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U.S. Department of Justice  
Office of Legal Counsel

Office of the  
Deputy Assistant Attorney General

Washington, D.C. 20530

MAY 20 1983

MEMORANDUM FOR RICHARD A. HAUSER  
Deputy Counsel to the President

Re: Unconstitutional Incursions into Presidential Power  
Contained in Enrolled Bill Currently Before the  
President, and in Second Bill in the Congress

Enclosed for your information is a letter from Assistant Attorney General McConnell to Director Stockman urging that the President veto an enrolled bill, S. 653, entitled "The Foundation for the Advancement of Military Medicine Act of 1983." Also enclosed is a copy of a Memorandum to the Attorney General alerting him to the unconstitutional incursions into the President's powers contained in this bill, and in a second bill, "The National Endowment for Democracy Act," now pending before the House and Senate. The Memorandum attaches a letter, dated May 2, 1983, from Assistant Attorney General McConnell to Chairman Zablocki, of the House Committee on Foreign Affairs, informing him of the "significant constitutional questions" raised by the National Endowment for Democracy Act. Copies of both bills are also enclosed.

A handwritten signature in cursive script that reads "Robert B. Shanks".

Robert B. Shanks  
Deputy Assistant Attorney General  
Office of Legal Counsel



U.S. Department of Justice

Office of Legal Counsel

Office of the  
Assistant Attorney General

Washington, D.C. 20530

MAY 19 1963

MEMORANDUM TO ROBERT A. MC CONNELL,  
ASSISTANT ATTORNEY GENERAL  
OFFICE OF LEGISLATIVE AFFAIRS

Re: S. 653, 98th Cong., 1st Sess.,  
"The Foundation for the Advancement  
of Military Medicine Act of 1983."

I am transmitting herewith a letter which we have prepared for you to send to Director Stockman urging that the President veto the above-referenced enrolled bill.

The Assistant Attorney General for the Civil Division also recommends a veto for different reasons as articulated in his memorandum to me, a copy of which is attached. We are not confident that the reasons stated by Mr. McGrath are persuasive and we have not included them in our proposed letter to Director Stockman.

Theodore B. Olson  
Assistant Attorney General  
Office of Legal Counsel

Enclosure



U. S. Department of Justice  
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable David A. Stockman  
Director  
Office of Management and Budget  
Washington, D.C. 20503

Dear Mr. Stockman:

In compliance with your request, this Department has examined a facsimile of the enrolled bill, S. 653, 98th Cong., 1st Sess., "The Foundation for the Advancement of Military Medicine Act of 1983." The bill would establish the Foundation for the Advancement of Military Medicine (the "Foundation") to contract with the Uniformed Services University of the Health Sciences (a military medical school established by 10 U.S.C. § 2112) (the "University") to "carry out medical research and education projects," to "serve as a focus for the interchange between military and civilian personnel," and to encourage cooperation between military and civilian medicine -- in short, to perform functions that are within the scope of the authority vested by statute in the University. See 10 U.S.C. §§ 2112-2117. Although not mentioned in the statement of purposes in the bill, the primary purpose underlying creation of the Foundation, as evidenced by the Senate Committee report, was to obtain funds and other types of assistance from nongovernmental sources and channel them to the University. S. Rep. No. 39, 98th Cong., 1st Sess. 2, 3, 7 (1983). As the Senate Committee report states, the Foundation would be patterned after the American Registry of Pathology (Registry) (10 U.S.C. § 177), which provides similar functions with respect to the Armed Forces Institute of Pathology. 10 U.S.C. § 176. S. Rep. No. 39, 98th Cong., 1st Sess. 2, 7 (1983). The bill recites that, like the Registry, the Foundation would "not for any purpose be an Agency or instrumentality of the United States Government." 10 U.S.C. § 178(a), as added by § 2(a) of the bill.

The Foundation, however, would differ in one significant aspect from the Registry. While 10 U.S.C. § 177 does not provide for congressional participation in the composition and selection of the Registry's governing board, 10 U.S.C. § 178(a), as added by § 2(a) of the bill, would provide specifically:

(C)(1) The Foundation shall have a Council of Directors (hereinafter in this section referred to as the 'Council') composed of --

(A) the Chairman and ranking minority members of the Committee on Armed Services of the Senate and the House of Representatives (or their designees from the membership of such committees), who shall be ex officio members,

(B) the Dean of the Uniformed Services University of the Health Sciences, who shall be an ex officio member, and

(C) four members appointed by the ex officio members of the Council designated in clauses (A) and (B).

