



Towards a More Secure Future: Reauthorization of the National Endowment for the Arts

Nancy Coyle

Follow this and additional works at: <https://via.library.depaul.edu/jatip>

Recommended Citation

Nancy Coyle, *Towards a More Secure Future: Reauthorization of the National Endowment for the Arts*, 8 DePaul J. Art, Tech. & Intell. Prop. L. 349 (1998)
Available at: <https://via.library.depaul.edu/jatip/vol8/iss2/5>

This Legislative Updates is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

LEGISLATIVE UPDATES

TOWARDS A MORE SECURE FUTURE: REAUTHORIZATION OF THE NATIONAL ENDOWMENT FOR THE ARTS

INTRODUCTION

The National Endowment for the Arts (NEA) faced a formidable challenge to its very existence this past year in a prolonged Congressional battle, fought, not surprisingly, along partisan lines. The first shots were fired in January, 1997, when long-time NEA nemesis Jesse Helms introduced a Senate bill that called for the termination of the agency,¹ and Philip Crane also introduced a similar bill in the House of Representatives.² These bills were later incorporated into proposed amendments to the House and Senate Appropriation Acts for the Department of the Interior for fiscal year 1998.³ Three additional amendments proposed the elimination or restructuring of the NEA.⁴ The Republican controlled House voted in July to abolish the endowment by a margin of one vote.⁵ In September, the Senate voted against the amendments affecting NEA funding, under threat of a presidential veto of any appropriations bill that did not keep the agency funded

1. National Endowment for the Arts Termination Act of 1997, S. 48, 105th Cong. (1997).

2. Privatization of Art Act, H.R. 122, 105th Cong. (1997).

3. H.R. 2107, 105th Cong. (1997).

4. See 143 CONG. REC. S9347 (daily ed. Sept. 15, 1997), 143 CONG. REC. S9486 (daily ed. Sept. 15, 1997), 143 CONG. REC. S9303 (daily ed. Sept. 15, 1997).

5. National Endowment for the Arts, *Year-End Review*, (visited Feb.27, 1998) <<http://www.nea.gov/Guide/Facts/Yearend12-10.html>>.

at 1997 levels.⁶ A conference committee of House and Senate members was appointed to reconcile the positions of both congressional bodies.⁷ This committee approved the NEA's \$100 million budget, but not without new restrictions on how the money will be used.⁸ A bill that would reauthorize the NEA for five years and would make changes in administration, grant making and priorities for funding passed the Senate Labor and Human Resources Committee in July 1997.⁹ Section I of this article will examine the background of the NEA and the history of the current controversies, Section II will discuss the reaction of the legislature and the new restrictions on the NEA, and Section III will discuss the pending reauthorization bill and possibilities for a more secure future.

I. BACKGROUND

A. *History of the NEA*

The founding of a federal agency to support the arts in America had its beginnings in a labor dispute.¹⁰ The musicians of the Metropolitan Opera's orchestra in New York, members of Local 802 of the American Federation of Musicians, went on strike in 1961.¹¹ The musicians had been receiving a salary that was about half of the minimum wage at the time.¹² Arthur J. Goldberg, the Secretary of Labor under President Kennedy was appointed to arbitrate.¹³ He found the performing arts to be in a state of financial crisis.¹⁴ In his decision statement regarding the labor

6. Jacqueline Trescott, *NEA Survives Key Vote*, WASH. POST, Oct. 1, 1997, at C01.

7. *Id.*

8. *Id.* See *infra* Part II(B)(1-3).

9. S. 1020, 105th Cong. (1997).

10. 143 CONG. REC. S9303, at S9318 (statement of Sen. Moynihan).

11. *Id.*

12. *Id.*

13. *Id.*

14. Arthur J. Goldberg, *Text of Goldberg's Statement Urging U.S.*

dispute, he urged the Federal Government to support the arts.¹⁵ Mr. Goldberg envisioned a partnership between the public, benefactors and patrons, state and city governments, corporations, the labor movement, and the federal government to provide financial support.¹⁶ President Kennedy appointed a commission to make recommendations for a solution to the problem.¹⁷

As a result, the National Endowment for the Arts was created in 1965, along with a related agency, the National Endowment for the Humanities.¹⁸ The Act recognized the importance of the arts in our nation's cultural heritage and in the education of our children.¹⁹ The Act authorized government financial support of the arts by the following statements:

While no government can call a great artist or scholar into existence, it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent.²⁰

It is vital to a democracy to honor and preserve its multicultural artistic heritage as well as support new ideas, and therefore it is essential to provide financial assistance to its artists and the organizations that support their work.²¹

The Act requires that all grant money distributed to arts organizations must be matched by private funds.²² This matching requirement has the effect of rewarding private fund raising and

Support for Performing Arts, N.Y. TIMES, Dec. 15, 1961, reprinted in 143 CONG. REC. S9303, at S9319 (daily ed. Sept. 15, 1997).

