A PROPOSAL TO CURB CONGRESSIONAL INTERFERENCE WITH THE NATIONAL ENDOWMENT FOR THE ARTS

I. INTRODUCTION

The United States Congress created the National Endowment for the Arts ("NEA"), an administrative agency,[1] in 1965 to effectuate its newly-established policy of providing financial support to the arts.[2] Specifically, the NEA's function is to "carry out a program of contracts with, or grants-in-aid or loans to, groups or . . . individuals of exceptional talent engaged in or concerned with the arts."[3] Congress intended to prevent the federal government from interfering with the grant-making process[4] and NEA grant recipients.[5] Notwithstanding this autonomy, the NEA is subject to judicial[6] and legislative checks.[7]

In the spring of 1989, a conflict between Congress and the NEA regarding the funding of photography exhibits forced the legislature to question the appropriate scope of the NEA's power.[8] The Institute of Contemporary Art in Philadelphia

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[1] "An administrative agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication, rulemaking, investigating, prosecuting, negotiating, settling, or informally acting." K. DAVIS, ADMINISTRATIVE LAW TEXT § 1.01 (3d ed. 1972). Some agencies have authority to make rules. The Administrative Procedure Act defines a rule as "an agency statement . . . designed to implement, interpret, or prescribe law or policy . . . of [that] agency and includes the approval or prescription for the future of . . . financial structures." 5 U.S.C. § 551(4) (1988); *see also* Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 908 (5th Cir. 1983) (" 'rule' . . . include[s] virtually every statement an agency may make"). Other agencies have authority to adjudicate. They are authorized to make "final disposition[s], whether affirmative, negative, injunctive, or declaratory in form, . . . including licensing." 5 U.S.C. § 551(6). Agencies also have the authority to grant relief, including grants of money or assistance, and to take action on an application or petition, or other actions beneficial to a person. *Id.* § 551(11).

[2] *See infra* note 24 and accompanying text.

[3] 20 U.S.C. § 954(c) (1988).

[4] *See infra* notes 34-44 and accompanying text.

[5] *See infra* notes 29-33 and accompanying text.

[6] *See infra* notes 46-52 and accompanying text.

[7] *See infra* notes 53-64 and accompanying text.

[8] *See Nightline: Art Attacks: Helms Seeks NEA Censorship* (ABC television broadcast, Aug. 2, 1989) (discussing the tension between federally funded art and governmental control over that art); Glueck, *A Congressman Confronts a Hostile Art World*, N.Y. Times, Sept. 16, 1989, at A13, col. 2 (Representative Dana T. Rohrabacher (R.-Cal.) joined artists and lawyers for a panel discussion sponsored by Volunteer Lawyers for the Arts to discuss the viability of public funding of the arts); Honan, *Helms Amendment is Facing a Major Test in Congress*, N.Y. Times, Sept. 13, 1989, at C17, col. 4 [hereinafter Honan, *Helms Amendment*] (balance between "artistic freedom" and "the proper role of government in the arts" caused bipartisanism in Congress as $10.9 billion Interior Appropriations bill was formulated).

("ICA") and the Southeastern Center for Contemporary Art in Winston-Salem ("SECCA") received federal grants from the NEA to fund art exhibits. ICA exhibited a retrospective of photographic works by the late Robert Mapplethorpe, including portraits, floral arrangements,[9] and works depicting "homosexual and heterosexual erotic acts and explicit sadomasochistic practices in which black and white, naked or leather-clad men and women assume erotic poses."[10] SECCA exhibited a photograph by Andres Serrano which showed a crucifix submerged in the artist's urine.[11] The controversial subject matter of those photographs, and the fact that the NEA had partially funded each exhibit, caused Congress to consider whether the NEA's grant-making standards were proper.[12] Congress subsequently implemented the most significant changes in the NEA's grant-making process since its inception.[13]

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9 Glueck, *Art on the Firing Line*, N.Y. Times, July 9, 1989, § 2 (Arts & Leisure), at 1, col. 3 [hereinafter Glueck, *Art on the Firing Line*].

10 *Id.*

11 *Id.* at 9, col. 1.

12 An NEA grant of $30,000 was awarded to ICA as partial funding for the Mapplethorpe exhibition. Gamarekian, *Senate Panel Asks Ban on Grants to 2 Arts Groups*, N.Y. Times, July 26, 1989, at C19, col. 1, col. 3 [hereinafter Gamarekian, *Senate Panel*]. SECCA received a $15,000 NEA grant. *Id.* One of the issues discussed in Congress was whether the federal government may appropriately use taxpayer money to fund exhibitions which some consider to be offensive or controversial. Glueck, *Art on the Firing Line*, *supra* note 9, at 9, col. 6 ("Congressmen have argued that taxpayers' money should not be used to support exhibitions containing material that many might find offensive . . . ."); *see also* Kramer, *Is Art Above the Laws of Decency?*, N.Y. Times, July 2, 1989, § 2 (Arts & Leisure), at 1, col. 1, col. 2 (questioning what standards should "be allowed to play [a] role in determining what sort of art . . . is appropriate for the Government to support").

13 Controversies regarding NEA funding of arguably offensive works arose in Congress on previous occasions. In 1984, a modern version of the opera *Rigoletto*, which received some federal funding from an NEA grant, was criticized as being offensive. Kimmelman, *Helms Bill, Whatever Its Outcome, Could Leave Mark on Arts Grants*, N.Y. Times, July 30, 1989, at A1, col. 1, A26, col. 3 [hereinafter Kimmelman, *Helms Bill*]. In response to the opera, former Representative Mario Biaggi (D.-N.Y.) "contacted NEA Chairperson Frank Hodsoll to urge cancellation of the production and to protest the use of NEA funds to promote disparaging ethnic images." Note, *The National Endowment for the Arts: A Search for an Equitable Grant Making Process*, 74 GEO. L.J. 1521, 1522 (1986) [hereinafter Note, *Grant Making Process*] (footnote omitted). Representative Biaggi then proposed to limit the power granted to the NEA so that "productions containing 'any ethnic or racially offensive material' " would not receive federal funding. *Id.*

Further, in 1985, endowment grants awarded to poets caused a controversy similar to the one currently before Congress: whether art should be funded with federal tax dollars if some find the art obscene or " 'contrary to the [public] taste.' " Molotsky, *Of Pornography and U.S. Subsidies*, N.Y. Times, Sept. 10, 1985, at A20, col. 3, col. 4 (quoting Rep. Dick Armey (R.-Tex.)). Representative Thomas D. DeLay (R.-Tex.) criticized the award of NEA money in that case, and said that the poetry in question constituted pornography if it could not be reproduced in the *Congressional Record*, published in a newspaper, or shown on television. *Id.* Representative Les AuCoin (D.-Or.) defended the endowment, claiming that if stricter standards were enforced, it would not be possible to read aloud some of Shakespeare's sonnets, as they "got a little racy at times." *Id.*

The result of the 1985 debate regarding the NEA affected neither the endowment's

After many congressional debates on proposed legislation to amend the NEA's grant-making process, Congress enacted two significant changes.[14] The Department of the Interior and Related Agencies Appropriations Act of 1990 ("Act") required the NEA to notify the Committee on Appropriations of the House and the Senate of any direct grant it intended to make to ICA or SECCA.[15] Further, the Act restricted the NEA from granting funds to works of art "considered obscene."[16] Both provisions were amended versions of more restrictive proposals.[17] One year later, Congress passed a new bill reauthorizing the NEA to fulfill its mandate as federal financier of the arts,[18] but without any restrictions regarding either obscenity or advance notice.[19] In the

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enabling statute nor its budget. Tolchin, *Congress Passes Bill Curbing Art Financing*, N.Y. Times, Oct. 8, 1989, at A27, col. 1, col. 2 [hereinafter Tolchin, *Art Financing*] (no measure to restrict arts financing due to its content ever "came to the floor in the House"). Moreover, "Congress responded [to the prior controversies] by requesting that the endowment be more careful in the future, but it legislated nothing as sweeping as the [present changes]." Kimmelman, *Helms Bill*, *supra*, at A26, col. 3. Although the 1984 and 1985 NEA grant controversies did not effect changes in the NEA's grant-making process, they indicate a trend of increased congressional interference with the NEA's grant-making process and recipients.

