so omnipotent or infallible in their judgments that they cannot be challenged or improved upon.

Many of those who fear the removal of the *Tilted Arc* openly admit that the sculpture in this plaza, or placing it there, was ill-conceived. But they say that the principle itself is what matters, and they are concerned that relocating the work itself may establish a bad precedent. Being concerned about what wrongful things may be done in the future is no justification for allowing a wrong to continue in the present. There are other principles involved, and the principles embodied in the original creation of the plaza, it seems to me, also ought to be regarded highly. Since the *Tilted Arc* was erected, the Art-in-Architecture procedures have been expanded to provide for consultations with local communities which are to be recipients of their art. If these procedures had existed when *Tilted Arc* was under consideration, it would not be necessary for us to be here today.

Mr. Serra, I do not wish to see your work destroyed. I simply would like to see it in a more felicitous location, within more compatible surroundings. This is not an assault on art or on artists, or indeed on this specific piece of art. It is simply an urging that it is located in the wrong place and that it ought to be moved to some other place to allow the plaza to be used for what it was originally intended, and to allow the work of art itself to continue to be viewed in a probably better and more felicitous light.

The community deserves to have its plaza restored and its advice sought as to how the plaza might host other artistic and community endeavors. The rights of a large number of people who live and work here have been overlooked and ignored. I would like to see their rights restored.

VICKIE O'DOUGHERTY

I am Vickie O'Dougherty. I am a representative, a physical security specialist for the Federal Protection and Safety Division of GSA. My main purpose here is to present to you the aspects, from the security angle, which affect us in the execution of our duties here.

The *Arc* is what I consider to be a security hazard or disadvantage. My main contention is that it presents a blast wall effect, and I will get more into this. It's 120 feet long, 12 feet high, and it's angled in a direction towards both federal buildings, 1 Federal Plaza and 26 Federal Plaza. The front curvature of the design is comparable to devices which are used by bomb experts to vent explosive forces; for instance, they have bomb trucks designed for this purpose which are cylindrical in shape, and this is half a cylinder or a quarter of a cylinder—whichever—and it's angled comparable to that. The purpose of these bomb trucks or bomb devices is to vent explosions upward. This one could vent an explosion both upward and in an angle toward both buildings.

Now in past experience we have had several explosions on federal property by terrorists, activists. The principles that they used were twofold: they used many times this type of device—a wall or something like that to vent the explosion against the building. Most of the time the wall was closer to the building. It would, of course, take a larger bomb than which has been previously used to destroy enough for their purposes; but it is possible, and lately we are expecting the worst in the federal sector . . . [audience laughter]. Yes—most people do express their opinions against us in either violent ways or with graffiti and those other types of ways. We are considering right now many, many antiterrorist types of devices to install in the building, but we already have some that exist which are proterrorist . . . [audience laughter].

One other problem that we have is the graffiti problem. That wall—pardon, the *Tilted Arc*—is used more for graffiti purposes than any of the other walls. We have found that, through experience, most of the graffiti is done on the other side where we cannot view it.

Loitering for illegal purposes is another problem that we experience, and we do have the problem with drug dealings which we cannot see from our side of the building. We, by the way, only concern ourselves with the federal side of the building most of the time because of the fact that we do not concern ourselves with jurisdictions which are not ours, which is the state side and the street side. So from

our side of the building we cannot see what goes on near the fountain and in the areas around the fountain.

Basically we consider that, if the *Arc* stays, we can adapt, but the problem is that we have limited manpower, limited people to do the job of enforcing any kind of problems which go on around the *Arc*, and we also—if there were to be an explosion on our side of the *Arc*—we can probably expect to have a great deal of property damage in the form of glass shattering. If it's during the daytime, this could mean loss of life; if it's during the nighttime then it's property damage. However, it does cost money to replace glass.

All right. So mainly our contention is that it could be a blast wall used for someone else's purposes, not ours, and that it could be a place that would foment criminal activities.

WILLIAM TOBY

Good morning, members of the panel. My name is William Toby and I am the Regional Administrator of the Department of Health and Human Services, Health Care Finance Administration. I have oversight responsibility for the Medicare and Medicaid Programs. I have a budget of fifteen billion dollars I am responsible for. I am also responsible for 172 people who work in this building. I am very pleased to appear before this public hearing to provide my opinion on how to better utilize the plaza on the side of the Federal Building, which now houses a rusted metal wall which passes under the sobriquet of a sculpture called *Tilted Arc*.

Let me emphasize at the outset that I am a vigorous supporter of the arts, sculpture in particular. I especially support the use of the lobby in the Federal Building to exhibit art. It's a source of joy and gratification to me. I am here today to express my opposition to the present location of the barrier that passes for art and to recommend its relocation to a better site—a metal salvage yard. There are four specific reasons why I recommend its relocation: number one, it destroys the previously open plaza by obstructing free passage across the plaza and blocking an open view of the fountain; number two, it constitutes a scar on the plaza and creates a fortresslike effect; number three, it's a target for graffiti; number four, it is too large for its present site and it violates the very spirit and concept of the plaza.

During my seventeen years of employment in this building nothing has offended me and my staff more than the erection of this huge, rusted metal barrier. It has been a source of continued complaint by my staff, who are affronted by its appearance on the plaza whenever they have to look at it. I venture to say that those who support it do not work at 26 Federal Plaza. They don't have to look at it, and they don't have to negotiate around it to walk across the plaza. So I urge all of you to hasten its demise or its reduction to the scrap iron from which it seems to have been born.

HARRY WATSON

Gentlemen, my name is Harry Delaney Watson. I work for the Bureau of Investigations of the State of New York as a supervisor. I have lived in this area for the last twenty years and work in this area.

Every time I pass this so-called sculpture I just can't believe it. Unbelievable. If you want to talk about sculpture you have in the City Hall Park three classic examples of it, namely, Benjamin Franklin, Horace Greeley of the *New York Tribune*, and Nathan Hale, who gave up his life in the Revolution. And if he saw this *Tilted Arc* he would say, "What did I give up my life for if this is what they descend to in these days?" As I said, when I pass it I can't believe it. The General Services Administration, or whoever approved this, this goes beyond the realm of stupidity. This goes into even worse than insanity. I think an insane person would say, "How crazy can you be to pay $175,000 for that rusted metal wall?" You would have to be insane—more than insane.

I believe that it was a complete waste of money. I think the only solution to the whole thing is to take it down and sell it to a scrap metal farm for maybe fifty dollars. I can't see where anybody would approve such a piece of nonsense or garbage in this day and age, and I hope that this can be resolved and that it be taken down.

I also voice an opinion that all of those in favor of it, you can bring up buses, take them over to Bellevue Hospital, and sign them into a mental ward. That is where they belong.

JESSIE GRAY

My name is Jessie Gray, and I am speaking as an artist who lives outside of New York City but exhibits here in New York City as well.

I believe the GSA is caught in a turmoil of the art world, which is divided into political camps about what art is, what art isn't, and, as in Reaganism and the Democrats, whoever is in office seems to do all the talking.

Artistically I don't agree with Richard Serra's sculpture. I have to agree that he has the right to do what he wants, and I regret the fact that you went ahead with it. I don't think it belongs there, but I don't know what you can do at this point except not make the same mistake again.

I have a prepared statement here saying that our public money is being squandered so that a small group of artists can make a financial killing. These artists are part of a larger, but still small but tightly organized and very controlled clique of galleries, curators, and critics. They all write about each other, recommend and promote each other, and, as in the case of the Serra sculpture, they sit on each other's boards and advise and give grants and monies to each other.

They, the political camp that is in control now, I believe, personally, advocates a dehumanized and minimal art, and in some cases an art that is out of the Dada movement that is just plain smart-aleckiness. For instance, a forty foot high clothespin by Claes Oldenburg is erected across from City Hall in Philadelphia; a sixty-two foot tall fishing pole, with its line running across Gore Creek in Vail, Colorado, has its line attached to a six foot long tin can mired in the creek (I don't know if that is up yet—it was in process); the crumpled mass of cars seventeen feet high by John Chamberlain, commissioned by the GSA again, for the McNamara Federal Building in Detroit (and, by the way, federal funds were used to the amount of seventy thousand dollars for that). So forth and so on. I don't know what public funds are in these following works: lightning rods placed in the desert to attract lightning (these are large scale works as far as money goes—I don't know exactly where the money came from for that); a pile of rocks forming a jetty in the shape of a spiral in the Great Salt Lake of Utah; and a sculpture, or we would call them earth works or site works, called *Lips*, which is signifying a mother earth in the shape of a vagina in a public park in this area.

Now the way they intimidate you is to just give you a smoke screen of intellectual mumbo-jumbo about art, which is the equivalent in government of bureaucratese, which everybody is trying to fight, and they will do this to make you feel you know nothing, should have no opinion, and just generally get rid of you; and I really don't

know what you can do about this. You can have more and more panels, but the panels are going to be all populated by people with a certain political viewpoint, and you can get every expert opinion in the world and you are still going to come up with the same kind of art. And the reason that I see that all of these people are in it, and especially there is a big movement towards site art, is money. There's lots of money to be made, hundreds of thousands, actually millions of dollars are being made out of something called site art through the new percentage laws which, you know, in many states and municipalities require public structures to put aside some of their monies in the construction as an art budget; in the land reclamation act, which lets strip miners restore damaged land by commissioning artwork, which can still leave much of the earth destroyed and adds insult to injury by creating further meaningless excavation, or just a piece of steel or concrete is called art. Anything can be called art, especially when surrounded by intellectual mumbo-jumbo. That can be called art, and it can save strip miners a lot of money, and does.

How do we stop this? I don't know. I almost feel this whole thing needs to be cauterized, and the only way you can cauterize is to just stop the money, and I, as an artist, hate to say that, but I have come to the conclusion that most of the monies given are just going into the destruction of a humanizing influence. It's going towards an art that I believe is basically dehumanized. If you dry up the money let's see how many of these artists continue out of artistic commitment. I doubt many would. I think they go where the money goes, and if the money goes toward a certain philosophy, the artists follow.

Speaking of the artists' rights, what about the public's right and, finally, what about the rights of—if we are talking about artists' rights, what about the rights of the designer of the square? I would presume his artistic rights should be paramount, take precedence over further artistic rights, just as some artist shouldn't come in and blowtorch Serra's sculpture and have his artistic rights take precedent over Serra's. So if we are talking about artistic rights, why not go back to the designer of the plaza?

PETER HIRSCH

My name is Peter Hirsch. I am the Research Director and Legal Counsel for the Association of Immigration Attorneys. We are a group of private attorneys and, as such, we are constantly at 26 Federal Plaza because that is where the Immigration Service is located.

My membership has authorized me to say that we are entirely opposed to the *Tilted Arc*. We feel that—this is my own personal view—that a good place to put the *Tilted Arc* would be in the Hudson River. This is not a facetious comment. The Westway is about to be built. I am told that they are going to have to place artificial things in the river so that we can have shelter for the striped bass. I think the *Tilted Arc* would make such a very fine shelter. Now this may sound a little facetious, and it is; however, there is something more profound at stake here than an object on a plaza that the overwhelming number of people who are exposed to that object do not want. And what really is at stake is a question of democracy.

We have heard artists come here—artists, mind you, speaking in terms of contracts, programs created by bureaucrats—and here I am, an attorney, saying maybe what we are talking about is democracy. We have lists here in this building of people who do and do not want that piece of sculpture. Overwhelmingly they do not want it.

Now Mr. Rockefeller—whichever Rockefeller we are talking about—and they are great patrons of the arts, they buy the art that they like. They do not buy art simply because it's modern or because somebody has told them, if you look at it for ten years you will then start to like it. They buy it because they like it at the time. The public has not been given that choice. The public is saying, we don't like it, and we are not stupid, and we are not philistines, and we don't need some art historians and some curators to tell us that we will like it. We don't like it.

Now the *Village Voice* points out that that piece of rusting metal is symbolic, in a way, of what goes on in that building, and I agree; it is symbolic, but not in a healthy way. There is right now pending a lawsuit against the General Services Administration, an extraordinary lawsuit by my association, to allow the public to go to the bathroom on the thirteenth floor, occupied by the Immigration Service. The Immigration Service has contempt for democracy; it is in 26 Federal Plaza. This piece of art has contempt for democracy; it fronts on the Federal Plaza. Democracy says we want to go to the bathroom. Democracy says we are not fools, we are not stupid, we don't like that piece of art. I say, in a democracy, why not let democracy rule.

MARGO JACOBS

My name is Margo Jacobs. I am a physical anthropologist; I am a thoroughbred horse breeder; and I am also married to Robert Allen Jacobs, one of the architects of the Federal Office Building and International Court of Trade. However, today I speak to you not as the wife of one of the architects but as an individual and as a member of the public. I have lived and worked in New York City for forty-five years, twenty of them in this area. I have a bachelor of arts degree in art and architectural history from New York University.

I realize that my views or anyone's views of the sculpture presently occupying the plaza are subjective and personal, but what we are meeting to discuss today is not whether or not we like the sculpture, but what the sculpture's effect is on the public and on the plaza—the public's space—which it presently occupies. In my view the sculpture does not belong in the Federal Plaza because it is hostile both to its environment and hostile to the public, since it acts as a barrier to their free movements. The plaza is both an integral part of the design of the Federal Office Building and Court House and, at the same time, an extension of Foley Square Park. This plaza was not designed to be an empty space, but it was designed as a place for people and for their public assembly.

The plaza is a site-specific work of art incorporating a geometric pavement design, now disrupted. The design invited us to follow its pathways from the courthouse to the fountain, from the street to the office building. Its antecedents are Roman pavement designs, specifically the Campidoglio in Rome done by Michelangelo. Modern use of pavement design may be seen today at Madison Avenue and Seventy-eighth Street in front of the Graham Gallery, designed, I believe, by Alexander Calder.

When we go back in history, we find that the plaza is based on European models of town and city squares or piazzas. The function of the plaza or piazza or square has always been to encourage members of the public and workers from the area to mingle, congregate, move freely back and forth—in sum, to snack, to exchange ideas, and maybe telephone numbers. Historically the plaza has always been a dynamic place with constant action, the move and flow of people. A plaza represents the best in urban design: a place for people in an open space made in the human dimensions.

This is what we had in Foley Square Plaza until a 120-foot long, 12-foot high metal sculpture was placed in the center, cutting the plaza in half and reducing its effectiveness as a public place, and possibly making it a dangerous place to be when

a large number of people congregate at once, as they do in the political demonstrations that we have all seen on the seven o'clock news.

We are not here to discuss the merits of the sculpture, but only the place it was put. Its placement is, at best, hostile to its environment, and it negates the use of the open space. Mr. Serra's work, according to him, was deliberately designed to change, alter, and dislocate someone else's artistic creation. This is wrong. The architects and landscape architects, believe it or not, consider themselves to be artists too. How would Mr. Serra feel if someone came in today and destroyed his design? From what I hear he would not like it.

Let us not lose what city dwellers prize so highly: an open space for use by people to pause in their hectic pace to rest, to savor the sun, the splashing of the fountain, to reflect and then to take up their busy lives again. May I invite the committee, in closing, to once again look at the plaza and envisage it as it once was intended, and as a beautiful and harmonious place.

SHIRLEY PARIS

Good morning. I am here as a private citizen, although I work in the area.

Tilted Arc is, in my opinion, the Berlin Wall of Foley Square and, like its prototype, it should have been knocked down during construction. This gigantic strip of rust is, in my opinion, an arrogant, nose-thumbing gesture at the government and at those who serve the government: the civil servants and those of us who comprise much of the regular daytime population of Foley Square. It is bad enough for the government and civil servants to be the perennial targets of the public and the press alike, but for us to be denigrated by artists as well—as exemplified by the affront embodied in *Tilted Arc*—is, to say the least, compounding the insult.

Federal Plaza should be returned to its original state: that of a public amenity, an oasis of light, air, and space, one which pleasantly greets individuals as they enter a building representing within its precincts the august government of the United States of America.

It should be noted here that many of those who visit only occasionally are those who visit the Immigration and Naturalization Service in order to apply for citizenship. They are anxious to become citizens of our great nation, to leave behind their original and often oppressive homelands. Yet when they enter the building from which they hope to emerge with hope and promise for a freer and better future for themselves and their families, they cannot help but be painfully reminded by *Tilted Arc* of the iron curtains from which they escape. Seeing the ominous rusty steel barriers which imprisoned them, minds as well as bodies, they seek the spiritual light, air, and space of America. They should then be impressed with the American spirit as they seek its protection. They should not be compelled to circumvent a rusty reminder of totalitarianism.

In my opinion the symbolism of *Tilted Arc* is political rather than artistic. As such, it does not merit its acceptance as an authentic work of art. The mere fact that its symbolism generates controversy does not admit it to posterity as a true artistic expression. In my opinion *Tilted Arc* is the absurd reduction and caricature, as it were, of a contemporary modular school of art. This is a school with which I am familiar, having studied it in connection with my graduate work towards a masters degree in art, my thesis advisor having been one of the giants of this school, the late Tony Smith.

As improvement to the plaza, I suggest that the fountain remain as it is; the entire area be resurfaced, being presently hazardous to pedestrians and difficult to

maintain in general; and as for *Tilted Arc*, I suggest as a substitute the planting of a row of evergreen bushes or, in the alternative, tall, graceful cypresses.

As a footnote, may I suggest that GSA amend its rules, if any such exist, in regard to the installation of artworks; such amendment to ban permanent installation of any kind, with time limitations of various periods, as is the practice in museums; such bans to include the alteration of walls and other surfaces except at the expense of the artist or his sponsors. Many more opportunities will thus be afforded for a number of artists to exhibit their work, and it also will serve to stimulate the attention of the public to the changing face of art as it is currently practiced.

PAUL GOLDSTEIN

My name is Paul Goldstein. I am speaking for Katherin Freed and on behalf of Community Board #1. Community Board #1 represents the area including this civic center area and most of Manhattan south of Canal Street, including the financial district, the Battery Park City area, and Tribeca.

The Community Board discussed this item and voted at our February 13 meeting, by a vote of twenty-two in favor, zero opposed, and two abstentions, to recommend the removal of *Tilted Arc* from 26 Federal Plaza and its relocation to a more suitable site.

In reaching this decision, our board felt that, unfortunately, this piece of art obstructs most of the open space at Federal Plaza and both dissuades and denies the public most uses that the public plaza could be used for. Our board is most concerned that we do whatever is possible to increase and make more attractive the very limited amount of open public space available in lower Manhattan.

This district, without question, contains a critically small amount of open space to serve hundreds of thousands of workers who spend a large portion of their waking hours here. In fact, of our total inventory of open space and recreation areas in this district, only Battery Park, City Hall Park, Washington Market Park, and the World Trade Center Plaza rank as larger open spaces than does this Federal Plaza sitting area.

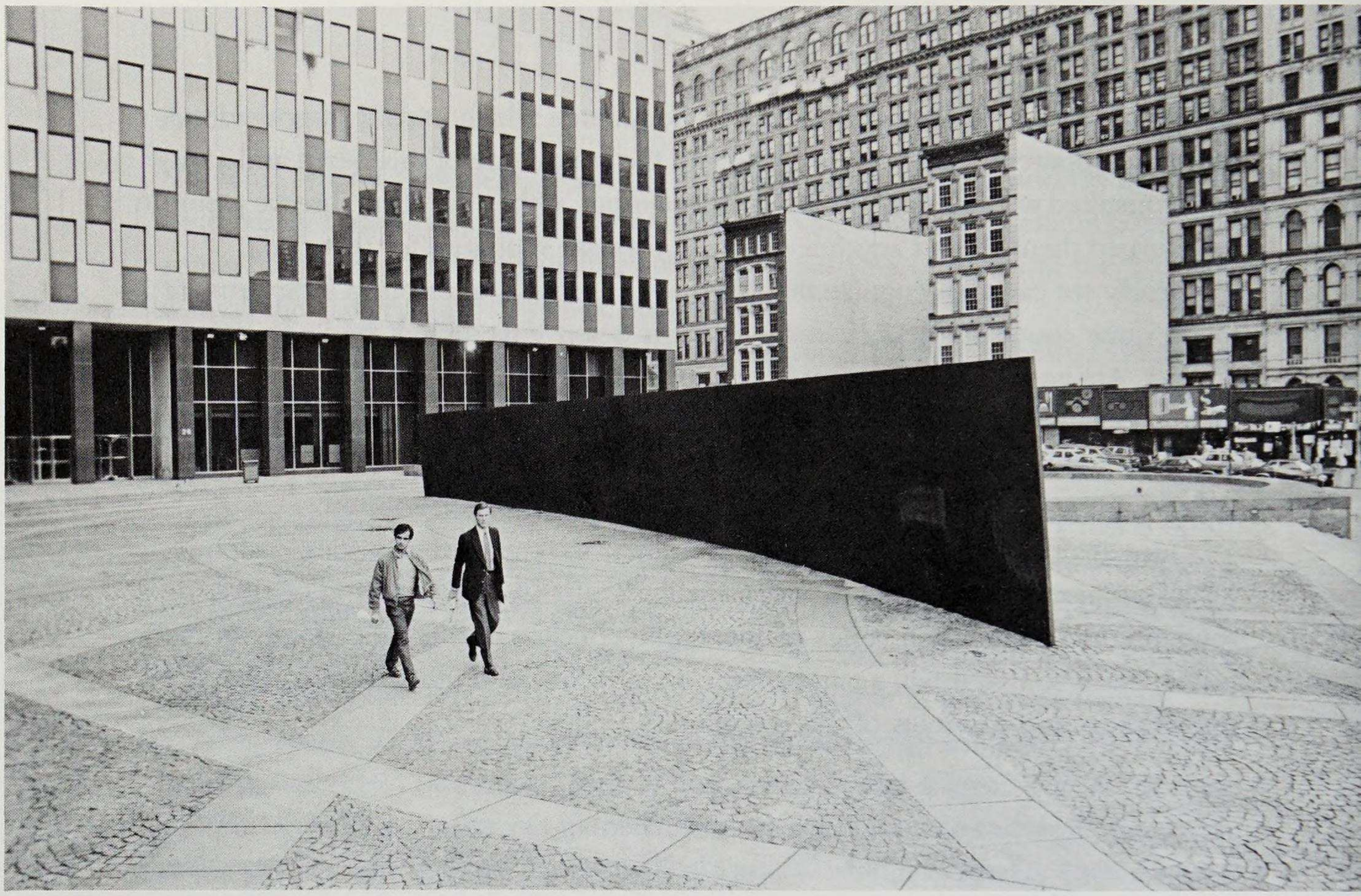
This potentially wonderful area, which could easily be brought to life with more trees and benches, a working fountain, and lunchtime entertainment, has instead been turned into a virtual no-man's-land, and it must be recognized that Mr. Serra's sculpture has regrettably contributed to the public's rejection of this space. Many people are even bewildered when they are told that this large metal structure is not a piece of leftover construction material, but is, in fact, a piece of art. Its overwhelming size prevents the free-flowing circulation that the plaza was built to enhance, and in the minds of many the piece constitutes both a safety and fire hazard.

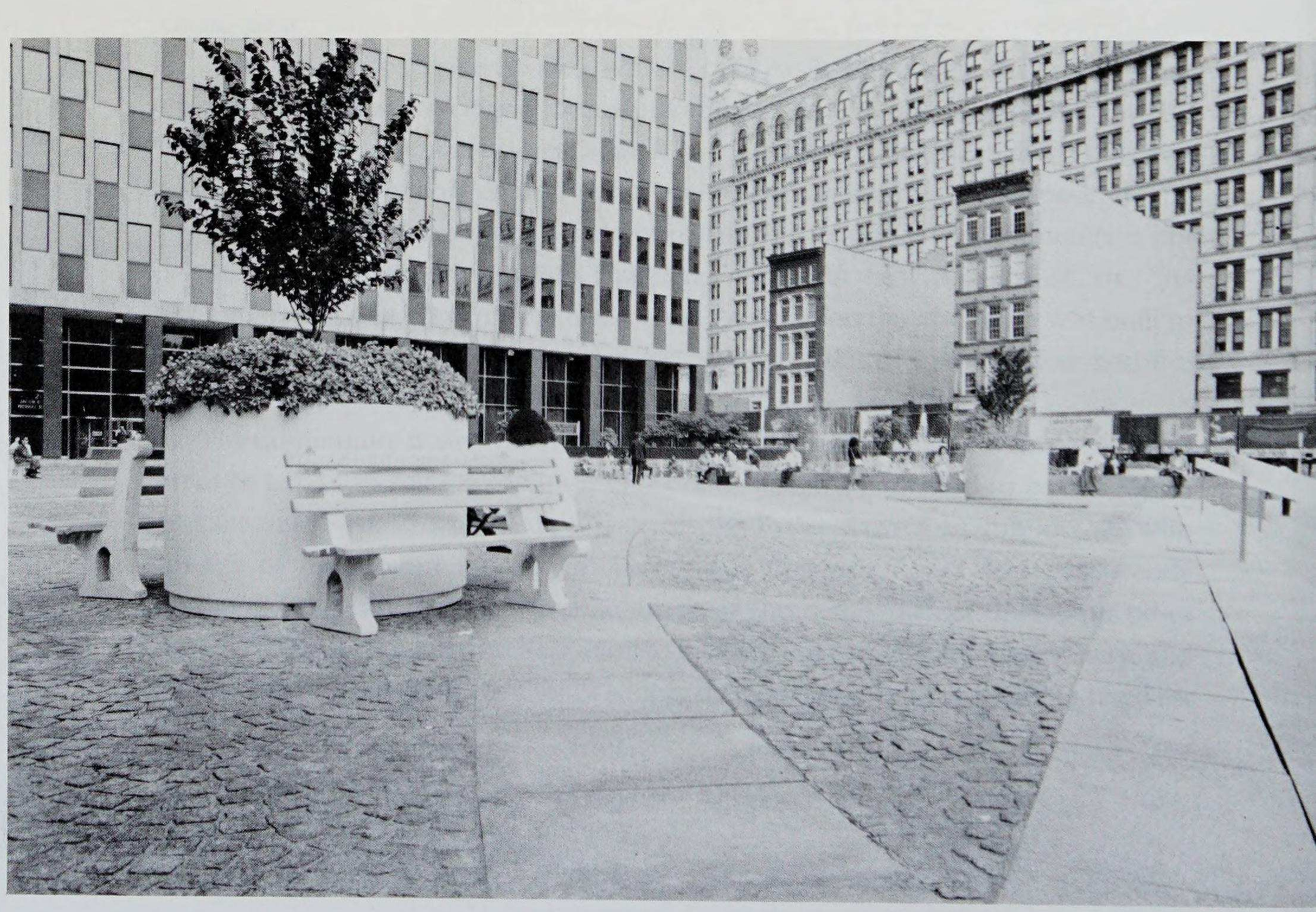
The Community Board does not view this hearing as an effort to stifle or suppress an artist's right to self-expression. Our board would be pleased to have another smaller and less obstructive sculpture on display in the plaza. Certainly anyone who knows of the Community Board recognizes that our board has consistently supported the installation of public art throughout this district, including other pieces by Serra. But it is also important to balance the needs of the community, and here in lower Manhattan we cannot simply turn our backs on our pressing need for

additional, useful, open space. The GSA committee which initially approved this sculpture apparently failed to comprehend the magnitude of this need, and at no time consulted with the community to get our input. If they had, I am sure we would have urged them to find another more appropriate sculpture for that plaza.

Clearly we can all recognize that planning mistakes and errors in judgment are made quite routinely, and even more often when government bodies are concerned. Are we supposed to simply sit back and accept an unacceptable condition merely because a piece of art is involved and stands to be removed? We feel that the people who live and work in this community and wish to utilize this plaza deserve to be heard and to have their needs and opinions respected.

Once again, we urge the Federal Government to remove the existing sculpture, install additional trees, benches, and a smaller sculpture, renovate and operate the fountain, and schedule a series of lunchtime concerts and special events in the public plaza so that it will again become an attractive and useful public space for the workers and residents of this community.





PART III

Correspondence and Documents Subsequent to the Public Hearing

Introduction

The key documents in this part of the book are William Diamond's letter of May 1, 1985 to Dwight Ink, Donald Thalacker's memo of May 9, 1985 to Ink, Ink's decision on *Tilted Arc*, and the paper Richard Serra presented to the Site Review Advisory Panel. As the reader will note, it is apparent that Ink's decision was largely based upon the reasons for removal set out in Diamond's letter. Furthermore, Diamond's letter clearly indicates that the negative petitions and form letters received by the GSA were used as evidence by Diamond to support his recommendation that *Tilted Arc* be removed from the plaza, while the outpouring of support for the work was minimized in his construction of the events. The texts by Thalacker and Serra, however, both counter many of the claims put forth in Diamond's letter; and both authors point out Diamond's predisposition against the work.

Other documents included here relate to events subsequent to the Ink decision. The Serra paper mentioned above was presented in the context of a panel appointed by the NEA to consider alternative locations for *Tilted Arc*. The NEA panel reached the conclusion that *Tilted Arc* was site-specific and that relocation of the work would therefore destroy it. The panel further indicated the improbability of finding an institution interested in erecting the work in the face of Serra's avowal to disclaim authorship should any attempt be made to relocate *Tilted Arc*.

Also included in this part is the correspondence pertaining to Serra's application for a copyright for *Tilted Arc*—an issue which comes into play in the context of the legal proceedings documented in part IV.

Letter from Richard Serra to William J. Diamond

(no date[1])

Dear Mr. Diamond,

One of the last speakers at the public hearing on March 8 suggested that *Tilted Arc* is not a site-specific work. Referring to an article in *Art in America* (No. 6, Summer 1984) he argued that my sculpture *Clara-Clara* "was designed for a specific area in the pit of the Museum Centre Georges Pompidou in Paris, and that because the piece couldn't fit in this specific area it was then placed in another site where it worked more successfully than it would have in the originally chosen site."

Contrary to this inference, *Clara-Clara* was conceived for a temporary exhibition. *Clara-Clara* was never intended to be installed permanently. Weight-load problems did not allow for an indoor installation. If the sculpture had been placed in the pit of the Pompidou Museum, it would have been taken down with the rest of the exhibition. For that very reason I proposed a sculptural concept which, by being autonomous and independent of any given site, could be moved to any other site as long as such a site would be flat and large enough to contain the sculpture.

The result is that the city of Paris has bought *Clara-Clara*, and the sculpture will be installed permanently in the thirteenth arrondissement, Parc de Choisy, in April of 1985. As an expression of this country's pride in the placement of this work in Paris, the American Ambassador to France will present the sculpture to the city of Paris.

Unlike *Clara-Clara*, my sculpture in Federal Plaza, *Tilted Arc*, is completely different in concept and entirely site-specific, and was conceived solely for permanent installation in the Plaza.

The article referred to is enclosed.

Sincerely,

Richard Serra

P.S. Also enclosed is a catalog of reviews of *Clara-Clara* produced by the Museum in Paris.

Letter from William Diamond to Dwight Ink

Acting Administrator, General Services Administration, Washington, D.C.

April 10, 1985

Dear Mr. Ink:

Based upon the facts contained in the record previously forwarded to your office, the panel authorized by Acting Administrator Ray Kline to conduct a hearing on the possible relocation of the Richard Serra sculpture entitled *Tilted Arc*, located on the plaza of 26 Federal Plaza, New York, New York, hereby recommends to you that said sculpture be relocated. The vote of the panel in favor of relocation was four to one.

The panel also recommends that, if possible, the sculpture be relocated to a suitable location where it can be viewed by other members of the public.

The panel also wishes to state that it does not intend to set a precedent for the relocation of any other piece of art commissioned by the General Services Administration, nor does the panel make a judgement as to the aesthetic quality of *Tilted Arc*.

Very truly yours,
William J. Diamond
Regional Administrator

Letter from Gustave Harrow

Attorney, New York

to Dwight Ink

April 23, 1985

Re: GSA Hearings on March 6–8 in N.Y.C. to Consider Removal of *Tilted Arc* from Federal Plaza

Dear Mr. Ink:

While I have not yet received a response to my letter of March 22, I have recently learned of the recommendation of the Regional Administrator's panel in the above matter.

