Independence vs. Accountability: Correcting the Structural Defects in the National Endowment for the Arts

Craig Alford Masback

Follow this and additional works at: https://digitalcommons.law.yale.edu/ylpr

Part of the Law Commons

Recommended Citation
Available at: https://digitalcommons.law.yale.edu/ylpr/vol10/iss1/10

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law & Policy Review by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Independence vs. Accountability: Correcting the Structural Defects in the National Endowment for the Arts

Craig Alford Masback†

Politics has moved to center stage in the arts world. It has been almost twenty-seven years since Congress established the National Endowment for the Arts (NEA) as part of the National Foundation on the Arts and Humanities Act of 1965 (Act).1 Since then, the NEA has faced a variety of challenges, but none like the one which unfolded during the last four years in Washington, D.C. During this time, the very existence of the organization has been at issue.²

Until the mid-1980s, the NEA enjoyed consistent, and only occasionally contested, congressional support as it distributed grants to arts organizations, state arts agencies, and individuals. As congressional appropriations grew from $2.5 million in 1966³ to $175 million in 1991,⁴ the NEA saved dying ballet companies, launched programs to improve the teaching of poetry in schools, and helped start an American literary anthology. The NEA has achieved a significant decentralization in arts funding, education, and participation in the United States by encouraging the expansion in the number of state arts agencies.⁵

While the NEA was, theoretically, structured to be insulated from government control, the issue of the organization’s independence has been central to

† A.B. 1977 Princeton University. J.D. expected 1992, Yale Law School. I would like to thank Jameson W. Doig and Jerry L. Mashaw for their assistance with this project.


5. LIVINGSTONE BIDDLE, OUR GOVERNMENT AND THE ARTS 142 (1988). Biddle is arguably the most important figure in the history of the NEA. While an aide to Senator Claiborne Pell of Rhode Island, he drafted the NEA’s enabling legislation. In subsequent years, he served as the NEA’s first Deputy Chairperson, worked as a congressional liaison on behalf of the organization, and was the Staff Director of the Senate Subcommittee on Education, Arts, and the Humanities. Appointed by President Carter, he served as the NEA Chairperson from 1977-1981. See also DICK NETZER, THE SUBSIDIZED MUSE: PUBLIC SUPPORT FOR THE ARTS IN THE UNITED STATES 89-90 (1978) (detailing rise in state arts agencies attributable to NEA block grants).
each of its seven reauthorization proceedings. During the past three years, grants to help fund exhibits by photographers Robert Mapplethorpe and Andres Serrano provoked extensive debate over the extent to which the NEA should monitor or control the content of the works it funds. This debate came at a time when Congress was preparing to consider reauthorization of the NEA for another five years.

While the NEA was reauthorized, the debate about its role entered the political mainstream and later became an issue in the 1992 presidential primary campaign. Republican candidate Patrick J. Buchanan attacked President George Bush for his policy on the arts, calling Bush's NEA an "upholstered playpen of the arts and crafts auxiliary of the Eastern liberal establishment" subsidizing "filthy and blasphemous art." Two days later and less than a week after Buchanan's surprisingly strong showing in the New Hampshire primary, Bush reacted to the Buchanan attack by forcing the Chairperson of the NEA, John E. Frohnmayer, out of his job.

Though there have been relatively few controversies or contested grants over the twenty-six year history of the NEA, each incident, like the recent debates, developed into a struggle largely centered around First Amendment issues. The NEA's enabling legislation speaks clearly of a congressional intent to guarantee protection against government control of the arts:

In the administration of this subchapter no department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over

---

8. Judy Keen & Bill Nichols, Buchanan Takes Aim at Arts Fund, USA TODAY, Feb. 21, 1992, at 4A.
10. Between 1965 and 1988, the NEA reviewed approximately 302,000 grant applications and funded approximately 85,000 grants. 135 Cong. Rec. H3639 (daily ed. July 12, 1989). According to Congressman Sidney Yates, "[i]n 85,000 grants, less than 20 have been found to be objectionable. That’s one-quarter of one-tenth of a percent." William H. Honan, Congressional Anger Threatens Arts Endowment's Budget, N.Y. TIMES, June 20, 1989, at C15. One observer commented, "[a]n arts endowment that had only twenty controversial grants in 85,000 would have some very serious explaining to do." Nichols Fox, Art Funding: The Fight over Sex, Money and Power, 14 NOVA L.J. 369, 372 (1990) (emphasis added).
11. For example, when an NEA grant for a modernized version of Rigoletto was criticized for promoting an offensive and stereotypical image of Italian Americans, Representative Mario Biaggi protested and proposed a set of content-based controls that leading constitutional scholars described as unconstitutional. See Enrique R. Carrasco, Note, The National Endowment for the Arts: A Search for an Equitable Grant Making Process, 74 Geo. L.J. 1521 (1986). For a comprehensive discussion of the First Amendment and the protection it offers controversial government subsidies, see Owen M. Fiss, State Activism and State Censorship, 100 YALE L.J. 1 (1991).
Correcting the Defects in the NEA

the policy determination, personnel, or curriculum, or the administration or operation of any school or other non-Federal agency, institution, organization, or association.\textsuperscript{12}

Certain Congresspersons have proposed modifying the language above in response to public outcry about the funding of controversial projects.\textsuperscript{13} That the above critical section of the Act remains in place serves as evidence that the majority in Congress appreciates the need to abstain from regulating creative expression.

However, the incentive to interfere with specific grant decisions and debate over the related constitutional issues will continue as long as the NEA retains its present operating structure. The Act created organizational forms and operating procedures inherently at odds with the notion of shielding art from government control. Regular congressional scrutiny of NEA affairs and the placement of final decisions on grants in the hands of the NEA Chairperson are inimical to the effective functioning of a government agency distributing grants to artists and arts organizations.

The Act’s creation of the NEA as a quasi-governmental organization (QUAGO) fits into a pattern of pre- and post-World War II legislative creations which might be termed the “fifth branch of government.”\textsuperscript{14} Unlike the massive administrative agencies such as the Federal Communications Commission and the Interstate Commerce Commission, commonly known as the “fourth branch of the Government,”\textsuperscript{15} these quasi-public agencies are not regulatory in either character or function; like the NEA, they tend to operate in fields traditionally considered ill-suited for governmental activity.\textsuperscript{16}

Quasi-governmental bodies inevitably experience tension between the need for independence (often their reason for being) and accountability to the public. The Act creating the NEA includes a form of “sunset” provision, one of the strongest means of assuring accountability. This combination of limited authorizations and annual appropriations hearings guarantees congressional scrutiny

\textsuperscript{12} 20 U.S.C. § 953(c) (1988).


\textsuperscript{14} While the notion of calling some class of government or extra-governmental bodies the “fifth branch of government” is not new, there is no consensus concerning what class or bodies should be so termed. See, e.g., REXFORD G. TUGWELL, THE EMERGING CONSTITUTION 592-621 (1974) (advocating a new constitution including regulation and planning as the fourth and fifth branches of government, respectively); Harold I. Abramson, A Fifth Branch of Government: The Private Regulators and Their Constitutionality, 16 HASTINGS CONST. L.Q. 166 (1989) (examining the constitutional and public policy implications of the activities of private regulators like the National Association of Security Regulators, the American Bar Association, and other groups he terms the “fifth branch” of government).

\textsuperscript{15} HAROLD SEIDMAN, POLITICS, POSITION, & POWER: THE DYNAMICS OF FEDERAL ORGANIZATION 259 (1980).

\textsuperscript{16} Two interesting examples of QUAGOs are the Corporation for Public Broadcasting (47 U.S.C. §§ 396-398 (1988)) and the National Science Foundation (42 U.S.C. §§ 1861-1887 (1988)). These forms of government organizations are not without their critics. President Truman believed the “foundation” form of QUAGO undemocratic and vetoed the original bill forming the National Science Foundation. SEIDMAN, supra note 15, at 23.
of the NEA on a regular basis, too much scrutiny for the organization to be characterized by either program independence (policy development and implementation freedom), process independence (internal and external operational freedom), or fiscal independence (financial freedom).17

This Current Topic will examine the goals, structure, operation, and effectiveness of the National Endowment for the Arts. In doing so, it will show that instead of insulating the grant-making process from the pressures of representative democracy, the structure created by the enabling legislation actually assures that the NEA will remain a highly visible target of scrutiny.