[14] Dep't of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, 1989 U.S. CODE CONG. & ADMIN. NEWS (103 Stat.) 701, 738-42 [hereinafter Appropriations Act of 1990].

[15] Appropriations Act of 1990, *supra* note 14, at 738. This advance notice requirement was effective only until September 30, 1990, at which time the appropriations contained in the Appropriations Act of 1990 expired. *Id.* at 701.

[16] *Id.* § 304(a), at 741. As this was a change in the NEA's enabling statute, it did not expire with the Appropriations Act of 1990. Rather, all the provisions of the enabling statute were considered at the NEA's last reauthorization hearing. *See* Gamarekian, *Arts Aide Backs Cincinnati Museum*, N.Y. Times, Mar. 30, 1990, at A10, col. 2, col. 4 (NEA's last reauthorization hearing took place in 1990). For a discussion of the NEA's enabling statute, see *infra* note 25 and accompanying text.

[17] In addition to the statutory changes, and in response to the two controversial exhibits, Congress subtracted $45,000 from the NEA budget, the amount equaling the endowment grants awarded to ICA and SECCA. Gamarekian, *Senate Panel*, *supra* note 12, at C19, col. 1. Congress reduced the budget to penalize the NEA for its involvement with the two criticized artists and their works. *See infra* note 56 and accompanying text. The $45,000 reduction was a small percentage of the total NEA budget, and therefore was probably not greatly felt, although it did send a strong political message to the NEA and museums. *See* Corn-Revere, *The New Assault on Artistic Freedom*, 18 STUDENT LAW. 18, 21-23 (Feb. 1990). The total NEA budget for fiscal year 1990 was $144,105,000. 135 CONG. REC. H6406 (daily ed. Oct. 2, 1989). That amount reflects the $45,000 reduction, as well as the $250,000 allocation to a special commission to "review . . . the endowment's grant-making procedures." Kimmelman, *Helms Bill*, *supra* note 13, at A26, col. 3.

[18] Congress reauthorized the NEA by appropriating "$125,800,000 for fiscal year 1991 and such sums as may be necessary for fiscal years 1992 and 1993." Dep't of the Interior and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-512, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 1915, 1972 [hereinafter Appropriations Act of 1991] (amending 20 U.S.C. § 960(a)(1)(A) (1988) (Authorizations for the National Endowment for the Arts)).

[19] Pursuant to the Appropriations Act of 1991, *supra* note 18, § 103(b), at 1963, the NEA is not required to make determinations regarding obscenity. *Compare* Appropriations Act of 1990, *supra* note 14, § 304(a), at 741 ("None of the funds authorized to be

same bill, however, Congress incorporated a requirement that grant applicants give a detailed explanation of their work to the NEA when seeking federal funds.[20]

This Note focuses on the appropriate scope of congressional involvement with the NEA and examines the means Congress employed to control it,[21] particularly in the context of the now-repealed regulations restricting the NEA's grant-making powers. Part II discusses the NEA's enabling statute and grant-making process, and then reviews the judicial and legislative checks on the NEA's power. Part III analyzes the statutory proposals and amendments to the NEA's grant-making power and discusses their constitutional implications. Finally, Part IV concludes that the NEA's grant-making process should be amended to require the NEA to record its reasons for awarding or denying a grant, thereby maintaining the correct constitutional relationship between Congress and the NEA.

II. THE NEA

A. *The Enabling Statute and Grant-Making Process*

In 1965, Congress created the National Foundation on the Arts and the Humanities ("Foundation")[22] to give financial aid and support to the arts and the humanities.[23] To fulfill this purpose, Congress established the NEA within the Foundation.[24] The authority granted to the NEA is enumerated in its enabling statute,[25] which defines and limits the NEA's ability to award

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appropriated for the National Endowment for the Arts . . . may be used to promote . . . materials which *in the judgment of the National Endowment for the Arts* . . . may be considered obscene . . . .") (emphasis added) *with* Appropriations Act of 1991, *supra* note 18, §§ 102(c), 103(b), at 1962-63 (When proposed works are determined to be obscene "*in a final judgment of a court* of record and of competent jurisdiction in the United States," they are prohibited from receiving federal grants by the National Endowment for the Arts.) (emphasis added).

20 Appropriations Act of 1991, *supra* note 18, § 103(g), at 1964 (When applying for a grant, each applicant must provide to the NEA "a detailed description of the proposed project, production, workshop, or program for which the applicant requests . . . assistance.").

21 For a general discussion regarding congressional control of administrative agencies, see S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 107-09 (1985) [hereinafter BREYER & STEWART].

22 National Foundation on the Arts and the Humanities Act of 1965, Pub. L. No. 89-209, 79 Stat. 845 (codified at 20 U.S.C. §§ 951-960 (1988)).

23 1965 U.S. CODE CONG. & ADMIN. NEWS 3192. This purpose was reaffirmed by Congress in a recent NEA amendment. 135 CONG. REC. S12,967 (amendment no. 153 B(3)-(4)) (daily ed. Oct. 7, 1989).

24 "There is established within the Foundation a National Endowment for the Arts." 20 U.S.C. § 954(a) (1988).

25 The NEA's enabling statute refers to the Act that created the Foundation and en-

grants.[26] This statute outlines the procedures the NEA must follow each time it authorizes a grant and describes its internal structure and grant-making standards.[27] The language in the enabling statute was purposely drafted to ensure that federal funds would be disbursed to artists based on the expert judgment of the NEA[28] and free from governmental interference.

1. Non-Interference with Grant Recipients

Congressional interference with grant recipients is specifically proscribed by section 953(c) of the NEA's enabling statute: "In the administration of this subchapter no department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over the policy determination, . . . or the administration or operation of any school or other non-Federal agency, institution, organization, or association."[29] The plain meaning of section 953(c) mandates that the federal government maintain a policy of non-interference with regard to federal grant recipients.[30] This section applies to Congress, museums, and art institutes.

There has been no litigation challenging governmental interference with NEA grant recipients, and thus the strength of section 953(c) as a check on federal abuse of private organizations remains unclear.[31] The absence of litigation may be due in

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compasses those statutory sections which define and limit the structure of the NEA. *See* 20 U.S.C. §§ 951-955.

[26] *Id.* § 954. *See also* Stark v. Wickard, 321 U.S. 288, 309 (1944) ("When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted.").

[27] 20 U.S.C. §§ 954-955.

[28] *Id.* § 955(b)(1), (2).

[29] *Id.* § 953(c).

[30] *See* Note, *Grant Making Process*, *supra* note 13, at 1523 (20 U.S.C. § 953(c) prohibits "federal bureaucrats from interfering with the internal affairs of organizations receiving NEA funds."). Prior to passage of section 953(c) in the House, Representative Fernand St. Germain (D.-R.I.) specifically highlighted section 953(c)'s importance, suggesting that "the Federal Government can provide the needed leadership in this regard *without inhibiting* artistic or scholarly effort in any way." 111 CONG. REC. 23,944 (1965) (emphasis added). Further, Representative St. Germain cited examples of state supported art programs such as orchestras and museums which have operated "without a trace of government control over the content." *Id.*

[31] In Advocates for the Arts v. Thomson, 532 F.2d 792 (1st Cir. 1976), members of a corporation that published a literary magazine sued to prevent the Governor and Council of New Hampshire from interfering with a state grant to that magazine. The plaintiffs claimed that "defendants' reversal of the grant awarded to [the magazine] . . . stifled [its] free expression." *Id.* at 794. The court stated that plaintiffs "must look elsewhere than to the Constitution for relief" because no constitutional right was denied. *Id.* at 797. While the plaintiffs did claim that the defendants violated the "federal and state statutes authorizing the grants program, [that is,] 20 U.S.C. § 954; N.H. Rev. Stats. Ann. ch. 19-A," *id.* at 794, they did not claim a section 953(c) violation.

part to the relatively few controversial grants awarded.[32] It might also imply that some congressional control over the money it allocates is permissible under the statute, since other provisions in the statute condition receipt of a grant on adherence to federal regulations.[33]

2. Non-Interference with the Grant-Making Standards

In addition to section 953(c)'s proscription on federal interference with grant recipients, the NEA's enabling statute also prohibits the government from interfering with the grant-making process. The enabling statute dictates that all decisions regarding grant applications be made solely by the NEA, and not the federal government. The structure of the statute was a "conscious effort at [the] time [of the endowment's creation] to separate the review process from political interference."[34] Recent congressional findings reaffirm that "the responsibility to determine whether . . . an application should be funded" lies with the NEA.[35]

Under the rubric of the NEA's enabling statute, grants are awarded according to a process known as the peer-review system. The members who comprise the peer-review sit on the National Council on the Arts ("Council"), which is composed of the NEA Chairperson and twenty-six other members, including "practicing artists, civic cultural leaders, [and] members of the museum profession."[36] These members are appointed by the President with the advice and consent of the Senate.[37] The Council's function is to "(1) advise the Chairperson with respect to policies, programs, and procedures for carrying out the Chairperson's functions, duties, or responsibilites . . . and (2) review applications for financial assistance . . . and make recommendations . . .