The Foundation thus would be governed by a Council of nine members, consisting of five ex officio members, four of whom would be Members of Congress. The five ex officio members would then appoint the other four members of the Council. The purpose of this provision is, as evidenced by the Senate Committee report, to ensure "that the Congress will remain involved in the purposes, direction and supervision of the Foundation." S. Rep. No. 39, 98th Cong., 1st Sess. 2 (1983).

The exercise of direction and supervision over the Foundation by a branch of the Federal Government plainly negates the statutory assertion that the Foundation would not be an agency or instrumentality of the United States Government. Reciting the verbal incantation that an entity is not an agency of the United States does not ipso facto validate that conclusion if the entity meets the traditional tests for determining whether an entity is an agency of the United States. Moreover, to place this exercise of direction and supervision in Members of Congress and persons appointed by them violates the doctrine of the separation of powers, which, as James Madison observed during the First Session of the First Congress, is the most sacred principle of our Constitution, 1 Annals of Cong. 581 (1789), and which the Supreme Court most recently termed the basic structural doctrine of the Constitution. Northern Pipeline Construction Co. v. Marathon Pipeline Company, \_\_\_ U.S. \_\_\_, 102 S.Ct. 2858, 2864-66 (1982). One of the elements of that doctrine is, as James Madison also observed, that once Congress enacts a statute "the legislative power ceases" except, of course, by the exercise of plenary legislation subject to the President's veto. After a bill has

become law, it must be enforced or interpreted by one of the other branches. The Framers of our Constitution believed that "[t]here can be no liberty where the legislative and executive power are united in the same person, or body of magistrates. . . . The Federalist No. 47, (Madison, quoting Montesquieu). Accordingly, if the Government of the United States is to be involved at all in the direction, supervision or management of the Foundation, those functions would have to be carried out by Executive officers who must be appointed as provided for in Article II, § 2, cl. 2 of the Constitution, and who may not be designated in legislation or appointed by Members of Congress. Buckley v. Valeo, 424 U.S. 1, 126, 141 (1976). Moreover, the function of directing and supervising the Foundation would constitute the holding of an Office under the United States, the exercise of which by Members of Congress would violate the command of Art. I, § 6, cl. 2 of the Constitution.

Finally, the Congressional direction and supervision which, in effect, makes the Foundation an arm of Congress, would not be limited to the Foundation itself. Since it is a function of the Foundation to channel private funds to the Uniformed Services University of the Health Sciences, the Foundation could, by the exercise of its economic power, control the administration and policies of the Uniformed Services University which constitutes a part of the Executive branch.\*/ This again would constitute a violation of the doctrine of separation of powers.

It may well be asserted that this bill would represent only minor encroachments on the principle of the separation of powers, and that major responsibility would not be transferred by it from the President to the Congress. However, we return again to Madison who reminded his fellow citizens nearly two hundred years ago:

"[I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freedom of America did not wait till usurped power had strengthened itself by exercise, and entangled the

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\*/ We realize that Congress generally has the power of the purse. That power, however, has to be exercised by appropriate legislation which is subject to the Presidential veto; here the power would be vested in the Chairmen and ranking minority members of two Congressional committees.

question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it." James Madison, A Memorial and Remonstrance, Addressed to the General Assembly of the Commonwealth of Virginia (1785).

The mechanisms established by this proposed legislation could be employed to transfer other kinds of governmental authority from the President to members of Congress. We believe that defense of the Presidency itself requires disapproval of this legislation.

For the above reasons, the Department of Justice recommends against Executive approval of the bill.

Sincerely,

Robert A. McConnell  
Assistant Attorney General  
Office of Legislative Affairs



U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

To: Theodore B. Olson  
Assistant Attorney General  
Office of Legal Counsel

From: J. Paul McGrath  
Assistant Attorney General  
Civil Division

Re: S 653 Title 10, U.S.C. to establish a Foundation for the  
Advancement of Military Medicine and for other purposes

RECEIVED  
MAY 19 4 53 PM '83  
OFFICE OF LEGAL COUNSEL

This is in response to the request for our views on the enrolled bill S. 653 Title 10, U.S.C. to establish a Foundation for the Advancement of Military Medicine and for other purposes.

While we defer to other agencies on the wisdom of creating this Foundation, we are concerned about the application of the Federal Tort Claims Act to individuals who would provide voluntary services to the Foundation. We note that the Foundation itself would not be considered a federal agency for purposes of the Federal Tort Claims Act. Therefore, we would be faced by the anomaly of the Federal Tort Claims Act applying to volunteers working at the Foundation but not to the full time employees.

In addition, the provision makes the federal government liable for the activities of individuals over whom it does not exercise the normal controls of an employer. Because of the potential liability, we request that the President veto this bill.