Section I of the paper will review the historical underpinnings of the mandate for a government-sponsored arts organization largely independent of government control. The structure and operation of the NEA will be described in the context of the QUAGO, with particular attention to the concepts of program, process, and fiscal independence.

Section II will detail how politics resulted in compromises affecting the status and structure of the NEA. Though nominally defined in independent "language," in reality the NEA has always been accountable to Congress via frequent appropriations hearings and reauthorization proceedings.

Section III will trace the history of the clash between the independence-encouraging dimensions of the NEA's QUAGO structure and the accountability-encouraging attributes of its sunset provision and decisionmaking procedures. Since its creation, the NEA's independence has been undermined by a series of crises.

Section IV offers recommendations for restructuring the NEA in order to neutralize the impact of the inherent tension between independence and accountability. These reforms highlight the need for the President and Congress to develop a firm policy for the arts and suggest changes in the NEA grant-making procedure to effectively insulate it from government control. Failure to make key structural changes in the NEA will result in continuing struggles between artists and government and regular attack from Congress and the American public.

I. THE MANDATE FOR INDEPENDENCE

A. Historical Underpinnings

The NEA came into existence in 1965 after a long gestation period, benefitting from the support of a popular U.S. President and a favorable social

17. The notions of program, process, and fiscal independence are stimulated by a discussion of ex-ante and ex-post accountability in a book which grew out of two Anglo-American conferences that considered the issues of decentralization of public activities and the accompanying problems of accountability. PUBLIC POLICY AND PRIVATE INTERESTS 362-68 (D.C. Hague et al. eds., 1975).
Correcting the Defects in the NEA

environment. Societal concerns at the time of the NEA's birth and the traditional wariness with which artists and public officials approached one another produced an organization with a quasi-governmental character.

The social development of the United States had much to do with the public's resistance to the notion of a government role in the arts. The dominance of the mercantile spirit, lingering puritanical attitudes, a widespread ideology of self-reliance, and the absence of princely patronage are among the factors cited for the development of the view that the arts and government were not a good combination. Nevertheless, the federal government funded a variety of arts-related activities including, for example, the Smithsonian Institution (1846) and the Work Project Administration arts programs of the 1930's. In addition, the federal tax system had long provided for allowances for charitable donations to museums and other art institutions.

After World War II, arts excellence came to be viewed as a virtue for a democratic society, and the arts joined sports on the front lines of the cold war competition over ideology and culture. In 1965, at the height of his popularity and power, President Lyndon Johnson backed Congresspersons and interest groups supporting a national arts foundation saying, "the pursuit of artistic achievement, and making the fruits of that achievement available to all its people, is also one of the hallmarks of a Great Society."

The supporters of the Act seemed to have several motivations, though they were never presented as official policy rationales. The primary intent was to initiate cultural democratization in the United States by exposing more people to the arts, widening the range of opportunities available to artists, and keeping museum doors open. Promoting the prestige of the United States and contributing to international understanding were also considered justifications for a more active governmental role in the arts.

19. NETZER, supra note 5, at 53.
22. National Arts and Humanities Foundations: Hearings Before the Special Subcomm. on Arts and Humanities, of the Comm. on Labor and Public Welfare, 89th Cong., 1st Sess. 737 (1965) [hereinafter Senate Hearings] (letter from President Lyndon B. Johnson to the Chairman of the Senate Special Subcommittee on Arts and the Humanities). The NEA legislation was part of an ambitious package of initiatives enacted under Johnson. Before and after he won a landslide victory in the 1964 election, Johnson cut income taxes, announced the "Great Society," and lobbied Congress to pass landmark civil rights legislation, a voting rights act, anti-pollution measures, and a major education bill.
B. Non-interference and the Need for Independence

Although the idea of direct government involvement in the arts had gained acceptance, the history of cultural politics in the United States suggested that a government grantmaking agency be given what one observer terms "limited authority and only indirect responsibility" in order to avoid the perception or reality of government control of culture.25 Government "non-interference" was the major focus of both political right and left, and that sentiment formed the basis of support for structuring the NEA as a quasi-governmental organization.26

President Johnson emphasized the non-interference issue when he transmitted an early draft of the Act to Congress: "Nor should any government seek to restrict the freedom of the artist to pursue his calling in his own way. Freedom is an essential condition for the artist, and in proportion as freedom is diminished so is the prospect of artistic achievement."27

Many of the witnesses at the Senate and House hearings to consider the Act, and a significant proportion of those speaking in the floor debates, referred to the issue of government control of an individual artist's freedom.28 The Minority Report of the House Education and Labor Committee, authored by seven conservative Republicans, outlined its opposition to the Act speaking repeatedly of the dangers of government "activism" in the arts field.29 They feared that the government would become too involved in art, and the Report quoted a writer who said that a program like the NEA might lead to attempts


26. BIDDLE, supra note 5, at 149, 167, 179. Three reasons that "non-interference" was a focus were a general fear of Communist conspiracies, allegations that government support of the arts was unconstitutional, and worries that government involvement would encourage artistic mediocrity.

27. Senate Hearings, supra note 22, at 737 (Letter from President Lyndon B. Johnson).

28. See, e.g., the statements of Rep. William Broomfield (R. Mich.): "I cannot and will not support a bill which can only lead to mediocre art and a Federal straightjacket over creativity." 111 CONG. REC. 23,941 (1965); Rep. Carlton Sickles (D. Md.): "The foundation would decentralize the arts so that they can be enjoyed by a greater number of people. The granting of Federal funds does not mean political control." Id. at 23959.

29. H.R. REP. No. 618, 89th Cong., 1st Sess. 1965, reprinted in 1965 U.S.C.C.A.N. 3186, 3203 [hereinafter HOUSE REPORT]. "This far-reaching bill, creating Federal czars over the arts and humanities, was 'railroaded' through the committee on June 24, 1965, after about 15 minutes of consideration." Id.
Correcting the Defects in the NEA

at "political control of culture" because the arts "are a sitting duck for any politician who feels the need of making personal headlines."30

The report of the Senate Labor and Public Welfare Committee addressed the government control question more thoroughly. It stressed that the bill contained specific language that would guard against government interference and domination of cultural activities.31 Instead, the drafters of the legislation intended for the NEA to stimulate significant private contributions and local fundraising initiatives. Most importantly, public citizens would be members of NEA advisory bodies, thereby providing a significant buffer against government meddling.

The one issue upon which both supporters and opponents of the NEA agreed was that the government role in the arts, if it should exist at all, should be carefully circumscribed to prevent interference with artistic freedom and humanistic expression.32 Those drafting the NEA enabling legislation had a clear mandate to create a structure providing a significant degree of independence from government control and influence.33

C. QUAGO's and the Structure of Independence

Only an organization outside of the normal government structure seemed likely to provide sufficient independence for effective NEA operation. For that reason, the NEA was created as a QUAGO. Quasi-governmental organizations were not new in 1965, having become a common tool of government after World War II, particularly in Great Britain.34 Established by statute,

30. Id. at 21 (quoting ALVIN TOFFLER, THE CULTURE CONSUMERS: A STUDY OF ART AND AFFLUENCE IN AMERICA 191 (1964) (quoting Russell Lynes)), reprinted in 1965 U.S.C.C.A.N. 3186, 3205. Lynes' observations have proven prescient over the past three years.

31. ESTABLISHING A NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES, S. REP. NO. 300, 89th Cong., 1st Sess. 18 (1965) [hereinafter SENATE REPORT]. The Senate Report bolsters its section on government non-interference with the following statement: "Moreover, modes of expression are not static, but are constantly evolving. Countless times in history artists and humanists who were vilified by their contemporaries because of their innovations in style or mode of expression have become prophets to a later age." Id. at 3-4. See also 20 U.S.C. § 953(c) (1988), supra text accompanying note 12.