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[32] For a discussion of the number of controversial grants awarded, see *infra* note 97 and accompanying text.

[33] It is not unusual for a federal agency to be subject to certain federal regulations which are not applied in the private sector. For example, one section of the NEA's enabling statute conditions federal funding on adherence to certain labor standards. 20 U.S.C. § 954(i) (1988) ("It shall be a condition of the receipt of any grant under this section that the group or individual . . . or State agency receiving such grant furnish adequate assurances to the Secretary of Labor that" minimum wage laws are followed and certain working conditions are met.).

[34] 135 CONG. REC. S8809 (daily ed. July 26, 1989) (remarks of Sen. Edward Kennedy (D.-Mass.)).

[35] Appropriations Act of 1990, *supra* note 14, § 304(b)(4)(B), at 741.

[36] 20 U.S.C. § 955(b)(2).

[37] *Id.* § 955(b). The government has initial and complete control over the composition of the Council.

to the Chairperson."[38] The Chairperson then is authorized to contract with or grant funds to exceptionally talented groups and individuals involved in the arts.[39]

When the Council considers a grant application, it is bound by the grant-making standards enumerated in the NEA's enabling statute. One of the eight criteria that the statute requires is that the "projects and productions . . . have substantial artistic and cultural significance, giving emphasis to American creativity and cultural diversity and the maintenance and encouragement of professional excellence."[40] Since the statute does not enumerate objective criteria, the Chairperson is required to make value judgments as to the quality and merit of works of art before awarding federal money.[41]

"If Congress has explicitly left a gap for the agency to fill, there is an *express delegation of authority* to the agency to elucidate a specific provision of the statute by regulation."[42] Rather than

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[38] *Id.* § 955(f).

[39] *Id.* § 954(c).

[40] *Id.* § 954(c)(1).

[41] The other seven criteria according to which grants are awarded are equally vague. *See id.* § 954(c)(2) ("projects and productions, meeting professional standards or standards of authenticity . . . which are of significant merit and which, without such assistance, would otherwise be unavailable"); *id.* § 954(c)(3) ("projects and productions that will encourage and assist artists and enable them to achieve wider distribution of their works, to work in residence at an educational or cultural institution, or to achieve standards of professional excellence"); *id.* § 954(c)(4) ("projects and productions which have substantial artistic and cultural significance and that reach, or reflect the culture of, a minority, inner city, rural, or tribal community"); *id.* § 954(c)(5) ("projects and productions that will encourage public knowledge, understanding, and appreciation of the arts"); *id.* § 954(c)(6) ("workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens"); *id.* § 954(c)(7) ("programs for the arts at the local level"); *id.* § 954(c)(8) ("other relevant projects, including surveys, research, planning, and publications relating to the purposes of this subsection").

[42] Chevron, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984) (emphasis added). In *Chevron*, the Court found that Congress failed to define the term "stationary source" in its 1977 Amendments to the Clean Air Act. *Id.* at 859-60; *see* 42 U.S.C. § 7411(a)(3) (1988). The Court said that where a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The Court thus enunciated a two-step process for review of an agency action: it considers whether (1) there is legislative history which defines the term in question or that speaks directly to the issue; and if there is no legislative history, whether (2) the agency action is reasonable. *Id.* at 842-43. The Environmental Protection Agency ("EPA") interpreted the phrase "stationary source" pursuant to its rulemaking authority to mean an entire industrial plant for the purpose of emission control limitations. *Id.* at 840. The Court held that the EPA's construction of "stationary source" was reasonable and thus upheld the interpretation.

Applying this test to the NEA's funding of "controversial" art, the *Chevron* Court would ask whether there is any indication in the legislative history that such funding was intended by Congress. If the legislative history speaks to that issue, the answer is dispositive. On the other hand, if the legislative history is silent with respect to the funding of "controversial" art, a reasonable agency interpretation of the grant-making standards will be upheld. Thus, if the NEA awards federal money to an artist pursuant to the

specify the exact criteria that form the basis for a grant, Congress purposely chose the Chairperson and the Council to distribute the grant awards based on their collective expertise in the field of art.[43] It is more efficient for a small group of experts to perform the grant-making function than for all the members of Congress to determine whether a work warrants a grant.[44] Therefore, just as section 953(c) requires federal non-interference with grant recipients, the structure of the grant-making process reflects Congress' intent that the process be free of governmental involvement.

B. *Judicial and Legislative Checks on NEA Actions*

The delegation of power to the NEA is not absolute. In addition to judicial review of an NEA action, the legislative branch retains power to control the agency through budgetary or statutory restrictions, and through political pressure.[45] All three types of congressional influence were involved in the most recent conflict between Congress and the NEA regarding the scope of the NEA's authority.

1. Judicial Review

A legislative delegation of power to an administrative agency can be challenged to determine whether "such a delegation of legislative power is permitted by the Constitution."[46] A broad

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standards enumerated in its enabling statute, and if a court finds that the agency's determination is reasonable, the agency action will be upheld.

43 20 U.S.C. § 955(b)(1), (2).

44 For example, Congress delegated to the Occupational Safety and Health Administration ("OSHA") the power to set standards "reasonably necessary or appropriate to provide safe or healthful employment." 29 U.S.C. § 652(8) (1988). Congress delegated this rulemaking power because it could not efficiently determine what constituted a safe level of benzene exposure. "[Congress] cannot realistically formulate statutes so specific that they could cover all of the complexities of modern society." Comment, *Judicial Limitation of Congressional Influence on Administrative Agencies*, 73 NW. U.L. REV. 931, 939 (1978) [hereinafter *Judicial Limitation*]. However, Congress can pass a broad act which delegates the specific decision-making power to an agency, and receive political recognition for advocating safe workplaces.

45 "The powers of . . . administrative agencies are subject to expansion, contraction or abolition at the will of the [legislature] . . . ." Stark v. Wickard, 321 U.S. 288, 310 (1944). *See Judicial Limitation*, *supra* note 44, at 938 ("Congress has the full power to alter an agency policy simply by passing a statute."). *See also* Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto"*, 32 ADMIN. L. REV. 667 (1980) [hereinafter *Congressional Action*] (discussing various statutory and non-statutory techniques by which Congress limits an agency's power).

46 Panama Ref. Co. v. Ryan, 293 U.S. 388, 420 (1935). Stark v. Wickard, 321 U.S. 288, 310 (1944) ("The responsibility of determining the limits of statutory grants of authority . . . is a judicial function . . . .").

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of

delegation will be upheld as long as (1) there is an "intelligible principle" in the agency's enabling statute according to which a court may determine whether the agency's action is within the scope of its delegated authority;[47] and (2) the standards governing the agency's acts are adequately specific, thereby limiting agency discretion.[48] The NEA's grant-making standards would probably pass constitutional muster. The standards governing the NEA are adequately specific for a court to review the agency's action and to determine whether that action is within the scope of the NEA's delegated authority.[49]

Statutory authority provides additional grounds for judicial review of agency action. The Administrative Procedure Act pro-

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Representatives." U.S. CONST. art. I, § 1. Although the legislative powers lie with the Congress,

> [t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility.

Panama Ref., 293 U.S. at 421.

47 *See, e.g.*, Synar v. United States, 626 F. Supp. 1374 (D.D.C.), *aff'd sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986). The district court held "that the totality of the [Balanced Budget] Act's standards, definitions, context, and reference[s] . . . provides an adequate 'intelligible principle' to guide and confine administrative decisionmaking." *Synar*, 626 F. Supp. at 1389. The Supreme Court, however, found the Balanced Budget Act to be unconstitutional on other grounds. *Bowsher*, 478 U.S. at 736.