To the United States Senate:

I have withheld my approval from S. 653, 98th Cong., 1st Sess., "To amend title 10, United States Code, to establish a Foundation for the Advancement of Military Medicine, and for other purposes."

The bill would establish a Foundation to perform a variety of functions that are within the scope of those vested by statute in the Uniformed Services University of the Health Sciences. Although not mentioned in the bill's statement of purposes, the Senate Committee report indicates that the Foundation was primarily designed to receive gifts, grants, and legacies from private sources and channel them to the University, and thus to further the University's teaching, research, and services without additional government expenditures. I am in full sympathy with this worthy purpose behind the bill.

The bill provides, however, that of the nine members of the Council of Directors, the governing body of the Foundation, four ex officio members of the Council would be Members of Congress and the four operating members of the Council would, in effect, be appointed by the Congressional members. The purpose of this composition of the Council is, as stated in the report of the Senate Committee on Armed Services, to ensure "that the Congress will remain involved in the purposes, direction and supervision of the Foundation."

The Attorney General has advised me that this reservation by Congress of the power to appoint the officers who would discharge the legal responsibilities of the Foundation and to remain involved in the direction and supervision of the Foundation constitutes a serious violation of the principle of the Separation of Powers, which as James Madison, the

Father of our Constitution, stated during the First Session of the First Congress, is the most sacred principle of our Constitution. The Separation of Powers requires that after a statute has been enacted by the legislature it may be enforced or interpreted only by the Executive or Judicial branches. As James Madison, quoting Montesquieu, stated: "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." The Federalist, No. 47. A bill which is designed to ensure that Congress will remain directly involved in the purposes, direction and supervision of a body created by legislation, and thereby in the execution of the law, constitutes a clear violation of that principle.

It might be argued that this bill constitutes only a minor infraction of the principle of the Separation of Powers. But here I must quote again from James Madison, this time from his Memorial and Remonstrance, Addressed to the General Assembly of the Commonwealth of Virginia:

"[I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freedom of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it."

I fully support proper effort to shift to the private sector some of those functions and fundings methods which are now being performed by the Government. However, this valid

and worthy objective may not provide justification for the selection of an improper mechanism.

It is my hope that I shall have in the near future the opportunity to approve legislation analogous to S. 653, which does not contain the unconstitutional provision.



U.S. Department of Justice  
Office of Legal Counsel

Office of the  
Assistant Attorney General

Washington, D.C. 20530

MAY 19 1983

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Privatization of Governmental Functions

This Office has recently been involved in the provision of legal advice to the Counsel to the President and others with respect to legal problems raised by various proposals, some Legislative and some Executive-initiated, to involve the private sector more deeply in the management of the government. Because several such proposals presently under consideration present recurring and potentially controversial legal issues, we thought you should be alerted to them. 1/

One example is an enrolled bill presently before the President for his approval or veto. This bill, which has Department of Defense support, was not reviewed by this Office during the legislative process as a result of an oversight. Our comments about it and objections to it therefore come at a rather awkward stage. Nevertheless, we feel obliged to raise them. Briefly, the bill would establish a private "Foundation for the Advancement of Military Medicine" which would be authorized, inter alia, to contract with the Uniformed Services University of the Health Sciences (a military medical school established by 10 U.S.C. § 2112) (the "University") to "carry out medical research and education projects," to "serve as a focus for the interchange between military and civilian personnel," and to encourage cooperation between military and civilian medicine -- in short, to perform functions that are within the scope of the authority vested by statute in the University. See 10 U.S.C. §§ 2112-2117. The bill's statement of purposes does not mention the primary purpose underlying creation of the Foundation which, as evidenced by the Senate Committee report, was to obtain funds and other types of assistance from nongovernmental sources and channel them to the University. S. Rep. No. 39, 98th Cong., 1st Sess. 2, 3, 7 (1983). Under the bill, the Foundation would not directly receive appropriated funds.

1/ A Department working group under the supervision of the Office of Legal Policy is also considering some of the broad policy implications of these types of projects and will be reporting to you at some time in the future.

Although the bill provides that the Foundation "shall not for any purpose be an agency or instrumentality of the United States Government," its purposes and authority are clearly established by the bill. Congress has sought to create an entity to perform specific tasks set forth in a public law. Thus, the directors of the Foundation would, in a very real sense, be involved in execution of federal law, despite the statement that the Foundation would not be an agency. Reciting the verbal incantation that an entity is not an agency of the United States does not ipso facto validate that conclusion if the entity meets the traditional tests for an agency of the United States. Moreover, we would caution that once the Foundation is established, there may well be a natural tendency on the part of Congress to provide appropriated funds for its operation to the extent that private donations could not be solicited in adequate amounts to support its operations. Congress' use of public funds to support another such mixed public/private entity, is discussed in the second part of this memorandum.