15. 143 CONG. REC., at S9320.

16. *Id.*

17. National Arts and Cultural Development Act of 1964, Pub. L. No. 88-579, 5(a), 78 Stat. 905, 905-06, reprinted in 1964 U.S.C.C.A.N. 1030, 1031.

18. National Foundation on the Arts and Humanities Act, 20 U.S.C. §951 (1965).

19. *Id.*

20. 20 U.S.C. §951(7).

21. 20 U.S.C. §951(10).

ensuring that neither the government nor the arts organizations and their private benefactors have to bear the entire cost of their program. For example, the American Film Institute receives about five percent of its budget from the NEA, funds from individual donors, foundations, gala events, a film festival, merchandising and an exhibit at the Disney-MGM Studios tour make up the rest of the Institute's \$12 million budget.²³

B. Accomplishments

The NEA has been very successful in increasing access to the arts and increasing private contributions. In 1965, there were 58 orchestras, 37 dance companies, 27 opera companies and 22 professional theaters operating nationally.²⁴ Private contributions to the arts was approximately \$250 million per year.²⁵ By 1990, the nation had 230 orchestras, 250 dance companies, 120 opera companies, and 420 professional theaters, and approximately \$6 billion per year in private funds were given to the arts.²⁶ The NEA is an important part of the non-profit arts industry, which supports 1.3 million jobs and generates \$36.8 billion annually, returning \$3.4 billion in Federal income taxes.²⁷

The agency has also funded many programs that have increased access to the arts at the local level.²⁸ For example, Albuquerque, New Mexico has a program for teenagers called the Working Classroom that provides free, year-round art and theater

23. Ted Johnson, *Going Public; Non-profit AFI Reaches Beyond Big Donors, Government in its Mission*, VARIETY, June 16, 1997 (Special Supp.: AFI at 30, at 1).

24. John Brademas, Fourth Annual American Council for the Arts, Nancy Hanks Lecture On Arts And Public Policy (1991), *reprinted in* 137 CONG. REC. E1585 (daily ed. May 2, 1991).

25. *Id.*

26. *Id.*

27. 143 CONG. REC. H 7651, at H7652.

28. Jean Latz Griffin, *On Art's Canvas, Clashing Visions*. CHI. TRIB., Sept. 18, 1997, §2, at 1. (describing organizations funded by the Illinois Arts Council, which receives funds from the NEA, many of which benefit residents of suburban and rural areas of the state.)

education.²⁹ The Working Classroom has also contributed to urban beautification by painting murals.³⁰ This program received \$15,000 from the NEA through a state grant.³¹

C. Current Controversies

In spite of all the impressive accomplishments of the NEA over the years, conservative groups and their supporters in Congress have attacked the agency because a handful of controversial art works received public funding.³² In 1989, two exhibits partially supported by the NEA came to the attention of the religious right and caused a well-publicized furor.³³ One of these exhibits featured homoerotic photographs by the late Robert Mapplethorpe, and the other contained a photograph by Andres Serrano of a crucifix in a jar filled with urine.³⁴ Senator Helms led the attack in Congress against the use of taxpayer's money in financing works of art found to be offensive, blasphemous and pornographic by himself and other conservatives.³⁵ A vigorous debate ensued regarding censorship, freedom of speech, public support of the arts, and artistic value.³⁶

As a result of this controversy, the 1990 Appropriations Bill contained a provision by Congressman Sidney Yates, Chairman of the House Appropriations Subcommittee, for the creation of an Independent Commission to review the grant making procedures of

29. 143 CONG. REC. S 9450, at 9474 (daily ed. Sept. 23, 1997)(statement of Senator Bingaman).

30. *Id.*

31. *Id.*

32. See generally Kim M. Shipley, *The Politicization of Art: The National Endowment for the Arts, the First Amendment, and Senator Helms*, 40 EMORY L.J. 241 (1991) (providing a thorough background of the 1989 controversy and the unconstitutionality of grant restrictions).

33. *Id.*

34. *Id.* at 241-42.