48 *Synar*, 626 F. Supp. at 1389. *See* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980). The Court reviewed whether OSHA acted within the scope of its delegated authority when it changed exposure levels of benzene in the workplace from 10 parts per million to 1 part per million. The issue turned on whether the "reasonably necessary or appropriate" standard set by Congress was adequately specific to guide OSHA, or whether the delegation of power to OSHA was so broad that Congress had, in effect, delegated its legislative powers to an agency.

Two Supreme Court cases decided in the mid-1930s held that a broad legislative delegation of power to the executive branch was unconstitutional. In Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935), the Court invalidated a provision of the National Industrial Recovery Act of 1933 ("NIRA") which allowed the President to ban, at his discretion, the interstate shipment of oil produced in violation of state regulations. The Court reasoned that because there were no standards or guidelines to aid the President in his determination, the delegation of legislative power to the executive branch was too broad and thus unconstitutional. *Id.* at 430, 433.

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) also involved an NIRA challenge. The President was authorized, pursuant to the NIRA, to adopt "codes of fair competition" regarding wages and maximum work hours. The Court also invalidated this section, reasoning that the NIRA did not adequately define what was meant by "codes of fair competition." *Id.* at 541-42. Therefore, the lack of specific standards by which to judge an unfair competition practice created an unconstitutionally broad delegation of legislative power to the executive branch.

49 *See, e.g.*, Advocates for the Arts v. Thomson, 532 F.2d 792 (1st Cir. 1976), *aff'g* 397 F. Supp. 1048 (D.N.H. 1975) (a state agency acted within scope of authority pursuant to 20 U.S.C. § 954).

vides for equitable relief against agency action,[50] "except to the extent that—(1) [the enabling statute] preclude[s] judicial review; or (2) [the] agency action is committed to agency discretion by law."[51] As there is nothing in the NEA's enabling statute to preclude review, and as the grant-making standards remove the "action" from the realm of agency discretion, an aggrieved party has the right to judicial review of NEA action.[52]

2. Legislative Oversight: The Means of Congressional Control

In addition to judicial review as a check on agency power, budget reductions or increases are commonly used to regulate an agency, indicating whether Congress approves or disapproves of its actions.[53] Thus, although Congress delegated broad power to the NEA, it retained the ability to coerce and control the NEA through the agency's budget.[54] The most recent reduction in the NEA's budget was the amount granted to fund the ICA and SECCA exhibits.[55] The significance of the reduction was not to stop the agency from functioning, but to send a clear message to the NEA that certain types of art were not deserving of federal funding.[56]

Congress can also maintain control over an agency by amending the agency's enabling statute. Since the extent of an agency's power or jurisdiction is dependent on the breadth of its enabling statute,[57] vague standards or broad regulatory powers

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50 5 U.S.C. § 702 (1988) ("A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof.").

51 *Id.* § 701(a).

52 Additionally, aggrieved parties can challenge an agency action to determine whether the action is in violation of *any* law, not only in violation of its enabling statute. For example, in Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 776 (C.D. Cal. 1991), a federal district court granted plaintiff's motion for summary judgment, holding unconstitutional an NEA rule requiring grant applicants to sign a stipulation asserting that "none of the funds awarded would be used 'to promote, disseminate, or produce materials which in the judgment of the NEA . . . may be considered obscene.'" *Id.* (quoting Appropriations Act of 1990, *supra* note 14, at 741).

53 *Congressional Action*, *supra* note 45, at 687-96.

54 "The budget process provides a powerful means of control. It is neither unusual nor inappropriate for Congress to use the . . . process to ensure that an agency is fulfilling its statutory mandate." Peters, *Independent Agencies: Government's Scourge or Salvation?*, 1988 DUKE L.J. 286, 294.

55 *See supra* note 17 and accompanying text.

56 *See* Gamarekian, *Senate Panel*, *supra* note 12, at C19, col. 3 ("Livingston Biddle, a former director of the endowment, said the action taken by the House in cutting $45,000 from the arts budget had sent a clear signal that Congress wanted more accountability in making grants.").

57 *See Congressional Action*, *supra* note 45 (congressional amendment narrowing Interstate Commerce Act's jurisdiction mooted a pending rule by the agency).

give an agency wide jurisdiction,[58] whereas narrow standards restrict an agency's power by limiting its discretionary authority. The legislative branch has "the resources and personnel to examine . . . the working[s] of the various [agencies] to determine the necessary changes of function or management."[59] When Congress amended the NEA's enabling statute by excluding direct grants for art considered obscene, it sought to narrow the NEA's grant-making power and jurisdiction.[60] The advance notice requirement further limited the NEA's power by prohibiting it from effecting a direct grant to ICA or SECCA.[61] Since both of these changes were only in effect for one year, however, they did not have a substantial impact on the NEA's powers. The current change in the NEA's enabling statute, requiring that artists give detailed explanations of their work, affects only the artists applying for the grant, and not the NEA's jurisdiction.

A final method Congress uses to control agency policy is through political pressure.[62] For example, prior to the Senate vote on Senator Jesse Helms' (R.-N.C.) proposal to exclude obscene works of art from receiving NEA grants, Senator Helms declared that "he would 'request a roll-call vote so that whoever voted against [his amendment] would be on record as favoring taxpayer funding for pornography.' "[63] The effect of this state-

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58 *See* Point Landing, Inc. v. Omni Capital Int'l Ltd., 795 F.2d 415, 422 (5th Cir. 1986) (the "broad and flexible" standards of the Commodity Exchange Act illustrate that Congress intended to give the Commodity Futures Trading Commission broad jurisdiction and regulatory powers).

59 Stark v. Wickard, 321 U.S. 288, 310 (1944).

60 *See infra* notes 104-16 and accompanying text.

61 *See infra* notes 117-34 and accompanying text.

62 Prior to the House vote to reduce the NEA's budget, and at the height of the Mapplethorpe and Serrano controversies, the Corcoran Gallery of Art in Washington, D.C. cancelled a Mapplethorpe exhibition. Gleuck, *Art on the Firing Line*, *supra* note 9, at 9, col. 1. Since then, the contemporary artist Annette Lemieux and six sculptors cancelled their shows at the Corcoran. Gamarekian, *Angry Artists Cancel Shows at Corcoran*, N.Y. Times, Aug. 31, 1989, at C19, col. 5. The artists did not want to be associated with the Corcoran for fear that some might think they approved of the Mapplethorpe cancellation. *Id.* at col. 6. The museum's director defended the cancellation on the ground that the controversy surrounding Mapplethorpe would only be enhanced if the museum were to proceed with the exhibit. *Id.* Others, however, claimed that the decision to cancel was due solely to governmental pressure and was thus a form of governmental censorship. Gleuck, *Art on the Firing Line*, *supra* note 9, at 9, col. 1.

The Whitney Museum of American Art in New York issued a full page advertisement in the *Washington Post* and the *New York Times* asking readers to contact Congress and to demand support for the NEA. Gleuck, *Museum Criticized for Ad on Grants*, N.Y. Times, Sept. 8, 1989, at C26, col. 4. Although the ad was criticized by some congressmen, *id.*, it had an effect in Washington. Honan, *Picture Isn't Always Clear in Lobbying over the Arts*, N.Y. Times, Sept. 13, 1989, at C19, col. 1 (numerous fax messages opposing curtailment of the scope of NEA funding were received by a number of Senators).

63 Honan, *Helms Amendment*, *supra* note 8, at C19, col. 2.

ment was felt throughout the Senate.[64]

III. Recent Congressional Attempts to Limit the NEA's Power: The Constitutional Implications

Immediately following the ICA and SECCA controversies, Congress considered enacting a proposal introduced by Senator Helms ("Helms Proposal") which sought to prevent the use of federal funds to support obscene, indecent, or anti-religious art.[65] A second congressional proposal would have precluded ICA and SECCA from receiving direct NEA grants for a period of five years.[66] Both of these legislative proposals raised different constitutional issues: the former regarding the implications of federally subsidized first amendment activities, and the latter regarding the denial of the right to freedom of speech without due process of law.