32. SENATE REPORT, supra note 31, at 3.

33. Id. at 18.

34. PETER HOLLAND, QUELLING THE QUANGO 5 (1982). Among the uses of quasi-governmental bodies in Great Britain have been: the Waste Management Advisory Council, the Hadrian's Wall Advisory Committee, and the Committee on the Banana Trade. Id. at 13. Alan Pifer coined the descriptive "quasi-nongovernmental organization" in the annual report of the Carnegie Corporation in 1967. His descriptive first became "QUANGO," a popular acronym in Britain. Later, those organizations considered more public than private in character were termed "QUAGO's." In the limited studies of these organizations, QUAGO's and QUANGO's are considered to have similar characteristics, and the acronyms are often used interchangeably. Alan Pifer, The Quasi-Non-Governmental Organization, in PUBLIC POLICY AND PRIVATE INTERESTS, supra note 17, at 380. See also Anthony Barker, Quango: a word and a campaign, in QUANGOS IN BRITAIN 219-31 (Anthony Barker ed., 1982). Administrative organizational structures are never neutral. An organization's form affects many aspects of its function, including its program direction. SEIDMAN, supra note 15, at 15. See also ANNMARIE HAUCK WALSH, THE PUBLIC'S BUSINESS: THE POLITICS AND PRACTICES OF GOVERNMENT CORPORATIONS 10 (1980).
QUAGO's are independent public agencies, whose directors are usually appointed by the central government, and are set up to perform executive (but not regulatory) tasks. Governments establish quasi-governmental organizations for a variety of reasons: (1) to protect certain activities from political interference; (2) to escape a known weakness of a government agency in a particular area; (3) to spread power; (4) to co-opt interest group representatives as agents of the government; (5) to assist an activity not traditionally under government control; (6) to hide the enlargement of the government bureaucracy; and (7) to discharge some of its business through disavowable and ostensibly independent front agencies. The formation of the NEA could be seen serving all of these goals except for spreading power (3) and hiding an enlargement of the government bureaucracy (6).

What distinguishes QUAGO's are the degrees of decisionmaking independence they exercise. This independence may be seen as taking three forms, each defined by input influences, defining controls from external sources which limit QUAGO discretion and action, and output behaviors, the QUAGO's latitude to act given the presence of controls. The first is program independence, which is defined by the policy framework in which an organization operates and the organization's ability to determine its own output goals. For example, a vague framework statute and/or the failure of Congress or the executive branch to articulate agency objectives via policy statements would leave an agency with wide latitude to define its own role and corresponding policies. Process independence describes how an agency is treated and how it treats others. It is defined by a QUAGO's organizational scheme, the frequency and degree of congressional oversight, and the extent to which congressional or executive program directives restrict agency freedom to determine how it will perform its tasks. Fiscal independence is influenced by the source and quantity of the organization's finances, and the organization's ability, within program and process guidelines, to control the allocation of its budget. An agency receiving a generous amount of funds earmarked for a specific purpose would have less fiscal independence than an organization receiving a smaller allocation of funds with no strings attached.

It should be recognized that, by definition, QUAGO's represent a retreat from the "simple democratic principle ... that those who perform a public duty should be fully responsible to an electorate ...." In theory, as long as the agency issues periodic reports, operates within the policy guidelines set by the government, and meets standards of professionalism, the model QUAGO frequently escapes normal scrutiny by the government which created it and the

35. See, e.g., Anthony Barker, Governmental Bodies and the Networks of Mutual Accountability, in QUANGOS IN BRITAIN, supra note 34, at 3, 7-16.
36. See Pifer, supra note 34, at 383-85.
37. Sir Norman Chester, Fringe Bodies, Quangos and All That, 57 PUB. ADMIN. 51, 54 (1979).
Correcting the Defects in the NEA
taxpayers who fund it. By operating in this way a QUAGO can achieve
significant degrees of program, process, and fiscal independence.

In practice, however, independence and accountability are almost irrecon-
cilable. If a QUAGO is not functioning properly, government intervention
designed to correct any structural defects will compromise the agency’s
independence,38 government inaction would allow the organization to escape
accountability, eliminating the agency leaves a gap where government action
was deemed important.39

D. The NEA as a QUAGO

1. Creating an independent “structure.” The Senate staff member who drafted
the NEA enabling legislation, Livingstone Biddle, solicited input from a variety
of sources on how to insulate the organization from government control.
Convinced that independent “language” in the Act would not be enough protec-
tion for the nascent NEA, Biddle and his advisors sought to create an organiza-
tional structure and policy agenda that would reinforce its independence.40
They were largely unsuccessful.

The Act created the NEA as an independent executive agency on the
“autonomous end of the federal spectrum.” It is headed by a Chairperson
who consults with a twenty-six member National Council on the Arts
(NCA).43 The Chairperson serves a four-year term.44 She has the sole au-
thority to award grants, based on recommendations from the NCA,45 which
itself receives recommendations from panels of expert advisors, and informa-
tion from the NEA staff. The Chairperson has only rarely ignored the sugges-
tion of his advisory bodies.46 In addition, since the NEA was founded, the
Chairperson has served as the standard-bearer of the organization, seeking to

38. According to Pifer, “nothing can reduce a quasi-governmental organization to ineffectuality more
quickly than to have government exercise its supervision at too detailed a level.” Pifer, supra note 34, at
391.

39. Id. at 390. Pifer adds that independence is related to a QUAGO’s “general prestige and standing,”
and that a clear definition of objectives and responsibilities is necessary for an organization’s “continued
viability.” See id. at 390-91.

40. Interview with Livingstone Biddle in Washington, D.C. (Oct. 22, 1990) (tape and transcript on
file with the author).

41. MICHAEL STRAIGHT, TWIGS FOR AN EAGLE’S NEST: GOVERNMENT AND THE ARTS:

42. 20 U.S.C. § 954(b)(1) (1988). The Chairperson is appointed by the President, “by and with the
advice and consent of the Senate.” Id.

43. 20 U.S.C. § 955(b) (1988). The NCA is also appointed by the President, “by and with the advice
and consent of the Senate.” Id.


at C19 (describing NEA records showing that between 1982-1989 the Chairperson reversed advisory panel
recommendations on only 35 out of 33,700 proposed grants).
build a congressional consensus for the arts and helping to organize the arts community.

By making the Chairperson the sole decisionmaker and standard-bearer of the NEA, the Act’s organizational and operational scheme places her at a focal point of constant congressional, presidential, and arts community pressure. Recently deposed Chairperson John Frohnmayer suggested that in order to survive in his position, he would need “body armor and helmet” rather than a background in the arts.47 In Frohnmayer’s case, no amount of body armor seemed adequate, as he became the target of both an arts community that believed he did not adequately advocate their rights and a militant conservative lobby which felt he showed too much deference to the judgment of arts experts.48 Even a Chairperson effective at managing the difficult role of pursuing the NEA’s interests risks undermining the organization’s independence. The NEA’s second Chairperson, Nancy Hanks, was said to be so successful at “winning congressional supporters and mobilizing constituency influence” that it created the politically dangerous impression that the NEA was “impregnable and therefore politically unaccountable.”49

Anticipating the need for a group of independent and impartial advisors to guide the Chairperson, Congress created the 26-member NCA. The NCA’s members include private citizens “widely recognized for their broad knowledge of the arts”50 who serve overlapping six-year terms.51 The NCA meets quarterly to review grant proposals and recommend policy changes, and files its own annual report (independent of the Chairperson) with Congress and the President. Infrequent meetings and the exercise of a mere advisory function result in an NCA with little real power, or role, in insulating the NEA or the artists and organizations it funds from outside influence.