The Foundation would be governed by a "Council of Directors," comprised of five ex-officio members (the Chairmen and ranking minority members of the Committees on Armed Services of the Senate and House of Representatives and the Dean of the Uniformed Services University of the Health Sciences), and four operational members who are to be appointed by the five ex-officio members.

According to the Senate Report, S. Rep. No. 39, 98th Cong., 1st Sess. 2 (1983), the composition of this Council of Directors ensures "that the Congress will remain involved in the purposes, direction and supervision of the Foundation." In short, this enrolled bill would create a so-called "private" foundation with congressionally defined purposes. Although the Foundation would be subject to governmental direction and supervision, the bill would place the appointment (and, presumably, the removal) <sup>2/</sup> of the officials charged with its direction and supervision not in the President or any other member of the Executive Branch, but in committees of Congress. As the

<sup>2/</sup> The rule that the power of appointment carries with it the power of removal was announced by James Madison during the First Session of the First Congress. 1 Ann. Cong. 469 (1789). The courts have consistently upheld the applicability of the rule. Matter of Hennen, 13 Pet. (38 U.S.) 230, 259-60 (1839); Blake v. United States, 103 U.S. 227, 231 (1880); Myers v. United States, 272 U.S. 52, 119 (1926); Cafeteria Workers v. McElroy, 367 U.S. 886, 896-97 (1961); Sampson v. Murray, 415 U.S. 61, 70 n.17 (1974); National Treasury Employees Union v. Reagan, 663 F.2d 239, 246-48 (D.C. Cir. 1981); Calaris v. Donovan, 697 F.2d 376 (D.C. Cir. 1983).

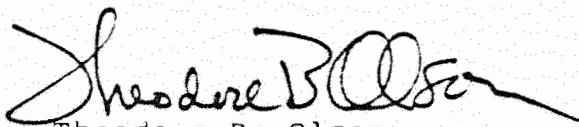
attached enrolled bill report prepared by this Office explains, such an appointment mechanism is unconstitutional as a violation of the separation of powers principle. It is also extremely unwise from the standpoint of the Executive's preservation of control over governmental activities.

A second bill, which has some of the same objectionable characteristics, was recently reported out of both the Senate and House Foreign Affairs Committees as Title VI of the Department of State's Appropriation for FY 1984. That bill would be known as the National Endowment for Democracy Act. It is the product of a cooperative research effort known as "Project Democracy" undertaken by a bipartisan group chaired by William E. Brock III and co-chaired by the Democratic and Republican National Committee Chairman, Charles T. Manatt and Frank J. Fahrenkopf, Jr., in cooperation with the Department of State, the National Security Council, and the United States Information Agency. As presently drafted, the Act would establish a nonprofit corporation funded out of the United States Information Agency's appropriations to support democratic institutions outside the United States. The Endowment would be under the supervision and control of the Congress, rather than the Executive Branch. Its incorporators (who would include at least one Member of Congress) would be named in the Act. Thereafter the Board would be self-perpetuating, subject to Congressional (not Presidential) oversight and to audits by the General Accounting Office. It would receive approximately \$30 million per year to be divided among the National Republican Institute for International Affairs (an arm of the Republican Party), the National Democratic Institute for International Affairs (an arm of the Democratic Party), the Free Trade Union Institute (an arm of the AFL-CIO), and the National Chamber Foundation (an arm of the Chamber of Commerce).

This Department was not aware of this bill until shortly before its passage by the House Committee on Foreign Affairs. Prior to the Committee's action, Assistant Attorney General McConnell wrote Chairman Zablocki, (with OMB clearance) pointing out that the bill raised "significant constitutional questions." See attached letter dated May 2, 1983, from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, to Honorable Clement J. Zablocki, Chairman, House Committee on Foreign Affairs. The letter pointed out that, under the Supreme Court's decision in Buckley v. Valeo, 424 U.S. 1 (1976), any person "exercising significant authority pursuant to the laws of the United States is an officer of

the United States" and must therefore be appointed consistent with the Appointments Clause of the Constitution, Art. II, § 2, cl. 2. Id. at 126. Certain functions given the Endowment under the bill, such as determination of eligibility for public funds, represent a "significant governmental duty exercised pursuant to a public law . . . ." Id. at 140-41. In this respect, Assistant Attorney General McConnell's letter explained that the Endowment would operate in substantially the same manner as foreign affairs agencies with the power to make grants, deciding which applicants and projects to fund in order to promote United States interests abroad. Consequently, its officers would have to be appointed pursuant to the Appointments Clause.