Word of the panel's recommendation to remove *Tilted Arc* reached me by chance on April 17. Immediately I called the Regional office but was told specific information was confidential. I then called your office and received a return call from your agency's counsel the next day. She confirmed this information, and to my amazement informed me the recommendation was made a week earlier, on April 10.

I expressed my serious concern at not having been informed, and requested a copy of the panel's recommendation. To date this has not been received and I have not yet seen it, although members of the press inform me they have seen copies. Kindly forward a copy.

It is my understanding that the panel provided no reasons for its recommendation, except to say it is based on the "record." This refers to testimony at the hearing and written statements submitted to the panel. In fact, the "record" overwhelmingly supported *Tilted Arc* at its site, and no objective reader of it could conclude otherwise.

A total of 180 people testified at the hearing. Of these, 123 supported the sculpture. In addition, more than 150 highly supportive written statements became part of the record.

The total ratio of oral and written statements, of those in support of the sculpture to those against, was between two and three to one in favor of *Tilted Arc*. Most significantly, the supportive testimony was expressed through an unprecedented consensus of highly regarded people and institutions. Each expressed their own

unique views, and they addressed all of the issues from multiple perspectives.

Those who opposed the sculpture were essentially drawn from a localized group of personnel in the Federal Plaza office building and Court adjoining the Plaza, which are under the Regional Administrator's jurisdiction. Those who supported *Tilted Arc* represented a broad spectrum of individuals involved in or concerned with public issues, art, and freedom of creative expression. Their testimony constituted an extraordinarily rich cross section of experience and judgment which, in addressing all of the issues, now forms an invaluable compendium of insights into these subjects.

As a result, I am certain you will agree, it would be a travesty to confirm the recommendation to remove based on this "record."

Your immediate response will be most appreciated.

Respectfully,
Gustave Harrow

cc: Honorable Mario Cuomo, Governor, New York State
Honorable Alfonse M. D'Amato, U.S. Senator
Honorable Daniel Moynihan, U.S. Senator
Honorable Howard M. Metzenbaum, U.S. Senator
Representative Thomas Downey, Chairman, Congressional Arts Caucus
Honorable Kitty Carlisle Hart, Chairperson of the New York State Council of the Arts
Honorable Bess Meyerson, Commissioner of Cultural Affairs, City of New York

Letter from Jerald Ordover

Attorney, New York

to Dwight Ink

April 24, 1985

Dear Mr. Ink:

I am writing to you in opposition to the recommendation made by your New York Regional Administrator that the Richard Serra sculpture *Tilted Arc* be removed from the plaza of the Jacob Javits Federal Building in New York City.

I think the recommendation is wrong and I urge you to reject it and reaffirm the continued maintenance of the sculpture at this site, for which it was created. I also urge you to support and continue the Art-in-Architecture Program which has done such a marvelous job for the country, for your agency, and for art in the United States.

However, my prime reason for writing to you is to object to the shameful way in which the artist, Richard Serra, and his counsel, Gustave Harrow, have been treated by the Regional Administrator, William Diamond. The most recent instance was his failure to send Mr. Serra a copy of his recommendation, which was dated, and presumably sent to you, on April 10. Mr. Serra was left to learn about it eight days later, *after* the newspapers were informed, and then only inadvertently and unofficially from an agency employee who assumed he already knew about it.

I am not dealing here with the legality of this and the other actions Mr. Diamond has taken in this matter, but about the utter lack of fair dealing and moral behavior that we, as Americans, have a right to expect from each other and particularly from our public officials.

Perhaps Mr. Diamond was hampered in acting fairly by his error in taking on the mantles of accuser, prosecutor, and judge. Before convening the panel, Mr. Diamond started to seek for a new site for the sculpture. Later, he confirmed his personal desire to have the sculpture removed on a television broadcast over Cable Network News *before* the hearings were concluded. Yet, despite this prior judgment and prejudice, he appointed himself chairman of the panel and assured himself of a majority report by appointing two of his subordinates to the panel as well.

Other examples of petty unfairness included the following: I am advised that it was only after repeated requests by Mr. Harrow that he was able to obtain a list of the scheduled speakers just before the hearings began. The hearing announcement

stated that those who wished to speak had to furnish their names to GSA by the Monday prior to the hearing. On Tuesday of that week, Mr. Harrow was told that no names could be added to the list, but in fact Mr. Diamond's people continued to solicit and add opposing speakers to the list throughout that week.

I am advised that no report, opinion, or commentary accompanied the short recommendation to you that the piece be removed. The opinion states that it is "based on the record," but if that was so, the overwhelming testimony favored the retention of the sculpture. Proceeding as they did, it is easy to conclude that the panelists voted their prejudices or voted as Mr. Diamond requested, without reference to the serious issues involved or the compelling testimony. One of the panel members, who voted to remove the sculpture, was absent during the last day and a half of the proceedings.

The hearing may not have been a judicial or quasi-judicial proceeding, but the concept of due process is not an alien one, nor one limited solely to formal courtrooms. It is woven into the fabric of our entire system and the way which we believe we should act toward one another. Many of us fail in the effort, but when it is an arm of our government, we accept such failures only when they are inadvertent and never when, as here, they approach malevolence.

I hope that you and your staff will carefully consider all the testimony and statements which have been submitted to you. I urge you to rule in favor of preserving the sculpture at its present location and in support of GSA's Art-in-Architecture Program.

The sculpture may be a difficult one to like. It is not conventional nor is it pretty, but it represents a major work by a major American artist and it redounds to the credit and prestige of the United States for its support of the arts and embellishes both the plaza and the City of New York by its presence.

The idea that large masses of people or employees were affected by or gave much thought to the sculpture during its three years in place is just not true. There was a flurry of attacks against the piece when it first came out, but thereafter there were no continued mutterings by the building's employees or passersby. Most public art, and public architecture for that matter, elicits both praise and condemnation, but, as time passes, both abate, and the standard public response is simply not to notice the object.

Only the powerful voice of Chief Judge Edward D. Re of the United States Court of International Trade was raised against it. Apparently, his letter was enough to move Mr. Diamond to embark upon the course described above. Thus, it was not

a public outcry, but the influence of one official from a position which required respect and consideration from your agency. From that followed the publicity and the arousal of hostile voices.

Modern art is, almost by definition, difficult for the public to grasp or accept, conditioned as it is for the most part to what is traditional and long present on the scene. But one hundred years or more from now, such work will elicit praise from posterity for the foresight of the officials who made it possible. I respectfully submit that the work has not been in place long enough for its true worth to be recognized nor for you or any official to make the judgment that it should be removed.

Very truly yours,
Jerald Ordover

Letter from William Diamond to Dwight Ink

May 1, 1985

Dear Mr. Ink:

I hereby set forth the reasons why I strongly recommend to you that the Richard Serra sculpture titled *Tilted Arc* be relocated from 26 Federal Plaza, New York, N.Y. This letter is in the format requested by your memorandum to me dated April 23, 1985.

GSA installed the Richard Serra sculpture *Tilted Arc* at 26 Federal Plaza in 1981. It has engendered intense controversy since its installation when some thirteen hundred persons signed a petition protesting its presence. Some of the most vehement oral and written comments that this region has ever received have concerned *Tilted Arc*. In response to the initial furor concerning the piece, Donald Thalacker, GSA's Staff Director of the Art-in-Architecture Program, said "We hope that those who object to it will give the work an opportunity over a period of time before making their final evaluation." Four years later, it is my experience that, if anything, the criticism of the piece has become even more intense. At the recent public hearing in March, over forty-five hundred letters and petitions urged the relocation of *Tilted Arc*.

The Art-in-Architecture Program has been responsible for many commissions which enhance the quality of the built environment. The stated policy of the Art-in-Architecture Program is that works of art "are intended to be an integral part of the total building's environment for the occupants and the general public." Since *Tilted Arc* was conceived and installed long after the plaza was designed and constructed, it was not integrated into the initial design of the plaza. Indeed, Mr. Serra has been quoted in the *New York Times* on September 25, 1981, as saying that he intended his work to "dislocat[e] the decorative function of the plaza." Can it be successfully alleged that this discordance is also intended to be "an integral part of the total environment?" I believe not. Manhattan Congressman Theodore Weiss, who represents the many artists who live in the district in which the piece is located, called for its relocation, saying "as might be expected from such an ambitious and far-reaching program, not every selection of artwork or location has been as fortunate as others." Personally, it grieves me to think that the important cultural

accomplishments of the Art-in-Architecture Program should be put in issue over a controversy involving one sculpture.

Critics of the Art-in-Architecture Program have leveled the charge of lack of communication with the public before a piece of art is installed. A prime example of this failure to consult the community is the subject sculpture. This policy problem has been addressed in part recently. Current procedures require consultation with local community and political representatives, but there still exists a need to codify community consultation into the rules and regulations which govern the Art-in-Architecture Program. Such revisions currently under way will insure that never again will a work of art be imposed upon a community without its prior knowledge and involvement.

GSA had received many requests to relocate the sculpture. Frequently these requests asked for the return of the plaza to the original concept envisioned by its architects and designers of a "fine pedestrian amenity where in pleasant weather it would serve as a resting place to eat lunch or bask in the sun" (Transcript, p. 25). In addition, certain agencies requested the relocation in order to regain the openness of the plaza for the benefit of their governmental missions. It should be emphasized that between 1976 and the installation of *Tilted Arc* in 1981 more than 20 major public events of all types, such as art shows, band concerts, and award ceremonies, were held on the plaza. GSA is aware that, since the installation of *Tilted Arc*, the aforementioned major events heretofore held in the open plaza for the benefit of the federal community, have been diverted to other locations or have been drastically reduced in scope so as to be able to fit within the confines of the 26 Federal Plaza building. It is therefore apparent that the inhibiting nature of the Serra piece and the fact that it bisects the plaza make it physically impractical to use the plaza for the same public beneficial purposes as was done prior to its installation (Transcript p. 543).

Knowing that the community was very concerned about this issue, and in accordance with the advice and consent of the Acting Administrator of GSA, Ray Kline, it was decided to hold a public hearing in March 1985. The purpose of such hearing was to encourage input by the federal community, the arts community, and the public at large. Public interest was so intense that it took three days to schedule all the speakers who wished their comments be made part of the record.

As a result of these hearings, there was accumulated 654 pages of testimony, 7,412 petitions and 1,779 letters, both for and against the relocation of the sculpture. One of the things that became extraordinarily clear to me was that certain ground

rules would have to be followed. First of all, I would have to avoid any reliance on a "numbers" game, for the decision should not be based upon "referendum." Therefore, while I am impressed by the great numbers of speakers, petitioners, and letter writers, I have relegated this aspect to the fact that there is great interest in this matter.

Secondly, there were many who spoke on the merits of the sculpture itself as a piece of art, of the artist as the foremost proponent of modern sculpture today, or of the ugliness of the artwork, etc. I decided that I am not in a position to make any evaluation as to the artistic merit of the piece; that is for the art community and future generations. Therefore, my consideration of the issue of whether to relocate the sculpture would not be in any way based upon the arguments of its beauty, its ugliness, or its place in art history. Analogous to my declination to evaluate the artistic merit, therefore, is any attempt in any way to censor, stifle, or suppress the freedom of expression of the artist. I do not believe the relocation of the sculpture and the reinstitution of the openness of the plaza is a First Amendment issue; censorship appears to me to be a nonissue in this case. Similarly, I do not have any need to address the issue raised that only time is needed until the piece is applauded by the public at large. The time needed for educating the public to appreciate great art is not relevant or applicable to my recommendation. As to time considerations, however, it should be noted that public opposition to the sculpture over the last four years appears to have grown, instead of diminished. An analysis of the letters and petitions received in connection with the public hearing clearly shows that those opposing the relocation of *Tilted Arc* come mostly from persons who do *not* live or work in the neighborhood where the sculpture is located, and that those favoring relocation come mostly from persons who *do* live and work near it on a daily basis.

I have also given serious consideration to all of the other arguments, issues, and points of view raised before me. In arriving at my recommendation, I have also considered, but decided against, the arguments raised by those seeking the retention of the sculpture in the plaza, and I will also briefly discuss these issues.

In coming to my recommendation, I relied heavily upon the arguments proffered by Manhattan Community Board #1, a legally constituted body which represents more than 250,000 residents of lower Manhattan. This community voice voted twenty-two to zero (with two abstentions) to recommend relocation of the *Tilted Arc* to a more suitable site because "the sculpture obstructs most of the open space at the Federal Plaza and both dissuades and denies the public most uses that the public plaza could be used for. . . . But it is also important to balance the needs of

the community, and here in lower Manhattan we cannot simply turn our backs on our pressing need for additional, useful open space" (Transcript, pp. 205–207).

I was also impressed by the statements of the federal agencies and employees, collectively and individually, who passionately sought the return of the plaza to its original space and openness; to its prior capacity for public events; to its freedom of physical passage and visual perspective; and to its originally designed concept of the plaza area contemplated and focused upon openness. The original design architect of the plaza space, Robert Jacobs, stated at the public hearing, in regard to his creation, that: "Its basic design concept was to enlarge Foley Square. . . . We thus provided a large plaza and put the courthouse on stilts so that the plaza could flow through it" (Transcript, p. 24). There can be no doubt that these original concepts have been severely compromised by the placing of *Tilted Arc* in the middle of the plaza. There can be no controversy that the space has been bisected, physical passage obstructed, visual perspective distorted, and the atmosphere of the plaza turned into affrontery. This message became extraordinarily clear to me. But I also became aware of the potential safety hazards of the "blast wall effect" in case of terrorist activity, as alleged by the Federal Protection and Safety Division of GSA (Transcript, p. 139), of possible security concerns due to the visual obstruction of the entire plaza area, of the never-ending defacement of the work by graffiti artists, and of the nuisance-causing vagrants who have frequently despoiled it. Indeed, the blast wall effect was inadvertently confirmed by a sound expert who testified in favor of retention (Transcript, p. 246).

It is for these reasons, among many others, that I am recommending that the *Tilted Arc* be relocated and the plaza returned to the public.

In coming to my recommendation, I also considered many arguments offered by the advocates of retaining the sculpture in the plaza. The following are my considerations of their arguments that I found the most significant.

CONTRACT RIGHTS

One of the foremost arguments asserted by the proponents of retention was based upon the contractual rights of the artist—or, the alleged breach thereof by the government. It was asserted that the contract does not authorize removal, that removal is a breach of contract (if not of the written terms, then of the expressed or implied representation of permanency), that Article 6 did not apply to the work of art but only to the drawings, etc., and that permanency was the only inducement

and consideration for the contract. On reviewing the relevant contract clause, I found that Article 6 of Richard Serra's contract with GSA states that "All designs, sketches, models, and *the work* produced under this agreement for which payment is made under the provisions of this contract shall be the property of the United States of America. All such items may be conveyed by the Contracting Officer to the National Collection of Fine Arts–Smithsonian Institution for exhibiting purposes and permanent safekeeping" (emphasis added). Clearly, Article 6 applies to the sculpture and gives GSA full title to the work. It is the only paragraph in the contract which deals in any way with the issue of removing the sculpture, and it expressly states that the contracting officer may convey the work. Accordingly, the artwork is conveyable and therefore removable. Indeed, there are no provisions at all in the contract which prohibit the government from removing the sculpture or which state that the sculpture is to be a permanent structure upon the plaza. Not only was full consideration paid for the sculpture according to the terms of the contract, but, on December 2, 1981, Mr. Serra executed a full release of "the United States from any and all claims arising under or by virtue of said contract or any modification change thereof except as follows: NONE."

As to the allegations of expressed or implied representations of permanency, if such were to be elements of consideration in the contract, they should have been incorporated into this negotiated contract. It is too late to amend the contract now. Furthermore, if an implied right of permanency were to be inferred from the contract, then wouldn't the original designers of the plaza, Robert Jacobs, et al., have the same right to have their "permanent work" undisturbed by Serra. There was testimony, however, that the Art-in-Architecture Program was founded upon the concept that the artwork would be "permanent." Probably a concept of "enduring nature" was intended to assure artists that their works were to be treated with respect and dignity. It cannot be asserted, however, that this concept conveys to artists the right to assert that the placement of their works upon federal sites is permanent so as to virtually give them a property right to the premises. Such a concept of "permanency" would be tantamount to a right of permanent easement in the property upon which the work is erected. When coupled with the argument of "site-specificity" (infra), such permanency would become an easement in perpetuity coupled with a restrictive covenant against the government from making any changes (structural or cosmetic) in the plaza environment. Such proprietary claims against the government cannot arise by implication or prescription. Such rights certainly have not been expressly granted by this contract to purchase a sculpture.

SITE-SPECIFICITY

Another issue raised by the artist and many of the speakers at the hearing concerned the "site-specific" nature of the sculpture. They allege that the sculpture was conceived and created as part of the plaza, that the sculpture is embedded philosophically in the space of the plaza, and that relocation is destructive of the sculpture. In juxtaposition to these allegations, I am aware of Mr. Serra's own statement on "Freeman Reports," CNN, March 7, 1985, that the *Tilted Arc* is "not any different from any of my other work." In fact, the similarities and continuities of his works may have been the basis upon which the original GSA Design Review Panel was able to choose Mr. Serra in the first place. I found one argument against site-specificity of his sculptures most convincing. It involved Mr. Serra's acceptance of the relocation, in Paris, of his sculpture entitled *Clara-Clara* when it was determined that the sculpture could not be installed in its intended site. As noted by Yve-Alain Bois in his article in *Art in America* (Summer 1984), "*Clara-Clara* is not only in perfect harmony with its new site, but transforms it with a delicacy new to Serra's work." Further, I understand that both the Port Authority of New York, New Jersey, and the City of New York have relocated Serra pieces from downtown Manhattan.[2] Accordingly, I have rejected claims proffered by the proponents of retention that the sculpture is site-specific and can not be relocated. What is especially disturbing in this site-specificity argument is the concept that, if the sculpture is specific to the site, and the sculpture is permanent and can not be removed, then there must not be any changes to the site either, else the change of the environment would also cause the destruction of the sculpture.

What does this argument of specificity imply for the future if carried out to its ultimate conclusion? It means that if GSA ever required the plaza space for the construction of a new annex to the existing Federal Building, such construction would be blocked by the artist's concept of site-specificity. Such a conclusion is clearly contrary to the best interests of the government and the people we serve, and in my opinion was never the intention of the Art-in-Architecture Program.

N.Y.S. ARTISTS' AUTHORSHIP RIGHTS ACT

Many of the proponents of retention stated that removal or relocation of the sculpture was a violation of the New York State Artists' Authorship Rights Act (effective January 1, 1984). Obviously, this state law is not binding upon the Federal Government. Accordingly, relocation of the sculpture to either another federal site

within New York State or to a site within any other state (except California), would be permissible. By relocating or even storing the sculpture, the government would not be in violation of any applicable U.S. law, and certainly not a NYS statute.

INTEGRITY OF THE ART-IN-ARCHITECTURE PROGRAM

There were other arguments offered as to why the sculpture should not be relocated. Some alleged that relocation of the sculpture would be a breach of the artist's right of due process in that the rules were being changed after the game was played, that GSA knew what it was buying and should accordingly be stopped from changing its mind, that selection was impartial and democratic, and therefore removal would be a second guessing of the selection panel and a violation of the trust relationship between the artist and GSA, and finally, that the integrity of the Art-in-Architecture Program would be compromised. It appears to me that the gravamen of these allegations relates to whether or not GSA has the right to adjust its policies in the face of public requests to address a perceived misjudgment of governmental action. This issue was succinctly presented by Mr. Franklin Feldman, an attorney who represented George Sugarman against GSA in Baltimore in 1976 and who is a leading author and critic in art law:

> If an aggressive artist can, not withstanding the public viewpoint, be prepared to dictate the location of the work, it seems to me that the whole General Services Public Arts Program is in jeopardy. The program was *not* designed, principally, to benefit artists, although that may be a side result; the objective was to enrich the environment and to bring significant art to public places. If one artist can so threaten a judgment and wishes of its benefactor, it seems to me that future awards, and the benefits to other artists as well as the public, could be in serious jeopardy. If the artist were held to have an enforceable claim, there is no document which you could write which would assure that you would have any control over future locations of works which you have commissioned, paid for, and to which you acquired full title. That must be disconcerting to anyone who administers this type of program as well as to those legislators who appropriate the funds therefor. . . . I believe it will be a serious error of judgment to conclude that the artists' wishes are decisive. It is quite disturbing to see one artist, in his effort to mandate a position that is legally questionable and not necessarily in the public interest, jeopardize a superior program which has brought high art and rich enjoyment to so many. (Transcript, pp. 60–61)

With this in mind, the major concern remaining relates to the impact such an action would have on the future of the Art-in-Architecture Program. Although art funded by nonfederal public programs has been removed, none funded under the

GSA program has been removed or relocated. However, no other piece of art funded under this program is functioning in such a disruptive manner in relation to its environs as does *Tilted Arc*. Furthermore, I specifically stated in my opening remarks at the public hearing that in no event did I wish to create a precedent for the removal of any piece of art already commissioned or to be commissioned in the future by the GSA Art-in-Architecture Program.

While it has been said that a vacated plaza would forever symbolize a broken contract, this would not be the case. Instead, a plaza returned to its original use would enhance our system of government by giving notice that the public which we serve can have its petition for redress heard and favorably acted upon. It is certainly not uncommon in the administration of justice to correct a mistake by restoring a status quo—in this case, the artwork first in place, i.e. the open plaza itself.

In my opinion, the relocation of *Tilted Arc* will serve to *strengthen*, not weaken, the Art-in-Architecture Program since the correction of a prior inadequately informed decision, whether by an individual or government, always works to increase, not diminish, public confidence.

In this matter, GSA is required to act in the position of arbitrator or public guardian, carefully weighing the needs of the populace with those of the art community. After thorough evaluation of all the testimony presented at the public hearing and of the total administrative accord, and based upon the aforementioned reasons, I strongly recommend that you order the relocation of *Tilted Arc* from 26 Federal Plaza.

Very truly yours,
William J. Diamond
Regional Administrator

Letter from Senators Howard M. Metzenbaum and Edward M. Kennedy and Representatives Tom Downey, Frank Horton, Hamilton Fish, Jr., and Jim Jeffords to Dwight Ink

May 6, 1985

Dear Mr. Ink:

We were deeply concerned to learn of action taken by the New York Regional Office of the General Services Administration which may compromise the intent and interests of the Art-in-Architecture Program.

Admittedly, there is a prevailing controversy regarding the sculpture, *Tilted Arc*, created by Richard Serra for the Federal Plaza in New York. Certainly this is not the first time a work of art, or a piece commissioned under the auspices of the Art-in-Architecture Program, has generated excitement or concern. It is however, the first time that precipitate action has been initiated to decertify a piece.

This deaccessioning action is troublesome for a number of reasons. There are no provisions established to provide a due process for the removal of a work of art. This omission reflects the intent that such agreements between the federal government and an artist would be permanent.

A decision to remove the sculpture would undermine government commitment to the program—one that was recently commended for a design excellence award by President Reagan for its courage in supporting stimulating and often controversial works of art. The decision also breaks faith with the artist, Mr. Serra, who complied with a set of competitive qualifications and standards in winning and completing the commission. The design for the sculpture was no surprise to the Federal Plaza; a mockup was submitted and site approval visits provided.

Regardless of one's views on abstract art, or this sculpture in particular, the preemptive move to destroy this work presents an alarming precedent for subjective criticism and disregard for due process.

We hope that you will consider our concerns for the rights of artists and due process when you review the recommendation of the New York Regional Office. Legislative remedies can be sought if it is the view of the agency that the program

is systematically problematic. We hope that you would pursue remedial action through those channels rather than a subjective and ad hoc evaluation.

Thanking you for your courtesy in this regard, we are

Sincerely,
Howard M. Metzenbaum, U.S. Senate
Edward M. Kennedy, U.S. Senate
Tom Downey, U.S. House of Representatives
Frank Horton, U.S. House of Representatives
Hamilton Fish, Jr., U.S. House of Representatives
Jim Jeffords, U.S. House of Representatives

Memo from Donald W. Thalacker

Director, Art-in-Architecture and Historic Preservation Programs

to Dwight Ink

May 9, 1985

Re: Recommendations concerning potential relocation of *Tilted Arc* sculpture by Richard Serra at 26 Federal Plaza, New York, NY.

Thank you for allowing me the opportunity to express my views on this subject. Your determination to research and review this matter carefully is most apparent to me. I wish to compliment you and your staff for your collective diligence.

There are nine issues which I wish to address candidly and briefly in this memo. They are as follows:

1. *Relocation possibilities:* To my knowledge, no organization has agreed to accept *Tilted Arc* for relocation thereby becoming party to what Mr. Serra contends would be the piece's destruction. GSA and, in particular, Regional Administrator Bill Diamond, consistently has maintained that the sculpture would not be relocated unless a "more appropriate" site has been identified. If we cannot identify such a site, what good purpose would announcing our intention to relocate the piece serve?

It has been suggested that we might relocate *Tilted Arc* on another federal site. To do so probably would generate as much controversy among federal employees at the new site while depriving the government of the art community's support. I therefore strongly urge that alternate sites be identified prior to any final decision to relocate the piece, if the decision is, in fact, to relocate.

2. *Purpose of the hearings:* The purpose of the GSA sponsored public hearings, which Bill Diamond explained to me last December, was twofold:

A. To learn of the public's opinion of *Tilted Arc*, especially its effect on public use of the plaza, and

B. To learn of possible sites for *Tilted Arc*'s relocation. Of the ten thousand employees in the subject building, approximately fifty-five people spoke in favor of its relocation. This modest number is significant because the employees were already at the site of the hearings and easily could take time off to testify. On the

other hand, 115 people testified in favor of keeping the sculpture.[3] These individuals, not being employed in the building, had to leave their homes or business to attend the hearings. Their presence required greater effort and implies greater commitment. Nonetheless, two-thirds of the people testified in favor of leaving the sculpture in place, while one-third testified on behalf of its relocation.

Whether the purpose of the hearings was to learn the will of the people or to provide support for a predetermined conclusion, it would appear the evidence produced by the hearings supports leaving the sculpture in place.

The views expressed by the petitions and the letters for and against the removal may balance one another quantitatively. Signing a form letter, however, cannot have the significance of thoughtfully and passionately written individual letters. As you know, we have received hundreds of such letters. They are one hundred to one in favor of keeping the sculpture.

Finally, no site for *Tilted Arc* was either identified or offered at the hearings or consequent to them.

3. *Community Board #1's recommendation to remove and relocate the sculpture:* At the February 13 meeting when the recommendation was drafted, twenty-two of the forty-seven board members were present. The members and the public had not been given prior notice of the agenda of this meeting. Such notice is normal procedure for this body. Without knowledge that the subject of relocating the sculpture was to be discussed, those citizens with an interest in the matter who did not habitually attend all board meetings were deprived of an opportunity to voice their opinion in a democratic manner.

I have learned from an official of Community Board #1 that a subcommittee, the Civic Center Committee, met previous to the February 13 meeting and developed upon a request "initiated by GSA officials in New York" the recommendation calling for relocation. I wish to make this point for the record because the fact that the recommendation did not receive a hearing before the full Board may precipitate a reconsideration of the recommendation. Since everyone has been alerted to the issue by the media, attendance at the board meeting undoubtedly will be much higher and the recommendation may be changed.

4. *The* Clara-Clara *incident in Paris:* The sculpture *Clara-Clara* by Richard Serra was created for a *temporary* site. It was not conceived with a specific site in mind. To equate the *Tilted Arc* with the *Clara-Clara* siting is to compare apples to oranges.

Those who make this analogy knowing or at least having the obligation of knowing that the parallel simply does not exist confuse rather than clarify the matter.

5. Most regrettably, there is *a widespread perception that the official GSA-sanctioned actions affecting the prehearing activities, the hearings themselves, and the posthearing activities have been manipulated.* In short, the government has been playing with a stacked deck. While many have written to you and to the President about this, perhaps the best letter is the one attached written by attorney Jerald Ordover of April 24.

The issue Mr. Ordover raises is a particularly sensitive one. The actions to which he refers reflect not only on the officials involved. In the public's perception they reflect on all of GSA and indeed on the entire federal government.

6. *Time and the perception of aesthetic quality:* Regional Administrator Diamond has claimed to you that public sentiment has grown against the *Tilted Arc* during the past four years. By making this contention which might support relocation, he has brought up the very issue which he has sought to avoid during this controversy: the issue of aesthetics. If, however, we allow ourselves to consider only the public function of the plaza, we ignore what I believe to be the central objection to *Tilted Arc.*

Aesthetic judgement is individual, subjective, and changing. The hearings have produced volumes of text about the aesthetic significance of *Tilted Arc* and in that sense provide the educational component so necessary for people to expand their knowledge and alter their views of this work of art. More will no doubt be written and published in the coming months. This will likely result in ever-increasing numbers of citizens appreciating the sculpture.

Nearly every museum in this country and all of the major art museums in New York City have spoken or written in favor of keeping *Tilted Arc* at 26 Federal Plaza. Additionally, museums abroad have expressed surprise, shock, and even outrage at the possibility of relocation.

With such a solid consensus of enlightened professionals nationally and internationally, I think we can conclude fairly that the likelihood of this work's becoming a hallmark of twentieth-century art is excellent—if it is not relocated. The most cautious conclusion we could draw is that four years is definitely not sufficient time to evaluate either long term public reaction to or artistic significance of *Tilted Arc.*

7. *Public function of plaza:* In the course of the plaza's seventeen years of existence, there have been very few public functions of any significance. One wonders why this issue has loomed so large.

The plaza functions primarily as the shortest line between the building entrance and the street. Visitors and government workers do not linger, partly because of the frequent gusts of strong winds. If the plaza were, in fact, a favored place for strollers, comfortable and relaxed lunches and conversations, why aren't there benches and other amenities? The much lauded pool in the plaza has not been functioning for years.

On the positive side, performing artists learned at the hearings that the sculpture creates a perfect amphitheater for performance. A number of artists consequently have expressed their desire to make use of the plaza because of its acoustical properties.

8. Much has been said about *conserving tax dollars* and not making unnecessary expenditures. Simply and obviously stated, it would cost additional tax dollars to relocate the sculpture. From purely a dollars-and-cents business viewpoint, it makes sense to leave the sculpture in place.

9. *Artistic freedom and the willingness of artists to contract with GSA for future commissions:* The artists themselves, both at the hearings and in letters to you and to the President, have plainly and forcefully expressed their apprehension about accepting a GSA commission if *Tilted Arc* is relocated. I am not simply venting my opinion on this matter; I am reflecting the record.

Some would have us conclude that the question of artistic freedom is not relevant to the issue before us. GSA attorneys may assure us that the question can never arise substantively in any subsequent litigation. The international artistic community is convinced that it is an issue and is indeed *the* issue.

President Reagan addressed this subject specifically when presenting the National Medals of Arts on April 23 at the White House, stating:

> No one realized the importance of freedom more than the artist. . . . (Artists) live in the realm of idea and expression, and their ideas will often be provocative and unusual.
>
> Artists stretch the limits of understanding. They express ideas that are sometimes unpopular. In an atmosphere of liberty, artists and patrons are free to think the unthinkable and create the audacious.
>
> In societies that are not free, art dies. In totalitarian societies of the world, all art is officially approved. This state-sanctioned art is usually, as a rule, 99 percent utterly banal and utterly common.

Mr. Ink, Richard Serra's *Tilted Arc* is anything but banal. It has generated more

excitement and conversation, stimulated more interest in public art, and crystallized the values of artistic-minded citizens more than any other single work of art in the Art-in-Architecture Program's history.

I personally believe it would be a grave error to relocate this work of art.

Thank you for giving me this opportunity to express my views.

cc: Mr. William F. Sullivan, Commissioner, Public Buildings Service

[handwritten postscript:]

Mr. Ink—

Also enclosed is a copy of GSA's agreement with the National Collection of Fine Art (now called the National Museum of American Art). As you may recall from our meeting on May 7, I mentioned that there was an error of intention in our xeroxed contract, that it never was our intention to convey anything other than the models and drawings to the museum, and that this information was conveyed to each artist.

The written agreement between GSA and the museum confirms this.