Peer panels in each of the NEA’s sixteen program areas52 are an important element in the NEA grantmaking process. As will be discussed below,

49. Wyszomirski, supra note 21, at 234.
52. Program areas include, for example, dance, folk art, music, theater, visual arts, museums, and design arts. Since 1965, more than 3,300 people have served on panels with 40-60% being replaced each year. See Stephen F. Rohde, Art of the State: Congressional Censorship of the National Endowment for the Arts, 12 HASTINGS COMM. & ENT. L.J. 353, 356 (1990).
peer panels should play an even more important role in the grantmaking process. Selected by the Chairperson, who is not obligated by statute to use the peer panel system for awarding grants, the panels consist of art experts who use a standard based on excellence, not subject matter, to review applications and make recommendations to the NCA concerning who should receive grants and at what level of funding. 53

2. Structure undermining independence. In spite of the best efforts of Biddle and others, the NEA's structure has provided little independence from government interference. In fact, in some ways it has actually assured interference with the NEA's process independence. While the use of impartial arts experts on peer panels does add some legitimacy to the grantmaking process, the fact that the Chairperson makes the final decisions on grants is significant. Rather than placing responsibility for grant decisions with citizen-experts located far from the locus of power and influence, the Act places decision-making in the most visible and political figure in the arts community. Even though the Chairperson only occasionally reverses the recommendations of the peer panels and NCA, the number of instances of reversals has increased in recent years. 54

Critical to the NEA's goal of independence, was a concentrated effort by NEA officials and its congressional supporters to establish the agency as preeminent in the government arts field. High status organizations are generally allowed more freedom to set their own agendas. 55 While they did not seek to supplant the Smithsonian or arts programs in the State, Labor, or Commerce Departments, Biddle and the others involved with creating the NEA were largely successful in placing the NEA in a leadership role in the government arts establishment by making it the focal point of federal government arts programs. 56 Other organizations and departments would look to the NEA to provide leadership on arts issues, awareness, and funding.

In its early years, and to a large extent since, the NEA kept its objectives broad and purposefully vague. In that way, the organization could be all things to all people and could avoid taking a stand on the difficult issue of whether its mission was to stress artistic quality ("elitism") or the widest possible dissemination and promotion of the arts ("populism"). 57 While this vagueness

53. 20 U.S.C. § 959(a) (1988) (charging panels with duty of identifying proposals that "foster excellence, are reflective of exceptional talent, and have significant literary, scholarly, cultural, or artistic merit."). Peer panels consist of artists, art teachers and administrators, and others having expert knowledge in a particular NEA program area.
54. See Honan, supra note 46.
55. See Pifer, supra note 34, at 390.
57. BANFIELD, supra note 24, at 5. Banfield comments that the NEA has no "defined purpose in any proper sense of the word, let alone one arrived at with knowledge and deliberation. What passes for purpose
served the NEA well as it built a consensus for its validity as an arts organization, it now makes it vulnerable to attack for anyone favoring increased spending on elite art or a more populist approach.

The drafters of the Act were successful at providing some elements of QUAGO program independence for the NEA. The Act included a strong commitment to government non-interference, and both supporters and opponents of the Act spoke of the importance of keeping the NEA and its grant recipients insulated from government influence. The Act made the NEA the preeminent organization in the government arts apparatus. Furthermore, congressional and presidential neglect of arts policy effectively ceded policy control to the NEA which, until recently, was able to maintain a politically effective policy of vagueness.

Process independence was attempted by placing citizens in charge of the first two layers of grant decisionmaking. The four-year term of the Chairperson and her pivotal role at the center of all public and private arts initiatives were intended to add to that independence. However, as soon as Congress decided to take a more active role in scrutinizing specific NEA grants, the frailty of that independence became quickly apparent. In addition, though called an “endowment,” the NEA is dependent on yearly congressional budget allocations, resulting in virtually no fiscal independence on the input level and significant limits on the NEA’s ability to control its own expenditures. By focusing on achieving independence in program and process, the drafters of the Act ignored important issues of accountability which would later become important to the NEA’s viability as an organization.

II. ACCOUNTABILITY AND THE COMPROMISE OF INDEPENDENCE

There is an inevitable tension between the values of independence and the values of accountability in a quasi-governmental body. These tensions began to manifest themselves even before the NEA was established as political wrangling diluted the critical non-interference language and compromised the agency’s independence. Congress referred to the NEA and the arts as being

. . . is a set of vague and conflicting statements of good intentions based on gross misperceptions of the nature of art and the amount and character of the public demand for it.” Id. See also Kevin Mulcahy, The Politics of Cultural Oversight: The Reauthorization Process and the National Endowment for the Arts, in CONGRESS AND THE ARTS: A PRECARIOUS ALLIANCE? 63, 77 (Margaret Wyszomirski ed., 1988). The Act’s Declaration of Finding and Purposes makes broad statements concerning the need for an advanced society not to “limit its efforts to science and technology alone” and a need to foster “worldwide respect and admiration for the Nation’s high qualities as a leader in the realm of ideas and of the spirit.” 20 U.S.C.A. § 951 (West Supp. 1991). While the NEA did not articulate a preference for elitism or populism, early policies clearly stressed excellence and favors awarding grants to established cultural institutions over a policy of cultural diversity. See, e.g., Margaret Wyszomirski, Controversies in Arts Policymaking, in PUBLIC POLICY AND THE ARTS, supra note 25, at 12-21.

Correcting the Defects in the NEA

free from government control, yet inserted significant control devices into its enabling legislation. Together, those devices virtually removed fiscal independence and significantly restricted process and program independence.

A. Legislative Process and Political Compromise

As outlined above, lingering historical ambivalence about government’s role in the arts meant that even as supporters developed a consensus for the idea of an arts organization, political support for the actual legislation was tenuous. Biddle says there were “very few real supporters and a thin line between success and failure. I was seeking every possible ally I could find.”

Building firm support for the Act required drafting what he calls “an offbeat piece of legislation” put together by “taking a paragraph from one bill and an idea from another.”

Deals that fundamentally compromised the NEA’s independence were essential to passage of the NEA enabling legislation. For example, in order to win passage in the Senate, a provision was included allocating one-third of the first-year budget of $7.5 million directly to the states, dividing the sum equally among the states, and mandating its use in setting up or helping fund state arts agencies. A yearly grant to enable the Office of Education to improve teaching of the arts and humanities was promised in order to receive the support of leaders of elementary and secondary school education. In these two broad strokes a significant portion of the NEA budget was allocated, and fiscal independence was significantly compromised not due to arts policy, but to political necessity.

Labor leaders, concerned about federal arts funds going to projects that employed non-labor employees, lobbied for a statutory commitment to standards of “professional excellence” in NEA sponsored productions, and a guarantee that the minimum wage would be paid to those working on NEA supported projects. In addition, the NCA was expanded from twenty-four to twenty-six members with the express purpose of appointing key labor lead-

59. Biddle interview, supra note 40.
60. Id.
62. SCOTT, supra note 3, at 15. See also BIDDLE, supra note 5, at 87 (commenting that educators were forceful in voicing their opinions).
63. 20 U.S.C. § 954(c) (1988) (emphasis added). See also BIDDLE, supra note 5, at 87. Organized labor was an avid supporter of the NEA legislation, but as Professor Harold Hongju Koh has noted, even interest groups considered to be backers of a particular bill will often compromise the bill’s broader public-policy objectives in order to forward their own agendas. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 124 (1990).
64. 20 U.S.C. §§ 954 (i), (j) (1988). “These provisions were crucial to getting the support of Actors Equity, the American Federation of Musicians, and the American Guild of Variety Artists.” Biddle interview, supra note 40

189
ers.65 These changes in program and process were not unrelated to the fact that the bill originated in a subcommittee of the Senate Committee on Labor and Public Welfare.

One early version of the bill that eventually formed the NEA and National Endowment for the Humanities (NEH) (S. 111) had a section stating the purpose of the bill which included the following phrase: “but [government] shall not attempt, directly or indirectly, to direct, control, or otherwise influence the scholarship, teaching, research, or artistic endeavors which it supports.”66 Unlike the language in the Act, which applies only to non-interference with groups receiving grants,67 this clause would have applied to both individuals and organizations, providing a better guarantee against attempts at content control. No substantive discussion of this provision occurred during the Senate hearings. When S. 111 was combined with the bill proposed by Senator Claiborne Pell (and written by Livingstone Biddle), S. 1483, the S. 111 clause discussing non-interference with individuals was lost.

Thus, the normal political process of creating legislation and seeking support for it fundamentally undermined the NEA’s program, process, and fiscal independence. Efforts to serve organized labor, the major constituency of the House and Senate committees from which the bill emerged, had an impact on the policy of the organization and its operational structure. Gaining the support of the educational community and state arts organizations required significant earmarking of funds. Moving forward with one proposed bill in place of another resulted in the loss of key protective language from the Act.