Although OMB, State and USIA have all indicated that they agree with our constitutional concerns, we perceive a strong effort by USIA and State to push this legislation in this form for some reason and, to date, Congressman Fascell who participated in Project Democracy and drafted the bill, seems to be adamantly opposed to any changes.



Theodore B. Olson  
Assistant Attorney General  
Office of Legal Counsel

cc: Edward C. Schmults  
Deputy Attorney General

Robert A. McConnell  
Assistant Attorney General  
Office of Legislative Affairs

Jonathan C. Rose  
Assistant Attorney General  
Office of Legal Policy



U. S. Department of Justice  
Office of Legislative Affairs

RECEIVED  
MAY 3 3 48 PM '83

Office of the Assistant Attorney General

Washington, D.C. 20530

OFFICE OF LEGAL COUNSEL

MAY 2 1983

Hon. Clement J. Zablocki  
Chairman,  
Committee on Foreign Affairs  
House of Representatives  
Washington, D. C. 20510

Dear Mr. Chairman:

Our attention has been called to "The National Endowment for Democracy Act," Title VI of the pending authorization bill for the Department of State. This title was added to the bill during a mark-up session of the International Operations Subcommittee on April 25 and thus has not had the benefit of previous comment by this Department. 1/

Title VI would create a nonprofit corporation to be known as the National Endowment for Democracy (the Endowment). The bill lists six purposes of the Endowment, including the encouragement of "free and democratic institutions throughout the world through private sector initiatives, including activities which promote the individual rights and freedoms which are essential to the functioning of democratic institutions." §603(a)(1). The Endowment provides funding for private groups and does not carry out programs directly. It is responsible under §603(b), however, for funding programs consistent with the purposes set forth in §603(a).

Funds for the Endowment are to come from money already appropriated to the United States Information Agency without regard to restrictions that may exist as to use of that agency's funds. §610. The bill provides that specified minimum amounts are to be allocated to four designated institutions: (1) the National Democratic Institute for International Affairs; (2) the National Republican Institute for International Affairs; (3) the Free Trade Union Institute, and (4) the National Chamber Foundation. §611. The bill appears to permit the provision of larger amounts to the designated groups, if the Endowment so decides, as well as funding of other groups not listed in §611, if in conformance with the bill.

1/There is no bill number at present, although the draft is designated WCM 169.



A designated list of individuals (now blank) will serve as incorporators of the Endowment and Congressman Dante B. Fascell will serve as interim chairman until a chairman is elected. §604. The Endowment will subsequently be governed by a Board of Directors, which will initially be the incorporators designated by Congress in §604. Thereafter the Board of Directors shall be self-perpetuating with members to be elected in accordance with the bylaws of the Endowment. §605. The daily operations of the Endowment shall be administered by a president appointed by the Board. §606.

It is our view that the bill raises significant constitutional questions. In a leading decision, the Supreme Court has ruled that someone "exercising significant authority pursuant to the laws of the United States is an Officer of the United States" and must therefore be appointed consistent with the Appointments Clause. Buckley v. Valeo, 424 U.S. 1, 126 (1976). Persons who are not officers may perform functions that are basically "investigative and informative" which are removed from the administration and enforcement of public law. Id. at 137-39. Certain functions given to the Endowment, such as determinations of eligibility for public funds, however, represent a "significant governmental duty exercised pursuant to a public law," in this case the National Endowment for Democracy Act. Id. at 140-41. In this respect, it appears that the Endowment will operate in substantially the same manner as foreign affairs agencies with grant power, deciding which applicants and projects to fund in order to promote United States interests abroad. Cf. United States v. Curtiss Wright Export Co. 299 U.S. 304, 319-20 (1936). The persons who perform the kinds of tasks assigned the directors under the bill therefore must be appointed pursuant to the Appointments Clause of the Constitution. Art. II, §2, cl. 2.

We do not think that statements in the bill that the Endowment is not an agency of the United States, §602(b), or that members of the Board shall not "by reason of their membership on the Board, be deemed to be officers ... of the United States," §605(c), determine the constitutional issue. The members of the Board are officers by reason of their performance of functions that the Constitution requires be performed by officers, rather by reason of their membership alone.