Donald W. Thalacker

Dwight Ink, Decision on Tilted Arc[4]

SUMMARY

The *Tilted Arc*, an artwork by sculptor Richard Serra, has been a source of controversy since its placement at 26 Federal Plaza in New York City in 1981. The artwork was commissioned under the General Services Administration's (GSA) Art-in-Architecture Program which seeks to use fine arts to enhance the environment for Federal building occupants and the general public. Many people, particularly occupants of the Federal buildings and community residents, have advocated removing the sculpture, while others, particularly members of the art community, have been equally adamant that the sculpture be retained at its present site. The issue of what action the federal government should take, if any, with regard to the sculpture has been brought before me for my decision.

Recently, GSA held public hearings on this issue in New York City, resulting in 654 pages of public transcript. Additionally, GSA has received 1,757 letters as well as petitions containing 7,412 names from persons expressing varying viewpoints. Strongly held views on both sides of the issue have been presented, and I find the decision a difficult task of weighing competing values, each of which has merit but none of which can be pursued in isolation of the others.

Those testifying in favor of relocation regarded the plaza and the open space it symbolized much more highly than did those who favored retention. Many of the latter found the plaza boring and unimaginative. Most of the people who urged relocation placed a high value on the wishes of the people who live and work in the area. Those favoring retention focused more on longer term values of the art work to the public rather than on the concerns of employees in the adjacent buildings and local residents who are directly affected by the art work.

In reaching my decisions, I have made no judgment whatsoever concerning the aesthetic value of the *Tilted Arc*.

I have concluded that several problems in the GSA process used for selection and placement of this artwork, primarily funding delays, contributed to the controversy that surrounds the *Tilted Arc*.

First, because funds were not available to proceed with the art recommended by the architect in 1968, this artwork was not commissioned until 1979, and was not installed until 1981. However, the Federal Building and Plaza construction were

completed in 1968, with the architect then recommending a very different concept than *Tilted Arc*. The timing gap hindered integration of the sculpture with the architectural design concept deemed appropriate by the project architect.

Second, because over a decade passed before funding was available, the artist was not provided the opportunity to work in concert with the Federal Building and Plaza architects during the building design and construction.

Third, the process in place at the time of the artist's nomination and selection did not involve soliciting views of the local community and the building occupants prior to the artwork's commissioning. As a consequence, the community was not properly prepared to receive the work of art and there was not a ready public understanding and acceptance of the work.

The artist provided what he said he would provide in creating the *Tilted Arc*. However, the GSA process as it then existed and the funding delays permitted the current controversy to become far more polarized than was necessary. In my view, both the artist and the local community have been the victims of this lack of funding which prevented the architect and artist from collaborating during the design of the Federal Building complex. Whatever scars the *Tilted Arc* may leave within the lower Manhattan community and the art world, it is an episode which should be regarded as a difficult, but nonetheless valuable, learning experience from which the Art-in-Architecture Program has already improved its processes and on which it now needs to build much further.

Accordingly, I have made the following decisions relative to the *Tilted Arc*:

1. I have rejected the option of physically destroying the *Tilted Arc* as violating our sense of values which tells us that such destruction, regardless of the artwork's limited acceptance by nonartists, is not compatible with a free society which prides itself on encouraging free expression.

2. Nevertheless, I believe that the concerns of the Federal Building occupants and the general public living and working in the vicinity of the sculpture must be considered, particularly since housing employees engaged in serving the public is a primary mission of GSA. Therefore, I conclude that the regional administrator should seek a new location for the *Arc* where it would not suffer significant loss of integrity; where it can be better understood and appreciated; and where it would be a less vulnerable target for graffiti.

I am requesting the National Endowment for the Arts to establish a relocation panel to review whether a specific alternative location would be an appropriate site.

The GSA regional administrator will consult with the panel before seeking possible alternative sites for the *Tilted Arc*. This panel should include members of the art community and public representation from both the community under consideration and the Foley Square area. The artist, Mr. Richard Serra, and the Federal Plaza architects should be consulted by the panel. Expenses of relocation, should relocation materialize, should be defrayed by individuals or groups interested in the relocation.

3. During the period that a possible alternate location is being sought, the *Tilted Arc* will be retained at its present site, and informational material should be placed near the Federal Plaza doors to explain the concept of the *Arc* as envisioned by the artist.

4. GSA will take necessary steps to strengthen its Art-in-Architecture Program as an important aspect of its responsibilities for federal facilities. I believe it must be strengthened in several respects if it is to survive and flourish. In particular, the program must be modified so that GSA tax-supported art is recognized as enhancing the environment for the occupants of federal buildings and the public. I have, therefore, invited the National Endowment for the Arts to join with GSA in developing model procedures that (a) further ensure that proposed art is fully integrated with the architectural concept for public buildings; (b) provide for more participation by the local community and by architects in the selection of both the artist and the work of art; (c) give more attention to the impact of proposed art on the employees housed in the office buildings and the public to be served by those employees; and (d) expand the current interagency agreement between GSA and NEA to deal with conservation and de-accession, as well as installation, of public art. These would be developed after the permanent GSA administrator is in office.

In addition, GSA should reserve Art-in-Architecture project funding at a sufficiently early time to allow for the artist to collaborate with the architect during the architectural design development of the project.

Congressional consultation should also take place before the revised procedures are issued to ensure that the program is consistent with the legislative framework for the GSA public buildings program.

5. Pending completion of the GSA and NEA review, I am instructing the GSA staff to follow, as interim guidance, the recommendation of the 1980 Task Force on the Art-in-Architecture Program established jointly by GSA and NEA, except that the

architect-engineer prescribed in the recommendations should be a voting member of any panel.

6. I have directed the GSA Regional Administrator to explore several low-cost options for improving the environmental character of the Federal Plaza that might be accomplished regardless of whether a suitable alternate location for the *Tilted Arc* is found.

The primary task of the GSA public buildings program is to provide suitable housing for Federal employees and the servicing of the general public. I strongly support the Art-in-Architecture Program because I believe art can contribute significantly to enriching the lives of our employees and the public they serve. But, if art in our federal office buildings becomes perceived as the prime objective to the detriment of our employees, then I believe we have strayed from our mission. In view of the notoriety of the *Tilted Arc* controversy, a course of action which totally rejects the concerns of workers and residents in the vicinity of *Tilted Arc* would, in my judgment, jeopardize the longer-range future of the Art-in-Architecture Program just as severely as would the opposite extreme of bulldozing the *Tilted Arc*.

FULL REPORT

I. Background

I have the responsibility of rendering a decision on whether the *Tilted Arc*, an artwork produced by Richard Serra and commissioned by the General Services Administration (GSA) under its Art-in-Architecture Program, should be retained at, or relocated from, its present site at the plaza in front of the Jacob Javits Federal Building, 26 Federal Plaza, New York, New York.

As a matter of public policy, GSA strives to enhance the environment for federal building occupants and the general public by commissioning works of art for federal facilities under its jurisdiction. As deemed appropriate by the contract architect-engineer, works of art by living American artists are incorporated as an integral part of the architectural design of new federal building projects, and artworks may also be commissioned for existing buildings. GSA's Public Buildings Service has an Art-in-Architecture Program to aid in carrying out this responsibility.

At the time of the construction at 26 Federal Plaza and the subsequent commissioning of Richard Serra's art work, GSA's process for carrying out its Art-in-

Architecture Program involved essentially the following procedures:

When a proposed art concept was approved, the National Endowment for the Arts (NEA) was requested by GSA to form an artist nominating panel. The panel's nominees were forwarded to GSA by the Chairman, NEA.

An Art-in-Architecture Design Review Panel, composed of art and architecture professionals from the Public Buildings Service, reviewed the nominees and submitted recommendations to the GSA administrator, who selected the artist.

The Art-in-Architecture Design Review Panel then reviewed the proposed artistic concept(s) and recommended approval or disapproval.

To date, GSA has commissioned approximately 250 works of art at Federal sites throughout the nation.

The *Tilted Arc* sculpture has been a source of controversy since its placement in the Plaza in 1981. Many people, particularly occupants of the federal buildings and community residents, have advocated the removal of the sculpture, while others, particularly members of the art community, have been adamant that the sculpture be retained at its present site. Indeed, a broad representation of the art community from this country and abroad have vigorously opposed relocation of the *Tilted Arc*. The issue of what action the federal government should take, if any, with regard to the sculpture has been brought before me for my decision. This paper sets forth my decision and the reasoning which lies behind that decision.

II. Contrast in Reactions at Public Hearing

Before reaching any conclusions with regard to the *Tilted Arc*, I carefully reviewed testimony from three days of public hearings that were held in March of 1985 in New York City on whether or not the sculpture should be retained in its present location. The hearings revealed widely contrasting views.

A. Favoring Retention

Positive reactions to the *Tilted Arc* and its retention on the Federal Plaza came largely, though not exclusively, from the art world and are illustrated by the following excerpts from the record of the public hearing:

Page 16: "History . . . teaches us that art, to be a valid expression of our culture, requires freedom for the artist to make his statement about the life and times in which the artist lives and works."

Page 120: "The removal . . . would set a dangerous precedent and erode people's confidence in the government's [commitment] to commission permanent works of art."

Page 124: "...Picasso was ridiculed by those who did not understand his work. . . ."

Page 125: "So, we are here apparently to judge something that only time can judge because this is the only true test."

Page 149: "Richard Serra's *Tilted Arc* is a powerful work of great artistic merit...I have never heard of the removal of a public monument having been settled by popular vote...the decision should...involve the sentiments of a much wider circle than simply those who work in its immediate neighborhood. The society as a whole has a stake in such works of art. . . ."

Page 230: "In time I predict that even the most concerned people working in this plaza will look on the sculpture with pride."

Page 377: ". . . it is prohibited [by New York State law] to alter or modify an artists' work on public display without their consent. Few artists will knowingly place themselves in the undesirable position of being at the mercy of whim and of anyone or any group who dislikes what they see. . . . there was a legitimate contest and the selection was made by accredited agencies and individuals, that the winning design was created just for the plaza, that never at any time prior to its installation was the quality questioned...."

Page 401: "...art is not democratic. It is not for the people."

Page 422: "... the planes move and shift at different rates of speed slow and fast, and I enjoy the movement from convex to concave...I can imagine choreographing movements around and against this curve."

Page 490: "...*Tilted Arc* is one of the major sculptures of the second half of the 20th century...."

Page 525: "Sometimes the *Tilted Arc*...has...the velocity and grandeur of a train coming around the bend. Sometimes it stands stock still the most solid, stable thing in sight. Sometimes it seems...like a fragment of a great, invisible cone that is up to me to complete. It manifests... a portion of the earth's curve and...enhances the illusion of the sky's dome."

Page 526: "This city and this nation are sinking in a rising tide of visual pollution, which this piece vigorously opposes."

Page 528: "I think it's rather outrageous that we have been called upon to come and attend this hearing, and it's obvious that what is at issue is the freedom and the innovative spirit of true art being brought to trial."

Page 572: "The artist here was specifically and formally assured that his work would be permanently installed in an environment where he intentionally planned

a harmonization with the environment."

Page 617: "There are no circumstances here to warrant further administrative or judicial action. If the matter stands as it is, no one will experience any serious harm or duress, and one more work of art will be preserved."

Page 619: "Art involves the presentation of tools to the public that are grounded in notions of optimism and clarity. One of our goals is to alter your perceptions, increase your awareness of the visual world. We are presenting gestures that point to the future. Don't send it back to the dark ages."

Page 632: "There aren't any tribes...in the history of mankind that destroy their totems and... that is what you are purporting to do here. That is what you are...contemplating doing and it looks like you...have made up your mind on that already."

Page 647: "...a majority, even an overwhelming majority, does not make the truth, does not make justice. It cannot change the truth and it cannot change justice as defined in our Constitution... if it were subjected to a review by a local, plebiscite type response then we would have the seeds of undermining the most fundamental principles in our government."

B. Favoring Relocation

Negative reactions to retention of the *Arc*, primarily from those who work in the buildings and live in the neighborhood, were also emphatic, such as:

Page 28: "...a target for graffiti...violates the very spirit and concept of a plaza."

Page 79: "There was a plaza once; now there is a steel wall."

Page 116: "It used to be very pleasant to walk out of the building and see an open space... and see people sitting on the ledge of the fountain talking or having lunch or sunning themselves. Now, all we see is a very unattractive slab of discolored metal...."

Page 138: "We are not here to discuss the merits of the sculpture, but only the place it was put. Its placement is, at best, hostile to its environment, and it negates the use of the open space. Mr. Serra's work of art ...was designed to change, alter, and dislocate someone else's artistic creation. This is wrong."

Page 146: "In New York... works of art have been removed....As a citizen whose money you are spending... we have the right to say no. This piece is...barren. It has the virtue of scrap iron...."

Page 298: "Having just come from visiting our embassies in Rome, Islamabad, Rangoon and Bangkok, I concluded that this rusted iron object was an antiterrorist barricade...."

Page 353: "This gigantic strip of rust is...an arrogant, nose-thumbing gesture...."

Page 472: "Rather than an arc, it is a wall with all the actual and symbolic connotations of lost freedom the law implies. Confinement, restriction, obstruction, and exclusion...."

Page 473: "It's the Berlin Wall, the Iron Curtain of our hardened and demeaned contemporary art...."

Page 477: "After being surrounded by four walls all day, the last thing I want to face is another wall."

Page 577: "Neither its shape nor its color nor its materials are compatible with the other elements already existing there."

Page 579: "Artists are human. They can make a mistake."

Page 613: "...I didn't expect to hear the arrogant position that the work of art justifies interference with simple joys of human activity in a plaza."

Page 640: "...I would just like artists, if they want support from the community, to consider our feelings as well."

Page 644: "There is a lesson to be learned from this....you don't go to Washington alone for approval of something placed in New York. You go to your own surroundings and get some input from the people. They are not all ignorant dunces to be ignored and presented with a fait accompli."

Comment: Those in favor of relocation regarded the Plaza and the open space it symbolized much more highly than did those who favored retention. Many of the latter found the plaza boring and unimaginative. Most of the people who testified for relocation placed a high value on the wishes of the people who live and work in the area. Those favoring retention focused more on longer-term values of the art work to the public rather than on the concerns of the employees and local residents who are directly affected by the art work.

III. Conclusions Regarding Process of Installation

In examining the current controversy surrounding the *Tilted Arc* sculpture and the administrative processes by which the artwork was commissioned and installed, I have concluded that several process difficulties contributed to the current problem.

First, a primary objective of the GSA Art-in-Architecture Program is to provide federal facilities with works of art which are integrated into the architectural design concept as deemed appropriate by the project architect. Because funds were not available to proceed with the type of art recommended by the architect, a timing

gap occurred in the case of *Tilted Arc* which prevented that integration. The artwork was not commissioned until 1979 and was not installed until 1981. The Federal Building and Plaza construction had been completed in 1968[5] with the architect therefore recommending a very different type of abstract artwork for the plaza area, one which would occupy a space eight to ten feet wide rather than the 120 feet occupied by the *Arc*.

Second, because over a decade passed before funding was available, the artist was not provided the opportunity to work in concert with architects as they designed the Federal Building and Plaza. Therefore, the integration of the views of the artist and the original architect, which should have resulted in a work of sculpture fully compatible with the Federal Plaza, did not occur. This was contrary to the Art-in-Architecture Program's intent.

Some years later, an unsuccessful attempt was made to bridge this disconnection between the artist and the architect. Apparently, the architect-engineer joint venture responsible for the Federal Plaza design was a participant on the 1979 panel to nominate artists for the sculpture and, under procedures then in effect, did not participate in the subsequent deliberations of the Art-in-Architecture Design Review Panel when it was called upon to review the artwork proposed by the artist selected earlier by the Administrator. Furthermore, true integration ten years after the building has been constructed is very difficult even with full communication.

The lack of integration is further illustrated by the fact that the members of the GSA panel reviewing the *Tilted Arc* in 1981 were deeply concerned about the proposed artwork and objected to it. I understand the then administrator of GSA was brought into the panel meeting and made the decision without having received the usual panel recommendation.

Finally, the process in place at the time of the artist's nomination and selection did not include soliciting public and community views and reactions to the artwork prior to its commissioning. Although representatives of the New York art community were on the Artist Nomination Board, there was no relationship perceived between the community and employees in the office building, and the goals and procedures of the Art-in-Architecture Program. As a consequence, the community, being largely a nonparticipant in the art selection process, was not properly prepared to receive the work of art and was not in a position to provide even minimal public understanding and acceptance of the work. The lack of community support was first evidenced when the artwork was installed and may have resulted, in part, from this failure.

I understand from the public comments that in reviewing art for New York City property, the city's Art Commission employs a panel which "includes an architect, a landscape architect, a painter, a sculptor, three lay members, representatives of the Metropolitan Museum of Art, the Brooklyn Museum, the New York Public Library, and a mayor's representative." This type of balanced panel, with local representation, was missing from the GSA process.

I should note the artist provided what he said he would. He showed GSA design sketches of the proposed artwork and was painstaking in his planning. However, the GSA process, as it then existed, and the way in which the process unfolded, permitted the current controversy to become far more polarized than was necessary. In my view, both the artist and the local community have been victims of our earlier governmental process problems, which grew in large part out of the extended lack of funds. Whatever scars the *Tilted Arc* may leave within the lower Manhattan community and the art world, however, it is an episode which should be regarded as a difficult, but nonetheless valuable, learning experience from which the Art-in-Architecture Program has improved its processes and on which it now needs to build further.

IV. Major Issues Related to Possible Relocation

Numerous points were raised in the public hearings on *Tilted Arc*. Because the letters and petitions largely covered the same concerns, and because the hearings were open to the public and the press, I have concentrated heavily on the testimony given at the hearings. The most significant issues raised by those testifying are addressed in the following comments.

Issue: Whether relocation would constitute a breach of contract.

Comment: Relocation would not constitute a breach of the federal government's contract with the artist. Under the contract's terms: "All designs, sketches, models, and the work produced under this agreement for which payment is made under the provisions of this contract shall be the property of the United States of America. All such items may be conveyed to the National Collection of Fine Arts–Smithsonian Institution for exhibiting purposes and permanent safekeeping."

It is also worth noting that under the standard contract clauses signed by Mr. Serra, prior to its completion GSA could have terminated the contract at any time for the convenience of the government. In the event of termination, at Mr. Serra's option, title to the completed or uncompleted *Tilted Arc* would have either (a)

resided with Mr. Serra, in which case it would not have been installed on the Plaza, or (b) resided with the government for whatever use was determined by the GSA to be appropriate. There was no contractual restriction on such use or location.

There is no contract provision giving the artist either property rights or permanent easement rights in the property upon which the work is erected.

Leaving aside for the moment the policy issues involved, GSA's legal counsel finds no legal barrier to possible relocation.

Issue: Whether there is a right on the part of an artist to insist on retention of publicly funded art in a particular location which overrides any views or rights of the affected community. Conversely, whether the location of public art should be subjected to the pressures of public opinion.

Comment: In my judgment, the views of the community should be taken into account in art programs located in open public areas and funded by the taxpayers while guarding against judging the acceptability of public art by popular vote. I am convinced that public views should weigh more heavily than was the case in the commissioning of the *Tilted Arc* in which such views appear to have been ignored. How those public views are best articulated, however, and how they should impact upon the decision making of the federal government which owns the art and the building complex where the art is placed have not been addressed adequately and need to be examined by GSA and the National Endowment for the Arts. This is particularly true with respect to cases such as this in which many in the community believe that their views have been ignored by governmental action that has unilaterally thrust unwelcome art in their midst.

If one were to accept the argument that, despite the lack of contractual language to support the contention, somehow there was a guarantee of permanence to those who design building complexes for the federal government, then it is unlikely that the *Tilted Arc* would have ever reached the design stage. The plaza, with its mosaic patterns, would have to be retained permanently in its original form under such a concept and could not have been changed by the anchoring of the *Tilted Arc* across its surface.

I find it difficult to accept an argument that an artist has rights not accorded an architect, particularly in cases such as this in which the architect's concept was commissioned and installed first.

Issue: Whether the opposition of employees and residents will largely disappear with the passage of time.

Comment: At times, pieces commissioned in the Art-in-Architecture Program initially receive a hostile reaction which then recedes after several years. In some cases, such as the *Batcolumn* in Chicago, the art work eventually becomes highly prized by large sections of the community.

With the *Tilted Arc*, however, the negative views of the affected people have not declined in nearly four years. I believe the employees and residents of lower Manhattan should not have to wait longer to see at least the beginning of a process which should resolve the question of whether an acceptable alternative site is available.

Issue: Whether Tilted Arc *is so site-specific it cannot be relocated.*

Comment: The *Arc* was planned very carefully and specifically by the artist for the Plaza. In that sense, it is site-specific. I am not persuaded, however, that it would be destroyed if it were moved to another compatible place with adequate viewing space.

Further, regardless of the careful planning of the artist and the high aesthetic value asserted by some eminent artists, I do not believe the community must be forever burdened, against their will, with what many of them regard as simply a 12 feet high, 120 feet long rusted steel wall. At the same time, I do not believe we can accept the type of arbitrary relocation which would destroy the integrity of the artwork.

Issue: Whether relocation threatens freedom of art.

Comment: Much has been said by a number of artists about the act of relocating the *Tilted Arc* constituting artistic censorship. Although I understand their concern, I do not accept this argument.

First of all, the decision as to whether to relocate is being made only after thousands of people have expressed their views through days of public hearings and the writing of letters and signing of petitions, and after the issue has been debated in a free press. This is scarcely the process of censorship.

Second, as described later in this document, a process for determining the suitability of possible location sites will be initiated which will involve the views of both artists and nonartists.

Third, in my judgment, this concern confuses a totalitarian system in which artists are prevented from creating art, or punished for having created it, with this very different situation in which highly controversial art is forced by the government upon a neighborhood and a large group of employees for a period of years. The

only question now under serious consideration is not whether to physically destroy an artwork, but whether or not a more acceptable location is possible.

Fourth, the allegation of censorship fails to recognize the difference between the freedom to place any type of art in a museum or on private property where people come to view art of their own choice, and this very different situation in which art is placed by a governmental agency in a work environment where the building occupants and the public using those buildings are given no free choice and must view it day after day.

Issue: Whether the Tilted Arc *decision may have a serious impact on the Art-in-Architecture Program.*

Comment: Much concern has been expressed about how the *Tilted Arc* decision will affect the future of the Art-in-Architecture Program. It is said, for example, that physical destruction of the *Tilted Arc* would send shock waves through the art world that would cause established artists to refuse further participation. Whether this reaction is likely or not, I have rejected the option of destruction. Some also believe that even the relocation to a new site would also greatly discourage future participation. I suspect this would depend, at least in part, on the process through which the relocation took place and the extent to which the new site was compatible with the artwork and was in an environment which evidenced understanding and support.

Perhaps not enough has been said about an entirely different aspect of this issue, namely that of the negative public reaction to paying taxes for art which many do not understand or like and which is placed in their community without meaningful local participation. The Art-in-Architecture Program has had a fragile history, confronted with funding difficulties and local criticism. Commissioning of new art has come to a virtual standstill, as the GSA regions have become increasingly concerned about negative public reaction to tax-supported art by an agency trying to find money to improve the safety of Federal buildings in these times of deep budget deficits.

I do not believe this program can survive if it becomes perceived by the public at large as simply art for the artists, a program which is regarded as ignoring the public and which produces art the public often finds controversial. In view of the notoriety of the *Tilted Arc* controversy, a course of action which totally rejects the concerns of workers and residents in the vicinity of *Tilted Arc* would, in my judgment, jeopardize the future of the Art-in-Architecture Program just as severely as would the opposite extreme of bulldozing the *Tilted Arc*.

V. Decision Process on *Tilted Arc*

No detailed guidelines exist for the relocation or removal of a piece of art installed under the GSA Art-in-Architecture Program. In this instance, the GSA regional administrator, Mr. William Diamond, recognized the importance of providing an opportunity for a wide range of opinion to be expressed. Although no opportunity for public participation and comment is required, consistent with our current emphasis on community input, three days of open public comment was solicited and received from people with widely divergent views. I have read all 654 pages of the transcript.

A total of 1,757 letters and petitions containing 7,412 names have been received from persons with varying viewpoints. I have carefully reviewed recommendations received from the GSA regional administrator, Mr. William Diamond, and from Mr. Donald Thalacker, director of the Art-in-Architecture Program. Both statements are included as Appendices "P" and "R."[6]

I have seen the *Tilted Arc* and talked personally with some of the employees who work in the Plaza. I also had the opportunity to visit with the sculptor, Richard Serra. Over the past weeks, I have devoted considerable attention to the issues reflected by those who have expressed their views. Strongly held views on both sides were presented, and I find the decision a difficult task of weighing competing values, each of which has merit but none of which can, in my view, be pursued in isolation from the others.

I would also stress that I made no judgment whatsoever concerning the aesthetic value of the *Tilted Arc*.

VI. Decision

The primary mission of the GSA public building program is to provide suitable housing for Federal employees and the servicing of the general public. I strongly support the Art-in-Architecture Program because I believe art can contribute significantly to enriching the lives of our employees and the public they serve. But, if art in our federal office buildings becomes perceived as the prime objective to the detriment of our employees, then I believe we have strayed from our mission.

1. Physical Destruction Rejected

I reject the option of physically destroying the *Tilted Arc* as violating our sense of values which tells us that deliberate destruction of art which has limited acceptance is not compatible with a free society which prides itself on encouraging free

expression of art. Destruction would have a negative effect upon many artists who are striving to pioneer new dimensions in art.

2. Site for Relocation to Be Sought

The relocation option is also opposed strongly by much of the art world. In the final analysis, however, I believe the concerns of the many employees who work in the plaza buildings, the public they serve, and the people who reside in the area, have to be given greater weight than the views we received from members of the art community—most of whom do not live or work near the plaza—in determining whether efforts should be made to relocate the *Arc* (as contrasted with the far more drastic option of destruction).

Therefore, the regional administrator should seek a new location for the *Arc* where it would not suffer significant loss of integrity as an artwork; where it can be better understood and appreciated; and where it would be a less vulnerable target for graffiti. Very likely, the *Tilted Arc* would be far better appreciated by those who had the free choice of viewing it than those in the Federal Building who find the plaza physically curtailed, and whose view is obstructed by the *Tilted Arc* as they arrive in the morning and as they leave the building at noon and after work.

3. Process to Determine Possible Relocation

Possible relocation, however, is an action which requires a process involving careful consideration of various points of view, including that of the artist. It is not a judgment I feel qualified to make alone, and deserves a more deliberative process. Now that the public comments have been received, including letters and petitions, I believe we have a record on which an orderly process should now be established and set in motion to resolve this issue.

It is my conclusion that the judgment of determining whether a particular alternate location would be an appropriate site should be made by the GSA administrator only upon receipt of recommendations from a panel of individuals appointed by the chairman of the National Endowment for the Arts (NEA). This panel should include members of the art and design community, and representation from both the communities under consideration and from the residents and employees in the area near Foley Square, with the members varying at any particular point in time according to the location under review. Mr. Serra and the plaza architects should be consulted by the panel. Expenses of relocation, in the event relocation materializes, should be defrayed by individuals or groups interested in relocation.

I am requesting the NEA to establish such a relocation review panel. The GSA regional administrator will consult with this panel before seeking possible alternative sites for the *Tilted Arc*.

4. Retain in Plaza during Relocation Search

Determining whether another location can be found where the *Tilted Arc* can be properly placed and viewed may take considerable time. During this period, the *Tilted Arc* should be retained in its present location, and informational material should be placed near the plaza doors which will explain the concept of the *Tilted Arc* as envisioned by the artist.

5. Strengthening the Art-in-Architecture Program

The GSA regards its Art-in-Architecture Program as an important aspect of its responsibilities for federal facilities. President Reagan has recognized the GSA program as exemplary. The *Tilted Arc* issue demonstrates, however, that additional development and refinement of the program is required. I believe it must be strengthened in several respects if it is to survive and flourish.

The issues associated with accession, conservation, and deaccession of public art triggered by this controversy are broader than the ultimate disposition of the *Tilted Arc* itself. In the interest of strengthening the program, which I strongly endorse, these issues need to be addressed in the immediate future.

In particular, the program must be modified so that GSA tax-supported art is recognized as enhancing the environment for the public employees who spend each day in the buildings which the art is intended to embellish and for the general public these employees serve, as well as the community in which the office buildings are located. This will require a more meaningful and formal involvement of the local community in the planning and selection process.

I have, therefore, invited the National Endowment for the Arts to join with GSA in developing model procedures that (a) further ensure that proposed art is fully integrated with the architectural concept for public buildings; (b) provide for more participation by the local community and by architects in the selection of both the artist and the work of art; (c) give more attention to the impact of proposed art on the employees to be housed in the office buildings and the public to be served by those employees; and (d) expand the current interagency agreement between GSA and NEA to deal with conservation and deaccession, as well as installation, of public art. These would be developed after the permanent GSA administrator is in office.

In addition, GSA should reserve Art-in-Architecture project funding at a sufficiently early time to allow for the artist to collaborate with the architect during the architectural design development of the project. Congressional consultation should also take place before the revised procedures are issued to ensure that the program is consistent with the legislative framework for the GSA public buildings program.

6. Interim Guidance for New Art

Pending completion of the GSA and NEA review, I am instructing the GSA staff to follow, as interim guidance, the recommendation of the 1980 Task Force on the Art-in-Architecture Program established jointly by GSA and NEA [included in the full report as an attachment] except that the architect-engineer prescribed in the recommendations should be a voting member of any review panel.

7. Improve Life Quality of Plaza

The water fountain was originally an important feature of the plaza until the city water shortage forced it out of operation. Its absence has given the plaza a more barren appearance than intended by the architect. The later addition of the Cor-Ten steel arc has further "hardened" the plaza in the eyes of many federal employees and neighborhood residents. Subject to the availability of a very modest amount of funds, it would be desirable to restore a more hospitable character to the plaza.

I have, therefore, directed the GSA regional administrator, Mr. William Diamond, to explore several low-cost options for improving the environmental character of the plaza that might be accomplished regardless of whether a suitable alternate location for the *Tilted Arc* is found.

This exploration should include investigation of a variety of ways in which the plaza might be made more hospitable for the public, employees, and others who regularly use it, including experimentation with performance events.

Letter from Senator Thomas F. Eagleton to Dwight Ink

May 31, 1985

Dear Mr. Ink:

I am very sorry you have made the *Tilted Arc* decision *prior* to Terence Golden's imminent appointment as administrator of the General Services Administration.

I fail to comprehend your rush to judgment when GSA is about to have a fully sworn administrator. The *Tilted Arc* has been in place for almost four years. Your instant rush to judgment, it seems to me, is to act as a hasty executioner of the *Tilted Arc*. The decision should have awaited Mr. Golden's confirmation.

It was well known to you that various senators had inquired of Mr. Golden as to how he would handle the *Tilted Arc* matter once he was in office. Yet, at one minute to midnight, you decided to act without giving Mr. Golden a chance to give the issue a fresh and independent judgment.

While I agree that the Art-in-Architecture Program may need procedural changes which would allow more local involvement and a closer working relation between artists and architects, I do not feel an existing sculpture, erected pursuant to all applicable review standards, should now be removed by an acting GSA administrator because he deemed earlier procedures inadequate.

Sincerely,
Thomas F. Eagleton
Ranking Minority Member
Committee on Governmental Affairs

cc Richard Serra
Gustave Harrow

Form Letter from Copyright Office, Library of Congress, Washington, D.C., to Gustave Harrow in Response to Richard Serra's Application for a Copyright for Tilted Arc

June 20, 1986

Regarding: *Tilted Arc*

Copyright protection subsists only in "original works of authorship" that are fixed in a tangible medium of expression. To be regarded as an "original work of authorship," a sculptural work must contain at least a certain minimum amount of original artistic material. In all cases, it is only the artistic expression of the author/artist that is protected by copyright.

Familiar shapes and symbols are not copyrightable. Nor are simple variations or combinations of basic geometric designs capable of supporting a copyright registration.

The work you have submitted lacks the sculptural authorship necessary to support a copyright registration. Therefore, we are filing your application and deposit without action.