Congress later enacted modified versions of these highly restrictive and controversial proposals. One, known as the Helms Amendment,[67] amended the NEA enabling statute to proscribe grants for works that are "obscene, including but not limited to, depictions of sadomasochism, homo-eroticism, the sexual exploitation 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."[68] The Helms Amendment differed from the Helms Proposal by excluding specific restrictions and including what Senator Helms referred to as a "loophole."[69] The amendment is analyzed pursuant to current obscenity law and first amendment protection. The second enactment which limited the NEA's power was the advance notice requirement: it required the NEA to notify the Committee on Appropriations of

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64 One Senator described what he thought Helms' television commercial against Congressmen who did not favor his amendment would say:

> Senator So-and-So voted for pornography tonight. Senator So-and-So wants to waste taxpayers' dollars so that you do not have enough money to buy your home. He wants that money to go to produce pornographic pictures of children, or people performing what would be labeled as unnatural sex acts
>
> . . . .

135 Cong. Rec. S12,115 (daily ed. Sept. 28, 1989) (remarks of Sen. Patrick J. Leahy (D.-Vt.)).

65 For the full text of the Helms Proposal, see *infra* note 72 and accompanying text.

66 135 Cong. Rec. S8833 (daily ed. July 26, 1989).

67 135 Cong. Rec. S12,967 (daily ed. Oct. 7, 1989).

68 135 Cong. Rec. H6407 (daily ed. Oct. 2, 1989).

69 135 Cong. Rec. S12,967 (daily ed. Oct. 7, 1989) (statement of Sen. Helms) ("[T]he conference report creates a loophole that will clearly allow the National Endowment for the Arts to fund the Mapplethorpe photographs again."). For a discussion of the loophole, see *infra* notes 115-16 and accompanying text.

the House and the Senate before effectuating a direct grant to either ICA or SECCA.[70] It raised the issue of whether such a congressional attempt to limit the NEA's power violates the doctrine of separation of powers.[71]

A. *The Helms Proposal: Governmental Censorship and the First Amendment*

The Helms Proposal sought to limit the NEA's grant-making powers and jurisdiction by excluding obscene, pornographic, and religiously offensive art works from receiving federal funding. It read as follows:

> None of the funds authorized to be appropriated pursuant to this Act may be used to promote, disseminate or produce —
>
> (1) obscene or indecent materials, including but not limited to depictions of sadomasochism, homo-eroticism, the exploitation of children, or individuals engaged in sex acts; or
>
> (2) material which denigrates the objects or beliefs of the adherents of a particular religion or non-religion; or
>
> (3) material which denigrates, debases, or reviles a person, group, or class of citizens on the basis of race, creed, sex, handicap, age, or national origin.[72]

When the federal government subsidizes a constitutionally protected activity such as speech, it may not condition the subsidy on "its message, its ideas, its subject matter, or its content."[73] Expression uninhibited by governmental censorship is the essence of first

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[70] 135 CONG. REC. H6407 (daily ed. Oct. 2, 1989). For a discussion of the advance notice requirement, see *infra* note 118 and accompanying text.

[71] In addition to being a constitutional violation, the advance notice requirement might have been a violation of the NEA's enabling statute. Section 953(c) of the NEA's enabling statute proscribes federal interference with the grant-making process and with grant recipients. Because ICA and SECCA fall within the scope of section 953(c)—"any school or other non-Federal agency, institution, organization, or association," 20 U.S.C. § 953(c) (1988)—they should be free from "direction, supervision, or control" by federal officials. *Id.* Therefore, depending on how broadly or narrowly the terms "direction, supervision, or control" are construed, the government may be prohibited from naming ICA or SECCA in any legislation, lest it violate the NEA's enabling statute.

[72] 135 CONG. REC. S8806 (daily ed. July 26, 1989). Senator Helms defended his proposal by contending that the restrictions merely aided Congress in fulfilling its legislative function and duty as regulator of appropriations. *See* Tolchin, *Art Financing*, *supra* note 13, at A7, col. 1, col. 4 (supporters of the Helms Proposal argued that they were "barring the use of taxpayers' money" for art considered obscene). *See, e.g.*, U.S. CONST. art. I, § 8, cl. 1 ("Congress shall have Power To lay and collect Taxes . . . and provide for the . . . general Welfare . . . ."); *id.* § 8, cl. 18 (Congress is authorized "To make all Laws . . . necessary and proper for carrying into Execution the foregoing Powers . . . ."); *id.* § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .").

[73] Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

amendment protection.[74] The decision whether to fund an activity protected by the first amendment may involve a choice among various protected activities. Such a decision does not constitute content-based discrimination,[75] as the government does not have a duty to subsidize any protected activity.[76] Yet, whether the government may constitutionally deny or withhold a subsidy for engaging in first amendment activities depends on the reason for the denial—it may not deny a benefit for any reason which jeopardizes first amendment rights.[77] Denial of a federal subsidy is unconstitutional when (1) the denial is intended to penalize a group or individual for exercising its constitutionally protected right;[78] or (2) the denial results in invidious discrimination which is aimed "at the suppression of dangerous ideas."[79] "The basic lesson to be drawn from the [Supreme] Court's subsidy cases is that although the government may not place obstacles in the path of the exercise of constitutionally protected activity, it need not remove obstacles not of its own creation."[80] Thus, once the government subsidizes a constitutionally protected activity, thereby removing financial obstacles to the exercise of the activity, a subsequent denial of the subsidy on a discriminatory basis would be an impermissible restraint on first amendment rights.

During the debate on the Helms Proposal, Senator Robert J. Dole (R.-Kan.) made the following remarks regarding federal funding of first amendment activities: "The first amendment does not entitle artists—or anyone for that matter—to use tax dollars to finance the exercise of their free speech rights. The Supreme Court made this point abundantly clear in its 1983 unanimous decision,

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74 *Id.* at 97.

75 Guttmacher Inst. v. McPherson, 616 F. Supp. 195, 204 (S.D.N.Y. 1985), *modified*, 805 F.2d 1088 (2d Cir. 1986) (government has right "not to pay for things for which it would prefer not to pay").

76 *See* Regan v. Taxation with Representation, 461 U.S. 540, 549 (1983) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.").

77 Perry v. Sindermann, 408 U.S. 593, 597 (1972) (the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech"). *See also* American Council of the Blind v. Boorstin, 644 F. Supp. 811, 815 (D.D.C. 1986) ("[O]nce [a benefit] is conferred, . . . the government cannot deny it on a basis that [implicates the U.S. Constitution].").

78 Speiser v. Randall, 357 U.S. 513 (1958). Notwithstanding the fact that a tax exemption is a privilege, and not a right, the *Speiser* court stated that "[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Id.* at 518. Moreover, such a denial, which "necessarily will have the effect of coercing the claimants to refrain from the proscribed speech," *id.* at 519, constitutes an abridgement of the right to freedom of speech. *Id.* at 518-19.

79 *Id.* at 519.

80 Student Gov't v. Trustees of Univ. of Massachusetts, 868 F.2d 473, 479 (1st Cir. 1989) (holding that termination of subsidy did not violate students' first amendment rights because termination neither penalized students for engaging in first amendment activities nor discriminated invidiously in an attempt to suppress dangerous ideas).

Regan versus Taxation With Representation."[81] While Senator Dole is not wrong, an analysis of *Regan v. Taxation With Representation*[82] will highlight an important distinction regarding discriminatory and non-discriminatory denials of federal funding.

In *Taxation*, the Court held that content-based discrimination is not prohibited so long as it does not amount to invidious discrimination "ai[med] at the suppression of dangerous ideas."[83] In that case, a non-profit organization challenged an Internal Revenue Service ("IRS") classification that prevented it from receiving tax deductible contributions because it engaged in lobbying. The organization claimed that its constitutional rights were being abridged since the IRS penalized it for exercising a first amendment right.[84]

The Court, however, upheld the classification. It reasoned that the government neither invidiously denied the benefit due to the exercise of a constitutional right, nor placed an obstacle before the protected activity—the right to lobby or petition the government.[85] Congress did not deny the tax benefit to the organization based on the content of its speech, but rather isolated lobbying from the category of tax exempt activities based on a long recognized view that taxation is treated differently. " 'It has . . . been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. . . . [T]he presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.' "[86] The plaintiffs in *Taxation* failed to show that the exclusion of lobbying expenses from the category of tax exempt activities amounted to invidious discrimination. Therefore, the Court held, "Congress has not infringed any First Amendment rights [n]or regulated any First Amendment activity."[87]

The Helms Proposal sought to distinguish works of art on the

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81 135 CONG. REC. S12,213 (daily ed. Sept. 29, 1989) (statement of Sen. Dole (R.-Kan.)).