35. *Id.*

36. See Amy Adler, *What's Left? Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CALIF. L. REV. 1499 (1996); see also

the NEA.³⁷ The bipartisan Commission unanimously recommended “against legislative changes to impose specific restrictions on the content of works of art supported by the Endowment.”³⁸ The Commission reasoned that “content restrictions may raise serious constitutional issues, would be inherently ambiguous and would almost certainly involve the Endowment and the Department of Justice in costly and unproductive lawsuits.”³⁹ Congress ultimately disagreed with this determination, and the Act was amended in 1990 in order to prevent the NEA from funding art found to be obscene under a test based on the Supreme Court’s decision in *Miller v. California*.⁴⁰ This amendment prohibited the NEA from funding works that, “when taken as a whole, do not have serious literary, artistic, political, or scientific value.”⁴¹ The NEA required every grant applicant to sign a pledge promising not to use a grant for obscene art.⁴² Grants were denied to artists who would not sign the pledge, and several grant recipients refused to accept their grants in protest of the amendment.⁴³ The pledge was subsequently held to be unconstitutionally vague in a federal district court decision.⁴⁴

37. Brademas, *supra* note 24, at 143 CONG REC, E1 585.

38. *Id.*

39. *Id.*

40. In *Miller v. California*, the Court used a three-pronged test for obscenity: (1) Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973).

41. Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 304 (b)(4)(D) (1990). See Pamela Weinstock, *The National Endowment for the Arts Funding Controversy and the Miller Test: A Plea for Reunification of Art and Society*, 72 B.U. L. REV. 803 (1992).

42. Weinstock, *supra* note 41, at 810.

43. *Id.*

44. *Bella Lewitzky Dance Fund v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991). In this case, the NEA withheld the plaintiffs’ grants because the plaintiffs objected to the obscenity pledge contained in the terms and

The 1990 obscenity amendment was replaced in 1991 with a new amendment that substituted a court's finding of obscenity for the NEA's judgment.⁴⁵ This amendment included the following standard for judging grant applications: "[A]rtistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American people"⁴⁶

The constitutional issue raised by the 1991 amendment was decided in a Ninth Circuit decision in 1996 against the NEA.⁴⁷ The court held the application standard was void for vagueness under the Fifth Amendment,⁴⁸ and the 1990 amendment to the Act was also a content and viewpoint-based restriction on speech in violation of the First Amendment.⁴⁹ The Supreme Court has granted certioria to hear this case in the 1998 term.⁵⁰

Conservatives continue to fight against the use of federal funds for art they consider offensive. Senator Helms mentioned the above Ninth Circuit decision in his remarks introducing the NEA Termination Act. He said that the "liberal" court "thumbed its nose" at the American people for allowing the NEA to fund "decadent acts" by the artists.⁵¹ His justification for eliminating public arts funding was entirely based on his opinion that the NEA funds works that have no value, produced by immoral people who are not artists.⁵² In the debate over his 1994 proposed amendment

conditions of the award. The court found that the NEA policy statements were unconstitutionally vague because the determination of obscenity was left in the hands of the NEA, and the agency could not provide the procedural safeguards outlined in *Miller*. The court also found that the policy had a chilling effect on the plaintiffs' First Amendment artistic expression rights. This chilling effect was shown to be exasperated by the dominant and influential role of the NEA in the artistic community.

45. 20 U.S.C. §952 (1997).

46. 20 U.S.C. §954(d) (1997).

47. *Finley v. National Endowment for the Arts*, 100 F.3d 671 (9th Cir. 1996), cert. granted, 118 S. Ct. 554 (1997).

48. *Id.* at 681.

49. *Id.* at 683.

50. *Court Decisions*, NAT'L L.J., Dec. 15, 1997, at B22.

51. 143 CONG. REC. S414.

restricting the content of funded works, he referred to certain artists as “homosexual or otherwise perverse mentalities” and “human cockroaches.”⁵³ Mr. Helms has support for his views on arts funding from other members of Congress.⁵⁴ For example, Senator Hutchison gives the funding of “obscenity” and “pornography” as one of the reasons behind her recent proposed amendment to reallocate federal funds to the states.⁵⁵ Despite this inflammatory rhetoric, in reality only a very small percentage of works funded by the agency have actually been controversial. Out of 112,000 grants in 32 years, only about 40 works have been controversial.⁵⁶ These works were largely the result of individual grants and subgrants that the NEA is no longer involved with because such grants were prohibited by 1996 appropriations legislation.⁵⁷

Critics of the NEA also complain that elitism and favoritism of the administration effects which grant applicants receive funds.⁵⁸ This charge is not without foundation, for example, in 1997, eighty-five percent of the grants went to programs that have received NEA funding before, and only fifteen percent of the grants went to new programs.⁵⁹ A related problem is that there has been disproportionate spending to the states.⁶⁰ One third of NEA funds have gone to six cities: New York, Boston, Los Angeles, Chicago, San Francisco, and Washington D.C.⁶¹ When the distribution by state is looked at, the state of New York received \$17,196,091 for 275 grants in 1997, while Arkansas received

53. 140 CONG. REC. S9606 (daily ed. July 25, 1994).