Sincerely yours,
Register of Copyrights

Letter from Gustave Harrow to Harriet Oler

Examining Unit, Copyright Office, Library of Congress

July 17, 1986

Re: Application for Copyright Registration, Richard Serra's Sculpture *Tilted Arc*

Dear Ms. Oler:

On April 17, 1986 the above application was mailed to the Copyright Office. In a response dated June 20 notice was received from the Register of Copyrights that no action was taken because the work lacked sculptural authorship (copies enclosed).

I am writing on behalf of Richard Serra as his counsel. I know you are aware that Richard Serra is internationally recognized as one of the most innovative artists working in America today. All of his work is abstract, and what many would term minimalist in direction. Much of it is stylistically akin to *Tilted Arc*, and all of it is essentially of the same genre. *Tilted Arc* in particular is not a familiar shape or symbol or basic geometric design.

Tilted Arc is specifically unique in that it is a *tilted cylinder* which crests at the top. This means both ends are below the surface of the ground, which results in graduated levels of height, with its highest point in the center. This, as well as the work's precise concave/convex curve and the degree of its tilt, are critical to its unique impact on the observer. As a tilted cylinder, the sculpture is also in sharp contrast to an ordinary cone shape. It is doubtful that the uniqueness of *Tilted Arc* in this respect can be seen in any other work of art, symbol, functional shape, or object.

In addition, *Tilted Arc* is unique in another basic respect. It is site-specific, which means it was created and functions in terms of its particular context. This includes, among additional factors, the design, contours and physical circumstances of its immediate site, and its volumetric space, architectural environment, and general social use. These determined the medium, height, length, dimensions, location, curve, and tilt of the sculpture.

I feel certain that these and other factors could not have been considered when Serra's application was first examined, and I therefore request an expedited reconsideration. In conjunction with this, enclosed is the catalogue which

accompanied Serra's recent major retrospective at the Museum of Modern Art in New York City. It explains the nature of his work. This type of retrospective is, of course, only accorded to the major artists of our time. The catalogue demonstrates that *Tilted Arc* is characteristic of Serra's seminal creative works.

The need for reconsideration of this matter is urgent, and your immediate efforts in this respect will be most appreciated.

I will be happy to come to Washington to discuss this matter with you further.

Very truly yours,
Gustave Harrow

Letter from James Allgeyer

Attorney Advisor, Visual Arts Section, Examining Division,
Copyright Office, Library of Congress
to Gustave Harrow[7]

August 11, 1986

Dear Mr. Harrow:

This is in response to your letter of July 17, 1986, addressed to Harriet Oler, requesting reconsideration of our refusal to register a claim to copyright in the work entitled, *Tilted Arc*. This claim was filed on behalf of Richard Serra.

I have considered the points you made in your letter, examined the accompanying catalogue, as well as the photographs originally received, and believe there is a basis for registering your client's claim, under our policy of resolving doubtful claims in favor of registration. Please note, this registration will not protect the basic geometric shape of Mr. Serra's work, because copyright does not extend to the designs of familiar geometric shapes, or trivial variations of such shapes.

As a result of the above, please prepare a new application in which the *Nature of Authorship* block of space 2 reads only "Sculpture placed in plaza." I understand from our recent telephone conversation that you agree to registration on this basis, and will bring a revised application to our office on Wednesday, together with a request for "Special Handling" and the $200.00 fee for that purpose. Once we receive this, we will expedite the registration.

In reply, please return the enclosed carbon copy of this letter referring to our *Control Number 60 621 743-H.*

Sincerely yours,
James Allgeyer

List of Members of National Endowment for the Arts Tilted Arc *Site Review Advisory Panel*

James Ingo Freed, architect, I. M. Pei & Partners, New York

Sam Hunter, Professor of art history, Princeton University; Curator of Modern Art, Princeton Art Museum

Theodore Kheel (Panel Chair), arbitrator, Battle, Fowler, Jaffin & Kheel, New York

Brenda Richardson, Assistant Director for Art, Baltimore Museum of Art

Jaquelin Robertson, architect, Eisenman Robertson Architects; faculty member, University of Virginia

Robert Ryman, painter, New York

The Honorable Joel Wachs, Councilman, City of Los Angeles

Paper Presented by Richard Serra to Tilted Arc *Site Review Advisory Panel, December 15, 1987*

I am not here to participate in site-finding activities. There is no alternative site for *Tilted Arc*. When I first learned of Mr. Diamond's efforts to remove *Tilted Arc* from its site and to relocate it, I immediately sent a letter to him and Donald Thalacker, then the director of the Art-in-Architecture Program of the GSA. I stated: "I want to make it perfectly clear that *Tilted Arc* was commissioned and designed for one particular site: Federal Plaza. It is a site-specific work and as such not to be relocated. To remove the work is to destroy the work." My position has not changed.

Therefore, I am here to oppose the intended destruction of *Tilted Arc*. I do not accept Dwight Ink's decision, which relies on a recommendation by William Diamond. William Diamond's removal recommendation consists of falsifications, distortions, and outright lies. I feel it necessary to reveal Mr. Diamond's involvement in the *Tilted Arc* case—a case, which he, in fact, instigated—because if he is allowed to continue his machinations it will lead not only to the destruction of my sculpture, but to the legalization of governmental censorship.

In 1979, I was commissioned by the General Services Administration to build an urban sculpture for permanent installation at 26 Federal Plaza. I explicitly discussed the question of permanency, which is implicit in the commission of a site-specific work, with Julia Brown, the GSA project manager, and Donald Thalacker. I felt it necessary that this implication be fully understood, and I only accepted the commission after I had been repeatedly assured that my work would be, as stated in the GSA Manual, "incorporated as a permanent integral part" into its context, that, as a matter of fact, the GSA did not want to have it any other way.

Mr. Diamond alleges that the decision to install *Tilted Arc* was made in Washington without any input from New York. This is wrong. Representatives from New York were present at all important meetings in Washington and voted for the sculpture. The installation also had the support of the architectural firm which designed the plaza and the buildings. Furthermore, the contracting officer of the GSA New York asked for a detailed study of the effect which the sculpture would have in relation to its environment. The inquiries included questions as to the effect

of the sculpture on existing pedestrian traffic patterns, questions of surveillance, lighting, waterproofing, etc. The GSA office in New York also requested that I slightly change the location of the curve on the plaza. As soon as the final location of the sculpture had been agreed upon by the GSA, New York, it was installed in 1981 and anchored into the existing steel and concrete substructure of the plaza.

After *Tilted Arc* was completed, I was invited by the NEA to the White House and congratulated by then President Jimmy Carter on my contribution to the cultural heritage of the United States. I was and still am proud of it.

Immediately following the installation of *Tilted Arc*, the GSA received a number of complaints, but the criticism died down soon after, and according to Donald Thalacker no further complaints were received 'till 1984. For three years there was no protest against *Tilted Arc*. Only after William Diamond had been appointed as regional administrator was the protest stirred up again by statements which he made in the press. He called *Tilted Arc* a mistake which had been made because at the time the impact of the piece was not understood. This is a lie. He also said that since the sculpture's installation the GSA had been inundated with complaints. This is another lie. It is inconceivable that Mr. Diamond did not know that the impact of my sculpture on the plaza had been scrutinized by GSA personnel for two years. Mr. Diamond conceals the truth and distorts facts as he sees convenient. The fabrication of ongoing protest against *Tilted Arc*, for example, gave him reason to call the removal hearing. The outcome of this hearing that, I was told, would be fair, democratic, and impartial, had been decided by Mr. Diamond beforehand. He must have been convinced that he would be able to get a majority to testify for removal. How could it otherwise be explained that he was taking bids on removal and relocation of *Tilted Arc* months before the hearing was officially called? In fact, he was shopping around for the highest bidder. He tried to sell the sculpture off to Storm King: he negotiated with the Cooper-Hewitt Museum and the City's Park and Recreation Department, to name just a few of those institutions he approached. At the time I asked Mr. Diamond who had given him the authority to sell my work. I also asked him if that was what he had meant by being impartial.

To assure a majority support for removal at his hearing, Mr. Diamond chose a twofold strategy. In order to avoid the accusation of censoring a work of art, he abstained from judging the aesthetic of *Tilted Arc* in his statements to the press and in soliciting letters which carried his signature. Here he concentrated on the destructive effects which he claimed the sculpture had on social functions of the plaza. The campaign he waged in his buildings was quite different in content. He

placed petition forms "For Relocation" in the lobbies and called upon the undersigned to "find no artistic merit in the Serra artwork." He thus encouraged his employees to censor the aesthetics of *Tilted Arc*, and they testified accordingly at the hearing. They used the public forum to air their hostile emotions against the sculpture in a litany of insults. Only very few federal workers mentioned any social functions of the plaza.

In his removal recommendation to Dwight Ink Mr. Diamond takes care to conceal this fact. He writes instead that he was "impressed by the statements of the federal agencies and employees . . . who passionately sought the return of the plaza to its original space and openness . . . and to its originally designed integrated serenity." Mr. Diamond also alleges that since *Tilted Arc* was installed, the plaza could not be used as a place to hold public events such as band concerts, performances, art shows and so on. Numbers defeat this point. In the plaza's nineteen years of existence there were fewer than twenty-five events.

Mr. Diamond has an even bigger problem with numbers when it comes to counting majorities at the hearing. Out of 180 people who spoke at the hearing, two-thirds testified in favor of retaining *Tilted Arc* in Federal Plaza. Letters opposing removal were received by the GSA at the rate of one hundred to one. Confronted with these numbers, Mr. Diamond writes to Dwight Ink: "One of the things that became extraordinarily clear to me was that certain ground rules would have to be followed. First of all I would have to avoid any reliance on a numbers game." Since the numbers leave Mr. Diamond with only a small minority for removal of *Tilted Arc*, he—abiding by his own rules—ignores them to further insist in his recommendation to Dwight Ink and in the press up to date that a majority demanded the sculpture's removal. This is one of Mr. Diamond's more despicable lies.

Having publicly proven before the hearing that he was absolutely biased, Mr. Diamond nonetheless made himself chairman of the hearing and chose all four panelists, two of which happen to be his underlings at the GSA. So, when his efforts to establish a majority for removal failed, he could falsify the record with the backing of his panel. Diamond acted as both prosecutor and judge. The hearing was a sham, a kangaroo court.

In his removal recommendation Mr. Diamond arrogates to disqualify my concept of site-specific sculpture. He is careful to avoid any attempt to prove the "unspecificity" of *Tilted Arc*. He relies instead on a diversion strategy based on another series of lies. Let me quote: "I found one argument against site-specificity of his sculpture most convincing. It involved Mr. Serra's acceptance of the

relocation, in Paris, of his sculpture entitled *Clara-Clara.*" My answer: *Clara-Clara* was not conceived as a site-specific work. It belongs to a series of pieces consisting of two conical elements. None of those pieces is bound to a particular site. Mr. Diamond continues: "Further, I understand that both the Port Authority of New York, New Jersey, and the City of New York have relocated pieces from downtown Manhattan. Accordingly, I have rejected claims proffered by the proponents of retention that the sculpture is site-specific and can not be relocated." Once again Mr. Diamond distorts the truth to achieve his ends. Neither the Port Authority nor the City of New York owned the pieces Mr. Diamond is referring to, so it would not have been up to them to relocate them in the first place. Neither piece was or has been relocated. Both works, *TWU* and *Rotary Arc*, were installed on the basis of temporary permits; after the permits expired both sculptures were dismantled. During the hearing, Mr. Diamond voiced publicly his admiration for *Rotary Arc.* There is no doubt that he knew that the piece was still up. Yet in his recommendation to Dwight Ink, written shortly after the hearing, he makes believe that the work had been relocated. The fact of the matter is that *Rotary Arc* was dismantled in 1987, two years after Mr. Diamond knowingly made his false statement about its removal and relocation. Can this government really destroy *Tilted Arc* relying on a recommendation which is based on lies?

I have never been confronted with removal efforts anywhere in the world. What is understood by numerous institutions and individuals which commissioned site-specific works is simply denied by Mr. Diamond. He was asked on a television program to comment upon my statement that *Tilted Arc* is a site-specific work. Here is his reply: "Well, that's his opinion. That's not so." Only a person thus qualified through lack of knowledge and ignorance can go out and find alternative sites for a site-specific sculpture.

The concept of site-specific sculpture has nothing to do with opinion or belief. It is a concept which can be verified in each case. The process of conception can be reconstructed, and the specificity of a work in relation to its site can be measured by its effects on the site.

I would like to explain a few premises of site-specificity and end my talk with an explanation of the specificity of *Tilted Arc.* Site-specific works deal with the environmental components of given places. The scale, size, and location of site-specific works are determined by the topography of the site, whether it be urban, landscape, or architectural enclosure. The works become part of the site, and

restructure both conceptually and perceptually the organization of the site. My works never decorate, illustrate, or depict a site.

The specificity of site-oriented works means that they are conceived for, dependent upon, and inseparable from their location. Scale, size, and placement of sculptural elements result from an analysis of the particular environmental components of a given context. The preliminary analysis of a given site takes not only formal but also social and political characteristics of the site into consideration. Site-specific works invariably manifest a value judgment about the larger social and political context of which they are a part. Based on the interdependence of work and site, site-specific works reveal the content of their site critically. A new behavioral and perceptual orientation to a site demands a new critical adjustment to one's experience of the place. Site-specific works primarily engender a dialogue with their context.

Tilted Arc was conceived for Federal Plaza, which was an undistinguished, large, semicircular, hard, open, static space. The plaza was unarticulated in terms of its functions in relation to the surrounding buildings. There were no amenities like benches, tables, or chairs in the plaza. A nonfunctioning fountain occupies about half of the existing space. The fountain's useless presence is accentuated by its being the eye of the nautilus stone pattern which covers the surface of the plaza. In short, Federal Plaza was an open, windy, desolate area, basically used for transit.

The plaza is bordered on two sides by stairs which lead to Lafayette and Worth Streets. The U.S. Court of International Trade and the Jacob K. Javits Building enclose the curvature of the plaza at the sides opposite the streets. The architecture of both buildings is as uncharacterized as the plaza itself. The Jacob K. Javits Building is a monotonous curtain wall monolith which, in relation to the larger architectural context, represents a total confusion of scale. The scale of the larger context is determined by the historical architecture of the court buildings across Foley Square. Standing on Federal Plaza, which functions as a promontory in the midst of the federal enclave, one senses that the entrances into the old court buildings are on the same elevational level as the entrances into the new federal buildings. New and old federal architectures are set off against each other.

In considering the placement of a sculpture on Federal Plaza it was my intention to: 1) structure the plaza and create directions, accentuating existing pedestrian traffic patterns; 2) link the two sides of the federal enclave so that the sculpture should act as a bridge, connecting and visually gathering the different federal

architectures; 3) create a sculptural space within the plaza which could be experienced by those crossing the plaza on their way into and out of buildings.

I realized immediately that a horizontal form was needed to change the merely decorative pattern of the plaza. A lateral extension of the work was asked for by the traffic movement into and out of the buildings. An extensive study of the existing traffic patterns led me to the conclusion that the sculpture ought to direct the flow of the main traffic from Lafayette Street into both buildings. In order to fulfill this function, the sculpture had to run more or less parallel to the U.S. Court of International Trade. Studying Federal Plaza, it became also apparent that the sun moved across the plaza in the same direction as people entered the buildings. The sculpture was laid out not only to direct the passage of the people but also to mirror the passage of the sun, so that there would be no shadows from the sculpture on the plaza at midday, which maximizes the effect of the sculpture at the time when most people are on the plaza.

The sculpture had to be of a particular size, proportion, and extension in relationship to the plaza and the buildings. After constructing several full scale mockups on the plaza, the form of a slow, arcing, 120-foot long curve was found to be the most pertinent solution in that its sculptural presence directed, encompassed and contained the traffic flow from the streets into both buildings. The poignancy of this horizontally extending curve was strengthened by the fact that it connected the opposing federal architectures from many viewpoints, the sweep of the curve having the capacity to carry the eye past the confines of the plaza. Even though the plaza and the adjacent buildings establish the basis and boundary of *Tilted Arc*, the work has a range of perceptual orientations from afar, above, below, across, around, etc. The plaza is continuously redrawn by the curve.

Tilted Arc is made of Cor-Ten steel. Cor-Ten is the most highly developed corrosion resistant weathering steel available. It is the material which has been used for a quarter century for industrial building throughout the world. People, unaware of the fact that Cor-Ten steel is a highly refined steel, equate the rusty surface with decay and waste. This equation, which is based on a lack of information, prompts hostility. The oxidation of Cor-Ten steel is a controlled chemical process. Oxidation happens gradually over a period of several years and then stops. After the surface ceases to oxidize, the steel reaches a dark amber color and retains long lasting durability. *Tilted Arc*'s contained weight and mass answer the hardness of the stone and the flat extension of the plaza. The sculpture's material substantiates the absolute difference between the physical characteristics of site and sculpture.

The spatial concept of the sculpture was to create a definite interval and volume between it and the architecture. I needed an active form which was going to be perceived as responding to its context. I determined the curve of the sculpture so that it echoes the curvature of the steps in front of the buildings. That alignment—curve answering curve—defines an amphitheater-like space, where the steps could easily be seen as seats.

I decided to tilt the cylinder of the curve at twelve feet, so that people exiting the buildings are at eye level with the top of the curve, thereby establishing a consciousness of human scale which the plaza otherwise denies. Walking across the plaza, the height of twelve feet is understood as being similar to the height of the exterior frontal columns of the buildings and the portals of the doorways, thus connecting the framing of the buildings to the elevation of the sculpture.

Tilted Arc is a tilted cylinder, not a section of a cone. A tilted cylinder will hold the volume between its plane and the architecture, whereas a cone shape will dissipate the space vertically because of a perspectival reading due to the particularity of the shape. The circumference of a cone changes vertically from larger to smaller as it rises, thus indicating a movement upwards. A tilted cylinder has no vertical ascent. It crests, shell-like in its center, thus containing the volume laterally. Unlike a cone, which is an autonomous shape sitting on the ground, a cylinder, in order to tilt, must be planted into the ground; that means that the cylinder is rotated on its central axis into the ground, rising out of the ground to its full height only in the center. That is why *Tilted Arc* had to be anchored into the steel and concrete substructure of Federal Plaza, and that is also the essential difference between *Tilted Arc* and *Clara-Clara*.

Tilted Arc, in its placement, balances the two sides of the plaza, forming a volume and containing the space on its concave side, reading as an infinite plane on its convex side. Its concavity allows for one to be held within the presence of the amphitheater-like space, whereas its convexity draws one to the planar movement of the curve and into the circulation of the entire plaza. The sculpture can never be seen from a single viewpoint, but is perceived as something always changing, always in motion. The experience of *Tilted Arc* is the sum of successive perceptions being revealed only to a moving observer. As the observer moves, the sculpture changes, and the perception of the context changes via the perception of the sculpture. A multitude of new configurations and images is drawn, establishing new meanings as well as revealing the original meaning of the context. This is a condition which can only be engendered by site-specific sculpture.

It remains to be stated that in case of relocation of *Tilted Arc*, I will withdraw my authorship. If the steel plates which in their present site establish my sculpture *Tilted Arc* are reassembled, the new installation will not be my work. I will immediately take legal proceedings against whoever accepts this falsification. I have instructed my attorneys to stop such action through litigation.

Letter from Frank Hodsoll

Chairman, National Endowment for the Arts, Washington, D.C.

to Terence C. Golden

Administrator, General Services Administration, Washington, D.C.[8]

January 5, 1988

Dear Terry:

It is my pleasure to convey to you the recommendations of the *Tilted Arc* Site Review Advisory Committee which met on December 15 to consider possible alternative sites for the sculpture as proposed by the office of the GSA Regional Administrator in accordance with our interagency agreement. All seven members of the panel, representing the fields of art, design, law, and government (see attachment A), were in attendance. Theodore Kheel served as chairman and Richard Andrews as the "designated federal official" required by federal regulations pursuant to the Advisory Committee Act. Public notice of the meeting had been provided in the December 2, 1987 *Federal Register*. The following summary of the panel's deliberations was prepared by Richard Andrews and approved by Theodore Kheel.

After a review of the panel's advisory responsibilities by the panel's chair and the designated federal official, Richard Serra presented a formal statement (see attachment B) articulating his position on relocating the sculpture. Subsequent panel discussion centered on two sections of the artist's statement: (1) the general definition of a "site-specific" work of art; and (2) the application of that definition to this particular work of art and the artist's efforts to imbue *Tilted Arc* with specific physical characteristics which were directly linked to the unique topographic and architectonic characteristics of the plaza and surrounding architecture.

Following Mr. Serra's presentation, the panel, accompanied by the artist, traveled to the Federal Plaza to view the work of art. Despite adverse weather conditions, the panel examined *Tilted Arc* and its environment carefully. They questioned the artist on details of the design process, modifications made during design and construction, and the relationship of the sculpture to the architectural surroundings.

Returning to the meeting room, the panel heard presentations by the two organizations which had indicated preliminary interest in receiving *Tilted Arc* (see

attachments C & D). Clemson University began its presentation by withdrawing its proposal. Their proposal had been predicated on the artist's participation in site selection, a possibility foreclosed by Mr. Serra's formal statement.

Long Island University (C. W. Post Campus) outlined its proposal for relocation of the sculpture but framed that proposal with four "concerns": (1) whether the artist would participate in the site selection; (2) the lack of clarity as to the length of the "loan" of the sculpture to the university from GSA; (3) the university's reluctance to become a target of litigation; and (4) the university's current lack of funds that could be allocated to the relocation, such that private funds would have to be solicited. Representatives of the university noted that they had not yet formed an official position on Mr. Serra's representation to the panel to the effect that he would disavow authorship of the work if relocated. Although not presented as explicit conditions of their proposal, these concerns raised a number of questions for the panel regarding the appropriateness of the university's proposal.

A series of interrogatories from the panel chair designed to encourage a clarification of these questions did not produce any greater degree of clarity from Long Island University. The willingness of the University to remain committed to the proposal even if some or all of the concerns were resolved remained unclear, leaving the impression that the proposal was, at best, tentative.

Upon completion of these presentations, the panel discussed the proposals in light of their charge to advise the General Services Administration as to the appropriateness or inappropriateness of each proposed site. *The unanimous conclusion of this discussion was that both sites were inappropriate.*

The conclusions of the panel were summarized by chairman Kheel as follows:

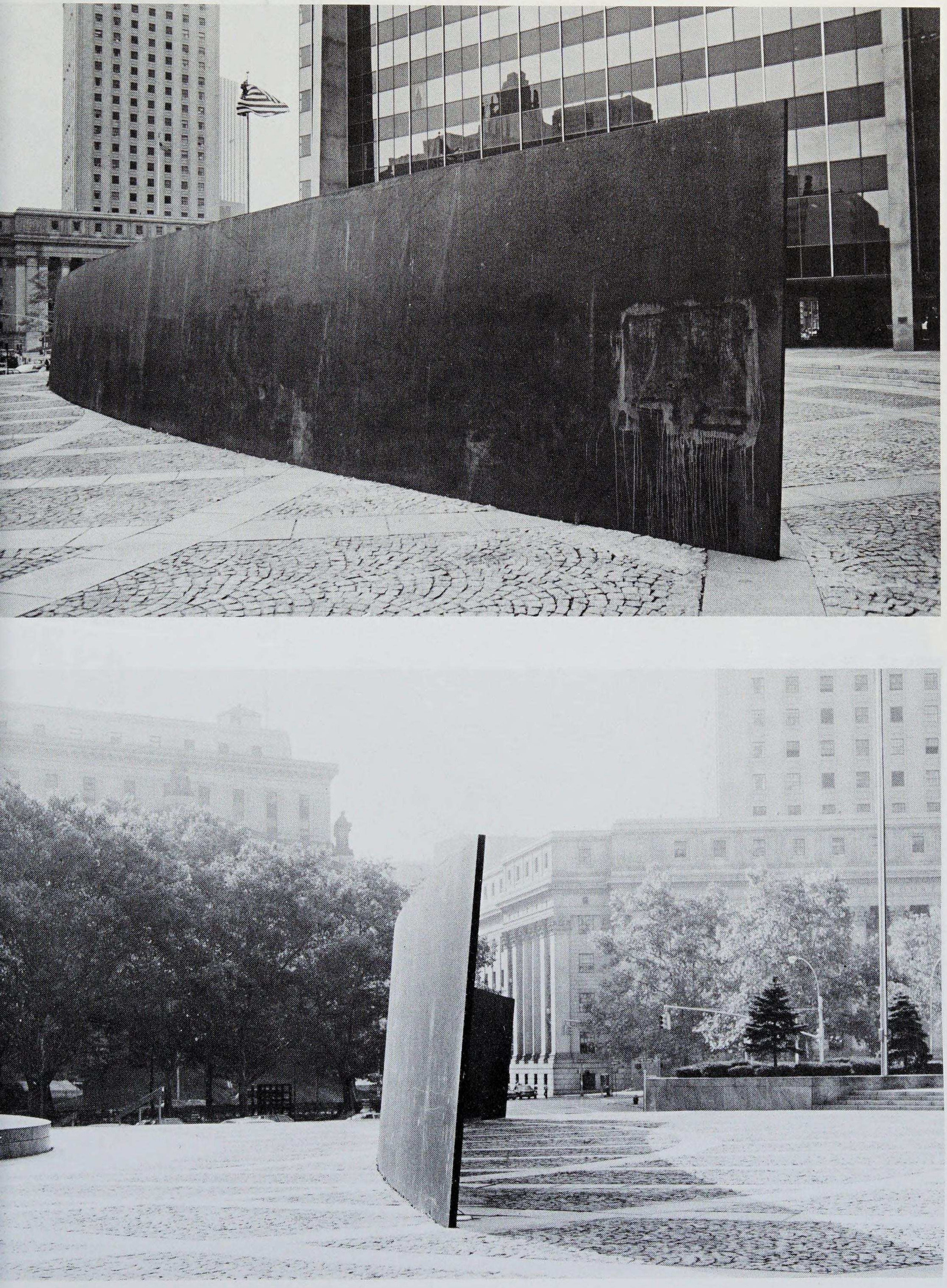
> The purpose of this panel, specifically outlined in the NEA/GSA Memorandum of Understanding (on page 3, paragraph 4), is to advise the GSA through the NEA on the appropriateness of relocating the *Tilted Arc* sculpture to either of the two sites presented to us today. Insofar as Clemson University has withdrawn its proposal and Long Island University has several concerns so as to render its proposal conditional, the panel's advice is that both sites would be inappropriate.
>
> We have also been presented with a statement by the artist, Richard Serra, about the site-specific nature of his *Tilted Arc* sculpture. Our visit to the Federal Plaza to review the actual relationship of the work to its site led us to conclude that there was merit in the artist's statement that relocation of the work would destroy it.
>
> Therefore, in light of the fact that only two proposals were submitted after a lengthy search by GSA, and both those proposals were inadequate, and the artist's view that relocation of the *Tilted Arc* would destroy it, the panel also advises that it is unlikely that

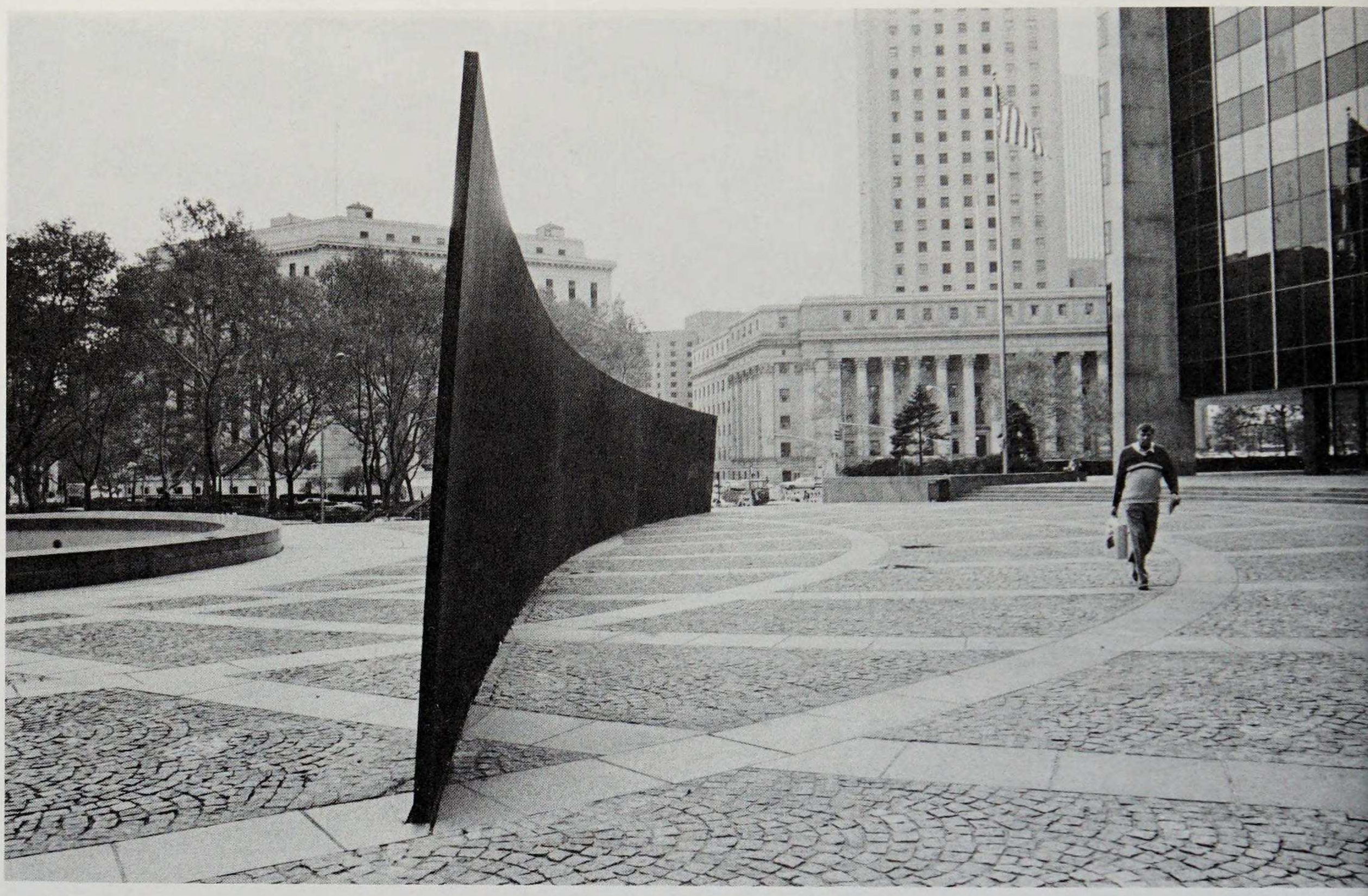
prolonging the search for alternate sites would attract any proposals which would be appropriate for *Tilted Arc*.

Finally, the panel wishes to make clear its understanding that its mandate did not extend to comment on *Tilted Arc*'s appropriateness to its current site or to imply any policy for future site-specific sculpture issues. Each such case must be examined on its own merits.

I would be happy to discuss any of the details of this process with you. I believe this was an exceptionally well qualified panel to consider these difficult questions and to provide the advice sought by Dwight Ink's May 31, 1985 decision memorandum on *Tilted Arc*. We remain committed to our partnership with GSA and look forward to further opportunities to work with you.

Sincerely,
Frank Hodsoll
Chairman





PART IV

Tilted Arc *in Court*

Introduction

Included in Part IV are the key documents which resulted from the legal proceedings brought by Serra in an attempt to block the removal of *Tilted Arc*. These documents concern two different legal actions: the initial claim, filed in the district court, concerning the contract and freedom-of-speech issues (represented here by the brief for the plaintiff and the judge's decision); and the appeal, filed in the court of appeals, which focuses on the First Amendment issues (represented here by the brief for the plaintiff, the Argument section of the brief for the defendants, and the final judgment by the court of appeals).