The Appointments Clause requires nomination by the President with advice and consent of the Senate, although Congress may by law vest the appointment of "inferior Officers," in the President alone, in the courts or in heads of departments. Since the Board members will be designated initially by

Congress, §604, and subsequently will be self-perpetuating, §605, none of the members will have been appointed consistent with the Appointments Clause. We therefore must object to this aspect of the bill as unconstitutional. We certainly would be willing to discuss with the Committee any proposals which would alleviate this concern.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

(Signed) Robert A. McConnell

ROBERT A. McCONNELL  
Assistant Attorney General

FILE COPY  
LEGISLATIVE AFFAIRS

# Ninety-eighth Congress of the United States of America

AT THE FIRST SESSION

*Begun and held at the City of Washington on Monday, the third day of January,  
one thousand nine hundred and eighty-three*

## An Act

To amend title 10, United States Code, to establish a Foundation for the Advancement of Military Medicine, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Foundation for the Advancement of Military Medicine Act of 1983".*

SEC. 2. (a) Chapter 7 of title 10, United States Code, is amended by adding at the end thereof the following new section:

**"§ 178. Foundation for the Advancement of Military Medicine**

"(a) There is authorized to be established a nonprofit corporation to be known as the Foundation for the Advancement of Military Medicine (hereinafter in this section referred to as the 'Foundation') which shall not for any purpose be an agency or instrumentality of the United States Government. The Foundation shall be subject to the provisions of this section and, to the extent not inconsistent with this section, the Corporations and Associations Articles of the State of Maryland.

"(b) It shall be the purpose of the Foundation (1) to carry out medical research and education projects under cooperative arrangements with the Uniformed Services University of the Health Sciences, (2) to serve as a focus for the interchange between military and civilian medical personnel, and (3) to encourage the participation of the medical, dental, nursing, veterinary, and other biomedical sciences in the work of the Foundation for the mutual benefit of military and civilian medicine.

"(c)(1) The Foundation shall have a Council of Directors (hereinafter in this section referred to as the 'Council') composed of—

"(A) the Chairmen and ranking minority members of the Committees on Armed Services of the Senate and the House of Representatives (or their designees from the membership of such committees), who shall be ex officio members,

"(B) the Dean of the Uniformed Services University of the Health Sciences, who shall be an ex officio member, and

"(C) four members appointed by the ex officio members of the Council designated in clauses (A) and (B).

"(2) The term of office of each member of the Council appointed under clause (C) of paragraph (1) shall be four years, except that—

"(A) any person appointed to fill a vacancy occurring before the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term; and

"(B) the terms of office of members first taking office shall expire, as designated by the ex officio members of the Council at the time of the appointment, two at the end of two years and two at the end of four years.

"(3) The Council shall elect a chairman from among its members.

"(d)(1) The Foundation shall have an Executive Director who shall be appointed by the Council and shall serve at the pleasure of the Council. The Executive Director shall be responsible for the day-to-day operations of the Foundation and shall have such specific duties and responsibilities as the Council shall prescribe.

"(2) The rate of compensation of the Executive Director shall be fixed by the Council.

"(e) The initial members of the Council shall serve as incorporators and take whatever actions as are necessary to establish under the Corporations and Associations Articles of the State of Maryland the corporation authorized by subsection (a).

"(f) Any vacancy in the Council shall not affect its powers, but shall be filled in the same manner in which the original designation or appointment was made.

"(g) In order to carry out the purposes of this section, the Foundation is authorized to—

"(1) enter into contracts with the Uniformed Services University of the Health Sciences for the purpose of carrying out cooperative enterprises in medical research, medical consultation, and medical education, including contracts for provision of such personnel and services as may be necessary to carry out such cooperative enterprises;

"(2) enter into contracts with public and private organizations for the writing, editing, printing, and publishing of books and other material;

"(3) take such action as may be necessary to obtain patents and licenses for devices and procedures developed by the Foundation and its employees;

"(4) accept, hold, administer, invest, and spend any gift, devise, or bequest of real or personal property made to the Foundation;

"(5) enter into contracts with individuals, public or private organizations, professional societies, and government agencies for the purpose of carrying out the functions of the Foundation;

"(6) enter into such other contracts, leases, cooperative agreements, and other transactions as the Executive Director considers appropriate to conduct the activities of the Foundation; and

"(7) charge such fees for professional services furnished by the Foundation as the Executive Director determines reasonable and appropriate.

"(h) A person who is a full-time or part-time employee of the Foundation may not be an employee (full-time or part-time) of the Federal Government.

"(i) The Council shall transmit to the President annually, and at such other times as the Council considers desirable, a report on the operations, activities, and accomplishments of the Foundation."

(b) The table of sections at the beginning of chapter 7 of such title is amended by adding at the end thereof the following new item:

"178. Foundation for the Advancement of Military Medicine."