54. See Shipley, *supra* note 32, at 241.

55. 143 CONG. REC. S9303.

56. This works out to .036% of the total applications in the last 32 years. 143 CONG. REC. S9450, at 9471.

57. 143 CONG. REC. S9303, AT S9322. An individual grant is awarded directly to an individual artist, as opposed to an organization. A subgrant is made when a grant to an organization in turn issues a grant to another project or individual from those funds.

58. Robert Brustein, *Mend It, Don't End It; National Endowment for the Arts*, NEW REPUBLIC, Oct. 6, 1997, at 29.

59. 143 CONG. REC. S 9303, at S9310.

60. *Id.*

61. *Id.*

\$410,200 for one grant.⁶² High administrative costs are another concern.⁶³ Administrative costs for 1997 were approximately nineteen percent of the agency's budget, representing an increase from fourteen percent in 1994.⁶⁴ The agency budget was cut by thirty-nine percent and lost 89 positions since 1994, and yet the administrative costs have risen.⁶⁵ The above concerns were expressed during the Senate debates regarding the defeated amendments, by NEA supporters as well as detractors. The supporters acknowledged the existence of problems, however they believed the problems could be fixed while maintaining the existing structure. The NEA has published a report on the current state of nonprofit arts, *An American Canvas*, that acknowledges the problems of elitism in the arts, lack of community involvement, and the need for increased education.⁶⁶ The report proposes solutions to these problems, and challenges individuals, the corporate and civic sectors, the arts community and the media and entertainment industries to take actions to help save the nonprofit arts.⁶⁷

II. LEGISLATION

A. Defeated Amendments

Three of the Senate amendments to the 1998 Appropriations Bill would have completely eliminated the NEA.⁶⁸ The Helms/Ashcroft and the Abraham amendments called for an end to all government funding of the arts.⁶⁹ The Hutchinson/Sessions and

62. Jill Lawrence, *How the NEA gets into Predicaments*, USA TODAY, Oct. 2, 1997, at 10A.

63. 143 CONG. REC. S9303, at S9311.

64. *Id.*

65. *Id.*

66. See generally, National Endowment for the Arts, *An American Canvas*, (Oct. 13, 1997) <<http://arts.endow.gov/Community/AmCan/html>>.

67. *Id.*

68. See *supra* text accompanying note 4.

the Hutchison amendments would have continued public arts funding, but would have sent all or three quarters of the money directly to the states for administration.⁷⁰ This section will discuss each of these amendments in more detail.

1. Helms/Ashcroft Amendment

The Helms/Ashcroft amendment would have eliminated funding for the NEA and terminate the agency.⁷¹ The amendment's sponsors reasoned that the arts do not need public money because the amount the government contributes is insignificant and because other sources of funding are available.⁷² They believe the American people need additional tax relief instead.⁷³ The sponsors believe that the NEA imposes its own values on what is art and culture and the public may not always agree with these determinations.⁷⁴ Senator Ashcroft analogized the NEA's allocation of resources to communist governments' use of centralized planning.⁷⁵ In addition, Senator Helms believes the government should not be involved in arts funding because obscene and offensive works are being funded by taxpayers.⁷⁶ The two Senators also believe that Congress has no constitutional authority to fund the NEA because the power to subsidize the arts is not listed among the powers enumerated and delegated to the Federal Government.⁷⁷ The Helms/Ashcroft amendment was defeated by a vote of 77-23.⁷⁸

70. 143 CONG. REC. S9347, at S9348.

71. 143 CONG. REC. S9303, at S9314.

72. 143 CONG. REC. S9450, at S9465.

73. *Id.* at S9466.

74. *Id.*

75. 143 CONG. REC. S9303, at S9320.

76. *Id.* at S9325.

77. *Id.* at S9326. The 10th Amendment requires that powers not delegated to the federal government in the Constitution are reserved to the states or to the people. U.S. CONST. Amend. X.

78. 143 CONG. REC. S9450, at S9483.