These documents have been edited in two ways. First, in order to promote reading clarity, all citations of legal precedents, page numbers, affidavits, etc., have been left out. Although this may prove frustrating to any legal scholars who happen upon this book, most readers will probably find that the texts read much more smoothly without a series of citations interrupting every other sentence. Second, some of the documents have been edited for length. In many cases, the sections omitted are those which give a background summary of events leading up to the decision to remove *Tilted Arc*. Even though it is interesting to note the telling variations in what events different parties chose to emphasize, these introductory summaries were also rather redundant, and most of them have therefore been omitted.

Places where parts of the text (as opposed to citations) have been omitted are indicated by ellipses (. . .). Because of questions of length, we have not included any of the affidavits filed along with the briefs.

Summary of Complaint Filed by Richard Serra in U.S. District Court, Southern District of New York, December 17, 1986 [edited]

United States District Court
Southern District of New York
Docket No. 86 Civ. 9656
VERIFIED COMPLAINT

RICHARD SERRA,
Plaintiff

against

UNITED STATES GENERAL SERVICES ADMINISTRATION; TERENCE C. GOLDEN, Administrator, General Services Administration; WILLIAM F. SULLIVAN, Commissioner, Public Buildings Service, General Services Administration; WILLIAM J. DIAMOND, Regional Administrator (Region Two), General Services Administration, Officially and Individually; DWIGHT INK, Former Acting Administrator, General Services Administration, individually,
Defendants

Gustave Harrow,
of Counsel

PARTIES

The Plaintiff is internationally recognized as a seminal contemporary artist. He was commissioned to create a major sculpture by the United States General Services Administration pursuant to its Art-in-Architecture Program.

The United States General Services Administration (GSA) is an agency of the executive branch of government of the United States which has responsibility for the acquisition and maintenance of property located at federal sites.

Terence C. Golden is the national administrator of the General Services Administration. He is named as defendant in his official capacity.

William F. Sullivan is the commissioner of the Public Buildings Service, a division of the General Services Administration within which the Art-in-Architecture Program operates. This program commissioned the plaintiff's sculpture. He is named as defendant in his official capacity.

William J. Diamond is the regional administrator for Region 2 (which includes New York) of the General Services Administration. He is named as defendant in both his official capacity and as a private individual.

Dwight Ink was the acting administrator of the General Services Administration during the pertinent times herein. He is named as a defendant as a private individual. . . .

This law suit has two objectives only. *One objective* is to enjoin the government from withdrawing its commitments and promises to preserve and protect *Tilted Arc* at its site, on the ground that its removal would: i) violate legally binding commitments; ii) violate the Constitution in that removal would be caused by judgments of the artistic expression of the work (its aesthetic, social and political meanings), and would mean the distortion and destruction of *Tilted Arc*. The *second objective* is to recover damages for violations of the First and Fifth Amendments which are clearly established (constitutional torts). The defendants had no reasonable basis for believing these protections were not being violated. The damages sought are based upon Serra's seriously impaired ability to receive commissions to continue his artistic work throughout the United States, due to misconceptions about his artistic intentions generally. This impact upon his artistic reputation resulted directly from the defendants' deliberate efforts to stimulate negative and hostile responses to the sculpture's artistic expression. . . .

BREACH OF CONTRACT

When the contract was negotiated, Serra was promised that his creation, when approved, would be permanently installed. This promise and inducement has not been denied by any of the Defendants.

In addition to explicit promises, permanency was also expressly set forth in the program's directives and policies as well as implied by its usage and experience. Artists commissioned under the Art-in-Architecture Program were uniformly given

commitments of permanency by its director; and none of some 250 works installed have been removed or relocated (the few that have were with the artist's consent).

GSA's policy, usage, and practice implied that Serra's sculpture would not be altered or distorted. It was intended and understood by all parties that this condition was part of Serra's agreement and contract; and that the integrity of artworks and artists in the program would be protected and respected by the GSA.

After approval of Serra's artistic concept, and after a year and a half of scrutiny and analysis of engineering and functional issues, *Tilted Arc* was permanently installed structurally.

The contract, dated September 18, 1979, signed by Serra and on behalf of the GSA for Serra's commission, was not intended by the parties to be, and was not a complete or an integrated contract. There is no provision in this document which states that it is an integrated contract, nor that it includes all of the terms of the contract. The terms of the written portion of Serra's agreement were adapted from a standard form the GSA used. It essentially provided only the terms and sequence of payment; and it made no references to GSA's procedures for approving the sculpture, the nature of the sculpture, the costs of making and installing it, nor to its specific location in site.

Essential terms were not included in the contract. The internal written orders, policies, and promises as to permanency were omitted. It was intended that the written directives, promises, and usage of the program would supply them, and that they were implied. The program's own written directives as to policy became part of the contract.

In addition, the promises given Serra as to permanency substantially comprised GSA's consideration for the commission and constituted a condition precedent to Serra's agreement to create a sculpture. The contract price for the sculpture was $175,000, while less than $18,000 remained with Serra.

COPYRIGHT INFRINGEMENT AND TRADEMARK VIOLATION

When Serra was commissioned to create a sculpture for Federal Plaza, the Art-in-Architecture project manager, who negotiated his contract, understood Serra would propose a site-specific sculpture. When Serra proposed *Tilted Arc* for the plaza, it was proposed as a site-specific work; and when *Tilted Arc* was approved and installed, it was as a site-specific sculpture.

If *Tilted Arc* is relocated, it will appear to be derived from Serra's original sculpture in style, however it will be different in concept, content, and function. Since *Tilted Arc*, in its site, is the sole embodiment of the work Serra created, any relocation would mean that GSA, not Serra, is the author of a derivative work, and this would waste and impair the value of Serra's copyright (Certificate of Copyright Registration by Richard Serra, No. VAU 96 606). Serra has not assigned or relinquished his copyrights in *Tilted Arc*; and he has not given consent to any person to make a derivation of *Tilted Arc*; nor to copy or exhibit it in a modified form.

Because *Tilted Arc* will inevitably be identified with Serra as the author, and since Serra's sculpture would be basically altered and distorted if it is relocated, any relocation of *Tilted Arc* will constitute a misrepresentation of the sculpture. It would misrepresent Serra's artistic authorship, confuse and misrepresent the source and quality of the work, and injure Serra's artistic reputation. The public would be deceived into believing that it is still Serra's work, when in fact the GSA will have altered not only the sculpture, but its authorship as well. This will result in a false attribution of authorship. This misrepresentation and falsification of Serra's authorship will present Serra to the public as the creator of a work not his own, provide the public with a false basis for evaluation, and subject him to criticism for a work he has not created.

DUE PROCESS OF LAW

The defendants violated and would further violate Serra's right to due process of law by depriving him of the interests generated by his contract, the government's commitment to him as to permanency, and by damage to his reputation and impairment of his livelihood.

Intricate procedures and safeguards were implemented at the time Serra was selected, and when he proposed and installed *Tilted Arc*. No procedures existed, nor were any contemplated, for removal of the work after installation. The hearing and GSA's decision constituted an ad hoc reversal of these procedures and safeguards.

The hearing which defendant Diamond convened and controlled was calculated to result in the removal of *Tilted Arc*. Diamond deliberately induced employee and public hostility toward the sculpture.

The panel was not impartial, having been chaired and designated by Diamond, who had prejudged the issues and who had campaigned for the result he sought.

The hearing was in fact a manipulated device used to give the appearance of an objective process, while designed to reach a predetermined result. It was not evidentiary; it was unstructured; it established no limitations or procedural safeguards; and the panel had discretion to make any findings and determinations, based upon any considerations, whether or not evidence as to them was presented.

The hearing failed to provide the plaintiff with a meaningful opportunity to confront the government's considerations and witnesses, particularly in light of the false and misleading public statements made by and on behalf of the defendants.

FREEDOM OF SPEECH

The defendants violated and would further violate the First Amendment by depriving Serra of his right to artistic communication without governmental influence, interference, censorship or suppression. The hearing and GSA's decision process were based upon manipulated hostile reactions to *Tilted Arc*, and as such upon the esthetics or content of Serra's artistic expression.

The negative reactions to *Tilted Arc*, which Diamond stimulated, expressed viewers' perceptions. These perceptions of the sculpture frequently envisioned the work as expressing confrontational and hostile social-political attitudes. This was evidenced at the hearings, in the press, and by Diamond. The manner in which hostile reactions to, and misconceptions concerning *Tilted Arc* were stimulated and induced by the government distorted Serra's expression and suppressed his right to be free of governmental influence in the expression of his art.

A relocation will not only misrepresent Serra's artistic expression, it will control Serra's interpretation and response to a particular area of human experience. A relocation would be the equivalent of governmental destruction or tampering with the sole copy of an author's manuscript for reasons of its *content*; and as such would constitute governmental censorship and suppression of artistic expression. Also, the defendants knew that generating hostility toward, and deliberately exacerbating misunderstandings of *Tilted Arc*, would block Serra's communication to the public, and the public's involvement in his work.

After the hearing, and continuing after Ink's decisions, the media nationally echoed and perpetuated the hostility to Serra's work Diamond had set in motion, and the false statements he made concerning *Tilted Arc*. From July through September, 1985, more than two hundred news stories, articles, and editorials reported this hostility and these false statements nationally.

In addition, the defendants knew that rigorous procedural safeguards must be in place when curtailing or terminating expression, and that the discretion of government officials is carefully controlled in this area. Nevertheless, they deliberately ignored these constitutional safeguards.

These events, knowingly and recklessly caused by the defendants, have had, and continue to have, the following repercussions for Serra: a) distortions and misconceptions concerning the intention and artistic value of *Tilted Arc*, its function in site, and its importance, have been perpetuated nationally and have become firmly entrenched in public opinion, effectively blocking the communication of *Tilted Arc* as artistic expression; b) Serra's name and artistic reputation have been severely damaged in the United States; c) further injury is now threatened by curtailing or eliminating new opportunities to receive commissions for placing major artworks in public places in the United States; and d) other major Serra works in the United States have been placed in jeopardy of removal. . . .

PRAYER FOR RELIEF

Wherefore, plaintiff requests relief as follows:

1. For plaintiff's first claim for a declaratory judgment against all of the defendants, except Diamond and Ink in their individual capacities:

a. adjudging that the plaintiff has a valid contract by reason of which he has the right to enforce his claim that *Tilted Arc* was to be permanently installed in Federal Plaza; and

b. that since plaintiff would be irreparably injured if *Tilted Arc* is relocated, defendants be enjoined pending this litigation, and thereafter permanently, from breaching this provision for permanency and from relocating *Tilted Arc*;

2. For plaintiff's second claim against all of the defendants, except Diamond and Ink in their individual capacities:

a. adjudging that the relocation of *Tilted Arc* to a site other than Federal Plaza would violate plaintiff's rights under the copyright and trademark laws of the United States; and

b. that since plaintiff would be irreparably injured if *Tilted Arc* is relocated, defendants be enjoined pending this litigation, and thereafter permanently, from violating said rights and from relocating *Tilted Arc*;

3. For plaintiff's third claim against all of the defendants, except Diamond and Ink in their individual capacities:

a. adjudging that the relocation of *Tilted Arc* to a site other than Federal Plaza would violate the plaintiff's First and Fifth Amendment rights under the Constitution of the United States; and

b. that since plaintiff would be irreparably injured if *Tilted Arc* is relocated defendants be enjoined pending this litigation, and thereafter permanently, from violating said rights and from relocating *Tilted Arc*;

4. For plaintiff's fourth claim against all of the defendants and the United States, that they be adjudged to have violated the Plaintiff's First and Fifth Amendment rights under the Constitution of the United States, and that as a result the plaintiff be awarded:

a. For Special Damages	$10,000,000.00
b. For General Damages	$10,000,000.00
c. For General Damages, in an additional amount, to be proven at trial; and	
d. For Punitive Damages	$10,000,000.00

5. For plaintiff's fifth claim against all of the defendants, except Diamond and Ink in their individual capacities:

a. adjudging that the relocation of *Tilted Arc* to a site in New York, California, Massachusetts or Maine would violate plaintiff's rights under the laws of these states; and

b. that since plaintiff would be irreparably injured if *Tilted Arc* is relocated, defendants be enjoined pending this litigation, and thereafter permanently, from violating said rights and from relocating *Tilted Arc* and from relocating *Tilted Arc* in the aforesaid states.

Decision by Judge Milton Pollack

U.S. District Court, Southern District of New York

August 31, 1987 [edited]

United States District Court
Southern District of New York
Docket 33, 86 civil 9656
JUDGMENT

Defendants having moved to dismiss the action, plaintiff having cross-moved for partial summary judgment, and the said motions having come before the Honorable MILTON POLLACK, Senior U.S.D.J., and the Court thereafter on August 31, 1987, having handed down its opinion (#61441); dismissing the claimed constitutional violation on the merits and dismissing the remainder of the complaint for lack of district court jurisdiction on the ground of sovereign immunity and this disposition moots the cross-motion for partial summary judgment sought by plaintiff, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

Dated: New York, New York, August 31, 1987

Appearances:
GUSTAVE HARROW, Attorney for Plaintiff
RUDOLPH W. GIULIANI, United States Attorney for the Southern District of New York, by: RICHARD M. SCHWARTZ
JOEL C. MANDELMAN, Deputy General Counsel, United States General Services Administration
BARBARA G. GERWIN, Regional Counsel, United States General Services Administration, Region 2

MILTON POLLACK, SENIOR UNITED STATES DISTRICT JUDGE

I. JURISDICTION AND SOVEREIGN IMMUNITY

This court lacks jurisdiction to administer the plaintiff's contract, copyright, trademark, and state law claims because the United States has not waived its

sovereign immunity.

Under the doctrine of sovereign immunity, "it is axiomatic that the United States may not be sued without its consent and the existence of consent is a prerequisite for jurisdiction." Where Congress has not passed a statute allowing a particular type of suit to proceed, the federal courts have no jurisdiction to hear that type of suit. . . .

Here, Serra has not sued the United States directly. He has named as defendants a government agency, the GSA, and three senior GSA officials, each sued in his official capacity.[1] The same principles of sovereign immunity which would apply to a suit against the United States apply to a suit against a government agency, because the United States is the real party of interest. Only where Congress has given explicit authority for a federal agency to be sued *eo nomine* may such a suit be maintained.

As to the individual defendants, the suit will still be regarded as one against the United States where, as here, the relief sought would interfere with the public administration, expend itself on the public treasury, or if the effect of a judgment in plaintiff's favor would be to restrain the government from acting, or compel it to act.

There can be no doubt that the claims against the GSA officials are actually claims against the United States. The principle relief sought by Serra is an injunction preventing the government from effecting its decision to relocate *Tilted Arc*. The location of such government property is a matter of public administration, not within the personal province of the three individual defendants.

There are two exceptions in the law to the application of sovereign immunity. These relate to: "(1) actions by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void." Neither of these exceptions applies to the actions by the GSA officials.

As this court stated in its previous opinion, "Congress has enacted numerous statutes giving the GSA broad authority over the acquisition, maintenance, and disposal of federal property." This statutory authority is broad enough to cover defendants' actions. Moreover, the powers of the GSA officials, and the manner in which they were exercised, were not constitutionally objectionable. As this court rules today, the government's decision to relocate *Tilted Arc* did not violate either Serra's First Amendment or Fifth Amendment rights.

In summary, plaintiff's suit is one against the United States and neither the plaintiff's choice of defendants nor the acts of the GSA officials named remove this

suit from the rule that this court may not hear this action since the government has not expressly consented thereto.

A. The Contract Claim

Plaintiff has noted two statutes by which, he claims, the government has consented to district court jurisdiction over the contract claim against it, thereby waiving sovereign immunity. The Tucker Act provides a consent of the United States to be sued in the district court on "Any other civil action or claim against the United States not exceeding $10,000 in amount, founded either upon the Constitution, or any act of Congress . . . or upon any express or implied contract with the United States."

However, that limited grant of jurisdiction to the district courts over contract claims was withdrawn in 1978 by the Contracts Disputes Act (CDA). . . . By enactment of the CDA, the district court jurisdiction over damage claims of less than $10,000 was removed.

The CDA was enacted to simplify the "needless complexity" which had previously governed the adjudication of claims by federal contractors. This legislation was intended to "[e]mpower contracting agencies to settle and pay, and administrative forums to decide, all claims or disputes arising under or growing out of or in connection with the administration or performance of contracts entered into by the United States." . . .

Serra asserts that he has made no contractor's claim under the CDA, and states that, because his claim is for nonmonetary damages, it is not subject to the CDA. He states that the claims court, which has jurisdiction to hear government contract claims under the CDA, cannot grant the injunctive relief he seeks. However, a plaintiff may not sidestep the restrictions of the CDA merely by avoiding a request for damages. Even if the claims court were unable to grant the relief plaintiff seeks, Congress has directed that it is the only court empowered to hear contract suits against the United States.

Serra, having executed a contract with the United States, is a "contractor" for the purposes of the CDA. His contract claim arises from that very contract, and is therefore "subject to" the CDA. Moreover, as has already been mentioned, the contract between Serra and the GSA, signed by Serra and witnessed by his attorney, provided explicitly that the contract is subject to the CDA, even giving statutory references to the CDA and to the federal regulations which govern the details of submission of contract claims under the CDA.

Plaintiff's second attempt to find a waiver of sovereign immunity is centered on the Administrative Procedure Act (APA). The APA is not an independent jurisdictional provision. As a threshold matter, this court does seemingly have jurisdiction over plaintiff's contract claim by reason of the grant to the federal courts of original jurisdiction over actions "arising under" the Constitution, laws, or treaties of the United States. Claims over contracts with the United States are generally governed by federal common law.

Thus, unless it can be found that the APA expressly waives sovereign immunity applicable to Serra's suit, this court is without jurisdiction to hear it. As we later show, the waiver contained in the APA does not apply to this suit. . . .

Section 702 provides a general waiver of sovereign immunity for actions which fall within its scope. . . . Plaintiff asserts that the limited waiver of sovereign immunity provided by the Tucker Act, as amended by the CDA, does not deprive him of the waiver of sovereign immunity provided by Section 702 because the jurisdiction of the claims court does not include the power to award the nonmonetary damages which he seeks. Plaintiff is correct in his observation that specific performance on a government contract is not available in the district court. The Supreme Court gave a resounding explication of this policy in *Larson*:

> It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. . . . But the reasoning is not applicable to suits for specific relief. For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract rights. . . .

Plaintiff briefly refers to Section 704 of the APA, which provides that "Agency action made reviewable by statute and final agency action for which there is not other adequate remedy in a court are subject to judicial review." Such a review, of course, presupposes an exhaustion of administrative remedies, such as are provided for by the CDA. Plaintiff has pointed to no authority, and this court is aware of none, which held that Section 704 can serve as a general waiver of sovereign immunity. . . .

Consequently, the Tucker Act as amended by the CDA satisfies the exclusionary clause of the APA. The Tucker Act, as amended, both expressly and impliedly forbids the relief that Serra seeks from this court. Accordingly, this court is devoid of jurisdiction over plaintiff's contract claim.

B. The Copyright Claim

The only possible waiver of sovereign immunity for plaintiff's copyright claim would be that found in the APA. Again, however, the last sentence of section 702 makes that waiver inapplicable to Serra's copyright claim, since there is a statute which grants consent to suit but expressly forbids jurisdiction in the district court for the relief which is sought, *viz*:

> Hereafter, whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States . . . the exclusive remedy of the owner of such copyright shall be by action against the United Sates in the claims court for the recovery of his reasonable and entire compensation as damages for such infringement.

Section 1498 grants consent against the United States to suits for patent and copyright actions against it, but limits relief only to that obtainable in the claims court.

C. The Trademark Claim

No statute of the United States contains a consent from the United States that it may be sued for trademark infringement. Under the doctrine of sovereign immunity, which requires any waiver to be explicit, the trademark claim must be dismissed.

Furthermore, the mark of the sculpture *Tilted Arc* is not at issue in this case. The site of the sculpture is distinct from the name of the art; the name is not in controversy. The identifying mark of the art in any relocated site would remain the same. The purpose of a trademark is to give notice of who was the producer of the art. No action of the government threatens the identification of Serra with *Tilted Arc*. There is no such thing as an abstract trademark apart from the work that the artist created; he can claim no trademark rights in the surroundings of the plaza. Where a device, mark, or symbol is adopted for any purpose other than as a reference to, or indication of, its ownership or creation, it cannot be sustained as a valid trademark.

D. State Law Claim

New York law prohibits the public display of an artwork "in an altered, effaced, mutilated, or modified form . . . without the artist's consent."

Since this court this day holds that no federal jurisdiction is presented by any of plaintiff's other claims, this court, in the exercise of its discretion will not take jurisdiction over the state-created claim.

II. ALLEGED CONSTITUTIONAL VIOLATIONS

A. The Authority of the GSA

The government's authority to alter the appearance of federal property stems from the United States Constitution, which states in pertinent part: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

2. Pursuant to this authority, Congress has enacted numerous statutes giving the GSA broad authority over the acquisition, maintenance, and disposal of federal property. Specifically, the Administrator of the GSA is "authorized to operate, maintain, and protect any building owned by the United States." Moreover, the Administrator is "authorized to alter any public building." The statutory definition of "public building," in this context, includes the "grounds, approaches, and appurtenances" to any such buildings.

B. Serra's Constitutional Claims

Serra contends that (1) *Tilted Arc* is constitutionally protected expression, and the government's actions are constrained by the First Amendment to the Constitution; and (2) the government's actions were in violation of the procedural due process requirements of the Fifth Amendment.

The constitutional issues presented are separate and apart from the alleged contractual commitment; the latter has already been dealt with above as a jurisdictional matter.

The constitutional claims are thus predicated on the following contentions by plaintiff:

1. The sculpture, as artistic expression, communicated philosophical, social, and political meanings;

2. The decision to relocate *Tilted Arc* was based upon reactions to its artistic expression, in part because these meanings, for some, caused anxiety or discomfort;

3. There was no factual or expert support for Diamond's and Ink's conclusion that *Tilted Arc* is not "site-specific."

4. Removing or relocating *Tilted Arc* negates, and therefore destroys, its artistic expression.

C. The Proceedings to Relocate *Tilted Arc*

In late November or early December 1984, William J. Diamond, the Region 2 (Local) Administrator of GSA, met in Washington with Donald W. Thalacker, Director of the Art-in-Architecture Program. That program involves the procurement and placement of art in public buildings. At that meeting, Diamond expressed his intention to convene a public hearing to consider the relocation of *Tilted Arc.*

About December 5, 1984, Thalacker telephoned Serra to inform him of the planned public hearing and to urge Serra to speak at the hearing. Serra agreed to speak. In a *New York Times* article of December 29, 1984, Diamond was quoted as saying "This is not an attack on the aesthetics of the artist. . . . This piece, for three-and-a-half years, has made it impossible for the public and Federal community to use the plaza." On February 3, 1985, Diamond was quoted as saying, "At the time [of installation] the impact on the site wasn't really understood."

One thousand letters were mailed over Diamond's signature inviting the recipients to attend the public hearing. He stated that the purpose of the hearing was to encourage input by the federal community, the arts community, and the public at large as to whether *Tilted Arc* should be relocated "to increase public use of the plaza." Circulars were posted in areas surrounding *Tilted Arc* headlined "Speak Out!" These flyers announced a public hearing on "Ways to More Fully Utilize the Plaza."

Petitions were placed in the lobby of the Federal Office Building to be signed by those "For Relocation" and "Against Relocation." More than one thousand forms were signed in favor of the relocation. Some sixty-eight persons are recorded as having spoken at the three-day public hearing.[2] The debate was robust and spirited with all points of view expressed. As a result of the hearings there were documented 654 pages of testimony, 7,412 petitions, and 1,779 letters either for or against the relocation of the sculpture.[3]

D. The Local Administrator's Report

On April 23, 1985 Dwight Ink, the acting administrator of GSA, located in Washington, D.C., requested a written recommendation of Diamond, the local

administrator, concerning whether *Tilted Arc* should be relocated. The report was intended to enable Ink to study the administrative record, including the statements given at the three day public comment session held in New York, and to assist him in making a decision. Diamond complied on May 1, 1985. His recommendation and reasons were substantially as follows.

Tilted Arc had engendered intense controversy since its installation, when thirteen hundred persons signed a petition protesting its presence. During the following years the criticism of the location of the piece had become even more intense; at the public hearing in March 1985 over forty-five hundred letters and petitions urged the relocation of the *Tilted Arc*. Frequently, these requests asked for the return of the plaza to the original concept envisioned by its architects and designers of a "fine pedestrian amenity where in pleasant weather it would serve as a resting place to eat lunch or bask in the sun." Others in the area expressed the purpose of relocation as "to regain the openness of the plaza for the benefit of their governmental missions . . . major events [t]heretofore held in the open plaza . . .have been diverted to other locations or have been drastically reduced in scope so as to be able to fit within the confines of the 26 Federal Plaza building." It is "physically impractical to use the plaza for the same public beneficial purposes as was done prior to its installation. . . ." "I [Diamond] decided that I am not in a position to make any evaluation as to the artistic merit of the piece; that is for the art community and future generations."

The Manhattan Community Board #1, representing more than 250,000 residents of lower Manhattan, voiced its unanimous recommendation for relocation to a more suitable site because "the sculpture obstructs most of the open space at the Federal Plaza. . . . We cannot simply turn our backs on our pressing need for additional, useful open space."

It was basically for those reasons that Diamond strongly recommended "that *Tilted Arc* be relocated and that the plaza be returned to the public." Diamond also reported in his opinion on the alleged contract rights claimed by Serra, the claim to site-specificity of the sculpture, the New York statutory claim, and the alleged compromise of the integrity of the Art-in-Architecture Program. Diamond concluded by saying, "In this matter, GSA is required to act in the position of arbitrator or public guardian, carefully weighing the needs of the populace with those of the art community." Diamond consequently recommended that Ink "order the relocation." . . .

On May 9, 1985, following the local administrator's recommendation but prior to any decision by GSA, Serra himself met with Ink and members of his staff in Ink's office in Washington. Serra articulated his concept of site-specificity at length, and stated that *Tilted Arc* would be negated and destroyed if relocated.

E. The GSA Decision

On or about May 31, 1985, after considering Diamond's report of May 1, 1985, the administrative record, and the proliferating expression of views including those of Serra and his attorney, Administrator Ink rendered his decision that *Tilted Arc* should be relocated, but not destroyed. He concluded "*Tilted Arc* would not be destroyed if it were moved to another compatible place with adequate viewing space." He relied heavily on the testimony given at the hearing. He made no findings as to plaintiff's conclusory charges that Diamond had prejudged the issue at the hearing, and that Diamond had ensured, through manipulating the panel, its recommendation to relocate *Tilted Arc*. No acceptable evidence thereof has been adduced.

Ink pointed out that his decision to relocate was being made on the administrative record and only after considering that thousands of people had expressed their views through days of public hearings, that innumerable letters and signed petitions had been received, and after the issue had been widely debated in the press.

The reasons for the decision to search for an acceptable alternative site for *Tilted Arc* clearly exclude any judgment on the aesthetics or the content of the art. Ink's decision firmly states, "I made no judgment whatsoever concerning the aesthetic value of the *Tilted Arc*." . . .

No part of the decision and none of the reasons for a relocation site were related to aesthetics or content of *Tilted Arc*. There is no evidence to the contrary. Nothing in the recommendations for relocation furnished by the local GSA Administrator dwelt on, or was based upon, any question of aesthetics or content of the art. The relocation recommendation was made "in order to regain the openness of the plaza; because major events heretofore held in the plaza for the benefit of the Federal community have been diverted to other locations or have been drastically reduced in scope so as to be able to fit within the confines of the 26 Federal Plaza building. . . . [T]he fact that it [*Tilted Arc*] bisects the plaza makes it physically impractical to use the plaza for the same public beneficial purposes as was done

prior to its installation." There is nothing in the decision which contradicts that recommendation or finds to the contrary.

F. The First Amendment Has Not Been Violated

Serra's First Amendment claim is that *Tilted Arc* is constitutionally protected expression and the GSA's decision to relocate the sculpture violates his freedom of speech.

A threshold issue is whether *Tilted Arc* is "speech" entitled to First Amendment protection. The burden is on the plaintiff to demonstrate that the First Amendment applies.

The Supreme Court has held that ideas need not necessarily be spoken or written to qualify for First Amendment protection.[4] Courts have assumed that artistic work is protected by the First Amendment.

Without deciding the issue, the court assumes for the purposes of this motion that *Tilted Arc* is expression protected to some extent by the First Amendment.

Even if *Tilted Arc* is speech, Serra's First Amendment rights in *Tilted Arc* must be balanced against the authority and mission of the GSA stemming from the Constitution itself, and against the fact that Serra conveyed title in the work to the GSA. The GSA owns the sculpture, and with that ownership comes a significant degree of control over the structure when exercised in the public interest. The sculpture falls within the statutory definition of "public building"; it is part of the "grounds, approaches, and appurtenances" of the Federal Plaza office building.

The Constitution does not grant Serra the authority to completely prevent the GSA from carrying out its statutory authority to maintain, alter, and manage government buildings, their grounds, and appurtenances. The GSA must have reasonable latitude to carry out its mandate. The latitude here is narrowly confined and surrounded with safeguards to conserve the art and its constitutional privileges.

Government may sometimes curtail speech when necessary to advance a significant and legitimate government interest.[5]

Of course the First Amendment forbids government from regulating speech based on the content of its message, or regulating speech in ways that favor some viewpoints or ideas at the expense of others.

There is no evidence in the record that GSA's decision to relocate the sculpture was based on the content of its message. Plaintiff contends that *Tilted Arc*, as artistic expression, communicates philosophical, social, and political meanings. However,

there is no suggestion that GSA's decision was motivated by any of these asserted meanings.

The claim that the relocation decision was designed to suppress Serra's ideas that some may find distasteful, or that it has been applied to Serra because of the views that the sculpture expresses, is a self-interested constructed conclusion, finds no factual support in the conclusory allegations and statements supplied by plaintiff. This conclusion is belied by findings of fact established by the conduct of the government representatives and the care with which every legitimate concern of Serra's has been met. The extensive processes to determine possible relocation, the retention of the work in the plaza during the relocation search, the precise specifications laid down for an acceptable relocation site, the inclusion of the artist in the search committee, were all designed to conserve and foster the free expression of the sculptor and the sculpture. This is not a case where a decision to remove or relocate art was based on its political or other content. Simply put, the purpose to relocate is not because of disagreements with the message presented.

GSA's decision to relocate the structure was undertaken for functional purposes—in order to regain the openness of the plaza.[6] Selecting landscape and architecture for government buildings is a legitimate and important objective at the heart of GSA's statutory responsibility to manage federal buildings for the benefit of the public. The decision to relocate narrowly focuses on the government's substantial interest in maintaining Federal Plaza in a attractive, open, and intact condition, readily available to the multitude of people who wish to enjoy the open and openly available space.

The GSA was within its authority when it found that the sheer size of the sculpture, wholly apart from its message, rendered the plaza physically impractical for use as a site for major events and public gatherings. GSA responded to a significant governmental interest when it found that the plaza was bisected, physical passage obstructed, and the public dissuaded for and denied most of the uses that a public plaza could provide.

Thus, GSA's decision to relocate *Tilted Arc* is a valid, content-neutral determination. It furthers an important governmental interest unrelated to the suppression of speech and the incidental restriction on alleged First Amendment freedoms and is no greater than is essential to the furtherance of that interest.

The only way in which the GSA can restore openness to the plaza, a valid objective, is to relocate the vast physical structure which is *Tilted Arc*. The GSA

decision "responds precisely to the substantive problem which legitimately concerns" the government, and "curtails no more speech than is necessary to accomplish its purpose." The interest cannot be served more narrowly. The relocation decision leaves open ample alternative channels for communication of Serra's message. GSA has not attempted to ban Serra's sculpture generally. Rather, GSA has embarked on an aggressive search for an ample, acceptable, alternative site for the work, and has included plaintiff's participation in that search.

Finally, Serra's claim that the sculpture is site-specific is not sufficient to paralyze or prohibit GSA's ability to reasonably manage and alter government buildings. The GSA took Serra's claim into consideration as part of its deliberations and decision to relocate the statue. Serra is entitled to no more.