B. Sunset and the Dawn of Accountability

No organization created and funded by government can expect to be completely free from government oversight and influence. The degree to which that influence is felt is largely determined by the frequency with which the agency must justify its existence (via reauthorization) and secure its budget (via the appropriations process).

Prior to World War II, almost all federal agencies had permanent authorizations. Over the past thirty to forty years, spurred largely by the sunset movement in the 1960’s and 1970’s, Congress has gradually shifted to temporary or periodic authorizations.68 Sunset legislation attempts to improve agency efficiency and accountability by forcing program evaluation onto the legislative agenda. A sunset provision sets up criteria for agency performance

65. BIDDLE, supra note 5, at 144.
66. Senate Hearings, supra note 22, at 128.
Correcting the Defects in the NEA

review: "[1] the extent to which the agency has accomplished its goals; [2] allocation of the agency budget and staff arrangements; [3] the extent to which public participation has been encouraged; and [4] duplication of agency objectives within other programs." By threatening to terminate inefficient or unnecessary programs, sunset review aims to strengthen the incentives for comprehensive policymaking. The burden of proof of an agency's viability is placed on those who seek its reauthorization.

A short authorization period (three years or less) is evidence of a congressional intent to maximize its control over an agency and its policies. The NEA had two- and three-year authorizations between 1965 and 1976, and progressed to a five-year authorization from 1985-90. However, in the reauthorization process in 1990, it was only granted a three-year extension of its legislative mandate, a clear signal from Congress that twenty-six years after it came into existence, the NEA remains on a "short leash."

Each of the seven sets of reauthorization proceedings have interfered significantly with the NEA's equilibrium and independence. In addition, yearly "grillings" before the Interior Appropriations Subcommittee and the particular attention paid to the NEA by the Subcommittee Chairpersons have added to a sense of organizational uncertainty. "As the guardians of the public purse, committee members are expected to cast a skeptical eye on the blandishments of a bureaucracy ever anxious to increase its dominion by raising its appropriations." Faced with that kind of scrutiny, the NEA responded by adopting policies that conformed with the subcommittee's wishes.

Though widely supported in Congress and enthusiastically supported by President Johnson when he signed the Act, the NEA's very viability was brought into question by the initial appearance before the appropriations subcommittee of the NEA's first Chairperson, Roger Stevens. Only three

70. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 60 (1982). Dean Calabresi adds that sunset laws can be over-inclusive and cause too much termination. Id. at 61.
71. Allen Schick, Politics through Law: Congressional Limitation on Executive Discretion, in BOTH ENDS OF THE AVENUE 154, 174-75 (Anthony King ed., 1983). Among the attributes of "vulnerable" organizations are the requirements that an organization undergo reauthorization at specific time intervals and that no money be appropriated in the absence of authorization. SEIDMAN, supra note 15, at 54.
73. See Mulcahy, supra note 57, at 69-77. Biddle says that Sidney Yates, Chairman of the Interior Appropriations Subcommittee, used to stop by the NEA unannounced and talk with staff members. Though Yates has been a supporter of the NEA, staff members have found his visits disconcerting when he asks questions and makes comments about specific programs and grants. BIDDLE, supra note 5, at 405. Appropriations Subcommittee grillings and high level political maneuvering have continued throughout the history of the NEA. In late October, 1991, a House-Senate Appropriations conference committee traded approval of the NEA's FY1992 funding of $178 million for low grazing fees for cattle (quickly dubbed a "Corn for Porn" trade), thereby avoiding new NEA grantmaking restrictions proposed by Senator Helms. Kim Masters, "Corn for Porn" Victory; NEA Funds Okayed Without Helms Proposal, WASH. POST, Oct. 25, 1991, at B2. See also Restrictions on Grants Defeated, N.Y. TIMES, Nov. 1, 1991, at C11.
weeks after the Act was signed into law and before the NEA staff or grant-making structure were in place, the Chairperson of the subcommittee, Rep. Winfield Denton, questioned Stevens extensively about how the NEA would operate, to whom grants would be offered, when the grants would be paid, and whether they would go only to American citizens. At one point, Denton intimated that no funds would be forthcoming because Stevens, three weeks into his tenure as Chairperson, could not produce a detailed list of grants for the coming year.

Stevens was agreeable and accommodating. When Denton expressed an interest in making the program a success, but added "we do not want to endanger it by moving too fast," Stevens replied, "By law, to see how this program would work, Congress limited us to $10 million per year for 3 years so that they could take a look and see how we progressed." Nowhere in the 8,000 pages of testimony at hearings or in the debates on the floor was there mention of the NEA being on trial status. An organization intended to become a centerpiece of a new government commitment to the arts was suddenly reduced to a temporary creation inviting scrutiny.

The appropriations committee approved an outlay of $2.5 million, one-third of what had been requested by the President and authorized by Congress.

Although taking place twenty-five years ago, that hearing remains important because it undercut NEA prestige and set the tone for a style of appropriations committee oversight that prevails to this day. Subsequent reauthorization proceedings and yearly appropriations hearings formed a powerful kind of sunset review that has kept an agency intended to be independent under constant government scrutiny.

75. Supplemental Appropriation Bill, 1966: Hearings Before Subcomm. on Dept. of Interior and Related Agencies Appropriations of the House Comm. on Appropriations, 89th Cong., 1st Sess. 38-39 (1965). Denton also questioned Stevens about the NEA's proposed office space, why they needed to hire experts instead of regular civil service employees, and conflicts of interest. Id. at 43, 45.
76. Id. at 36-37, 45-47.
77. Id. at 45.
78. Id. at 49 (emphasis added).
79. Rep. William Widnall (R. N.J.), a supporter of the legislation and a member of the appropriations subcommittee, added, "I would urge this committee to keep a very careful watch... and make sure that every dollar is spent wisely... Whether its record will commend its continuance will depend in very large part on the degree of concern shown by the Appropriations Committee..." Id. at 50.
81. The 1991 Appropriations Committee proceedings, House and Senate votes, and conference negotiations were, once again, highly contentious and highly public struggles. See supra note 73.
Correcting the Defects in the NEA

III. THE CLASH OF QUAGO AND SUNSET

A. Failing to Achieve Inevitability

While the NEA has made important contributions to the arts since its founding, the structure created by the Act, which provides for a QUAGO's independence tempered by the accountability inherent in sunset review, has kept the NEA in a state of continuous turmoil as it moved from crisis to crisis. Having failed to achieve "inevitability," a sense that its future as an organization is assured, the NEA has been "operating by a kind of slight-of-hand, understanding its own vulnerability and intent upon keeping a high enough profile to get funding and a low enough one to avoid detection."

While most agencies progress through steps in a predictable lifecycle, progressing from what one observer terms an "initial survival threshold" to a point where it has a "stable relationship with its clientele and a sense of confidence about its continuation," the NEA has never "matured" as an agency. The failure of Congress and the executive branch to articulate specific policy goals, and the growing tendency of both groups to interfere in NEA affairs has kept the organization unstable, hampering the development of effective policies and undermining the agency's image.

The congressional shift toward a more conservative consensus has undercut the bipartisan support for the arts that existed at the NEA's creation. Instead
of working with Congress to develop art policies, the NEA has been in a largely defensive posture concerning its process and program, and has been operating without a clear sense of purpose. While policy vagueness had its advantages when the organization was first in operation, in recent years it has allowed the NEA to be a target for all political viewpoints.

An arts policy can be legitimate with respect to its program, its process, or both. The attacks from the political right concerning NEA funding of art work alleged to be “pornographic” or “obscene” compromised the agency’s program independence, as members of Congress and the executive branch injected themselves into the grantmaking process. Rather than taking positive steps to define the limits of NEA program independence via coherent arts policies, congressional opponents have undermined the organization’s effectiveness by attacking individual grant decisions. More effective and positive congressional action changed the composition of the peer panels in response to concerns about their effectiveness and impartiality, a change that may have limited the NEA’s process independence, but it did so in a clearly defined manner based on a specific policy rationale.