2. *Abraham Amendment*

The Abraham amendment sought to privatize the NEA by reducing its funding over three years, at which time it would be replaced with private support.⁷⁹ Privatization would allow the agency to continue in its present form, but outside of the political arena.⁸⁰ The Senator feels that there would be enough support from private sources for the Endowment to sustain itself in an independent form.⁸¹ \$30 million from the NEA appropriation would be used to support national treasures such as Ellis Island, presidential papers, Mount Rushmore, etc. and to protect them from deterioration.⁸² The Abraham amendment was defeated 26 to 73.⁸³

3. *Hutchinson/Sessions Amendment*

The Hutchinson/Sessions amendment called for termination of the NEA with grants to the individual states instead.⁸⁴ The Senators believe that the NEA has not fulfilled its mission to broaden public access to the arts because most of the grants go to artists and organizations in large cities.⁸⁵ Under this amendment, 45 out of 50 states would receive more money, while five states would receive less.⁸⁶ The amendment would impose the following conditions on the use of funds: No project or production "that (A) denigrates the religious objects or religious beliefs of the adherents

79. 143 CONG. REC. S9486, at S9487.

80. *Id.*

81. *Id.* Senator Abraham stated that there are many private institutions that are larger than the NEA, and that national support for arts activities amounts to \$9 billion per year. *Id.*

82. *Id.*

83. 143 CONG. REC. S9486, at S9495.

84. *Id.*

85. 143 CONG. REC. S9363, at S9370. Six cities receive over one-third of the total grants awarded. As one example of the disparity, the state of Arkansas received only \$400,000 in 1996, while the Whitney Museum in New York City received that amount for just one exhibit.

86. 143 CONG. REC. S9308, at S9312.

of a particular religion; or (B) depicts or describes, in a patently offensive way, sexual or excretory activities or organs” would be acceptable.⁸⁷ These conditions “shall be strictly applied without regard to the content or viewpoint of the project or production.”⁸⁸ The Hutchinson/Sessions amendment was defeated 37 to 62.⁸⁹

4. Hutchinson Amendment

The Hutchison amendment kept the same amount of money in the budget for the NEA, but mandated that seventy-five percent of the appropriation would be redirected as block grants to the individual states to fund their own arts projects directly.⁹⁰ Under this plan, most of the states would receive more money than they currently do through the federal system.⁹¹ The NEA would distribute twenty percent of the appropriation to national groups and institutions, and five percent would be used for administrative costs.⁹² All national grants would require matching grants from private sources.⁹³ Senator Hutchison believes that this program would eliminate the problems of “obscene” works being funded by the NEA and the inequitable distribution to the states.⁹⁴ The Hutchison amendment was defeated by a vote of 39 to 61.⁹⁵

The defeat of these amendments that sought to eliminate or severely curtail the agency demonstrates that a majority of Congress recognize the NEA’s necessity to the development of the arts. An elimination of government funding to the arts through the NEA would have three effects on the arts.⁹⁶ First, it would remove

87. 143 CONG. REC. S9347, at S9350.

88. *Id.*

89. 143 CONG. REC. S9486, at S9496.

90. 143 CONG. REC. S9347.

91. 143 CONG. REC. S9303, at S9308.

92. 143 CONG. REC. S9303, at S9307.

93. *Id.*

94. 143 CONG. REC. S9303.

95. 143 CONG. REC. S9532, at S9536.

96. Thomas P. Leff, *The Arts: A Traditional Sphere of Free Expression? First Amendment Implications of Government Funding to the Arts in the Aftermath of Rust v. Sullivan*, 45 AM. U. L. REV. 353, 405 (1995).

a large amount of support for the arts and would have a negative impact on many art organizations ability to attract non-government funds.⁹⁷ Second, the development of new and promising programs would be hindered because they will not receive the national recognition provided by the NEA.⁹⁸ Third, the United States would lose its stature as an international leader in the arts, and this would send a negative message about the United States' values and priorities to other nations.⁹⁹

B. New Restrictions on the Agency

Although each of the above amendments were defeated in the Senate and the Senate version of the 1998 Appropriations Bill included funds for the NEA, the House had previously voted against including the NEA in the House Appropriations Bill.¹⁰⁰ A joint House and Senate conference met to reconcile these differences.¹⁰¹ The conference voted unanimously to continue the Agency, but imposed several new conditions on it.¹⁰² This section will examine the substance and impact of these new conditions.

1. Increased Funding to the States

Funding allocated to the individual state arts agencies will be increased from thirty-five percent to forty percent.¹⁰³ This increase will allow the states more money to develop their own programs, such as regional arts centers and arts education for children and adults; this may make up for the decrease to national programs. No more than fifteen percent of the total NEA grant money can go

97. *Id.*

98. *Id.*

99. *Id.* at 406.

100. National Endowment for the Arts, *Year-End Review*, (visited Feb. 27, 1998) <<http://arts.endow.gov/Guide/Facts/Yearend12-10.html>>.