In sum, Serra's First Amendment rights must be evaluated in the context of his voluntary decision to convey ownership of the object to the government; GSA's reasonable authority to manage the massive physical structure which it owns and which became part of a government building; GSA's careful decision to relocate the work for neutral reasons unrelated to the sculpture's content or message; and GSA's attempt to narrowly serve its interest while not ignoring plaintiff's interests by relocating *Tilted Arc* in a more suitable forum rather than simply removing and destroying the work. Based on all of these factors, the decision to relocate the sculpture did not violate the First Amendment.

G. The Fifth Amendment Has Not Been Violated

The GSA's procedures were in complete conformity with due process of law. The artist and his lawyer were notified, given an opportunity to be heard, and continued to argue their position before the administrator in Washington, D.C. They had a full opportunity to make their viewpoint known before any decision was made. Serra was not deprived of due process of law by defendants' actions.

H. Findings and Conclusions

The foregoing shall constitute the findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a). The findings by this court "do not purport to resolve any disputed issue of fact; instead, they summarize material in the record that appears to be uncontroverted."

Accordingly, the claimed constitutional violation is dismissed on merits. The remainder of the complaint is dismissed for lack of district court jurisdiction on the

grounds of sovereign immunity. This disposition necessarily moots the cross-motion for partial summary judgment sought by plaintiff.

SO ORDERED
August 31, 1987

Milton Pollack
Senior United States District Judge

Appeal Filed by Richard Serra in the U.S. Court of Appeals for the Second Circuit, December 15, 1987

United States Court of Appeals
For the Second Circuit
Docket No. 87-6231
BRIEF FOR PLAINTIFF-APPELLANT

RICHARD SERRA,
Plaintiff-Appellant,

against

UNITED STATES GENERAL SERVICES ADMINISTRATION; TERENCE C. GOLDEN, Administrator, General Services Administration; WILLIAM F. SULLIVAN, Commissioner, Public Buildings Service, General Services Administration; WILLIAM J. DIAMOND, Regional Administrator (Region Two),General Services Administration,
Defendants-Appellees

On Appeal From the United States District Court for the Southern District of New York

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of Counsel
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PRELIMINARY STATEMENT

It would surely be terribly difficult to determine the circumstances under which our society may destroy a work of art, the embodiment of the creator's freedom of

expression. Happily, this case does not now present that question.

Rather, we have here the paradigm of the motives and techniques which must *not* characterize the destruction of a work of art in a society which prizes freedom of expression and due process of law.

QUESTION PRESENTED

At the request of the General Services Administration (GSA), plaintiff created the sculpture, *Tilted Arc*, which is now part of the Federal Plaza. The GSA now threatens to "relocate" the work to another site. Since the work was created for, and has meaning only on its site, "relocation" will accomplish its destruction. Plaintiff claims that the GSA is motivated by the content of the work and that, in consequence, the threatened action infringes his First Amendment freedom of expression.

Plaintiff claims also that his right to due process of law was denied by the manner in which the GSA decided to "relocate" the work, including prejudgment of the issue by the GSA official who initiated and presided over the hearing which the GSA held on the matter, and creation of evidence for use at the hearing by a GSA employee.

Discovery was stayed before it was really begun. The question presented is: On the record here presented, without real discovery, are plaintiff's First and Fifth Amendment claims so patently lacking in merit that summary judgment should have been granted dismissing them?

STATEMENT OF THE CASE

The record before this court reveals the following facts to be without dispute:

Richard Serra

Richard Serra is an American sculptor. Raised in California, he worked in steel mills to pay his way through the University of California and on to graduate degrees at Yale, culminating in the Master of Fine Arts. He has received innumerable awards, fellowships, and commissions throughout the world.

Opinion is unanimous that he is among the most distinguished sculptors of this generation:

> "[W]e at the Museum of Modern Art consider Richard Serra to be the major sculptor of his generation" (William Rubin, Director, Department of Painting and Sculpture, Museum of

Modern Art).

* * *

"Richard Serra is one of the most accomplished, famous sculptors since the Second World War. His international status is indisputable" (Jean-Christophe Ammann, Director, Kunsthalle Basel, Switzerland).

* * *

"Richard Serra is one of the outstanding international figures in contemporary sculpture. . . ." (Robert T. Buck, Director, The Brooklyn Museum).

* * *

"There can be no doubt about the preeminent status that Richard Serra occupies among creative artists of our time" (Thomas Messer, Director, Guggenheim Museum).

* * *

"There is a considerable international consensus that Serra is the most important sculptor of his generation, an estimation that I wholeheartedly endorse" (Douglas Crimp, art critic).

Mr. Serra works primarily with large steel plates or forgings which he fashions into works that are created for specific sites:

My major concern as a sculptor is to build works which are oriented to a site. This concept has come to be known as "site-specific" sculpture . . . a site-specific sculpture is one which is conceived and created in relation to the particular conditions of a specific site. . . . [My works] are conceived for, dependent upon, and inseparable from their location.

His pieces are displayed throughout the world, at the Tuileries Gardens in Paris, in the Netherlands, Switzerland, Italy, Denmark, Canada, Japan, West Germany, and Spain, and at a number of locations in the United States. His works have been exhibited at the world's major museums, including the Guggenheim and the Whitney in New York, the Centre Georges Pompidou in Paris, and the Museum Haus Lange in Krefeld, West Germany. In 1986, the Museum of Modern Art in New York had a one-man retrospective of his work.

Beyond question on this record or any other, he is a master artist.

The GSA

The General Services Administration is "authorized to operate, maintain, and protect any building owned by the United States." In 1963, by policy order, the GSA established the Art-in-Architecture Program to commission living American artists

to create works of art for federal buildings. Under this program, one-half of one percent of the construction cost of federal buildings is reserved for funding artworks. The GSA policy manual states that the "works of art shall be incorporated as a permanent and integral part" of the architectural design. Since 1972, over 250 artists have been commissioned under the program to create works. No work has ever been removed from its site.

The Selection of Mr. Serra

In August 1979, the GSA Administrator selected Mr. Serra to create a major work of sculpture for installation at 26 Federal Plaza in downtown Manhattan. The selection was the end-product of careful procedures mandated by the GSA: First, a panel appointed by the National Endowment for the Arts nominated six sculptors, Mr. Serra among them. The Art-in-Architecture Design Review Panel then recommended Mr. Serra as its first choice, and the GSA Administrator made the final selection.

Mr. Serra did not seek the nomination, and he did not do the work for profit: his $175,000 fee barely covered the cost of creating and installing the work. Rather, it was the opportunity to create a work for permanent installation at a major federal site which won him. Donald Thalacker, the director of the Art-in-Architecture Program, said to him:

> "You get one chance in your lifetime to build one permanent work for one federal building. There is one permanent Oldenberg, one permanent Segal, one permanent Stella, one permanent Calder, and this is your one opportunity to build a permanent work for a federal site in America." "I said okay."

Julia Brown, the Art-in-Architecture Program's project manager, who attended most of the meetings concerning Mr. Serra's selection, and who then negotiated the GSA-Serra contract, testified that the commission was for a permanent, site-specific work:

> In all stages of the decision-making process, it was understood by Serra and by the government that Serra was making a permanent work for that specific space.

In giving Mr. Serra a commitment to permanence, the GSA was only following its basic policy that permanence and nonremoval are the "foundation" of the Art-

in-Architecture Program. Mr. Thalacker has said that the permanency policy is the primary inducement that the GSA offers artists to participate in the program:

> [Artists] have always given generously of their time and money for [Art-in-Architecture] projects. The GSA drives a hard bargain, and in most cases the fees paid to the artists barely cover the cost of materials and manufacture. No other professionals would do that. We've always been able to say to them, the work is permanent.[7]

The Work

Mr. Serra spent much of the next two years creating the work. He spent months studying the plaza—its pedestrian traffic patterns, its winds, its sounds, its surroundings, its balance. He made models and then built full-scale mockups on the site.

In Mr. Serra's conception, the sculpture responds to and interacts with the site. Site and sculpture became inextricable parts of each other:

> In studying the Federal Plaza it became apparent that the sun moved across the plaza in the same direction in which people entered the buildings. The sculpture was laid out in relationship to both, the passage of people and the movement of the sun, so that there would be no shadows from the sculpture on the plaza at midday . . . [thus] maximiz[ing] the sculptural condition when some people gather in the plaza.
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> I determined that the curve of the sculpture needed to mirror the curvature of the steps in front of the buildings. That alignment—curve answering curve—defines an amphitheater-like space, where the steps could easily function as seats.
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> I decided to tilt the cylinder of the curve at twelve feet so that people exiting the buildings are at eye level with the top of the curve, thereby establishing a consciousness and condition of human scale. . . . [T]he height of twelve feet is understood as being similar to the height of the exterior frontal columns of the building and portals of the doorways, thus connecting the framing of the building to the elevation of the sculpture.

The work that emerged from this creative process is a sweeping curve of Cor-Ten steel, 120 feet in length, 12 feet tall, weighing 73 tons. It is known as *Tilted Arc*.

GSA Supervision

At all stages of its creation, *Tilted Arc* underwent the closest scrutiny and review by the GSA New York and Washington offices. Mr. Serra's consultant and engineer on the project, Malcolm Graff, testified:

Every step along the way was given intensive review from the head of the Public Building Service in Washington, down to the head of maintenance at the Federal Plaza.

To suggest the intensity of the review:

On February 28, 1980, Mr. Serra and Mr. Graff met with the technical staff of the GSA New York Region to consider the sculpture's impact on safety and pedestrian traffic. The next day, the GSA acknowledged its satisfaction that "the plaza...can safely support the weight of the sculpture and that pedestrian traffic in the area will not be impaired."

On March 3, 1980, Mr. Serra and Mr. Graff met in Washington with Art-in-Architecture and New York and Washington GSA officials. Mr. Serra made a detailed presentation of his proposed sculpture, including its size, curves, and precise location on the plaza; he even presented photographs of models. The Art-in-Architecture Design Review Panel thereupon approved Mr. Serra's plans.

In letters dated March 19 and 21, 1980 the GSA contracting officer acknowledged approval of Mr. Serra's plans but listed seven items of "concern" to be resolved before installation could proceed, including "a screen effect in the presently wide open plaza," pedestrian traffic, graffiti, wind tunnels and "security and crime." It took seven months of extensive meetings, tests, and reviews before Mr. Serra finally satisfied every one of these concerns. But by letter dated October 17, 1980, the regional contracting officer acknowledged that all issues were satisfactorily resolved; he gave notice to proceed.

On December 1, 1981, after a seven-month installation process, the "permanent anchoring" of *Tilted Arc* into the plaza was complete.

The Reaction to *Tilted Arc*

Shortly after *Tilted Arc* was installed, the GSA received letters and petitions complaining about the sculpture's "stark ugliness."

Among the early protesters was Chief Judge Edward D. Re, of the Court of International Trade, who wrote to the GSA in July and August of 1981, while *Tilted Arc* was being installed. Complaining of the work's "stark ugliness," Judge Re sought to prevent permanent installation. Evidently, the GSA either ignored or overrode his protests.

The criticism soon subsided: this record contains not the slightest word of protest for over three years.

Then, three years later, on November 5, 1984, Judge Re returned to the attack, directing a letter of bitter complaint to the GSA Administrator. He saw *Tilted Arc*

as "an ugly, rusted, steel wall" that interfered with the aesthetic appeal and utility of the plaza; he expressed concern also about graffiti, a "rodent problem" of "enormity," and a "loss of efficient security surveillance." He asked that the work be removed.

Apparently, government officials do not always ignore the views of chief judges—on December 10, Ray Kline, acting administrator of the GSA, answered Judge Re. He said:

> After the work was installed, a petition signed by over thirteen hundred employees was sent to this agency requesting its removal. . . . At the same time, we also received letters from the major art institution officials in New York City commending us for sponsoring what they viewed as a major and significant achievement in public art.
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> . . . we have learned that initial reactions often result from the new and unfamiliar aspects of the artwork, not the inherent quality. The past three years seem to have mitigated the newness and the unfamiliarity of *Tilted Arc*.
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> We are sure you can appreciate our dilemma concerning the potential removal and relocation of this work of art. A great divergence of opinion is possible, even probable, in judging the merits of a particular work of art. Historically, initial reactions to new artworks are often negative while public acceptance takes time to develop. This was the case with the large Picasso sculpture in Chicago and the Calder sculpture in the center of Grand Rapids, both of which achieved landmark status after slightly more than four years.

Nevertheless, Mr. Kline told Judge Re the GSA would hold a public hearing on "relocation of the sculpture."

Mr. Diamond's Prejudgment

The hearing was initiated by William J. Diamond, GSA Regional Administrator. He scheduled it for March 6, 1985, and designated himself to preside over the five-person board. But this record makes it clear that, if Mr. Diamond had not entirely prejudged the question two months *before* the hearing, he was surely tilted pretty far. He told the *New York Times* on December 29, 1984:

> What we're deeply concerned about is the fact that this piece, for three and a half years, has made it impossible for the public and the Federal Community to use the plaza.

As the hearing neared, Mr. Diamond's tilt became total. On February 3, 1985, he was quoted in the *New York Times* as saying: "We'd like to put a more appropriate

piece in the plaza."

While the hearing was going on, Mr. Diamond announced on national television that his mind was made up. One of the most critical questions was whether "relocation" was literally possible: as we shall see shortly, Mr. Serra and every other witness who testified on the issue swore that, since the work was designed to exist and be viewed only at 26 Federal Plaza, its relocation would accomplish its destruction. But Mr. Diamond, appearing on a CNN television program on the second night of the hearing, with a full day of testimony still to be heard, said of Mr. Serra's plea: "Well, that's his position. That's not so."

Since Mr. Diamond had named two of his subordinates to sit on the five-person board, any taint of prejudgment was critical. Here, it would appear, there was more than a taint.

Stacking the Deck

This record also contains strong indication that Mr. Diamond or a subordinate went beyond prejudgment to the point of actually stirring up protest against *Tilted Arc.*

At the March hearing, one Paul Goldstein appeared on behalf of Community Board #1 of lower Manhattan. Mr. Goldstein testified that the Board had voted twenty-two to zero, with two abstentions, "to recommend the removal of *Tilted Arc* ...and its relocation to another site." This apparent expression of community sentiment can scarcely have been without impact on any uncommitted members of the board.

But Donald W. Thalacker, Director of the Art-in-Architecture Program, cast grave doubt on the reliability of this outburst of community sentiment: he charged that it was stirred up by the GSA. In a memorandum of protest to the GSA Administrator after the hearing, Mr. Thalacker said:

> *Community Board #l's recommendation to remove and relocate the sculpture:* At the February 13 meeting when the recommendation was drafted, twenty-two of the forty-seven board members were present. The members and the public had not been given prior notice of the agenda of this meeting. Such notice is normal procedure for this body. Without knowledge that the subject of relocating the sculpture was to be discussed, those citizens with an interest in the matter who did not habitually attend all board meetings were deprived of an opportunity to voice their opinion in a democratic manner.
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> I have learned from an official of Community Board #1 that a subcommittee, the Civic Center Committee, met previous to the February 13 meeting and developed *upon a request "initiated by GSA officials in New York"* the recommendation calling for relocation (emphasis added).

So if Mr. Thalacker is to be credited—and we are dealing here with summary judgment—the GSA itself created evidence so that it could be presented at the GSA hearing.

The Hearing

The hearing lasted three days. Almost all of the sixty-five people who spoke in favor of removal testified that they did not like *Tilted Arc*. Typical was Judge Bernard Newman, of the Court of International Trade, who said: "It is difficult for me to mention or describe this rusting hulk in dignified language." Louise Reisman said: "*Tilted Arc* is one of the ugliest pieces of public art in New York City." Tommy Lazzara, an employee at Federal Plaza, said: "Those of us who work here should not be required to live with such ugliness in the name of an artist's concept."

But 115 witnesses, *more than two-thirds of those who came to be heard*,[8] testified in favor of keeping the sculpture where it is. None of them said that *Tilted Arc* is pretty or conventional. But many of them found it "beautiful," "powerful," "elegant." And witness after witness described it as a major work of art by a major American artist which it would be disgraceful to destroy.

The Diamond Decision

The board voted four to one to recommend that *Tilted Arc* be "relocated"; the record does not identify the dissenter. Diamond then wrote a seven-page letter to the GSA Administrator recommending "relocation." Strangely, having convened the board and heard its vote, Mr. Diamond does not mention the dissent in his letter, he does not say that he has shown his letter to the board, nor does he say that he offered the dissenter an opportunity to express his views.

Comparison of the Diamond recommendation with the recorded facts dictates the conclusion that Mr. Diamond does not like *Tilted Arc* and, for that reason, wants it "removed." For the reasons which he gives for recommending "relocation" are refuted by the record.

He begins by noting that 654 pages of testimony were taken, and many petitions and letters received. But, he says, he will not play a "numbers game" because the decision should not be based upon "referendum"; he ascribes the volume of opinions to the "great interest in the matter." At the very least, we should note, there is a real question of fact as to where public sentiment stands on *Tilted Arc*. Mr. Diamond says that the hearing received "forty-five hundred letters and petitions" urging "relocation." He does not mention thirty-five hundred petitions which were

received *against* removal, nor the fact that the GSA received hundreds of individually-written letters which ran "one hundred to one in favor of keeping the sculpture."

Mr. Diamond then asserts that he makes no "evaluation as to the artistic merit of the piece," and he asserts that he has no intent "to censor, stifle, or suppress the freedom of expression of the artist."

He says that "In coming to my recommendation, I *relied heavily* upon the arguments proffered by Manhattan Community Board #1 . . ." (emphasis added). As we have seen, however, there is evidence in this record that this "community voice" was inspired to speak by Mr. Diamond or one of his subordinates.

Mr. Diamond then says: "There can be no controversy that the space has been bisected, physical passage obstructed, visual perspective distorted, and the atmosphere of the place turned into affrontry [*sic*]." In short, Mr. Diamond does not like the work, it interferes with his idea of the way the plaza should look. Its appearance, its content, its artistic message and expression are "affrontry."

As a private citizen, Mr. Diamond is certainly entitled to these views. But, as we shall demonstrate shortly, the First Amendment bars Mr. Diamond and the GSA from "relocating" *Tilted Arc* for this content-based reason.

Of course, he also says that "physical passage" is "obstructed"—but that is precisely the point on which the GSA's "concern" was satisfied when the work was in the planning stage.

Finally, Mr. Diamond throws out a stream of shibboleths: he professes anxiety about "security concerns," "'blast wall' effect in case of terrorist activity,"[9] "graffiti" and "vagrants who have frequently despoiled" the work. As we have seen, security and graffiti were considered as possible problems, and dismissed, when the work was being planned—nothing in this record supports the suggestion that there is reality in these mutterings. And of course it is in the nature of public art that it will always be to some degree "despoiled"—as long as there are vagrants and pigeons. But no one has ever supported the abandonment of public art on this score.

Mr. Diamond says also that *Tilted Arc* has made "it physically impossible to use the plaza for the same public beneficial purposes [art shows, concerts, award ceremonies] as was done prior to installation." This argument is without significant support in the record. The record contains no real count of functions that have been held in Federal Plaza, but even a list which Mr. Diamond claims to have assembled on the basis of "memory" shows no more than twenty-five or thirty events in the

seventeen years of the plaza's existence. Moreover, it is hard to understand why *Tilted Arc* makes an art show or other public events impossible.[10] Nothing in the record suggests it does.

For these nonreasons, suspect reasons, and other reasons not specified, Mr. Diamond says he recommends that *Tilted Arc* be "relocated."[11] He then turns to arguments put forward by those who want *Tilted Arc* to stay where it is. The only point requiring discussion here[12] is Mr. Serra's assertion that, since *Tilted Arc* was created to exist only at the Federal Plaza, to "relocate" it to some other site will be to destroy it—it will be scrap metal, not Richard Serra's *Tilted Arc*.

On the record before this Court, this is no issue. Every art expert who testified at the hearing and every expert who submitted an affidavit (some thirty in all) said that, because *Tilted Arc* is "site-specific" in that it was created for the Federal Plaza, removal would constitute destruction. William Rubin, Director of the Department of Painting and Sculpture of the Museum of Modern Art, typified this sentiment:

> The moment that this steel structure is removed from the site from which it was specifically conceived, it would cease to be the work of art created by Serra and would become simply a piece of steel.
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> Those who would "relocate" *Tilted Arc* should be under no illusions. While there are works by Serra that are conceived for generic spaces and can, in fact, be relocated into comparable spaces, *Tilted Arc* is surely not one of them.

Many others testified similarly:

> "All of [the] qualities [of the Federal Plaza] were carefully weighed in the creative process by [Serra] as he determined the size, angles, and height of the sculpture. I thoroughly endorse the artist's intent to have the piece destroyed if removed. It is the only answer that integrity allows" (Robert T. Buck, Director, Brooklyn Museum).
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> "Works of art are not baubles. They mean something. The suppression of their meaning can be carried out in many ways. In the case of a site-specific work, it is carried out by separating work and site. This would be *Tilted Arc*'s fate were it to be removed from Federal Plaza" (Rosalind E. Krauss, Professor of Art History, Hunter College).
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> "*Tilted Arc* is a site-specific work. It has been designed for a specific site. Site and sculpture together are one piece. The piece gets its meaning . . . from its consistent integration, from its being an environment. Moving the steel parts of the piece to another site will ruin a major

piece by a major artist" (Rudolf W. D. Oxenaar, Director, Kröller-Müller National Museum, Otterlo, The Netherlands).

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"This site-specific quality is in fact the essence of this great work of sculpture. Any removal of *Tilted Arc* will in fact be a destruction of this great work. It cannot be moved and considered a work of art by Richard Serra any more than one could conceive of snipping a square out of a great painting, reframing it, and declaring the snip a valid work. This is, in fact, how history will view this misguided effort" (David A. Ross, Director, Institute of Contemporary Art, Boston).

Mr. Diamond ignores all of this uncontradicted evidence. Instead, he says first, a "most convincing" argument against relocation-is-destruction is Mr. Serra's "acceptance of the relocation, in Paris, of his sculpture entitled *Clara-Clara* when it was determined that the sculpture could not be installed in its intended site." This statement by Mr. Diamond is incredible. The facts, as Mr. Serra carefully explained to Mr. Diamond in a letter immediately after the hearing, are: *Clara-Clara* was not created for any specific site or any permanent installation; it is a *movable* piece which can be erected on any flat area large enough to hold it. The Centre Georges Pompidou held a Serra retrospective in 1984, and originally planned to show *Clara-Clara* in an area known as "the pit." But Clara-Clara would not fit in the pit, and so the Centre placed it at the entrance to the Tuileries, where it stayed until the City of Paris bought the piece and placed it in the Parc de Choisy—the American ambassador making the presentation.[13]

Finally, Mr. Diamond says, "I understand that both the Port Authority of New York, New Jersey [*sic*] and the City of New York relocated Serra pieces from downtown Manhattan." Again Mr. Diamond has his nonrecord facts totally wrong. The reality is that Mr. Serra created two works for what was always intended to be *temporary* exhibition in lower Manhattan—as witness the fact that they were installed on *temporary* permits and insured by *temporary* policies—and when the periods of *temporary* exhibition ended, the pieces were destroyed and the metal was removed and stored. That Mr. Serra was willing to create works for limited life and then destroy them does *not* mean that the "relocation" of *Tilted Arc* would be other than destruction.

The thesis that *Tilted Arc* could survive "relocation" is central to Mr. Diamond's recommendation. But the thesis is totally destroyed by the overwhelming and uncontradicted evidence in this record.

The Ink Decision

Mr. Diamond forwarded his recommendation to Dwight Ink, acting GSA administrator, and on May 31, 1985, Mr. Ink issued a seventeen-page decision calling for the commencement of a "relocation" process.

It is a most extraordinary document. For nowhere in the seventeen pages does Mr. Ink state *why Tilted Arc* should be "relocated."

Rather, he begins by expressing regret for a lack of community input to the original decision to commission *Tilted Arc*, and he says that better procedures should be developed. Then, he reviews the testimony of witnesses at the hearing who found *Tilted Arc* to be a significant work by a major artist—and of witnesses who found it ugly and inappropriate to the site. He goes on:

> The *Arc* was planned very carefully and specifically by the artist for the plaza. In that sense, it is site-specific. I am not persuaded, however, that it would be destroyed if it were removed to another place with adequate viewing space.

Mr. Ink does not state why he was "not persuaded" by the unanimous testimony of the approximately thirty witnesses who said that "relocation" of a site-specific work is destruction. Significantly, he does *not* echo Mr. Diamond's reliance on *Clara-Clara* and the temporary works in lower Manhattan. Nor, for that matter, does he say anything about security, bombs, pedestrian traffic or vagrants.

The closest Mr. Ink comes to a *ratio decidendi* is this:

> In the final analysis, however, I believe the concerns of the many employees who work in the plaza buildings, the public they serve, and the people who reside in the area, have to be given greater weight than the views we received from members of the art community—most of whom do not live or work near the plaza—in determining whether efforts should be made to relocate the *Arc* (as contrasted with the far more drastic option of destruction).
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> Therefore, the regional administrator should seek a new location for the *Arc* where it would not suffer significant loss of integrity as an artwork; where it can be better understood and appreciated; and where it would be a less vulnerable target for graffiti. Very likely, the *Tilted Arc* would be far better appreciated by those who had the free choice of viewing it than those in the Federal Building who find the plaza physically curtailed, and whose view is obstructed by the *Tilted Arc* as they arrive in the morning and as they leave the building at noon and after work.

That is to say, Mr. Ink believes that the people who live with *Tilted Arc* don't like it.

It is difficult to tell how he reached this conclusion: even Mr. Diamond abjured the "numbers game" of counting signatures on petitions.

But in any event, that is Mr. Ink's only stated reason: people in unspecified number are disturbed by *Tilted Arc* and do not like it.

Significantly, Mr. Ink says not a word about Mr. Diamond's prejudgment nor about the charge that a GSA official connived at the vote of Community Board #1. Mr. Thalacker called these matters to Mr. Ink's attention in a letter which Mr. Ink even attaches as an appendix to his decision. The language is scarcely delicate:

> Most regrettably, there is a widespread perception that the official GSA-sanctioned actions affecting the prehearing activities, the hearings themselves, and the posthearing activities have been manipulated. In short, the government has been playing with a stacked deck.

Mr. Ink thought it fitting to say nothing of these matters.

Instead, he decided to ask the National Endowment for the Arts to establish a "relocation review panel" to try to find a suitable site for "relocation."

The Litigation

Mr. Serra filed this action in the Southern District of New York in December 1986, against the government agencies and officials involved, and against Mr. Diamond and Mr. Ink, individually as well as officially.[14] The complaint sought injunctive and declaratory relief for violation of the First and Fifth Amendments, for breach of contract, and for violation of the trademark and copyright laws and the Moral Rights Law of the State of New York. Plaintiff also sought damages for invasion of his constitutional rights.

Defendants moved to dismiss the complaint for lack of jurisdiction and failure to state a claim, under Rule 12(b)(l, 6) and for summary judgment under Rule 56, Fed. R. Civ. P.

In an opinion dated August 31, 1987, the district court (Pollack, J.) dismissed the contract, copyright, and trademark claims for lack of jurisdiction, "because the United States has not waived its sovereign immunity." Judge Pollack also dismissed the state law claim "in the exercise of . . . discretion." This appeal does not challenge these rulings.

In the same opinion, granting the motion for summary judgment, Judge Pollack dismissed Mr. Serra's claimed constitutional violations on the merits. It is these rulings that we bring to this court for review.

The court below granted this ultimate relief despite the fact that there had been virtually no pretrial discovery—no deposition other than that of Mr. Thalacker and no document production by the government other than some documents that Mr. Thalacker produced voluntarily. It appears that discovery was stayed when the government made its summary judgment motion.[15]

Argument

I. Summary Judgment Dismissing the First Amendment Claim Must Be Reversed

Pico

Once a medium of expression—be it writing, film, theater, painting or sculpture—is publicly installed or displayed, First Amendment rights attach which prohibit the government from removing the expression on the basis of its content. And, most assuredly, this is no area where summary judgment has particular attraction.

The leading case on these propositions is *Board of Educ., Island Trees Union Free School Dist. v. Pico* (1982). There a board of education ordered the removal from high school libraries of nine books said to be "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy." Students brought an action for injunctive relief against the school board alleging violation of the First Amendment. The district court granted summary judgment in defendants' favor. This court reversed and remanded for trial on the merits, and the Supreme Court affirmed.

Drawing a sharp distinction between acquisition and removal, Justice Brennan, writing for the plurality, made clear that, once a book is acquired and placed in a school library, removal on the basis of content violates the First Amendment:

> ...the action before us does not involve the *acquisition* of books. Respondents have not sought to compel their school board to add to the school library shelves any books that students desire to read. Rather, the only action challenged in this case is the *removal* from school libraries of books originally placed there by the school authorities, or without objection from them.
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> [W]hether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas...then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette* [by this Court].

Justice Brennan thus summarized the Court's ruling:

> ... we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books....

And he noted that the ruling applies even though there may be justifications for the removal in addition to "dislike" of the expression—to defeat reliance on the First Amendment, a government agency must affirmatively show that it would have reached the same decision in the absence of "dislike."

Finally, on the question of the propriety of summary judgment, Justice Brennan joined this Court in ruling that there must be a trial on the merits because, viewing all of the evidence in the light most favorable to the First Amendment claim, the possibility was not excluded that the challenged action was significantly triggered by dislike of the books' content.

Applying the teaching of *Pico* to the case at bar, the GSA may not "relocate" *Tilted Arc* because Mr. Ink finds it unattractive or offensive, or even for that reason plus others. As we have seen, however, dislike of the work—or belief that others dislike it—is the only basis for removal that can be read in Mr. Ink's decision.

At the very least, this is scarcely a case where summary judgment is appropriate. Reading this record in the light most favorable to Mr. Serra, the conclusion is inescapable that there are critical factual issues which require careful resolution, not summary disposition—most particularly, the motives of the GSA.

Non-Verbal Expression

Pico is no less applicable here because *Tilted Arc* contains no words. The plastic arts—sculpture, painting, drawing—can be as powerful as any verbal medium of expression, as witness Picasso's *Guernica*, Michelangelo's *Pieta*, Daumier's drawings of legal life, and Goya's black paintings of war.

And the courts have, of course, protected all manner of expression under the First Amendment: *Schad v. Mt. Ephraim* (1981) (nude dancing); *Doran v. Salem Inn, Inc.* (1975) (topless dancing); *Southeastern Promotions, Ltd. v. Conrad* (1975) (rock musical "Hair"); *Cohen v. California* (1971) (writing on man's jacket); *Joseph Burstyn, Inc. v. Wilson* (1952) (films).

The question may perhaps be asked: what *is* the message of *Tilted Arc*? This record furnishes a number of answers, and there are doubtless many more. To some it is beauty (Hearing Transcripts 85, 147, 166, 184, 221, 229, 282, 287, 335, 357, 374); to others it is a "powerful political statement" about "state power" (Kovel), "the federal government" (Crimp), or "the spirit and strength of our country" (Rosen).

Yet others view *Tilted Arc* as a statement about "human freedom or human intention" (Krauss), or expression forcing "viewers to confront aspects about their environment, their government, or their lives" (Ross).

Of course, the messages of *Tilted Arc* are not perceptible to all. Doubtless to some people it is an eyesore, no more and no less. But the same may be said about every other work of art—in greater or lesser number, there will always be viewers who are left unmoved, untouched, and there will often be those who regard the work as unattractive or worse. These considerations do not undercut the proposition that an artist expresses his ideas, his emotions, his opinions in his art. That is what Richard Serra did here.

If the issue here were only *removal* of *Tilted Arc*, the authorities we have cited would preclude this result—they would surely preclude summary judgment. The result is put beyond question, we submit, when we recall that to remove *Tilted Arc* is to destroy it. It is no overstatement to say that we here deal with conduct akin to book-burning. As Judge Newman pointed out in *Pico*:

> [I]f this case involved government *prohibition* of a book because of . . . content, there is no doubt the panel would be unanimous in finding a First Amendment violation. But the case is not so simple. . . . the governmental action is not prohibition, it is removal from one location.