The NEA will be weaker and less effective than it could be until the limits of its program and process independence are clearly defined, and until it achieves increased fiscal independence. First, it requires an articulation of a coherent policy framework which will clearly define the limits of its program independence. This would include, for example, clear statements concerning to what extent the NEA should be dividing its efforts between elite and populist art. Second, it needs to restore confidence in the grantmaking process, making an effort to move grantmaking decisions from the Chairperson to peer panels perceived to be representative of the arts community.

B. Content Control and the Demise of Non-interference

The most disturbing outcome of the NEA’s failure to achieve inevitability is the increasing efforts by Congress to exercise content control over federally funded art. Content control is in total contradiction with both the letter and spirit of the Act, and it is, arguably, at odds with the Constitution. These partially successful efforts at content control may mark the death of the principle of non-interference, which was designed to be an essential element of the NEA’s guiding philosophy.

89. See supra note 57 and accompanying text.
90. Helms, supra note 13.
91. 20 U.S.C.A. § 959(c) (West Supp. 1991) (requiring the Chairperson to include a variety of geographic, ethnic, and minority perspectives on panels as well as lay individuals knowledgeable about the arts).
92. See supra notes 11 and 12 and accompanying text.
Correcting the Defects in the NEA

The issues of content control and artistic freedom have an important historical antecedent which reverberates ominously through recent debates. As noted above, the 1965 hearings and floor debates concerning the establishment of the NEA focused prominently on the issue of government interference in the creative process.\(^9\) H.R. 334, an early version of the Act proposed by Rep. William Moorhead and joined by more than one hundred cosponsors, contained a loyalty provision which would have required all individuals and representatives of organizations receiving federal arts support to sign a loyalty oath.\(^4\)

While this provision was not included in the final version of the Act, it foreshadowed the notion of Congress requiring the NEA to award grants based, in part, on the recipients agreeing to abide by terms concerning their own behavior. Recently, for example, congressional outrage at a handful of NEA grants resulted in a 1990 appropriations measure stating:

None of the funds authorized to be appropriated for [the NEA] may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts . . . may be considered obscene including but not limited to, depictions of sado-masochism, homo-eroticism, the sexual exploits of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.\(^5\)

This measure was passed after a vigorous legislative battle waged by Sen. Jesse Helms. A perennial critic of the NEA, Senator Helms first challenged the NEA in 1975 concerning a $5,000 grant which helped author Erica Jong write her bestseller *Fear of Flying.*\(^9\) His 1989 campaign, which led in part to the insertion of the “obscenity” control language in the 1990 appropriations measure, centered around two controversial NEA-sponsored photography exhibits featuring the work of Andres Serrano and Robert Mapplethorpe. The Serrano show included a work entitled *Piss Christ,* an image of a crucifix submerged in a container of Serrano’s urine. The Mapplethorpe show included several photographs with homoerotic themes.

In an attempt to comply with the language included in the appropriations measure, NEA Chairperson John E. Frohmayer drafted regulations requiring all grant recipients to sign a release acknowledging that they understood the

\(^9\) See supra note 28 and accompanying text.

\(^4\) “I do solemnly swear (or affirm) that I bear true faith and allegiance to the United States of America and will support and defend the Constitution and laws of the United States against all its enemies, foreign and domestic.” *National Arts and Humanities Foundation Act of 1965: Joint Hearings Before the Special Subcomm. on Arts and Humanities of the Senate Comm. on Labor and Public Welfare and the Special Subcomm. of the House Comm. on Education and Labor on H.R. 334, H.R. 2043, H.R. 3617 and Similar Bills, 89th Cong., 1st Sess. 5 (1965); see also BIDDLE, supra note 5, at 107.


\(^9\) Jong dedicated her controversial, best-selling book to the NEA. STRAIGHT, supra note 41, at 135-48 (describing how supporters of the NEA had to rally behind the organization as a result of the Helms attacks).
language of the congressional measure and would abide by it. Several recipients sued successfully to enjoin the use of the regulations alleging they represented impermissible prior restraint.\textsuperscript{97} Unstated in the discussion of the validity of content controls was their direct contradiction with the letter and spirit of the NEA's enabling Act and its commitment to non-interference.\textsuperscript{98} While the legal challenges were successful in defeating a direct attempt at content control, the entire discussion had a chilling effect on artists seeking grants and compromised the NEA's independence.\textsuperscript{99} The NEA's transformation from a quasi-governmental organization that would award grants to artists free of government influence, to a regulatory agency making grant decisions based on content, not quality, was underway.

C. The NEA on the Precipice: The 1990 Reauthorization Process

The 1990 NEA reauthorization process developed into an organizational struggle for survival. Congressman Pat Williams, a leading congressional supporter of the NEA, predicted in 1990 that the reauthorization would "confront the fundamental question whether the rights of freedom of expression can be reconciled with the duty of legislators to monitor the use of public funds."\textsuperscript{100} Based on the action of Congress, the answer may be "no."

After a debate lasting more than a year, the House and Senate finally agreed on the last day of the session (November 5, 1990) to extend the NEA's authorization.\textsuperscript{101} While the bill does not include a prior restraint measure like the one in the 1989 legislation, it does require the NEA Chairperson to ensure that grants are made "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."\textsuperscript{102} Artists receiving NEA grants who later have their work declared "obscene" by a court will be required to return their grant monies. "Decency" may be more difficult to define than "obscenity," and may have an even greater chilling effect on artists and the NEA.

The exact impact of the content guidelines is hard to assess. Elements of the reauthorization measure relating to earmarking of funds and grant decision-

\textsuperscript{97} Rohde, supra note 52, at 373-92. See also Karen Faaborg, Some Constitutional Implications of Denying NEA Subsidies to Arts Projects Under the Yates Compromise, 12 HASTINGS COMM. & ENT. L.J. 397 (1990). This requirement was recently overturned in federal district court. See Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774 (C.D. Cal. 1991).

\textsuperscript{98} See 20 U.S.C. § 953(c) (1988); see also supra text accompanying note 12.

\textsuperscript{99} See generally Fiss, supra note 11.

\textsuperscript{100} Rohde, supra note 52, at 373.

\textsuperscript{101} 1990 Authorization, supra note 7.

Correcting the Defects in the NEA

making, however, will have a significant impact on the operation and independence of the NEA. Under the reauthorization measure, the portion of the NEA appropriation earmarked for the state arts organizations will increase from 20% to 35% over the next three years. This will result in cuts in grants to national programs including major ballet and theater companies. Five percent of the state funds have been designated for arts programs in rural areas or the inner city. Under the measure, the NEA Chairperson will be granted increased powers, and the NCA will be given a veto power over all peer panel decisions. The NEA will also be required to increase the size of peer panels, broaden their ethnic and geographical diversity, and, for the first time, include non-artists.

It is possible to view the 1990 reauthorization proceedings as the most successful in NEA history. Congress clearly has the right to define general and specific policy goals for the NEA (program), and to better define the means by which those goals should be implemented (process). However, by failing to address squarely the issue of government control of artistic content, Congress has left the NEA with a very vague program mandate—the enforcement of “standards of decency.” This has had serious process impact as the Chairperson attempted to promulgate the regulations within which the grantees will operate.

The requirement that a larger percentage of the NEA budget go directly to the states represents a program mandate for increased decentralization of the arts (further weakening NEA fiscal independence). Additionally, by simultaneously strengthening the Chairperson and NCA, Congress has weakened the role of the peer panels—the NEA’s link with the broader arts community—which is a critical process change and limitation.

IV. RECOMMENDATIONS FOR RESTRUCTURING

At a time when artistic and political freedoms have begun to flower in Eastern Europe, a government arts agency in the United States has been forced to introduce policies restricting artistic liberty. While it may be that controversy and challenge are important contributors to artistic vitality, they place the NEA, as currently structured, in a dilemma. If the NEA plays politics, it compromises its mission. If it doesn’t play politics, it loses support. If it anticipates possible public outcry and modifies its behavior, it contributes to the softening of the cutting edges of art. If it does not respond, it threatens its own existence.