101. 143 CONG. REC. H7651.

102. Julia Duin, *Leaders' Deal to Fund NEA Angers House GOP*

Rebels', WASH. TIMES, Oct. 3, 1997, at A2.

to any individual state.¹⁰⁴ The cap is flexible because programs that have a national impact or that tour to several states would not be included in the fifteen percent.¹⁰⁵ The only state that currently receives more than fifteen percent of grant funds is New York, which last year received about twenty percent.¹⁰⁶ The cap may not actually have a negative effect on New York because many of their programs could meet the national impact requirement.¹⁰⁷ If this turns out to be the case, the effect of the increase to the other states will be negligible.

2. Grant Priorities

Priority must be given to educational grants and programs that would impact under-served populations, such as communities that do not have access to the cultural institutions in larger cities. Projects that will encourage public knowledge, education, understanding and appreciation of the arts must also be given priority. The ban on grants to individual artists, subgrants and seasonal support will be continued.¹⁰⁸ The allocation for the agency's administrative expenses have been frozen at the fiscal year 1997 level.¹⁰⁹ The NEA was given the authority to solicit and invest funds from the private sector.¹¹⁰

3. Congressmen Appointed to Council

The most potentially problematic condition imposed on the NEA requires six members of Congress to serve on the National Council

104. *Id.*

105. *See Year-End Review, supra* note 100.

106. Susan Benkelman, *Does NEA Deal Target New York*, NEWSDAY, Oct. 2, 1997, at A39.

107. Jerry Gray, *Cuts to Arts Budgets Would Hit New York Hardest*, N.Y. TIMES, Oct. 2, 1997, at A14.

108. Duin, *supra* note 102, at A2.

109. *See Year-End Review, supra* note 100.

on the Arts.¹¹¹ These Congressmen will serve the Council in a non-voting capacity and will provide advice on policy matters.¹¹² The size of the Council was also reduced from twenty-six members to twenty.¹¹³ The Council is an advisory body composed of members who each have knowledge and expertise in the arts.¹¹⁴ Current members include scholars, artists from various fields, educators, directors of performing arts companies, and museum directors.¹¹⁵ The Council advises the Chairman of the NEA on such matters as recommendations on applications for grant funds, NEA policy guidelines and budget allocations, and funding priorities.¹¹⁶ The Chairman may not fund grant applications that the Council has rejected.¹¹⁷ A potential disadvantage of having Congressmen on the Council could be that only the most mainstream, safe projects will be approved.

Interaction between the NEA and Congress does find some support in the statute:

Public funding of the arts and humanities is subject to the conditions that traditionally govern the use of public money. Such funding should contribute to public support and confidence in the use of taxpayer funds. Public funds provided by the Federal Government must ultimately serve public purposes the Congress defines.¹¹⁸

111. Four members for fiscal year 1998 were appointed by the Speaker and Majority Leaders of the House of Representatives and the Senate, and two were appointed by the Minority Leaders of the House and the Senate. The appointees are: Senators Susan Collins (R-ME), Richard Durbin (D-IL), and Jeff Sessions (R-AL), and Representatives Cass Ballenger (R-NC), John Doolittle (R-CA), and Nita Lowey (D-NY). NEA News (Feb. 27, 1998) <<http://arts.endow.gov/Community/News/FebrNCA98.html>>

112. *See Year-End Review*, *supra* note 100.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. National Foundation on the Arts and Humanities Act, 20 U.S.C.

However, the U.S. Department of Justice Office of Legal Counsel has advised the NEA that legislation requiring members of Congress to serve on the Council is “constitutionally questionable in the absence of contrary authority from the Supreme Court.”¹¹⁹ Perhaps this provision will be challenged in court at some point.

The presence of Congressmen in this Council may work to the Agency’s advantage in the long run. If the Congressmen are involved in the recommendation process for grant funds, this could help eliminate several of the complaints NEA opponents have, such as elitism, funding of obscene or offensive works, and disproportionate spending to the states. Concerns about excessive administrative costs may lessen when congressmen participate directly in the Agency’s budget process. Hopefully, adding Congressmen to the Council will ultimately improve communication and cooperation between the legislature and the NEA, and perhaps create a greater appreciation for the challenges and accomplishments of the NEA.