82 461 U.S. 540, 549 (1983) (holding, among other things, that there is no law requiring government to subsidize speech).

83 *Id.* at 548 (citations omitted).

84 *Id.* at 542.

85 *Id.* at 548.

86 *Id.* at 547 (quoting Madden v. Kentucky, 309 U.S. 83, 87-88 (1940) (footnotes omitted)). The Court then stated that a low level of scrutiny is applied to this legislation because "[t]he distinction between veterans' organizations and other charitable organizations is not at all like distinctions based on race or national origin." *Id.* at 548.

87 *Id.* at 546. The Court stated that it is untrue that first amendment rights are " 'not fully realized unless they are subsidized by the State.' " *Id.* (quoting Cammarano v. United States, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)).

basis of their content.[88] Those works which were labelled as advancing radical, controversial, or obscene ideas would have fallen within the proscribed category and thus would have been excluded from receiving federal funding. Such classifications would have lead to subsidy denials on a basis that violated the first amendment, since the government was "motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues."[89] Consequently, the Helms Proposal probably would not have survived a constitutional challenge.

B. *Proposed Five-Year Ban: Due Process Limitations on Regulations Affecting Free Speech*

The proposed five-year ban on direct grants to ICA and SECCA also raised the issue of the constitutionality of regulations that affect first amendment activity. Although the proposal ultimately was not adopted, it would have precluded ICA and SECCA from receiving direct NEA grants for a period of five years because they exhibited controversial art. The ban sought to punish the museums for what, at one time, was not prohibited. Thus, irrespective of whether the government may draft a statute denying subsidies for the types of work in question, the retroactive effect of the five-year ban would have denied ICA and SECCA their first amendment rights without due process of law.[90]

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88 With respect to the NEA, a danger exists that access to a federal grant is conditioned on the content of the photograph. *See* Grundberg, *Blaming a Medium for Its Message*, N.Y. Times, Aug. 6, 1989, § 2 (Arts & Leisure), at 1, col. 1 ("[P]hotography's seemingly inherent realism makes it especially vulnerable to a criticism based solely on the contents of an image.").

In addition to violating the free speech clause of the first amendment, the Helms Proposal might have been violative of other constitutional or statutory provisions as well. It arguably would have violated the religion clause of the first amendment. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). Application of the Helms Proposal would have necessitated defining religion to determine whether an exhibit "denigrates the objects or beliefs of the adherents of a particular religion or nonreligion." 135 CONG. REC. S8806 (daily ed. July 26, 1989). In relation to the Serrano photograph, Helms would have had to show that a crucifix in a jar of urine "denigrates the . . . beliefs of . . . a particular religion." *Id.* Such a showing is probably unconstitutional. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971) (categorization of religion which creates excessive state entanglement with religion by advancing one belief over another, constitutes establishment of religion).

89 Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 546 (1980) (Stevens, J., concurring). However, Congress might not wish to subsidize the art in question, not because it promotes dangerous ideas, but because it is aesthetically offensive. Senator Helms called the Mapplethorpe and Serrano works "trash." Collins, *On Helms and Grants With Poison Pills*, N.Y. Times, Aug. 7, 1989, at C11, col. 3, col. 5 [hereinafter Collins, *On Helms*].

90 Had the ban on direct grants to ICA and SECCA been prospective, a violation of

While the federal government may grant a subsidy conditioned on certain terms, the Southern District of New York, in *Guttmacher Institute v. McPherson*,[91] held that it must give adequate notice prior to the imposition of such conditions to allow the recipient either to "forego the speech and accept the benefits; or forego the benefits and indulge in the speech; or press a claim that the condition is unconstitutional."[92] In *Guttmacher*, the plaintiff challenged an agency decision not to renew federal funding for its publication, a journal which published articles on international population control and family planning. The plaintiff claimed that it had no fair warning that certain articles "could lead to a denial of [federal] funding."[93] Holding the denial to be unlawful, the court reasoned that the government is obligated to make a "prospective declaration [to] let[] the citizens know where they stand."[94] The court thus recognized the party's right to rely on the status quo of the law, the right not to be penalized for doing so, and the legislator's duty to grant a party prior notice of the conditions which form the basis for the subsidy.[95]

ICA and SECCA received no notice that the showing of the Mapplethorpe and Serrano works, respectively, would result in the denial of federal money in the future. Those who worked at ICA claimed that the institute was being punished "after [it] compl[ied] with the law and with existing Federal guidelines."[96] Moreover, ICA and SECCA had no reason to anticipate any governmental retribution, since of the 80,000 NEA grants awarded since its inception, only twenty had caused any real controversy.[97] A direct consequence of the five-year ban on federal funds to ICA would have resulted in an equal loss in matching

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20 U.S.C. § 953(c) could have been raised, since the ban might then have constituted unlawful interference with grant recipients. *See supra* note 71 and accompanying text.

91 Guttmacher Inst. v. McPherson, 616 F. Supp. 195 (S.D.N.Y. 1985), *modified*, 805 F.2d 1088 (2d Cir. 1986).

92 *Id.* at 205 ("[A]t the very least the government is obligated to state in advance the restrictions on speech which it seeks to exact as a condition for the receipt of benefits.").

93 *Id.* at 204.

94 *Id.* at 205.

95 *Id.* (prior notice of conditions assures "democratic and constitutional testing").

96 Collins, *On Helms*, *supra* note 89, at C11, col. 5. Gamarekian, *Senate Panel*, *supra* note 12, at C19, col. 4 (chief of development at ICA claimed that it "went through the peer-review process and followed all established procedures"). *See also* 135 CONG. REC. E3024 (daily ed. Sept. 13, 1989) (remarks of Rep. Thomas M. Foglietta (D.-Pa.)) ("ICA provided the NEA with complete information on the nature of the artist's work, including photographic slides."); 135 CONG. REC. S8813 (daily ed. July 26, 1989) (remarks of Sen. Timothy E. Wirth (D.-Colo.)) (ICA and SECCA both "applied for and accurately completed a rigorous review process by . . . their peers and by members of the Presidentially appointed National Council on the Arts to receive NEA grants.").

97 Kimmelman, *Helms Bill*, *supra* note 13, at A26, col. 2. This is only .025% of all grants awarded by the NEA.

funds from private sources, amounting to a total loss of one million dollars.[98] This loss would have meant "fewer exhibitions . . . publications, lectures, film series and educational outreach . . . ."[99]

A compelling governmental interest can justify the imposition of a retroactive law that affects a constitutionally protected right.[100] The justification offered during congressional debates on the proposal, however, probably does not constitute such a compelling state interest. Some members of Congress stated that the five-year ban on direct NEA grants was intended to punish the museums for accepting the NEA grants used to sponsor the controversial art exhibits.[101] While the government has a valid interest in the grant-making process,[102] its stated interest in the five-year ban—punishing the museum—did not constitute an interest sufficient to justify the retroactive imposition of new conditions or standards on the receipt of an NEA grant. If Congress' power to control first amendment activity were not subject to due process limitations, it might invidiously discriminate among benefited activities.[103]

C. *The Helms Amendment: Obscenity and the First Amendment*

Unlike the Helms Proposal, the Helms Amendment did not contain an outright ban on certain subject matters. Rather, it placed a general prohibition on funding for art works considered obscene.

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98 Collins, *On Helms*, *supra* note 89, at C14, col. 6.

99 *Id.*

100 FCC v. League of Women Voters, 468 U.S. 364, 380 (1984) (a restriction on free speech which is narrowly tailored to serve a "substantial governmental interest" is not *per se* unconstitutional).

101 When the proposed ban was considered in the Senate, the following discussion took place between two Senators:

> Mr. Sanford. . . . [T]he bill bars the National Endowment [for] the Arts from providing direct grants to SECCA for a period of 5 years. Is this the proper reading of the language?
>
> Mr. Byrd. The Senator from North Carolina is correct.
>
> Mr. Sanford. Is this language intended to punish SECCA for its involvement in the recent controversy over the art work of Andres Serrano?
>
> Mr. Byrd. That is correct.