105. 20 U.S.C.A. § 959(c) (West Supp. 1991); Parachini, supra note 103.
Without major changes in the NEA, the tension between independence and accountability inherent in the NEA structure will continue to produce a predictable series of controversies, especially now that the general public is demanding to be part of the dialogue about what role the government should play in the arts. Recommendations for restructuring need to concentrate on the achievable goal of establishing clearly stated policy goals within which NEA decisionmakers can select grant recipients based on quality, not content.

A. Two Ideas That Won't Work

Looking for organizational models that might help the NEA function as was intended by the drafters of the enabling legislation may be futile. Perhaps Congress will attempt to control any entity it forms. There are no examples of organizations formed and funded by Congress which it later totally ignored. In other words, there may be no place for a government arts organization in the American system. One conservative commentator calls government art "mediocre art" and says that the best way to avoid the content control issue is to leave artists free to create, without government assistance. As Senator Helms has said, "refusing to subsidize something does not 'ban' it." Congressmen Philip Crane points to the $6.8 billion spent on the arts in 1988 by individuals, bequests, foundations, and corporations, and asks if the relatively insignificant $171 million spent by the NEA is really needed.

According to the American public, the answer is "yes." A 1990 study conducted for The People for the American Way Action Fund indicated that eighty-three percent of the public feels that the NEA "serves a very useful purpose for American society." Considering that the current outlay amounts to

106. Reverend Donald Wildmon of Tupelo, Mississippi, has organized the American Family Association in an effort to galvanize public opposition to the NEA. He has 535 chapters in all 50 states and a mailing list of 380,000 individuals. NEA Under Siege, MUSEUM & ARTS WASH., Nov./Dec. 1989, at 54. After Congress approved the 1990 authorization bill, Helms commented, "I say to the arts community and all homosexuals upset about this [decency provision] amendment: what is past is prologue. You ain't seen nothing yet." 42 CONG. Q. 3613 (Oct. 27, 1990). Even Orrin Hatch, a supporter of the legislation, issued a warning: "If there are any of these [offensive projects] funded in the future, they're [the NEA] going to be in trouble, and I'm going to be upset, too." Id. Helms made good on his promise during the "Corn for Porn" debate of October 1991. See Masters, supra note 73.


108. Helms, supra note 13, at 320.

109. Crane, supra note 2, at A27.

110. RESEARCH & FORECASTS, INC., THE AMERICAN PUBLIC'S PERSPECTIVE ON FEDERAL SUPPORT FOR THE ARTS, AND THE CONTROVERSY OVER FUNDING FOR THE NATIONAL ENDOWMENT FOR THE ARTS 16 (April, 1990) (survey of 1,200 U.S. adults prepared for The People for the American Way Action Fund). Only 13% of those surveyed support stricter content controls and funding cuts. Id. at 7-10. The conclusions of the survey were that the American public:

(1) stands strongly behind the NEA's role in fostering the arts;
(2) is satisfied with the NEA's performance and sides with the NEA on issues of artistic freedom of expression, not with Senator Helms and his supporters;
Correcting the Defects in the NEA

about $.70 per person (one third of what they contribute to the cost of a single B-2 bomber), if public support seems relatively secure.

If doing away with the NEA is not the answer, changing the enabling legislation to make the NEA more private than public in character may be effective. This idea was first suggested in 1981, when the Reagan transition team considered reconfiguring the NEA along the lines of the Corporation for Public Broadcasting (CPB). The CPB is a federally chartered, nonprofit and nongovernmental corporation. It is authorized to develop non-commercial television and radio services in the United States by providing funds to help local public stations obtain or produce programming. The CPB is guided by a ten-member board of directors selected by the President (with the advice and consent of the Senate) for five-year terms. The board selects a Chairperson from its ranks.

The Public Broadcasting Act set four major goals for the CPB:
1. to facilitate the production of diverse, high quality programming “with strict adherence to objectivity and balance in all programs . . . of a controversial nature”;
2. to establish a system for program distribution to allow public television and radio stations to have access to quality programming;
3. to provide financial and organizational support to those stations;
4. to operate in such a way as “to assure the maximum freedom of the public telecommunications entities and systems from interference with or control of program content or other activities.”

Though designed to shield public television and radio from political interference and to allocate funding for public television programming independent of political considerations, CPB has lived a very political existence. Like the

---

(3) believes that politicians in Congress are not the right people to make funding decisions. They would prefer NEA control of funding, leaving art content decisions to panels of citizens knowledgeable in the arts;

(4) believes the NEA should continue to fund artists whose work may be deemed controversial.

Id. at 24.

111. Fox, supra note 10, at 379.
112. Biddle interview, supra note 40. As one scholar has noted, “Reorganization has become almost a religion in Washington.” Seidman, supra note 15, at 3.
NEA, the CPB was part of Lyndon Johnson’s “Great Society.” While the commitment to noninterference over programming seemed clear, the organization has suffered from ideological tension and political dissension. For example, in 1972, President Nixon vetoed the 1973 appropriations measure because he did not like the political slant taken by public television. The Nixon White House believed that CPB-supported public television was becoming “a vehicle for political criticism of his administration.” Similar arguments were recently made by a group of conservative Senate Republicans who held up the CPB funding bill for the years 1994 to 1996, asserting that public television stations display a consistent liberal bias in their choice of programs.

The controversies during the Nixon and subsequent administrations have focused on politics and the issue of whether the CPB’s support for the development of a public broadcasting “network” was at odds with the intent of the Public Broadcasting Act of 1967. The CPB’s, greatest weakness has been that it never received the long-range authorization and financing it was promised at its creation. While long-range or independent funding was not part of the Public Broadcasting Act, President Johnson had guaranteed that he would submit a long term funding proposal within a year. Unfortunately, “a financially independent system of public broadcasting was a casualty of Vietnam along with the war on poverty.”

While a variety of proposals were made concerning long-term funding of the CPB, none were ever adopted. The CPB remains a captive of short-term federal authorizations and appropriations just like the NEA. The most popular proposal for long-range financing was to place an excise tax on television sets at the point of manufacture. Other proposals would have assessed a tax on the gross revenues of the commercial networks, created a public broad-

118. Mulcahy & Widoff, supra note 117, at 44.
119. Id.
120. Id. at 48.
121. THE CARNEGIE COMMISSION ON THE FUTURE OF PUBLIC BROADCASTING, A PUBLIC TRUST 43 (1979).
122. Id. at 41. Patrick Buchanan, a White House speechwriter at the time, appeared on television defending the Nixon veto and called one leading public television journalist “anti-administration,” another “a notorious Kennedy sycophant,” saying that “until we get that fair shake, network television can expect to be criticized.” Id. at 43-44. See also GEORGE H. GIBSON, PUBLIC BROADCASTING: THE ROLE OF THE FEDERAL GOVERNMENT, 1912-76, at 170-208 (1977); ERWIN G. KRASNOW & LAWRENCE D. LONGLEY, THE POLITICS OF BROADCAST REGULATION 61 (1978).
124. Mulcahy & Widoff, supra note 117, at 49. See also GIBSON, supra note 122, at 145.
125. Mulcahy & Widoff, supra note 117, at 49. An “independent” long-range funding possibility for the NEA might be a one percent excise tax on all entertainment event tickets. While such a tax would raise a significant amount of income, it would be vulnerable to attack as regressive and an unfair burden on entertainment event organizers.
126. GIBSON, supra note 122, at 148.
Correcting the Defects in the NEA

casting “trust fund” in the Treasury Department, or charged a license fee to every home with a television as in Great Britain.\textsuperscript{127} These proposals were never passed, as there was resistance from Treasury officials and Congress.\textsuperscript{128}

While there are features of the CPB and other quasi-governmental organizations (like the National Science Foundation) that might provide some guidance for restructuring the NEA, no single structure utilized by another organization seems suited for the particular dynamics of a government arts organization. In the sections that follow, recommendations for tailoring changes in the program and process of the NEA are proposed. By accepting defined limits on program independence (less independence) the NEA could reap more significant process independence (less accountability).

B. A National Arts Policy Favoring Populism

Congress, with input from the public and executive branch, should first establish broad arts policy goals. These goals must include a philosophy about what kind of art should be encouraged, by and for whom it should be created, and under what level of government oversight. This philosophy must not be confused with content control. Congress could say that only painters, or dancers, or educational programs would be funded in a particular year; it couldn’t say that only women, or gay men, or marxists would be funded.