III. REAUTHORIZATION BILL

Despite the debates and conferences, the NEA has survived, largely intact, for another year. A long-run solution is obviously necessary to ensure the agency’s continuation. Without a reauthorization, the agency must undergo a similar process every year at appropriations time.¹²⁰ A longer-lasting fix may come from Senators Jeffords, Kennedy, and Chafee, who currently sponsor the Arts and Humanities Amendments of 1997, a reauthorization bill extending both the NEA, the National Endowment for the Humanities (NEH), and the Arts and Artifacts Indemnity Act for five years.¹²¹ Senator Jeffords is Chairman of the Senate Labor and Human Resources Committee (the Committee), and Senator Kennedy is the ranking minority member. The reauthorization bill

119. National Endowment for the Arts, *Legislative Update*, (Dec. 10, 1997), <<http://arts.endow.gov/Guide/Facts/Legup12-9.html>>.

120. Jacqueline Trescott, *Senators Defend Arts Agency; Panel’s Proposal Would Boost Endowments’ Funds*, WASH. POST, July 16, 1997, at D01.

121. S. 1020, 105th Cong. (1997).

was approved by the Committee on July 23, 1997,¹²² and is ready for a Senate vote. The sponsors want to reaffirm the government's commitment to supporting the arts, while also making changes to the current system to reduce the Federal bureaucracy, increase accountability and share greater responsibility with the states.¹²³

A. Proposed Budget

This bill would provide \$105 million in funds per year to the NEA, with any amount over \$99.5 million going towards arts education programs.¹²⁴ The Committee feels strongly that the NEA must facilitate access to the arts in historically under served communities, especially educational services to children in these communities.¹²⁵ Research has shown that arts education for young children aids in their development and produces higher standardized test scores.¹²⁶

The bill addresses the problem of high administrative costs with a proposed limit of seventeen percent of funding allocated towards administration for 1998 and a twelve percent cap for 1999-2002.¹²⁷ The bill also calls for the NEA to merge common functions and services with the National Endowment for the Humanities where possible.¹²⁸ The NEA would have the authority to solicit funds in order to establish an endowment to supplement Federal appropriations.¹²⁹ The Committee proposed that the NEA and the NEH consult experts and conduct a feasibility study to explore innovative funding sources for such an endowment.¹³⁰ Another interesting provision of the bill calls for the "recapture" of funds

122. 143 CONG. REC. D806.

123. S. REP. NO. 105-86, at 1 (1997).

124. *Id.*

125. *Id.* at 8.

126. See Jacqueline Trescott, "Arts Education" *Colors Debate; Foes, Proponents of NEA Use Strategy for Different Ends*, WASH. POST, Aug. 5, 1997, at B01.

127. S. REP. NO. 105-86, at 9.

128. *Id.*

129. *Id.* at 9-10.

from financially successful grant recipients.¹³¹ The Committee believes that the Agency should be rewarded for some of the profitable projects it has supported.¹³² The Committee's report does not elaborate on the recapture provision, and consequently it is unclear how this provision would operate if enacted.

B. Awarding of Grants

The bill also proposes changes to the grant-making process.¹³³ Grants would be awarded in four categories: Partnership grants, National Significance grants, Direct grants, and Arts Education and Underserved Communities grants.¹³⁴ Partnership grants would be made to state arts agencies, with each state receiving either \$200,000 or one percent of the total funds allocated for this category, whichever is greater.¹³⁵ National Significance grants would be available for projects, productions and workshops that will reach a national audience.¹³⁶ Projects that increase access by touring, regional or national dissemination, geographic dispersion, and arts education, especially to under served communities, would be given priority.¹³⁷ Matching requirements for private funds are increased from current levels, excepting certain small groups who may be eligible for one-to-one matching.¹³⁸ Direct grants are the only category that individual artists are eligible to receive. Literature, Jazz Masters, and National Heritage fellowships are the only grants awarded from this category.¹³⁹ The Committee would limit eligibility for Direct grants because of concerns about these

131. *Id.* at 15.

132. S. REP. NO. 105-86, at 15.

133. *Id.* at 12.

134. *Id.*

135. *Id.* Partnership grants would receive forty-one percent of the total authorized funds. This amount is a twelve and one half percent increase from the previous allocation to the states. *Id.*

136. *Id.*

137. S. REP. NO. 105-86, at 13. This category would receive forty percent of authorized funds.

138. *Id.*

139. *Id.*

grants having been awarded for projects lacking artistic excellence and merit in the past.¹⁴⁰ The Committee acknowledged that these “dubious examples” have been few, yet they want “assurances that the Endowment will exercise good judgment consistent with the use of public monies.”¹⁴¹ Arts Education and Underserved Communities grants would be made to state, regional or local groups for arts education or for broadening public access to underserved communities.¹⁴²