135 CONG. REC. S8833 (daily ed. July 26, 1989).

102 *See supra* note 72 (discussing Congress' constitutional role as regulator of appropriations).

103 On the other hand, Congress can control first amendment activities without engaging in invidious discrimination or abridging procedural due process rights. *See* Regan v. Taxation with Representation, 461 U.S. 540, 546-48 (1983) (holding that § 501(c)(3) of the Internal Revenue Code, which grants tax exemptions to non-profit organizations not substantially engaged in carrying out propaganda or otherwise attempting to influence legislation, does not violate the first amendment or the equal protection component of the fifth amendment).

> None of the funds authorized to be appropriated for the National Endowment for the Arts . . . 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 sadomasochism, homoeroticism, the sexual exploitation 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.*[104]

This proscription contained part of the obscenity standard set forth in the Supreme Court case *Miller v. California.*[105] *Miller* held that the first amendment does not protect all speech. Obscene forms of expression are not entitled to constitutional protection.[106] The *Miller* Court established a three-prong test to determine what speech or expression constitutes obscenity.

> The basic guidelines for the trier of fact [are]: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[107]

For purposes of the *Miller* analysis, to determine whether a work is obscene, it must be considered in the context of the entire exhibit. When analyzing whether *Playboy* magazine was obscene pursuant to the *Miller* standard, the Court of Appeals for the Fifth Circuit held that " 'the inclusion of . . . literary matter . . . in significant proportions precludes a finding that *Playboy* taken as a whole lacks serious literary, artistic, political or scientific value.' "[108]

In contrast, a Cincinnati judge instructed the jurors in an obscenity trial to evaluate only the seven photographs which formed the basis of the criminal charge, without considering the 175-photograph exhibition as a whole.[109] In that case, a museum and its director were charged with obscenity for exhibiting Mapplethorpe

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104 Appropriations Act of 1990, *supra* note 14, at 741 (emphasis added).

105 413 U.S. 15, *reh'g denied*, 414 U.S. 881 (1973).

106 *Id.* at 23.

107 *Id.* at 24 (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972) (quoting Roth v. United States, 354 U.S. 476, 489 (1957))).

108 American Council of the Blind v. Boorstin, 644 F. Supp. 811, 815 n.2 (D.D.C. 1986) (quoting Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353, 1372 (5th Cir.), *cert. dismissed*, 447 U.S. 931 (1980)).

109 City of Cincinnati v. Contemporary Arts Center, 57 Ohio Misc.2d 15, 566 N.E.2d 214 (1990). Margolick, *Rank-and-File Rebuff to Censorship*, N.Y. Times, Oct. 6, 1990, at A6, col. 1, col. 3 [hereinafter *Rank-and-File Rebuff*].

photographs.[110] Although both the museum and its director were acquitted of the charges against them, it might have been reversible error not to consider the seven photographs in context with the others.[111] One scholar analogized that because "a long line of cases suggests that books must be judged in their entirety rather than on [the basis of] random passages,"[112] the photographs, too, should be construed only in the context in which they were presented to the viewer.[113] Therefore, pursuant to the *Miller* standard, the Mapplethorpe exhibit should have been considered as a whole since that was how it was presented to the community.

If the purpose of the Helms Amendment was to narrow the NEA's jurisdiction so that certain types of art would not receive federal funding, it would not have been realized for two reasons. The first reason stems from the difficulty of applying the *Miller* obscenity standard to works of art. In the Cincinnati obscenity trial, "[t]he jurors decided that the photographs appealed to prurient interests and depicted sex in a patently offensive way. But the weight of the defense testimony forced them to concede that the works were art."[114] Thus, a work may appear "obscene" on its face, but if it has "serious artistic" value, it does not constitute obscenity.

Secondly, the NEA's enabling statute requires that a work have substantial artistic value before a grant is awarded.[115] Pursuant to this standard, the Council and the Chairperson determine whether a work constitutes art irrespective of incorporation of the *Miller* standard in the NEA's enabling statute. If the NEA is required to make a finding of "art" prior to awarding any federal funds, and such a finding precludes a judgment of the work as being obscene, then requiring the NEA to apply the *Miller* standard is superfluous. The NEA need not confront this problematic logic, however, since one year after the Helms Amendment was passed, Congress passed a bill "that would leave judgments about obscenity and pornography to the courts."[116]

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110 *Rank-and-File Rebuff*, *supra* note 109, at col. 1.

111 *Id.* at col. 3. "The legal scholars suggested that any conviction would . . . have been overturned . . . [because] by forcing the jury to consider the photographs in isolation rather than in the context of the entire 175-photograph exhibition, [the judge] . . . misconstrued the law." *Id.*

112 *Id.*

113 *Id.*

114 Wilkerson, *Obscenity Jurors Were Pulled 2 Ways*, N.Y. Times, Oct. 10, 1990, at A12, col. 4, col. 6. "The defense . . . paraded expert after expert, from directors of leading museums to the original curator of the exhibition, each of whom testified to the brilliance and seriousness of the late Mr. Mapplethorpe's work." *Id.* at col. 4.

115 20 U.S.C. § 954(c)(1) (1988).

116 Tolchin, *Senate Passes Compromise on Arts Endowment*, N.Y. Times, Oct. 25, 1990, at

D. *The Advance Notice Requirement: Separation of Powers*

The advance notice requirement,[117] incorporated in the Appropriations Act of 1990, conditioned funding on meeting certain requirements:

> For necessary expenses to carry out the National Foundation on the Arts and Humanities Act of 1965, as amended, $144,105,000 shall be available to the National Endowment for the Arts for the support of projects and productions in the arts through assistance to groups and individuals pursuant to section 5(c) of the Act, and for administering the functions of the Act: *Provided*, That not less than thirty days prior to the award of any direct grant to the Southeastern Center for Contemporary Art . . . or for the Institute of Contemporary Art . . . , the National Endowment for the Arts shall submit . . . notification of its intent to make such an award: *Provided further*, That said notification shall delineate the purposes of the award which is proposed to be made and the specific criteria used by the Endowment to justify selection of said award.[118]

Generally, the purpose of advance notice is to afford Congress an opportunity to scrutinize an agency proposal before its effective date.[119] "Congress . . . use[s] [advance notice] provisions to delay implementation of an Executive action . . . until Congress has time to consider it and to enact legislation preventing the action from taking effect."[120] While an advance notice provision does not itself permit direct rejection of an action,[121] Congress can enact legisla-

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C19, col. 1. Senator Orrin G. Hatch (R.-Utah) stated that " 'Congress cannot effectively micro-manage matters that are inherently subjective.' " *Id.* at col. 2.

117 Advance notice requirements are generally applied to a set of rules promulgated by an agency, and are not tailored to a specific rule or agency action. *See Congressional Action, supra* note 45, at 710.

118 Appropriations Act of 1990, *supra* note 14, at 738 (emphasis in original).

119 *Congressional Action, supra* note 45, at 701.

120 BREYER & STEWART, *supra* note 21, at 108 (footnote omitted).

121 *See Congressional Action, supra* note 45, at 701. This would constitute a legislative veto, which was held unconstitutional in Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983). Pursuant to the Immigration and Naturalization Act ("INA"), the Attorney General is empowered to suspend the deportation of illegal aliens if the alien would experience undue hardship in his country of origin. *Id.* In *Chadha*, the Attorney General used his authority to suspend the deportation of Chadha to Uganda. The Attorney General's decision not to deport Chadha was vetoed by a one-House veto provision in the INA. The veto provision authorized one House of Congress to overturn the Attorney General's decision to deport the alien. This was held unconstitutional because it circumvented the bicameralism and presentment clauses of the Constitution. The Court explained the purpose of these constitutional requirements:

> [T]he bicameral requirement and the Presentment Clauses . . . serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two

tion to prevent passage of the rule. Thus, Congress could have introduced legislation to prevent a grant from being awarded to ICA or SECCA. If Congress were to have introduced such legislation, however, it would have violated the principle of separation of powers.