This case *is* so simple. Mr. Ink, with a blithe self-confidence that at least approaches arrogance, is "not persuaded" by the approximately thirty witnesses who testified without contradiction that *Tilted Arc* will be destroyed if it is "relocated." We may perhaps wonder what *would* persuade Mr. Ink. But in any event, the bottom line is clear: however Mr. Ink may be persuaded, if he has his way he will destroy.

Pico, we submit, stands in his way.

The Decision Below

Addressing the First Amendment issue, the court below assumes that "*Tilted Arc* is expression protected to some extent by the First Amendment." It recognizes also that "the First Amendment forbids government from regulating speech based on the content of its message...."

The court concludes, however, that "There is no evidence in the record that GSA's decision to relocate the sculpture was based on the content of its message."

With respect, we disagree. We submit that this conclusion can not stand in a world where Mr. Diamond acts because of *Tilted Arc*'s "affrontry," where Mr. Ink

claims to act because he believes that unidentified people do not like *Tilted Arc*.

The court says that: "GSA's decision to relocate the structure was undertaken for functional purposes—in order to regain the openness of the plaza." This may seem to the court below a good reason to get rid of *Tilted Arc*. But, whatever its merits, it is *not* the reason given by Mr. Ink, it is not the reason which moved Mr. Ink to act.

The court attempts to buttress its ruling by saying that: "The GSA was within its authority when it found that the sheer size of the sculpture, wholly apart from its message, rendered the plaza physically impractical for use as a site for major events and public gatherings." Again, however, as we have seen Mr. Ink did not claim that the need to use the plaza for "major events and public gatherings" played any role in his decision.

The court below next deals with the fact that *Tilted Arc* is site-specific and will be destroyed if it is "relocated." Says the court: "The GSA took Serra's claim into consideration as part of its deliberations and decision to relocate the statute [*sic*]. Serra is entitled to no more." With respect again, we disagree. Mr. Serra is entitled to this "more": a judgment that the GSA may not destroy his work for reasons offensive to the First Amendment. And he is entitled also to a trial of that issue.

Finally, the court below reminds us of Mr. Serra's "voluntary decision to convey ownership of the object to the government. . . ." But publishers also sell books to schools—that does not enfranchise school boards to destroy the books.

The court below, we respectfully submit, did not give plaintiff's First Amendment claims the "most exacting scrutiny" to which claimants such as Mr. Serra are entitled, *Widmar v. Vincent* (1981). We ask that the First Amendment issue be remanded so that scrutiny may be had—after discovery, on a full record.

II. Summary Judgment Dismissing the Due Process Claim Must Be Reversed

The court below was no more solicitous of Mr. Serra's due process claim. The court addresses only these words to Mr. Serra's claim that he had been denied due process:

> The GSA's procedures were in complete conformity with due process of law. The artist and his lawyer were notified, given an opportunity to be heard, and continued to argue their position before the administrator in Washington, D.C. They had a full opportunity to make their viewpoint known before any decision was made. Serra was not deprived of due process of law by defendants' actions.

Of Mr. Diamond's prejudgment, the charge that the GSA connived at the vote of Community Board #1 and then relied upon it, and Mr. Thalacker's other charges of "bias" and "manipulation," the court says only this:

> [Ink] made no findings as to plaintiff's conclusory charges that Diamond had prejudged the issue at the hearing, and that Diamond has ensured, through manipulating the Panel, its recommendation to relocate *Tilted Arc*. No acceptable evidence thereof has been adduced.

We do not know why the evidence here of record on these matters is not "acceptable"—it either is totally undisputed (as with Mr. Diamond's prejudgment), or comes from a source that can scarcely be ignored on summary judgment, Mr. Thalacker, a senior GSA official.

These matters, we submit, require investigation and trial. To say that they may be disposed of on summary judgment is to continue the denial of due process which Mr. Serra has already experienced.

Again, *Pico* is our guide. There, the Court said:

> This would be a very different case if the record demonstrated that petitioners had employed established, regular, and facially unbiased procedures for the review of controversial materials. But the actual record in the case before us suggests the exact opposite.
>
> * * *
>
> ...respondents' allegations and some of the evidentiary materials presented below do not rule out the possibility that petitioners' removal procedures were highly irregular and ad hoc—the antithesis of those procedures that might tend to allay suspicions regarding petitioners' motivations.

Pertinent, also, is this language in this Court's ruling in *Pico* :

> Precision of regulation and sensitivity to First Amendment concerns are hardly established by the erratic, arbitrary and free-wheeling manner in which the defendant school officials proceeded in this case...Moreover, so far from seeking to insure that the "prejudices of the community" not infringe individual free speech and so far from recognizing that the "will of the transient majority can prove devastating to freedom of expression,"...defendants conducted themselves...in a manner calculated to create public uproar. They insured that the impression would be created that freedom of expression in the district would be determined in some substantial measure by the majority's will...as this Court has said, the erratic, unfair, and arbitrary administration of policy with regard to speech...is as much to be feared as the contents of the policy itself as a source of First Amendment violations.

Having found questions of fact concerning the fairness of the manner of removal, this Court reversed the lower court's summary judgment dismissal. The same result is required here.

CONCLUSION

One may or may not like *Tilted Arc.*

But the destruction of a work of art is a terribly final act which no free society can approach without the greatest apprehension.

That apprehension, we submit, requires the rejection of summary judgment in this case at this time.

Dated: New York, New York
December 15, 1987

Respectfully submitted,
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Brief Filed by the Defendants, U.S. Court of Appeals for the Second Circuit, January 26, 1988 [edited]

United States Court of Appeals
For the Second Circuit
Docket Nos. 87-6231, 87-6251
BRIEF FOR DEFENDANTS-APPELLEES

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ARGUMENT

Point I

This Court Should Affirm the Dismissal of Serra's Purported Constitutional Claims Because Plaintiff's Only Remedies Are Contractual.

Plaintiff's claim that GSA's decision to remove *Tilted Arc* from Federal Plaza has deprived him of his constitutional rights amounts to a transparent attempt to recast a breach of contract claim as an alleged constitutional violation. Although plaintiff purports to seek review of only the district court's dismissal of the constitutional claims against the government and explicitly states that he is not seeking review of Judge Pollack's dismissal of the breach of contract claim, Serra's brief states that "we submit that [Serra has a contractual right to object to relocation], and that the GSA is here trying to ignore the firm commitment it gave him. . . ." Indeed, his brief is replete with references to GSA's alleged "commitment" that *Tilted Arc* would be permanently displayed on Federal Plaza. Thus, plaintiff's brief demonstrates that the purported constitutional claims are, at bottom, breach of contract claims outside the district court's subject matter jurisdiction because they are "founded upon" Serra's contract with the government.

Efforts to characterize contract disputes as constitutional violations have uniformly failed because courts recognize that contract remedies are a complete and adequate system for resolving disputes arising out of a contractual relationship.

This is particularly true in the context of government contracts, where Congress has specifically established in the CDA an entire system of dispute resolution for government contractors, such as Serra.

Plaintiff's continued insistence on his breach of contract claim constitutes a telling acknowledgment of the essentially contractual nature of the dispute. That Serra is seeking a different remedy from that provided to government contractors by Congress does not transmute his contract claim into a constitutional cause of action. . . .

Point II

The District Court Correctly Held That GSA's Decision to Remove a Government-Owned Sculpture from Federal Plaza Did Not Violate the First Amendment.

In an attempt to transmogrify his contract dispute into a constitutional lawsuit, Serra inappropriately characterizes GSA's decision to manage government property and to restore openness to Federal Plaza as "conducted akin to book-burning." As will be demonstrated below, no First Amendment right of Serra's has been infringed.

A. GSA's Decision to Alter the Appearance of Federal Plaza Was a Reasonable Exercise of GSA's Statutory Authority to Manage Federal Property.

As a threshold matter, Serra sold his "speech" to the government pursuant to the contract. As such, his "speech" became government property in 1981, when he received full payment for his work. No case cited by plaintiff stands for the proposition that a government contractor retains a protected "speech" interest in a piece of property after he has sold it to the government. To the contrary, the contract expressly made *Tilted Arc* "the property of the United States of America." An owner's "[p]roperty rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" Serra simply has no "speech" interest in *Tilted Arc* because the sculpture became government property after the sale.

Nor does the First Amendment "require the government to speak." It is well recognized that "the First Amendment does not preclude the government from exercising control over its own medium of expression." In such instances there is and can be no "tradition of absolute neutrality" because "the exercise of editorial judgment by those administering [public finding of the arts] is inescapable." Thus,

any decision regarding the display or removal of art owned by the government to decorate federal office buildings inherently requires the exercise of judgment and "it would be unwise to require an objective measure of artistic merit as a matter of constitutional law."

Moreover, governmental decisions with respect to display of government-owned art in federal office buildings are not subject to constitutional scrutiny where, as here, such places are not public forums for purposes of the First Amendment rights claimed. As the district court noted, the record contains no indication that "GSA freely allows access to the plaza for artists wishing to display their works." Because Federal Plaza is not used in such a manner, no public forum has been created.

Otherwise, "display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." As such, the decision not to display *Tilted Arc* on Federal Plaza does not "rise to the dignity of a First Amendment violation."

In the context of public sponsorship of an art exhibit, the Seventh Circuit held that "it would make nonsense of the concept of public forum" to find that a public college's decision to display art produced by its faculty—as opposed to its students or the public—was equivalent to opening up its facilities to the public. Indeed, the court held that even "[o]ccasional use by outsiders...is not enough to make a college art gallery a public forum."

A fortiori where, as here, GSA purchased a sculpture to be displayed on Federal Plaza as part of a federal office complex, the purpose of which is to provide suitable offices for federal agencies, employees, and the public, no First Amendment forum for displays of art has been created and GSA is free to alter the appearance of federal property pursuant to its constitutionally derived statutory authority.

B. GSA's Decision to Remove a Government-Owned Sculpture Furthered a Valid Government Interest.

Assuming, *arguendo*, that *Tilted Arc* "is expression protected to some extent by the First Amendment," Judge Pollack correctly ruled that no violation of the First Amendment occurred as a result of GSA's decision to remove and/or relocate the sculpture.

In regulating the functions for which federal facilities are to be used, government officials have a duty to recognize that public buildings "by virtue of their dedication to public service...are for the common use of all." As such, in deciding the use to

which Federal Plaza is to be put, the government "is not only entitled, but is required, to take into consideration the interests of all concerned."

GSA is constitutionally permitted to take into account the views of federal employees who work in the building in regulating the appearance and use of Federal Plaza. For example, the First Circuit dismissed a lawsuit brought by an artist who alleged that his First Amendment rights were violated when his work was removed from the corridor of a public university. The court of appeals held that defendants "were entitled to consider the primary use to which the corridor was put" in reaching their decision to remove the artist's works. In formulating a broad rule appropriate to the case at bar, the court held:

> *On the basis of the complaints received, and even without such*, defendants were warranted in finding the exhibit inappropriate to that use [display in the corridor]. Where there was, in effect, a captive audience, defendants had a right to afford protection against "assault upon individual privacy,"...short of legal obscenity.

Even in the absence of complaints by federal employees and members of the public who use Federal Plaza, the sheer size of *Tilted Arc* is adequate justification for GSA to decide to restore Federal Plaza to open public space. The government has the "power to preserve the property under its control for the use to which it is lawfully dedicated." Thus, the district court properly concluded that "GSA's decision to relocate the structure was undertaken for functional purposes—in order to regain the openness of the plaza."

In addition to controlling the location on federal property where government-owned art may be exhibited, GSA may constitutionally regulate the duration of any display. . . .

Thus, where, as here, plaintiff has been afforded over six years of continuous display of the work, it does not infringe plaintiff's First Amendment rights for the GSA to terminate the display of the sculpture regardless of the reasons advanced. The government need not "indefinitely retain" a public forum once the government has created such a forum. The right of free speech does "not mean that everybody with opinions or beliefs to express may address a group at any public place and *at any time*." Clearly, the GSA may reasonably regulate "the time, place, duration, or manner of use" of Federal Plaza. No person has a constitutional right to permanent display of his or her art (or any other expression) at a fixed location on federal property. The Constitution does not—and cannot—require the imposition of one person's aesthetic vision on Federal Plaza for generations to come.

As the Seventh Circuit noted, in upholding a decision to relocate art which was sexually explicit but not legally obscene:

> The concept of freedom of expression ought not to be pushed to doctrinaire extremes.
>
> To hold the defendants liable to Piarowski for ordering his work relocated would have disturbing implications for the scope of federal judicial intervention in the affairs of public museums and art galleries. Distinguished public galleries such as the Metropolitan Museum of Art in New York and the National Gallery of Art in Washington would have to worry that if they refused to flaunt their most offensive works of art they might be held to have violated the constitutional rights of artist, donor, or viewer. . . . It cannot be right that if any authority whatever is delegated to a curator, the owner of a museum—the college in this case—is helpless to correct the curator's errors of taste.

Finally, the instant matter is not remotely analogous to a decision to remove books from a school library and does not raise the constitutional question posed in that situation. In *Pico*, a plurality of the Supreme Court held the defendants in a section 1983 action were not entitled to summary judgment on the record then before the court on the question of whether removal of nine specific books, including books about racism, from school libraries was constitutionally permissible. The five to four decision, with seven separate opinions affirming a two to one decision below, which reversed the district court, stands for no clear constitutional principle. Only four justices held that school boards may not exercise their discretion to remove books "in a narrowly partisan or political manner." Only three justices joined in that portion of the plurality opinion which spoke of a general "right to receive information."

The sole legal argument advanced in plaintiff's brief rests on a misreading of *Pico*. Plaintiff mistakenly claims that *Pico* establishes a general First Amendment ban against all content-based regulation. First, as already demonstrated, *Pico* stands for no specific proposition of law outside the specific context of a school library and, not surprisingly, courts have rejected the applicability of *Pico* to contexts other than public school libraries. Second, courts have permitted reasonable time, place, and manner restrictions even though such restraints have the effect of curtailing content. Third, reliance on *Pico* entirely ignores the constitutional basis for GSA's actions here. No comparable power was at issue in *Pico*.

Even assuming, *arguendo*, that local school board members may not remove library books for purely political reasons, the district court correctly found that there was not support in the record that "GSA's decision was motivated by any of [*Tilted*

Arc's] asserted meanings." As such, GSA's decision to remove an enormous work of art from outside a federal office building was an entirely proper response to GSA's valid determination that "the plaza was bisected, physical passage obstructed, and the public dissuaded from and denied most of the uses that a public plaza could provide."

GSA's constitutionally derived power to regulate and alter the appearance of federal property by removing a government-owned sculpture cannot be held captive to claims of improper motive where, as here, a substantial governmental interest justifies the decision. Otherwise, government property displays would acquire constitutionally protected tenure, an absurd result.

Accordingly, where, as here, the decision to remove or relocate a government-owned sculpture is explicitly based on a constitutionally permissible decision to restore an open plaza, the district court properly concluded that the First Amendment had not been violated.

Point III

The District Court Correctly Held That GSA Followed a Constitutionally Adequate Procedure in Deciding to Remove a Government-Owned Sculpture from Federal Plaza.

Congress has not provided that contractors who have sold property to the government be provided with any kind of hearing prior to a decision by the administrator "to alter any public building." Otherwise, every managerial decision to alter a federal building would implicate due process rights on the part of architects, artists, and tradesmen whose contributions had been purchased and incorporated into a particular federal structure.

No statute, regulation, or provision of the contract required GSA to hold a public comment session concerning *Tilted Arc*. Although GSA had no obligation to solicit the public's view concerning a government-owned sculpture, the "debate" surrounding GSA's consideration of the matter was found by the district court to be "robust and spirited with all points of view expressed."

Judge Pollack correctly ruled that the procedures followed by GSA were in "complete conformity" with due process because Serra was provided an opportunity to be heard before the final decision was made. Indeed, it would be ludicrous to require the government to hold trial-type adversary hearings concerning subjective preferences and policies regarding art owned by the government. Such

a requirement would effectively paralyze governmental decisions with respect to the management of federal property.

Accordingly, even if the court were to balance the private and governmental interests at stake, it is clear that the government policy judgments at issue here are inherently ill-suited to adjudicatory resolution.

In sum, GSA followed a constitutionally adequate procedure in deciding to remove a government-owned sculpture from Federal Plaza.

Decision by Judge Jon 0. Newman,
U.S. Court of Appeals for the Second Circuit,
May 27, 1988

United States Court of Appeals
for the Second Circuit
Nos. 822, 823—August Term 1987

Before: NEWMAN and KEARSE, Circuit Judges, and CEDARBAUM, District Judge [sitting by designation].

Appeal from a judgment of the District Court for the Southern District of New York (Milton Pollack, Judge) granting summary judgment for defendants in an action seeking to bar the defendants from removing a sculpture from Federal Plaza in Manhattan.

Affirmed.

JON O. NEWMAN, Circuit Judge:

This appeal presents the question whether the removal of a government-owned artwork from federal property violates the free expression and due process rights of the artist. Richard Serra, a prominent American sculptor, brought the action seeking to bar the United States General Services Administration (GSA) from removing his controversial sculpture *Tilted Arc* from Federal Plaza in lower Manhattan. The District Court for the Southern District of New York (Milton Pollack, Judge) granted summary judgment against Serra on his constitutional claims. For the reasons that follow, we affirm the judgment of the district court.

BACKGROUND

The facts and procedural history of this case are comprehensively set forth in the two opinions of the District Court, *Serra v. United States General Services Administration*, 664 F. Supp. 798 (S.D.N.Y. 1987), and *Serra v. United States General*

Services Administration, 667 F. Supp. 1042 (S.D.N.Y. 1987). We set forth only those facts necessary for an understanding of the present appeal.

In 1979, GSA selected Serra to create an outdoor sculpture to be installed on the plaza adjacent to the federal office complex at 26 Federal Plaza in lower Manhattan (the "plaza" or "Federal Plaza"). The sculpture was commissioned under GSA's Art-in-Architecture Program pursuant to which one-half of one percent of the construction cost of federal buildings is reserved for the funding of artworks by living American artists. Serra is an internationally renowned sculptor, known primarily for his "site-specific" work. According to Serra, a site-specific sculpture "is one which is conceived and created in relation to the particular conditions of a specific site." Site-specific sculpture is meaningful only when displayed in the particular location for which it is created; such works are not intended to be displayed in more than one place. Serra's site-specific works consist primarily of steel plates or "forgings" that are welded together to form large abstract forms. Serra's sculptures have been displayed in many prominent locations throughout the world, including the Tuileries Gardens in Paris.

In September 1979, Serra signed a contract with GSA setting forth the terms of his commission. The contract provided that Serra would receive a fee of $175,000 for building a sculpture on Federal Plaza. The contract further provided that "all designs, sketches, models, and the work produced under this agreement . . . shall be the property of [the United States]." The contract contained no provisions restricting the government's use of the sculpture after it was purchased.

Tilted Arc was completed and installed at Federal Plaza in 1981. The work is an arc of steel 120 feet long, 12 feet tall, and several inches thick. It is fabricated out of Cor-Ten steel, a material designed to oxidize naturally over time. Consequently, the work is now coated with what the artist refers to as "a golden amber patina" and what the sculpture's critics refer to as "rust." The sculpture bisects Federal Plaza. According to Serra, *Tilted Arc* is site-specific: It was designed for the Federal Plaza and is artistically inseparable from its location. Serra maintains that removing *Tilted Arc* to another site will destroy it.

The pigeons had barely begun to roost on *Tilted Arc* before the sculpture became the object of intense public criticism. GSA received hundreds of letters from community residents and federal employees complaining about the sculpture's appearance and its obstruction of Federal Plaza's previously open space. Initially, GSA took the position that critics should give the work time to gain public

acceptance. However, when hostility to the work had not abated after several years, GSA agreed to hold a hearing on the possible relocation of the sculpture.

A public hearing was held in March 1985, presided over by William J. Diamond, GSA regional administrator. More than 150 persons spoke at the hearing, representing a wide range of constituencies including artists, civic leaders, employees at the Federal Plaza complex, and community residents. In addition, Serra was given the opportunity to state his views on the site-specific nature of *Tilted Arc* and the need to keep it at Federal Plaza. Those urging removal tended to be federal employees and area residents who complained primarily of the obstruction of Federal Plaza and the sculpture's unappealing aesthetic qualities. Those against removal tended to be artists and others from the art world who pointed to the work's significance in twentieth-century sculpture and the importance of protecting the artist's freedom of expression.

Following the hearing, Diamond prepared a report in which he recommended to Dwight Ink, acting administrator of GSA, that *Tilted Arc* be relocated. Diamond urged primarily that the sculpture obstructed Federal Plaza, preventing the public from using the space for recreation and community events. Additionally, he noted concerns expressed at the hearing regarding potential safety hazards caused by the sculpture and its vulnerability to graffiti. Though Diamond included in the report his opinion that the atmosphere of the plaza had been "turned into affrontery," he also stated that "my consideration of the issue of whether to relocate the sculpture would not be in any way based upon the arguments of its beauty, its ugliness, or its place in art history."

Diamond's report and the entire administrative record were reviewed by Ink. Ink also met with Serra and his attorney so that Serra could personally articulate his concern about site-specificity. In a written decision issued in May 1985, Ink decided that *Tilted Arc* should be relocated. He relied largely on the views of federal employees and community residents that the sculpture interfered with their use of Federal Plaza. Like Diamond, Ink expressly avoided linking his decision to his personal evaluation of the work's artistic merit; he stated that he "made no judgment whatsoever concerning the aesthetic value of the *Tilted Arc*."

Serra initiated this lawsuit in December 1986. His complaint named as defendants GSA and administrators Diamond and Ink in their individual capacities. He alleged that GSA's decision to remove *Tilted Arc* violated his rights under the Free Speech Clause of the First Amendment, the Due Process Clause of the Fifth Amendment, federal trademark and copyright laws, and state law. Serra sought a

declaratory judgment that his rights had been violated, an injunction against removal of the sculpture, and damages from the individual defendants in excess of $30,000,000.

The district court issued two opinions disposing of Serra's complaint. In the first opinion, Judge Pollack dismissed Serra's claims against GSA administrators Diamond and Ink in their individual capacities on the ground of qualified immunity. Serra does not appeal that decision. In his second opinion, the District Judge dismissed for lack of subject matter jurisdiction Serra's claims based on breach of contract, the federal trademark and copyright statutes, and state law. Judge Pollack granted summary judgment to GSA on Serra's constitutional claims on the grounds that the decision to relocate *Tilted Arc* was a content-neutral determination made to further significant government interests and that the hearing provided all the process that was due. On appeal from the judgment dismissing his suit, Serra challenges only the rejection of his free expression and due process claims.

DISCUSSION

A. Free Expression

The district court assumed, without deciding the issue, that *Tilted Arc* is expression protected to some extent by the First Amendment. The court reasoned that "ideas need not necessarily be spoken or written to qualify for First Amendment protection." While we agree that artwork, like other nonverbal forms of expression, may under some circumstances constitute speech for First Amendment purposes, we believe that the First Amendment has only limited application in a case like the present one where the artistic expression belongs to the government rather than a private individual.

"The purpose of the First Amendment is to protect private expression, and nothing in the guarantee precludes the government from controlling its own expression or that of its agents." Consequently, the government may advance or restrict its own speech in a manner that would clearly be forbidden were it regulating the speech of a private citizen. In this case, the speaker is the United States Government. *Tilted Arc* is entirely owned by the government and is displayed on government property. Serra relinquished his own speech rights in the sculpture when he voluntarily sold it to GSA; if he wished to retain some degree of control as to the duration and location of the display of his work he had the opportunity to bargain for such rights in making the contract for sale of his work. Nothing GSA

has done limits the right of any private citizen to say what he pleases, nor has Serra been prevented from making any sculpture or displaying those that he has not sold. Rather, the government's action in this case is limited to an exercise of discretion with respect to the display of its own property. Though there are conceivably situations in which the government's exercise of its discretion in this regard could violate the First Amendment rights of the public, nothing GSA has done here encroaches in any way on Serra's or any other individual's right to communicate.

Even assuming that Serra retains some First Amendment interest in the continued display of *Tilted Arc*, we agree with the district court that removal of the sculpture is a permissible time, place, and manner restriction.[16] Such restrictions are valid "provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." Relocation of *Tilted Arc* conforms with these requirements.

GSA has a significant interest in keeping the plaza unobstructed, an interest that may be furthered only by removing the sculpture. This interest stems from GSA's clearly established authority to maintain, operate, and alter federal buildings, including their "grounds, approaches, and appurtenances," which in turn derives from Congress's power under the Constitution "to dispose of and make all needful Rules and Regulations respecting the . . . property belonging to the United States." In other contexts, the government's important interest in controlling federal property has been found to prevail over individuals' First Amendment rights.

Nor does relocation of *Tilted Arc* preclude Serra from communicating his ideas in other ways. First, Serra has already had six years to convey his message through the sculpture's presence in the plaza. Since the First Amendment protects the freedom to express one's views, not the freedom to continue speaking forever, the relocation of the sculpture after a lengthy period of initial display does not significantly impair Serra's right to free speech. Second, Serra has not shown that removal of the sculpture creates "any barrier to delivering to the media, or to the public by other means," whatever message he intended to convey with *Tilted Arc*. Notwithstanding that the sculpture is site-specific and may lose its artistic value if relocated, Serra is free to express his artistic and political views through the press and through other means that do not entail obstructing the plaza.

Finally, the decision to remove *Tilted Arc* was not impermissibly content-based. According to the reports of GSA administrators Diamond and Ink, the primary reason for removal was the fact that the sculpture interfered with the public's use

of Federal Plaza. Additionally, GSA was concerned about public safety and graffiti. Both Diamond and Ink expressly represented that they had not based their decisions on the work's artistic merit or its message. We agree with the district court's assessment that "[t]here is no evidence in the record that GSA's decision to relocate the sculpture was based on the content of its message. . . . GSA's decision to relocate the structure was undertaken for functional purposes—in order to regain the openness of the plaza."

Serra argues that the GSA administrators' reports were disingenuous. Relying on *Board of Education v. Pico*, *supra*, Serra contends that he is entitled to a trial to determine whether in fact the removal was impermissibly content-based. We reject Serra's claim because he did not assert any facts that could possibly constitute a constitutional violation. In *Pico*, a plurality of the Supreme Court determined that a local school board could not remove books from the school library in order to deny the students access to ideas with which the board disagreed. Recognizing that school officials enjoy significant discretion to determine the content of school libraries, the plurality said only that such discretion "may not be exercised in a narrowly partisan or political manner"—for example, if a Democratic school board sought to ban all books by Republicans, or an all-white school board decided to remove all books authored by blacks. The plurality left completely intact the board's discretion to remove books for other reasons. Thus, removal of books that were pervasively vulgar or educationally unsuitable would, even in the plurality's view, be "perfectly permissible."

We recognize that this case poses at least the potential for a *Pico*-type First Amendment violation. Even where, as here, the removal of an artwork does not restrict the artist's free speech because the work is owned by the government, it is still possible that the government's broad discretion to dispose of its property could be exercised in an impermissibly repressive partisan or political manner. Nevertheless, even if we assume, without deciding, that Serra has standing to assert a *Pico*-type claim, it is clear that under any reading of the record in this case, the removal of *Tilted Arc* did not violate the principles of *Pico*. At the very most, Serra suggests that Diamond and Ink thought that *Tilted Arc* was ugly. That is surely an assessment of the work's content, but it raises no issue under *Pico*, since there is no assertion of facts to indicate that GSA officials understood the sculpture to be expressing any particular idea, much less that they sought to remove the sculpture to restrict such expression or convey their own disapproval of the sculptor's message. Indeed, Serra is unable to identify any particular message conveyed by *Tilted Arc* that he believes

may have led to its removal. In view of the uncertainty as to the meaning of *Tilted Arc* and in the face of the overwhelming evidence that it was removed solely because of its obstructive effect on the plaza, Serra has failed to present any facts to support a claim that government officials acted in a "narrowly partisan or political manner."

To the extent that GSA's decision may have been motivated by the sculpture's lack of aesthetic appeal, the decision was entirely permissible. As stated above, *Pico* held that books could be removed from the school library if they were vulgar or educationally unsuitable. Similarly, GSA, which is charged with providing office space for federal employees, may remove from its buildings artworks that it decides are aesthetically unsuitable for particular locations. Moreover, the Supreme Court has consistently recognized that consideration of aesthetics is a legitimate government function that does not render a decision to restrict expression impermissibly content-based. Finally, several courts have held that the state may regulate the display and location of art based on its aesthetic qualities and suitability for the viewing public without running afoul of First Amendment concerns.

We recognize that courts considering First Amendment challenges by artists to governmental decisions to remove purchased works of art must proceed with some caution, lest a removal ostensibly based on unsuitable physical characteristics of the work or an unfavorable assessment of its aesthetic appeal camouflage an impermissible condemnation of political viewpoint. At the same time, artists must recognize that overly intrusive judicial restraints upon the prerogatives of government to decide when, where, and whether to display works of art that it has purchased would pose a serious threat to the vigor of such commendable ventures as GSA's Art-in-Architecture Program. Government can be a significant patron of the arts. Its incentive to fulfill that role must not be dampened by unwarranted restrictions on its freedom to decide what to do with art it has purchased. If Serra had presented any facts to create a genuine issue as to whether GSA was removing *Tilted Arc* to condemn a political point of view or otherwise to trench upon First Amendment rights, we would require a trial, just as we did in *Pico*. But he has not done so. In the absence of such facts, his lawsuit is really an invitation to the courts to announce a new rule, without any basis in First Amendment law, that an artist retains a constitutional right to have permanently displayed at the intended site a work of art that he has sold to a government agency. Neither the values of the First Amendment nor the cause of public art would be served by accepting that invitation.

B. Due Process

Serra claims that he was denied due process because GSA administrator Diamond "prejudged" the issue of whether *Tilted Arc* should be removed. Serra claims that Diamond had decided that he was opposed to the sculpture even before the public hearing had begun. In support of this argument, Serra points to statements Diamond made to the press before and during the hearing indicating that he was against retaining *Tilted Arc* at Federal Plaza. Additionally, Serra suggests that Diamond may have stirred up opposition to the sculpture among federal employees and community residents. Serra argues that Diamond's conduct violated his right to a fair and impartial hearing on the removal issue.

Accepting Serra's factual allegations as true for purposes of this appeal, we conclude that his due process claim fails as a matter of law. First, Serra has no protected property interest in the continued display of *Tilted Arc* at Federal Plaza. Pursuant to Serra's contract, the sculpture is the property of GSA, not the artist. Moreover, though Serra might suffer injury to his reputation as a result of relocation of the sculpture, such an injury without an accompanying loss of government employment would not constitute a constitutionally cognizable deprivation of property or liberty. And without a protected property or liberty interest, Serra was not constitutionally entitled to a hearing before the sculpture could be removed. The lengthy and comprehensive hearing that was provided was therefore a gratuitous benefit to Serra. Even if Diamond was not entirely impartial, Serra received more process than what was due. Second, there is no allegation that Ink was biased or in any way prejudged the removal issue. Since Ink undertook a *de novo* review of the entire controversy, the effect of Diamond's prejudgment, if any, was marginal. Particularly since Serra was given the opportunity to defend his position at length before both Diamond and Ink, any due process requirement that might have arisen in the context of this case was clearly satisfied.

The judgment of the district court is affirmed.