The “people’s” will would be important in the decisionmaking process establishing these broad policy goals, not specific grant awards. After all, while the public input is presumed to be important on the question of whether we build bombs, or stress conventional weapons over nuclear weapons, no one offers the public a say in exactly what kind of bomb to build. Neither Congress nor the President has ever clearly articulated either an arts policy or the rationale underlying it. Only when these political actors, with the assistance of the public, the NEA Chairperson, and NCA define the precise parameters of an arts program can the NEA administer an effective grantmaking process.

Because private sources of funds have historically supported elite art forms and institutions,\textsuperscript{129} the government should focus its attention on areas traditionally neglected by private benefactors. The focus should be on democratiza-

\textsuperscript{127} Mulcahy & Widoff, supra note 117, at 49.
\textsuperscript{128} Id. The Carnegie Commission on Education Television, whose report led to the creation of the CPB, had wanted to establish an institution without precedent in the American governmental structure, “an institution which could be financed by government and responsible to the public but at the same time free from political interference.” Id. at 49-50. At least in the public broadcasting context, this goal proved elusive. It should be noted that like the NEA, the CPB has been successful at using government funding as seed money to leverage additional private and public support. CORPORATION FOR PUBLIC BROADCASTING, supra note 114, at 29.
\textsuperscript{129} Feld \textit{et al.}, supra note 20, at 24-71.
tion of the arts, the spreading of art to a more diverse segment of the population, and the preservation of art treasures.\textsuperscript{130}

Democratization may result in a reduction of the NEA’s ability to help fund national dance and theater companies and major art retrospectives, as the grants go not to a central core of large, national arts organizations, but are “decentralized,” going to smaller, regional arts groups. However, democratization through the decentralization of grants is the most effective way to spread artistic creation and arts education to a wider range of geographic and economic groups. The recent congressional action to mandate five percent of the NEA budget for inner city and rural “access to art” programs, though limiting fiscal independence, is a good example of such an initiative.\textsuperscript{131} Congress should also ask the NEA to take a more proactive approach to arts education, by working as an advocate for arts education, facilitating collaboration among those involved in teaching art, and by assisting in the development and distribution of curricular materials.\textsuperscript{132} In addition to exposing a larger segment of school children to art in all its forms, democratization and decentralization would lay the groundwork for a broader consensus for the arts in the future.

What the government’s role in overseeing its arts policy should be is as much a \textit{program} as a \textit{process} decision. If its other policy goals are well defined, Congress would not have to be as aggressive about requiring yearly appropriations hearings and frequent reauthorization proceedings. While one of the founding principles of the NEA was that creativity of the artist and arts community is stifled by too much government interference, it would be proper, however, for Congress to express a preference for an art policy stressing “populism” over “elitism,” and to mandate that a certain percentage of the budget be allocated for state programs or educational projects.

An effort should be made to secure five-to-ten year authorizations and appropriations measures of three-to-four years for the NEA; the realities of politics suggest, however, that such a development would require a difficult political struggle. While they are unusual, multi-year authorizations and

\textsuperscript{130} Kevin Mulcahy, a leading analyst of the NEA’s history, administrative structure, and function, has called for a policy encouraging “artistic excellence that is broadly acceptable.” Kevin Mulcahy, \textit{Statement Before the Independent Commission 13} (August 1, 1990) (considering restructuring of the National Endowment for the Arts) (transcript on file with author).

The Independent Commission was a twelve member bi-partisan study group created by the 1990 Appropriations Act. Its mandate was to review the NEA’s grant making procedures, including the use of peer panels, and to consider whether the standard for publicly funded art should be different from the standard for privately funded art. 1990 Appropriations Act, supra note 95, at § 304(c). The Independent Commission, in its September 1990 report, recommended strengthening the Chairperson and making her role as the sole decisionmaker on grants more explicit in the NEA enabling act. \textit{INDEPENDENT COMMISSION, supra} note 83, at 63. They also recommended a variety of changes that would increase scrutiny on the peer panels and NCA. \textit{Id.} at 69, 75. The Independent Commission also recommended against any legislative restrictions on the content of works of art supported by the NEA. \textit{Id.} at 89.


\textsuperscript{132} Charles Fowler, \textit{Arts Education and the NEA: Does the National Science Foundation Point the Way?}, \textit{91 Design for the Arts in Educ.} 1253, 1253 (1990).
Correcting the Defects in the NEA

appropriations do exist. Multi-year authorizations would still allow for congressional oversight and require NEA accountability, but they would place the process on a schedule less likely to result in congressional interference. The political deal that could make such an arrangement possible might involve a trade of NEA program independence, via the move toward democratization and earmarking of funds, in return for greater process and fiscal independence, in the form of less frequent oversight.

C. Progress via Process

The curtailment of NEA program flexibility and independence which would result from the articulation of the kind of specific arts policies outlined above, should be further balanced with an additional grant of process independence. The locus of decisionmaking power should be moved from the Chairperson to the peer panels. Under this plan, the Chairperson's responsibilities would become strictly administrative, assisting Congress in the development of program parameters and acting as an advocate for the arts. The NCA would also participate in the policy development process, and would continue to act as an advisory body.

The peer panels would become the official decisionmakers in the grant-making process. While the Chairperson has only rarely overturned a peer panel grant recommendation in the past, the Act should be amended to make the panels the final authority in the NEA process. As a diverse group of experts, they are the most capable of being sensitive to public concerns while being aware of the need to encourage artists and arts organizations to explore new art forms and challenge convention. Transferring this authority from an easily identified and pressured individual—the Chairperson—to a large, anonymous group of citizen/experts—the panels—offers politicians "plausible deniability" for any specific decision. This process would lessen the incentives for politicization of the grant process.

In addition, there is public support for the concept of putting decision-making about the arts in the hands of experts. Support for the peer panel

---

133. See CARNEGIE COMMISSION ON THE FUTURE OF PUBLIC BROADCASTING, supra note 121, at 51 (discussing multi-year funding for the CPB). See also Walter W. Powell & Rebecca Jo Friedkin, Politics and Programs: Organizational Factors in Public Television Decision Making, in NONPROFIT ENTERPRISE IN THE ARTS, supra note 18, at 248 (noting the three-year appropriation granted to the CPB, in the wake of Nixon's veto, was "intended to provide more stable and unobtrusive federal support and to allow public broadcasting to engage in more effective long-term planning"). For a discussion of the appropriations process, see Louis Fisher, The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices, 29 CATH. U. L. REV. 51 (1979).

134. See Honan, supra note 46 and accompanying text.

135. In a June 1989 poll sponsored by Newsweek, 58% of the U.S. public believed that experts should be the judge of what constitutes art. When Taxes Pay for Art: Lawmakers Feel Heat, NEWSWEEK, July 3, 1989, at 68.
concept can be increased by continuing the recent moves toward making them more diverse, especially in terms of the panelists' background and geography. Knowledgeable citizens who are not arts professionals should be part of every panel, and all panel meetings should be open, when feasible. These reforms will encourage a wide variety of different approaches to grantmaking and guidelines. While developing arts policy will remain political, the grantmaking process would be located far from the center of political power—and influence.

D. Conclusions

Compared to many other nations, the people and government of the United States have always been ambivalent about a government role in the arts. Given the history of problems with the National Endowment for the Arts, their ambivalence is well warranted. As currently structured, the NEA is subject to constant tension between its QUAGO-inspired interest in independence, and its sunset-inspired need for accountability.

Congress has never altered the statute that guarantees funding of the arts without interfering with artistic creativity. The events of the last few years indicate, however, that while there remains a commitment to the statutory “language” of independence, the NEA and the artists to whom it offers grants remain accountable to Congress.

One observer asks the threshold questions: “Is this country capable of funding the arts? Is it mature enough to understand that a culture under orders is no culture at all—it is an instrument of the state?” The answer is yes. Working under strict program guidelines consisting of broad arts policies and narrow congressional mandates, NEA peer panels can select institutions and individuals for grants based on artistic quality, not subject matter or political viewpoint. It is possible for the NEA to be both independent and accountable.

136. Fox, supra note 10, at 381.