SEC. 3. Section 2113 of title 10, United States Code, is amended by adding at the end thereof the following new subsection:

"(j)(1) The Board also is authorized—

"(A) to enter into contracts with the Foundation for the Advancement of Military Medicine established under section 178 of this title, or with any other nonprofit entity, for the

purpose of carrying out cooperative enterprises in medical research, medical consultation, and medical education;

“(B) subject to paragraph (2), to make available to the Foundation for the Advancement of Military Medicine, on such terms and conditions as the Board determines appropriate, such space, facilities, equipment, and support services within the University as the Board considers necessary to accomplish cooperative enterprises undertaken by such Foundation and the University;

“(C) subject to paragraph (2), to enter into contracts with the Foundation for the Advancement of Military Medicine under which the Board may furnish the services of such professional, technical, or clerical personnel as may be necessary to fulfill cooperative enterprises undertaken by such Foundation and the University;

“(D) to accept, hold, administer, invest, and spend any gift, devise, or bequest of personal property made to the University, including any gift, devise, or bequest for the support of an academic chair, teaching, research, or demonstration project;

“(E) subject to paragraph (2), to enter into agreements with the Foundation for the Advancement of Military Medicine, or with any other nonprofit entity, under which scientists or other personnel of the Foundation or other entity may be utilized by the University for the purpose of enhancing the activities of the University in education, research, and technological applications of knowledge; and

“(F) to accept the voluntary services of guest scholars and other persons.

“(2) The authority of the Board under clauses (B), (C), and (E) of paragraph (1) may be exercised only if—

“(A) before the Board enters into any arrangement under which any space, facility, equipment, or support service is made available under clause (B) of such paragraph, before the Board enters into any contract under clause (C) of such paragraph, or before the Board enters into any agreement under clause (E) of such paragraph, it notifies the Committees on Armed Services of the Senate and the House of Representatives in writing of the proposed arrangement, contract, or agreement, as the case may be, the terms and conditions thereof, and, in the case of a proposed agreement under clause (E) of paragraph (1), any appointments proposed to be made under the authority of paragraph (4) in connection with the agreement, and

“(B) a period of fifteen days has elapsed following the date on which the notice is received by such committees.

“(3) The Board may not enter into any contract with the Foundation for the Advancement of Military Medicine, or with any other entity, if the contract would obligate the University to make outlays in advance of the enactment of budget authority for such outlays.

“(4) Scientists or other medical personnel utilized by the University under an agreement described in clause (E) of paragraph (1) may be appointed to any position within the University and may be permitted to perform such duties within the University as the Board may approve.

S. 653—4

“(5) A person who provides voluntary services under the authority of clause (F) of paragraph (1) shall be considered to be an employee of the Federal Government for the purposes of chapter 81 of title 5, relating to compensation for work-related injuries, and to be an employee of the Federal Government for the purposes of chapter 171 of title 28, relating to tort claims. Such a person who is not otherwise employed by the Federal Government shall not be considered to be a Federal employee for any other purpose by reason of the provision of such services.”

*Speaker of the House of Representatives.*

*Vice President of the United States and  
President of the Senate.*

5 TITLE VI--NATIONAL ENDOWMENT FOR DEMOCRACY

6 SHORT TITLE

7 SEC. 601. This title may be cited as the ''National  
8 Endowment for Democracy Act''.

9 ESTABLISHMENT OF THE NATIONAL ENDOWMENT FOR DEMOCRACY

10 SEC. 602. (a) There is authorized to be established a  
11 nonprofit corporation to be known as the National Endowment  
12 for Democracy (hereafter in this title referred to as the  
13 ''Endowment'').

14 (b) The Endowment will not be an agency or establishment  
15 of the United States Government.

16 (c) The Endowment shall be subject to the provisions of  
17 this title and, to the extent consistent with this title, to  
18 the District of Columbia Nonprofit Corporation Act.

19 (d) The Endowment shall have its principal offices in  
20 the District of Columbia.

21 PURPOSES OF THE ENDOWMENT

22 SEC. 603. (a) The purposes of the Endowment are--

23 (1) to encourage free and democratic institutions  
24 throughout the world through private sector initiatives,  
25 including activities which promote the individual rights

1 and freedoms which are essential to the functioning of  
2 democratic institutions;

3 (2) to facilitate exchanges between United States  
4 private sector groups (especially the two major American  
5 political parties, labor, and business) and democratic  
6 groups abroad;

7 (3) to promote United States nongovernmental  
8 participation, especially through the two major American  
9 political parties, labor, business, and other private  
10 sector groups, in democratic training programs and  
11 democratic institution-building abroad;

12 (4) to strengthen democratic electoral processes  
13 abroad through timely measures in cooperation with  
14 indigenous democratic forces;

15 (5) to support the participation of the two major  
16 American political parties, labor, business, and other  
17 United States private sector groups in fostering  
18 cooperation with those abroad dedicated to the cultural  
19 values, institutions, and organizations of democratic  
20 pluralism; and

21 (6) to encourage the establishment and growth of  
22 democratic development in a manner consistent both with  
23 the broad concerns of United States national interests  
24 and with the specific requirements of the democratic  
25 groups in other countries which are aided by programs



1 funded by the Endowment.