C. Accountability

Other measures intended to address the accountability concerns are prohibitions on seasonal support and subgranting.¹⁴³ This would eliminate the chance that projects would receive agency funds that have not gone through the proper review procedure.¹⁴⁴ In the past, seasonal support and subgranting have resulted in objectionable projects.¹⁴⁵ The bill would put greater responsibility for grant making on the National Council of the Arts, whose members are appointed by the President and approved by the Senate.¹⁴⁶ The current three-tiered structure of the Agency would remain in place, although there would be changes in size, composition and authority.¹⁴⁷ The advisory panels, the first tier, would only be able to recommend general ranges of funds for applicants they select.¹⁴⁸ Additional changes are made to guard against conflicts of interest, increase the number of lay people on the panel, ensure the states are more evenly represented, and limit service to 5 non-consecutive years.¹⁴⁹ The National Council’s

140. *Id.*

141. *Id.* This category would receive ten percent of the total funds.

142. S. REP. NO. 105-86, at 14. This category would receive ten percent of funds authorized.

143. *Id.*

144. *Id.*

145. 143 CONG. REC. S9303 at S9322.

146. S. REP. NO. 105-86, at 14.

147. *Id.* at 14-15.

148. *Id.*

membership would be reduced, and each member will be limited to one term.¹⁵⁰ The Council must recommend more applicants for grants than there are funds available, so that the Chairperson has the final authority.¹⁵¹ These measures should increase accountability and prevent the “rubber-stamping” of recommendations from the advisory panels.¹⁵²

Whether or not this bill will become a reality is uncertain, as both the Senate and the House must approve any reauthorization for the NEA.¹⁵³

IV. CONCLUSION

The National Endowment for the Arts has made considerable accomplishments in its thirty two year history. It is an integral part of the non-profit arts industry in the United States, and the public’s investment in its own culture reaps many benefits. The NEA is fortunate to have President Clinton in its corner, along with many strong supporters in Congress. The President has requested \$136 million for the agency in the 1999 budget proposal submitted to Congress in February 1998.¹⁵⁴ Without a reauthorization, however, the President’s desire to strengthen the agency will continue to be fought by conservatives in Congress.

A tension exists between only spending public funds on projects that the public supports and allowing artists the freedom to express themselves. Many critics of the NEA speak of “offensive” works being funded with public money. However, artists use a particular medium to create expressions of their personal experiences and emotions, or their observations and opinions about the world and the human experiences we all share, or a combination of these. These subjects are not always pleasant, and the artists’ expressions are not always pretty and may sometimes

150. *Id.* at 15.

151. S. REP. NO. 105-86, at 15.

152. *Id.*

153. Trescott, *supra* note 120, at D01.

154. *The Clinton Budget: Culture; A Showdown for the Arts*, N.Y. TIMES,

Feb. 3, 1998, at A17.

be disturbing. While something may be “offensive” to some, the NEA is prohibited by law against funding anything that fits the legal definition of obscenity. Many commentators seem to confuse this legal definition with personal beliefs. The increased awareness of this problem by the agency, the continued prohibition against individual grants and subgrants, and the appointment of members of Congress to the NEA may combine to eliminate the funding of offensive works. The changes to grant making allocations and priorities enacted in 1997 should help quiet some of the criticism regarding uneven distribution of funds to the states and elitism of the agency.

The passage of the reauthorization bill would give the NEA some security for five years, allowing the agency time to solve some of the problems its critics have with it. The bill’s provisions address these problems and offer potential solutions to many areas of concern that could quiet the voices of critics. The bill’s mission of reaffirming commitment to the arts, while at the same time increasing accountability and sharing responsibility with the states, finds support in the statements of congressman during the recent debates, and probably reflects the beliefs of the public as well. One editorial commentator attributed the growth of Austin, Texas arts institutions to “a disciplined search for quality, service and balanced books, things that attract trust and generosity from the public.”¹⁵⁵

The reauthorization bill offers changes that would decrease administrative costs without resorting to severe cuts in service through cooperation with the NEH. Accountability is increased through the structural changes to the grant making process, which may also eliminate charges of elitism and favoritism. The creation of an endowment funded through private funds or other innovative means could reduce the agency’s dependence on public funds, which in turn could lessen objections to how these funds are spent. Money from such an endowment could be spent on individual projects, which have been largely curtailed in recent years. The reauthorization bill would also retain the legal prohibition against

155. Michael Barnes, *Austin May Be Ahead of the Game as Arts* *Shed by Mike Austin*, AMERICAN-STATESMAN, Oct. 20, 1997.

funding anything that is truly obscene. In sum, the reauthorization bill would offer the NEA security for a long enough period of time to make necessary changes to ensure that it continues to fulfill its mission.

Nancy Coyle