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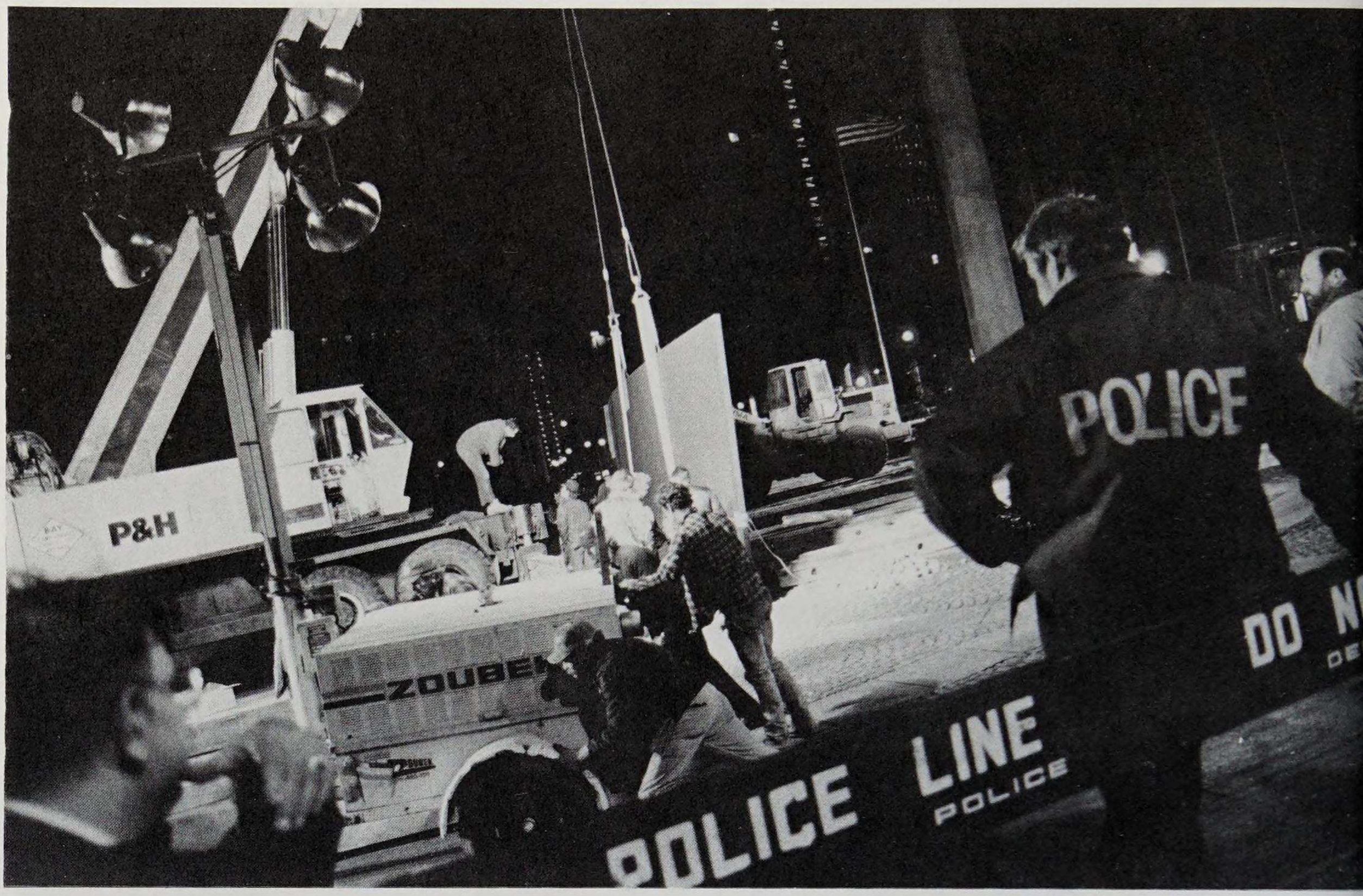
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PART V

The Destruction of Tilted Arc

Introduction

As Judge Newman's decision indicates, Richard Serra's appeal of the lower court's ruling was not granted; and, in fact, the appeals court's decision reflects a general tendency within American law toward favoring the protection of property rights over freedom of expression or artistic integrity. Although not protected by American law, however, the right to artistic integrity, also known as moral rights or *droit moral*, is sustained in many parts of Europe, and it is an important component of the Berne Convention, which seventy-eight countries in Europe and other parts of the world have now signed. Because of the moral rights provisions contained in the Berne Convention, Serra called for its U.S. ratification in several public talks given in 1988.[1]

The Berne Convention *was* incorporated into U.S. copyright law by means of the Berne Convention Implementation Act, which was signed on October 31, 1988, and which became law on March 1, 1989. Thus, when Serra and his attorneys learned on March 13, 1989 that *Tilted Arc* was about to be dismantled by the GSA, they immediately filed for a stay in order to explore whether the Berne Convention would provide protection. But as the excerpts from the Implementation Act indicate, the U.S. Congress specifically rejected the section of the Berne Convention which applies to moral rights, and adopted only those copyright provisions which would provide economic protection for American publishing companies.

Unprotected by the U.S. version of the Berne Convention, *Tilted Arc* was dismantled on the night of March 15, 1989. Although the GSA would still deny *Tilted Arc*'s site-specificity by insisting that the piece could theoretically be relocated, those who respect the nature of Serra's work recognize that *Tilted Arc* has been permanently destroyed by the GSA's actions.

Complaint Filed by Richard Serra in U.S. District Court, Southern District of New York, March 10, 1989

United States District Court
Southern District of New York
89 Civ.

VERIFIED COMPLAINT

RICHARD SERRA,
Plaintiff,

against

UNITED STATES GENERAL SERVICES ADMINISTRATION,
Defendant.

Plaintiff, RICHARD SERRA, by his attorneys, for his complaint alleges:

JURISDICTION AND VENUE

1. This court has original jurisdiction of this matter pursuant to 28 U.S.C. 1331 and 28 U.S.C. 1343.

2. Venue is invoked pursuant to 28 U.S.C. 1391.

PARTIES

3. Plaintiff, Richard Serra, is an internationally distinguished American sculptor. In 1979, the General Services Administration selected Mr. Serra to create a major work of sculpture for installation at 26 Federal Plaza in downtown Manhattan. His pieces are displayed throughout the world, at the Tuileries Gardens in Paris, in the Netherlands, Switzerland, Italy, Denmark, Canada, Japan, West Germany, and Spain, and at a number of locations in the United States. His works have been

exhibited at the world's major museums, including the Guggenheim and the Whitney in New York, the Centre Georges Pompidou in Paris, and the Museum Haus Lange in Krefeld, West Germany. In 1986, the Museum of Modern Art in New York had a one-man retrospective of his work.

4. The United States General Services Administration (GSA) is an executive agency of the United States Government and is authorized to operate, maintain, and protect any building owned by the United States pursuant to 40 U.S.C. Sec. 490(b).

ALLEGATIONS AND NATURE OF THE CLAIMS

5. In 1979, Richard Serra, the Plaintiff, was selected by the General Services Administration to create and permanently install a major sculpture in Federal Plaza.

6. The installation of Serra's creation in 1981 resulted from a carefully devised process established by GSA's Art-in-Architecture Program. This program ensures the selection of distinguished artists and works of art.

7. *Tilted Arc* is a site-specific work. In December 1987 a National Endowment For the Arts Panel found that removal of *Tilted Arc* is tantamount to its destruction.

8. As of March 10, 1989, the GSA has begun to remove *Tilted Arc* from Federal Plaza.

COUNT I

9. In removing *Tilted Arc* the GSA will destroy it in violation of the Berne Convention and the Berne Convention Implementation Act. The Berne Convention provides: "(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."

WHEREFORE, PLAINTIFF PRAYS FOR JUDGMENT:

A. Declaring that the GSA be enjoined from removing *Tilted Arc* until further

order of this court

B. Awarding such other and further relief as the court may deem just and proper.

Dated: New York, New York, March 10, 1989.

Paul, Weiss, Rifkind, Wharton & Garrison
By Jay Topkis

Berne Convention for the Protection of Literary and Artistic Works [excerpt][2]

ARTICLE 6BIS

(1) Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Berne Convention Implementation Act of 1988 [excerpts][3]

SEC. 2. DECLARATIONS.

The Congress makes the following declarations:

(1) The Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto (hereafter in this Act referred to as the "Berne Convention") are not self-executing under the Constitution and laws of the United States.

(2) The obligations of the United States under the Berne Convention may be performed pursuant to appropriate domestic law.

(3) The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.

SEC. 3. CONSTRUCTION OF THE BERNE CONVENTION . . . .

(b) Certain Rights Not Affected.—The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law—

(1) to claim authorship of the work; or

(2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.

SEC. 4. SUBJECT MATTER AND SCOPE OF COPYRIGHTS.

(a) Subject and Scope.—Chapter 1 is amended— . . .

(3) in section 104 by adding at the end thereof the following:

"(c) Effect of Berne Convention.—No right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto. Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto."...

SEC. 6. PREEMPTION WITH RESPECT TO OTHER LAWS NOT AFFECTED.

Section 301 is amended by adding at the end thereof the following:

"(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder."

Letter From Jay Topkis

Attorney

to Richard M. Schwartz

Assistant U.S. Attorney

and Jed L. Rubenfeld

Assistant U.S. Attorney

March 15, 1989

Re: Serra v. GSA

Gentlemen:

Following up on our telephone conversation, I write to confirm, on behalf of Mr. Richard Serra, that he will take no further steps to prevent the government from destroying *Tilted Arc*. Let me confirm, also, that Mr. Serra is relying on your statement that the government will seek no damages or costs by reason of the efforts we made beginning last Friday, including the stay, to bar destruction of *Tilted Arc*.

Sincerely,

Jay Topkis

Press Release from Jay Topkis and Leslie Urfirer Cornfeld

Attorney

March 15, 1989

On Friday afternoon, we learned that a wrecking crew was about to destroy Richard Serra's *Tilted Arc* by removing it from the site for which it was created at 26 Federal Plaza. At Mr. Serra's request, we immediately went before the United States District Court seeking a stay of the destruction so that we might study the possible applicability of the Berne Convention, which became effective in the United States on March 1. Government counsel consented to a stay and the court ordered it.

We have now completed our study and have sadly advised Mr. Serra that, in our view, neither the Berne Convention nor the Implementation Act bars the General Services Administration from destroying this work of one of our country's most distinguished artists. Accordingly, Mr. Serra has directed us to make no further effort to interfere with the GSA's intended course.

Interview with William J. Diamond, Conducted by Shu Lea Cheang, March 15, 1989 [excerpts][4]

WILLIAM DIAMOND:

I am the regional administrator of the United States General Services Administration. The GSA is responsible for all federal properties in the United States, including *Tilted Arc*. . . .

Approximately eight years ago the *Tilted Arc* was placed in this community without any consultation with the people of this neighborhood or the thousands of people who work here. The decision was made by a group of elitists in Washington. Protests arose immediately upon the installation of this sculpture because it blocked the light and air, and it took away the use for the community of the plaza. After a public hearing, two extensive court cases, and recent delays, the government finally has gotten the authority now to dismantle the sculpture and put it in safekeeping elsewhere, thereby giving back to the community the use of all of this open space so we will now have the use that we didn't have before. We will be able to bring cultural shows here. We will have bandstands, and we will have performances. We will have food here sold to people. We will have greenery, landscaping. All the wonderful things that people have so little of in downtown Manhattan will now be made possible since we will have the sculpture removed. . . .

Tonight the crane and the contractors are coming and the sculpture will be removed. It will not be harmed. It will be removed in the same fashion that it was placed here. It will be placed in a storage facility of the government's in Brooklyn, New York. . . . This piece can be reassembled somewhere else without any damage to it. The government does not agree with the artist's contention that he has permanent right to this space. This space belongs to the government and to the public. It doesn't belong to the artist. . . . Not if he sells [his work] to the government. He has a right to exhibit his art. He has a right to have it treated with respect. But he doesn't have the right to force his art upon the public forever. . . . The program was never intended to give lien in perpetuity against all government locations.

There is a difference between private art and public art. In private art you have a choice whether you want to go to a museum and see a piece. In public art, paid

for by the taxpayers, you do not have that choice. The people that live here and work here must see and face and go around and be confronted by this piece on a daily basis. They pay for it, they should have a right to dispose of it accordingly. . . . I believe its placement here on the plaza interferes with the use of the plaza. The piece appears to be menacing and overwhelming and has discouraged people from even going on the plaza, and most prefer not even to confront it, but to walk half a block away from it. . . .

The Berne Convention does not apply to works of art of this nature. The United States Government has sovereign immunity and never dissented when the ratified Berne Convention specifically said that the Berne Convention does not increase the so-called moral rights of artists in this country. That was the way it was ratified, so therefore it does not apply. The reason that it is being moved away now is that we have already had delays. The artist has delayed us. We do not seek to punish the artist by holding him responsible for the cost of these delays, but at the same time we have a contract in place, and we intend to execute it forthwith. . . . We understand it is very painful for him to have his work of art removed, but at the same time it is not the artist's right that counts, it is the public's right that counts. . . .

NOTES

Introduction

1. Quoted in the *New York Post*, March 17, 1989.

2. Richard Serra, letter to Donald Thalacker, January 1, 1985 (p. 38).

3. Richard Serra, hearing statement (p. 67).

4. Julia Brown, hearing statement (p. 85).

5. Although Joseph Colt of Jacobs, Poor, Eggers (the firm that designed the U.S. Customs Court, the Federal Office Building and Federal Plaza) participated fully in the nominating process for *Tilted Arc*, senior members of the firm later wrote vociferous letters in opposition to the work and testified against it at the hearing. See the letters of Alfred Easton Poor, Albert Homer Swanke, and Robert Jacobs in Dwight Ink, "Decision on The Tilted Arc," J.S.G.S.A. document, May 31, 1985, appendixes M and O. Jacobs and his wife testified that *Tilted Arc* violated the architecture of the site; their testimony was cited frequently by officials arguing for removal (see William Diamond to Dwight Ink, May 1, 1985 (p. 145)).

6. Edward D. Re, letter to Gerald P. Carmen, August 18, 1981 (p. 26).

7. Grace Glueck, "An Outdoor-Sculpture Safari Around New York," *New York Times*, August 7, 1981, p. C20.

8. Ray Kline, letter to Edward D. Re, December 10, 1984 (p. 30). See also *Richard Serra v. United States General Services Administration*, Case No. 86 Civ. 9656, Deposition of Donald W. Thalacker, p. 104.

9. Edward D. Re, letter to Ray Kline, November 5, 1984 (p. 28).

10. Ibid.

11. Grace Glueck, "What Part Should the Public Play in Choosing Public Art?" *New York Times*, February 3, 1985, section 2, pp. 1, 27.

12. Letter from William Diamond to announce the hearing concerning *Tilted Arc* (p. 45).

13. There is no clause in my contract that gives the government the right to sell and thereby destroy *Tilted Arc*. (The contract was reproduced in full as Appendix J of Dwight Ink, "Decision on the Tilted Arc.")

    Letters from Barbara G. Gerwin, regional counsel for the GSA, offering *Tilted Arc* to Storm King, the Cooper-Hewitt Museum, and the New York City Department of Parks, among others, are reproduced below (pp. 33–34, 36).

14. Senator Howard M. Metzenbaum, letter to Ray Kline, February 25, 1985 (p. 44).

15. The panelists were, in addition to Diamond, Michael Findlay, vice-president of Christie's; Thomas Lewin, a lawyer; Paul Chistolini, acting assistant regional administrator for the GSA's Public Building and Real Property division; and Gerald J. Turetsky, acting deputy regional administrator of the GSA.

(Turetsky had been the GSA regional administrator—Diamond's job—at the time *Tilted Arc* was installed.)

16. Diamond's "cordial invitation" to the hearing and the "For Relocation" petition are reproduced below (pp. 45, 48).

17. A sampling of comments from those opposed to the sculpture is included below (pp. 111–129).

18. See the testimony of Vickie O'Dougherty, a physical security specialist for the GSA (p. 117).

19. William Diamond, letter to Dwight Ink, May 1, 1985 (p. 145).

20. Donald Thalacker cites these statistics in his letter to Dwight Ink of May 9, 1985 (p. 153). Thalacker also notes that of the approximately 10,000 employees in the Federal Building, only 58 testified against *Tilted Arc* at the hearing.

21. Diamond, letter to Ink, May 1, 1985 (p. 144). Typical of Diamond's boasts to the press about the hearing is that reported by Joseph Berger in "Tilted Arc To Be Moved From Plaza at Foley Square" (*New York Times*, June 1, 1985): "`The people have spoken and they have been listened to by their government,' said William Diamond, the regional administrator of the federal agency. 'This is a victory for thousands of New Yorkers who live and work in lower Manhattan.'"

22. Paul Goldberger, "Harmonizing Old and New Buildings," *New York Times*, May 2, 1985.

23. "Television Delivers People" is the title of a video made by Richard Serra in 1973 (color, sound, 6 min.). [editors' note]

24. Diamond, letter to Ink, May 1, 1985 (p. 147). Diamond also attempted to make extensive use of the resiting of *Clara-Clara* in Paris to forward his arguments for relocation of *Tilted Arc*; in fact, however, that case was entirely different: *Clara-Clara* was specifically created for a temporary site.

25. This memo was originally included as Appendix R of Dwight Ink's "Decision on the Tilted Arc." It is reprinted on pp. 152–156. This quote appears on p. 154.

26. Dwight Ink, "Decision on The Tilted Arc" (p. 171). Diamond dismissed Ink's directive not to destroy *Tilted Arc* when he ordered workmen to saw and torch the piece during its removal on March 15.

27. Ink, "Decision" (p. 168).

28. Ibid., p. 171.

29. The NEA *Tilted Arc* Site Review Advisory Panel included James Ingo Freed, architect; Sam Hunter, art historian; Theodore Kheel (panel chair), legal arbitrator; Brend Richardson, museum administrator; Jacquelin Robertson, architect; Robert Ryman, painter; and Joel Wachs, councilman from Los Angeles.

30. When Diamond was asked during a television interview to comment on my assertion that *Tilted Arc* was a site-specific work, he replied: "Well, that's his opinion. That's not so." (From "The Freeman Reports," CNN broadcast, March 7, 1985.) See also note 4 to part II.

31. Le Corbusier, letter to Victor Nekrasov, in S. Frederick Starr, "Le Corbusier and the USSR: New Documents," *Oppositions* 23 (winter 1981): 133.

32. This quotation from the conclusions of the panel as summarized by Chairman Theodore Kheel is taken from a letter from Frank Hodsoll, chairman of the NEA, to Terence C. Golden, administrator of the GSA, January 5, 1988. This letter is reprinted in full on pp. 188–190.

33. The two institutions originally interested in accepting *Tilted Arc* were Clemson University and Long Island University (C. W. Post campus). Clemson withdrew outright when it was clear that I would not participate in the on-campus site selection. Long Island University presented a litany of questions which remained unresolved, and the panel members concluded that their participation was "at best, tentative." As Hodsoll noted in his letter (p. 189), "The unanimous conclusion of this discussion was that both sites were inappropriate."

34. Appeal filed by Richard Serra in the U.S. Court of Appeals for the Second Circuit, December 15, 1987 (p. 233).

35. Appeal by Richard Serra (p. 235).

36. Brief filed by the defendants, U.S. Court of Appeals for the Second Circuit, January 26, 1988 (p. 240.).

37. Decision by Judge Jon O. Newman, U.S. Court of Appeals for the Second Circuit, May 27, 1988 (p. 249).

38. Decision by Judge Jon O. Newman (p. 252).

39. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

40. Decision by Judge Jon O. Newman (p. 253).

41. Decision by Judge Jon O. Newman (p. 252).

42. For details on the Berne Convention and on moral rights legislation, I have relied on an unpublished paper by Veronique Heim, titled "America Moves Toward French Moral Rights Legislation." For a recent update, see Herbert Mitgang, "Old Copyright Treaty: New Shield for U.S. Artists," *New York Times*, March 10, 1989, p. B7.

PART I

1. Although the Cultural Council refused either to endorse or to condemn *Tilted Arc*, this was not the case with Community Board #1. For a discussion of the recommendation by the Community Board, see point number 3 in Donald Thalacker's May 9, 1985 memo to Dwight Ink (p. 153). Diamond also made prejudicial statements, which were quoted in an article by Grace Glueck entitled "What Part Should the Public Play in Choosing Public Art?" (*New York Times*, Feb. 3, 1985, section 2). After stating that "for the three and one-half years since the sculpture's installation, we have received ongoing complaints from individuals and community organizations, who feel the plaza's use as a recreational and performance facility has been destroyed," he went on to remark: "Mistakes can be made in the placement of art. At that time the impact on the site wasn't really understood." Furthermore, Glueck reported a statement Diamond made to Jenny Dixon (director of the Public

Art Fund) to the effect that "We'd like to put a more appropriate piece on the plaza. If the art is arrogant, it will damage the Art-in-Architecture Program." And Glueck herself was also biased against the work, calling it "one of the ugliest pieces of public art in the city, a domineering work that bullies, rather than enhances, the open plaza...."

2. Whether or not Bess Meyerson was "enthusiastic" about relocating *Tilted Arc* in December 1984, she was among those arguing in support of the work in her March 7, 1985 statement at the Public Hearing: "As a site-specific work it [*Tilted Arc*] cannot simply be placed in an alternative site, and such a move would destroy the piece's context and intention. Now whether or not the General Services Administration has the legal or contractual right to move or dismantle or destroy this piece I do not know. I do know that it has a strong moral and ethical commitment not to do so, and not to do so lightly. I urge the GSA to respect this artist and his work even in the face of harsh criticism—indeed, especially in the face of such criticism." (Hearing Testimony, pp. 349-350)

3. The change of sentiment between this letter and the immediately preceding one is due to the fact that Serra found out about Storm King's offer via a December 29, 1984 article in the *New York Times* in which Diamond announced that he had received offers from Storm King and the New York City Parks and Recreation Department to take *Tilted Arc*. In the time between the two Storm King letters, Serra informed representatives of Storm King by phone of the site-specific nature of *Tilted Arc* and his opposition to any attempts to relocate the work.

4. The GSA's Art-in-Architecture Program was one of thirteen recipients (selected from 630 entries) of the First Presidential Award for Design Excellence.

PART II

1. Our attempts to confirm the exact contents of the statements have been hampered by the fact that, according to representatives of the GSA Regional Office in New York, the official audio tapes of the hearing are no longer available. We have therefore relied on unofficial tapes wherever possible. Also, it should be noted that many names were misspelled in the official transcripts. Wherever feasible we have checked the transcript spellings against other sources, but often this was not possible.

2. The affiliations given for the speakers are their stated affiliations in 1985. Also, where one person simply read the statement of another into the record, the statement is listed under the name of the author rather than the name of the reader.

3. The names on the list of speakers arguing for removal of *Tilted Arc* were culled from the Hearing Transcripts, where many of the names were spelled phonetically. When possible, we have checked the names against other sources, but in most cases we have had to follow the spelling in the Hearing Transcripts. (Members of the GSA staff in the New York Regional Office did attempt to locate a copy of their original list of speakers, but the list is apparently no longer included in current GSA files.)

4. Diamond's comments were made to Sandi Freeman on "Freeman Reports," which aired on CNN March 7, 1985. Although Diamond did make some attempts to appear impartial, a negative assessment of *Tilted Arc* was clearly implicit in many of his statements. He argued, for instance, that the work had made it "practically impossible for any public function to be held in the plaza,

as it happened for the years in the past. We had twenty-one public functions there, including band concerts, art shows, award ceremonies, and we have not had one since 1981, that's when the art went into the Federal Plaza." An important consideration, according to Diamond, was "the ability of the plaza to function for the purpose it was originally created for, which a number of people say it cannot do anymore. As a matter of fact, we have had over four thousand letters and petitions requesting the removal of *Tilted Arc*. If the government has made a mistake, and we don't know yet, because the panel has not yet made a recommendation, but I believe that if the government makes a mistake it ought to correct it."

In response to a question by Freeman about who had started the petitions, Diamond stated: "Over the past three and a half years that *Tilted Arc* has been in the plaza we have been inundated with complaints from the people that work and live in the neighborhood, and it got to the point where I decided that there was only one way to determine what the future of *Tilted Arc* should be. So I forwarded the complaints to the administrator of GSA in Washington and at my request he directed me to hold a public hearing."

When asked if he had ever circulated petitions, Diamond stated: "Yes, we made petitions available both for and against."

5. Richard Serra was nominated for this commission by three NEA panelists: Suzanne Delehanty, director of Neuberger Museum, SUNY Purchase; Robert Pincus-Witten, art critic and professor, Queens College; and Ira Licht, director of Lowe Gallery, University of Miami.

6. This quote, as read by Michelson at the hearing, differs in some small ways from the published interview. For the original text, see "Richard Serra's Films: An Interview," *October* 10 (1979): 87–88.

PART III

1. Although it was not dated, Serra sent this letter to Diamond immediately after the March 1985 hearings.

2. Contrary to Diamond's contention, *Clara-Clara* does not constitute a precedent for relocating *Tilted Arc*, since *Clara-Clara* was never intended as a site-specific piece. Diamond is also incorrect about the works done for the Port Authority. For an explication of these points, see Serra's Site Review Advisory Panel Paper (pp. 182–183).

3. Although Thalacker has the basic proportions correct, in fact the total number testifying against *Tilted Arc* was 58; 122 testified in its favor.

4. Although we have reprinted the text of Dwight Ink's decision here in full, we have not reprinted the series of documents included in the eighteen appendices attached to the original decision. (Some of the documents included in these appendices are, however, reprinted elsewhere in this book.)

5. A Federal Building Annex was also completed in 1977. [footnote in original]

6. Appendixes P and R contained William Diamond's May 1, 1985 letter to Dwight Ink and Donald Thalacker's May 9, 1985 memo to Dwight Ink (both reprinted above).

7. A Certificate of Copyright Registration was granted for *Tilted Arc* by the U.S. Copyright Office.

8. We have not reprinted the attachments included with the original letter. The list of panel members (which constituted attachment A) is, however, reprinted above, as is the paper Richard Serra presented to the panel (attachment B).

PART IV

1. Claims against two GSA officials for liability as individuals were dismissed by prior opinion. One of these officials, William J. Diamond, remains as a defendant in his official capacity. [footnote in original]

2. In fact, 180 people spoke at the hearings. Pollack may have confused the number of those who spoke against the work (58) with the total number. [editors' note]

3. For a full discussion of the numbers of letters and petitions for and against—and of the way those numbers were used—see Richard Serra's introduction, above. [editors' note]

4. The cases cited by Pollack of nonverbal expressions which were protected by the First Amendment involved the following: black armbands worn by public school students to protest U.S. policy in Vietnam, a sit-in by black students in a "whites only" library to protest segregation, and the flying of a red flag designating support for communism. [editors' note]

5. Both plaintiff's and defendants' protracted arguments as to whether the plaza is a public forum miss the point that government may reasonably regulate speech in such a forum as long as it does so without regard to the content of that speech. [footnote in original]

6. Plaintiff contends that GSA's decision to relocate the structure was based in part on an aesthetic evaluation, or because some believed the rusting structure to be an eyesore. Advancing aesthetic values and eliminating visual clutter are weighty and constitutionally legitimate objectives of government. [footnote in original]

7. The GSA enforces the nonremoval policy rigorously: it would not even allow artist Frank Stella to borrow his commissioned artwork from the Federal Building in Wilmington, Delaware for a major retrospective of his work in Fort Worth, Texas; the GSA feared that even temporary removal would jeopardize the program. [footnote in original]

8. In point of fact, 122 spoke for the work and 58 against. [editors' note]

9. This is not the first time that concern has been raised about possible interplay between bombs and public art. The *New York Times* reported on February 3, 1985: "Another imbroglio occurred in the mid-1970s, when a group of federal judges almost succeeded in blocking the installation of a work by George Sugerman on 'security' grounds, i.e., that its presence would supply a shelter for bomb-throwers. But after a public hearing, at which massive support for the work was expressed, the G.S.A. stood firm, and the piece was installed." [footnote in original]

10. As we shall see, Mr. Ink, who made the final decision to "relocate," and who had asked Mr. Diamond to investigate public functions in the plaza before *Tilted Arc*, paid no attention to Mr. Diamond's "memory." [footnote in original]

11. The Civil Rights Committee of the New York County Lawyers Association has recognized that this is all pretext. It has adopted this resolution:

> The Civil Rights Committee of the New York County Lawyers Association has enacted the following resolution for submission to the United States General Services Administration in regard to the Public Hearing noticed for March 6, 1985. The Committee has considered the issue of governmental censorship and feels there is a serious risk that the act of relocating the artwork will in fact constitute invidious censorship. The piece was installed pursuant to a deliberate and orderly process for the selection of public artworks. The question of public use of the plaza had to be a concern of the GSA prior to approval of the work's installation. There is nothing to suggest any changed circumstances that would justify a reevaluation of the public's interest in the use of the plaza. *Rather, the issue of public use appears to be a guise for censoring the artwork because some members of the public do not like the piece.* (emphasis added) [footnote in original]

12. Mr. Diamond first addresses the question of whether Mr. Serra has a contractual right to object to "relocation." Although we submit that he does, and that the GSA is here trying to ignore the firm commitment it gave him, it appears that the United States is immune to an injunction action on this issue, and so we shall not discuss it. [footnote in original]

13. Mr. Diamond got his strange version of the facts from a witness at the hearing, who read from a magazine article. But this does not explain Mr. Diamond's ignoring plain truth when it was called to his attention. [footnote in original]

14. The complaint was dismissed as to Mr. Ink and Mr. Diamond individually by order of July 14, 1987. [footnote in original]

15. We base this assertion upon these statements made in a document filed by the government on April 8, 1987, entitled "Memorandum of Law in Opposition to Plaintiff's Discovery Motion":

> . . . the court should not modify its previous ruling staying all discovery pending the outcome of the defendants' dispositive motion.
>
> * * *
>
> This court correctly stayed discovery pending the outcome of the defendants' dispositive motion.
>
> * * *
>
> . . . discovery in this matter should remain stayed pending disposition of the defendants' motion.
>
> [footnote in original]

16. The government argues that its decision to remove *Tilted Arc* does not implicate the First Amendment because Federal Plaza is not a public forum. However, the cases it cites do not involve open public places like Federal Plaza. E.g., *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (municipal buses); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (school mail facilities); *Piarowski v. Illinois Community College*, *supra*, 759 F.2d at 628–29 (school art gallery). Streets and public parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, *supra*, 460 U.S. at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). We need not decide whether Federal Plaza is a public forum because, even in a public forum, expression is subject to reasonable time, place, and manner restrictions. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). [footnote in original]

PART V

1. Although New York, along with California and Massachusetts, has legislation that includes moral rights provisions, the lack of national legislation meant that *Tilted Arc*, commissioned by the federal government, was unprotected.

2. The Berne Convention was first signed in Berne, Switzerland, on September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, and revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971. This excerpt is taken from the 1971 Paris text.

3. The Berne Convention Implementation Act of 1988 was enacted as an amendment to U.S. copyright law. The amendments to specific sections mentioned within the text of the act refer, therefore, to the copyright law (Title 17, U.S. Code), and not to the Berne Convention.

4. This interview was conducted by Shu Lea Cheang, who is the producer/director of a documentary video on *Tilted Arc* entitled "A Trial of *Tilted Arc*."

PHOTOGRAPHY CREDITS

Anne Chauvet: page 52

Addison Thompson Architectural Photographs: page 53

David Aschkenas: pages 130 (top), 191 (top), 192

Jennifer Kotter: pages 130 (bottom), 254, 255, 256, 257

Glenn Steigelman, Inc.: page 191 (bottom)

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The Destruction of *Tilted Arc*: Documents

edited by Clara Weyergraf-Serra and Martha Buskirk
introduction by Richard Serra

Richard Serra's *Tilted Arc*, a 120-foot curved Cor-Ten steel structure in New York City's Federal Plaza, was destroyed in the spring of 1989 by the General Services Administration, the federal agency that had commissioned and installed what was Serra's most ambitious and probably most important public sculpture. These documents from the public hearing and the court proceedings are an essential primary source for scholars of art and law, providing a complete and moving record of censorship in the arts.

The impassioned speeches by important artists, political figures, and federal employees for and against the sculpture's removal also make fascinating reading. Among those testifying at the hearing were Marion Javits, reading a letter from her husband, the dying Senator Jacob Javits; Congressman Theodore Weiss; artists Claes Oldenburg and Frank Stella; filmmaker Emile de Antonio; and Museum of Modern Art Director William Rubin. Richard Serra's introduction presents his own acerbic view of the government's case.

Serra's argument that the GSA should be prevented from destroying the work on First Amendment grounds was rejected by the courts, and it was torn down after his last-ditch attempt to invoke the Berne copyright convention, just ratified by the U.S. Congress, failed. *The Destruction of Tilted Arc* is a valuable complete record of this landmark event in the arts.

An OCTOBER Book.

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