> One of the ways in which the founding fathers sought to avoid tyranny was by building into the Constitution the doctrine of separation of powers. This means that each branch—executive, judicial, and legislative—has specific functions which are not to be encroached upon by the others. The doctrine thus attempts to assure that no single body can alone effectuate the total policy of government. A given policy can, in theory, be effectuated only by a combination of legislative enactment, judicial application, and executive implementation.[122]

The advance notice requirement applied only to two grant recipients, and not to all grants promulgated by the NEA.[123] As such, Congress would have used the advance notice provision to review these grants on a case-by-case basis, thus determining whether the Council and the Chairperson adhered to the NEA's enabling statute standards when they chose to award federal money to ICA and SECCA. Therefore, by scrutinizing the "specific criteria used by the Endowment"[124] to determine whether the NEA acted within the scope of its delegated authority, Congress would have engaged in judicial review of the NEA's decision.[125] Congress is not the appropriate branch of government to review agency action, as "under Article III, Congress established courts to adjudicate cases and controversies . . . [arising] by the exertion of unauthorized administrative power."[126]

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distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings.

Id. at 951.

122 Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 343 (1962); *see also Chadha*, 462 U.S. at 951 (1983) ("The Constitution sought to divide the delegated powers of the . . . Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility.").

123 Had the advance notice requirement been structured so that all grants were subject to congressional review, no separation of powers violation would have arisen. Pursuant to this scenario, Congress would not engage in judicial review of grants on a case-by-case basis. Rather, Congress would then have effectively limited the NEA's powers, rendering the NEA a mere advisory committee on art to Congress.

124 Appropriations Act of 1990, *supra* note 14, at 738.

125 *See also* 135 CONG. REC. H6408 (daily ed. Oct. 2, 1989) (before passing the Appropriations Act of 1990, Congress found that the grants awarded to ICA and SECCA did "not come within the requirement[s] of the NEA [enabling] statute").

126 Stark v. Wickard, 321 U.S. 288, 310 (1944). Moreover, 5 U.S.C. § 706 (1988) de-

Whether congressional action blocking a direct grant to ICA or SECCA would have constituted a separation of powers violation depends on the analysis adopted. *Immigration and Naturalization Service v. Chadha*[127] and *Bowsher v. Synar*[128] represent two different approaches to analyzing separation of powers issues— the majority in each of these opinions adhered to the formalist view, while the dissenting opinions argued the functionalist position.[129] The formalists believe that if the functions of one branch of government were to overlap with those of another, the purpose of the system of checks and balances would be undermined.[130] Advocating the functionalist approach in his dissent in *Bowsher*, Justice White criticized the formalists as impractical. "[T]he attainment of governmental objectives"[131] should not be barred by legislation which "is of minimal practical significance and that presents no substantial threat to the basic scheme of separation of powers."[132]

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fines the scope of judicial review of agency action. The reviewing *court* has the power to set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or if] in excess of statutory jurisdiction, [or] authority." *Id.* § 706 2(A), (C).

127 462 U.S. 919 (1983).

128 478 U.S. 714 (1986).

129 Writing for the majority in *Chadha*, Chief Justice Burger adopted the formalist approach to separation of powers. He asserted that to prevent a breakdown in the system of checks and balances, a strict separation between the three branches should be maintained. *Chadha*, 462 U.S. at 956-58. In analyzing a separation of powers issue, a formalist will identify the branch of government from which the act derives, categorize the type of act, and then align the two to determine whether that type of act belongs to, or was properly executed by, that branch. In *Chadha*, for example, the Court categorized the veto as a legislative act. It then reasoned that since the legislative act was not executed according to constitutional procedure, the veto provision was unconstitutional.

Justice White, in his dissent, urged the Court to adopt a functionalist approach to separation of powers. He maintained that the veto provision did not constitute a legislative act because it did not create anything new, but merely upheld the status quo. *Id.* at 990 (White, J., dissenting). Thus, since Congress was not legislating, it did not need to adhere to the bicameralism and presentment requirements in the Constitution. *Id.* at 987-89 (White, J., dissenting). Either argument turns on how the Court categorizes the act.

130 The separation of powers principle is intended to prevent tyranny, to preserve individual liberties, and to maintain an efficient government. *See Bowsher*, 478 U.S. at 721-22. Explaining separation of powers, the *Bowsher* Court stated that "[t]he declared purpose of separating and dividing the powers of government . . . was to 'diffus[e] power . . . [and] to secure liberty.' " *Id.* at 721 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). " '[T]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates' . . . ." *Id.* at 722 (quoting THE FEDERALIST No. 47, at 325 (J. Madison) (J. Cooke ed. 1961)).

131 *Id.* at 759 (White, J., dissenting).

132 *Id.* Justice White explained why the formalist approach is impractical.

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.

With regard to the advance notice provision, the formalists would argue that legislation preventing a grant is a separation of powers violation because only the strictest separation between the branches is constitutionally permissible.[133] Therefore, allowing Congress to engage in a judicial function by reviewing NEA grants on a case-by-case basis is constitutionally impermissible. The functionalists would argue that such interference with the delegated authority of the NEA does not violate the separation of powers principle because the legislative act by Congress preventing a direct grant does not constitute judicial review, but rather, is permissible legislative oversight.[134] Thus, according to the functionalists, Congress should be entitled to maintain this type of check on agency action.

IV. PROPOSAL

To maintain the proper balance between the Constitution and congressional control over the NEA and grant recipients, the Chairperson should be required to submit a written explanation when it either awards or denies a grant. In the course of its delegated authority, the NEA should delineate the purposes of the proposed award and the specific criteria according to which the grant was awarded or denied, and record these purposes and criteria for later judicial review.[135]

The written explanation would serve two purposes. First, if a grant were to be challenged, there would be a complete record for review so that a court could determine whether the agency's action was outside the scope of its enabling statute.[136] Second, such a requirement would force the agency to think through its decisions carefully.[137] By requiring the NEA to outline its rea-

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Id. at 760 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

133 *See Bowsher*, 478 U.S. 714 (1986).

134 For a discussion of permissible legislative oversight, see *supra* notes 53-64 and accompanying text.

135 This requirement would be in addition to the current requirement that grant applicants give a detailed explanation of their work to the NEA before they receive a subsidy. *See supra* note 20.

136 Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (Court needed to review findings made prior to litigation to determine whether agency acted within scope of delegated authority). In addition, because the grant-making standards are vague, see *supra* note 41 and accompanying text, a detailed record requirement will facilitate a court's review process when applying the two-part reasonableness test enunciated in Chevron, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984). *See supra* note 42 and accompanying text.

137 Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974) (agency required to state principle and supporting rationale when explaining departure from prior inconsistent decisions).

sons for awarding or denying a grant, the agency would be more conscious of the standards it was applying to any particular grant, diminishing the likelihood that works lacking in true artistic value would be awarded federal money. As that probability decreases, so would the likelihood that Congress would wrongfully challenge an NEA determination or interfere with a grant recipient. The effect of this proposal would be to lessen congressional scrutiny of NEA action, thereby curbing unwarranted interference. Moreover, the requirement of a written explanation would not be too intrusive of the Council and would be highly beneficial for Congress.

V. CONCLUSION

Congress recently reaffirmed its intent that the NEA remain free from governmental control.[138] Yet, although the legislative proposals and statutory amendments discussed in this Note are no longer in effect, their impact should not be underestimated.[139] In 1965, when Congress created the NEA, it believed art to be worthy of federal subsidies. Until it comes to a contrary determination, Congress must not only subsidize art on a non-discriminatory basis, but also must accord due deference to the NEA.

Nancy Ravitz

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138 "[T]he Chairman of the National Endowment for the Arts has the responsibility to determine whether . . . an application should be funded." 135 CONG. REC. H6407 (daily ed. Oct. 2, 1989).

139 Due to the proposed legislation and statutory amendments, at least one museum cancelled an exhibition in an effort to quiet the funding controversy. As a direct result, artists refused to exhibit their works at that museum to protest the cancellation. *See supra* note 62. Additionally, the NEA's attempt to enforce the Helms Amendment through its rulemaking procedure created a chilling effect on free speech. Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 783 (C.D. Cal. 1990) ("chilling effect on these two plaintiffs arising from the NEA's vague certification requirement is *unmistakably clear*") (emphasis added). For a discussion of *Lewitzky*, see *supra* note 52. While the future effect of the legislation remains unclear, it is likely that as the NEA attempts to effectuate congressional intent, conflicts will continue to exist between the rights of artists, the NEA, and Congress.