2 (b)(1) The Endowment may only provide funding for  
3 programs of private sector groups and may not carry out  
4 programs directly.

5 (2) The Endowment may provide funding only for programs  
6 which are consistent with the purposes set forth in this  
7 section.

8 (c) The Endowment and its grantees shall be subject to  
9 the appropriate oversight procedures of the Congress.

10 INCORPORATION OF THE ENDOWMENT

11 SEC. 604. (a) The following individuals shall serve as  
12 incorporators of the Endowment and shall take whatever  
13 actions are necessary to establish the Endowment under the  
14 District of Columbia Nonprofit Corporation Act:

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23 (b) The Honorable Dante B. Fascell shall serve as  
24 chairman of the incorporators and as interim chairman of the  
25 Endowment until such time as a chairman is elected in

1 accordance with the bylaws of the Endowment.

2 BOARD OF DIRECTORS

3 SEC. 605. (a) The Endowment shall be governed by a Board  
4 of Directors (hereafter in this Act referred to as the  
5 "Board") composed of 15 members. The initial members of  
6 the Board shall be the incorporators designated in section  
7 604; and thereafter the Board shall be self-perpetuating,  
8 with members to be elected in accordance with the bylaws of  
9 the Endowment.

10 (b) Vacancies in the membership of the Board shall not  
11 affect its powers.

12 (c) The members of the Board shall not, by reason of  
13 their membership on the Board, be deemed to be officers or  
14 employees of the United States. They shall, while attending  
15 meetings of the Board or while engaged in duties relating to  
16 such meetings or in other activities of the Board pursuant  
17 to this Act, be entitled to receive compensation at the  
18 daily equivalent of the rate payable for level V of the  
19 Executive Schedule under section 5316 of title 5, United  
20 States Code, and, while away from their homes or regular  
21 places of business, they may be allowed travel expenses,  
22 including per diem in lieu of subsistence, equal to that  
23 authorized by section 5703 of title 5, United States Code,  
24 for persons in the Government service employed  
25 intermittently.

## 1 OFFICERS OF THE ENDOWMENT

2 SEC. 606. (a) The chief executive officer of the  
3 Endowment shall be a president appointed by the Board. The  
4 president of the Endowment shall administer the daily  
5 operations of the Endowment, reporting to the Board under  
6 guidelines and procedures to be established by the Board.

7 (b) The Endowment shall have such other officers and  
8 employees as the Board may determine.

9 (c) Officers of the Endowment shall be appointed on such  
10 terms, and for such terms or at the pleasure of the Board,  
11 as the Board may determine.

12 (d) Officers of the Endowment may not receive any salary  
13 or other compensation from any source other than the  
14 Endowment during the period of their employment by the  
15 Endowment.

## 16 NONPROFIT NATURE OF THE ENDOWMENT

17 SEC 607. (a) The Corporation shall have no power to  
18 issue any shares of stock, or to declare or pay any  
19 dividends.

20 (b) No part of the assets of the Corporation shall inure  
21 to the benefit of any member of the Board, any officer or  
22 employee of the Endowment, or any other individual, except  
23 as salary or reasonable compensation for services.

## 24 RECORDS AND AUDIT OF THE ENDOWMENT AND THE

## 25 RECIPIENTS OF ASSISTANCE

1        SEC. 608. (a)(1) The accounts of the Endowment shall be  
2 audited annually in accordance with generally accepted  
3 auditing standards by independent certified public  
4 accountants or independent licensed public accountants  
5 certified or licensed by a regulatory authority of a State  
6 or other political subdivision of the United States. The  
7 audits shall be conducted at the place or places where the  
8 accounts of the Endowment are normally kept. All books,  
9 accounts, financial records, reports, files, and all other  
10 papers, things, or property belonging to or in use by the  
11 Endowment and necessary to facilitate the audits shall be  
12 made available to the person or persons conducting the  
13 audits; and full facilities for verifying transactions with  
14 any assets held by depositories, fiscal agents, and  
15 custodians shall be afforded to such person or persons.

16        (2) The report of each such independent audit shall be  
17 included in the annual report required by section 609. The  
18 audit report shall set forth the scope of the audit and  
19 include such statements as are necessary to present fairly  
20 the Endowment's assets and liabilities, surplus or deficit,  
21 with an analysis of the changes therein during the year,  
22 supplemented in reasonable detail by a statement of the  
23 Endowment's income and expenses during the year, and a  
24 statement of the application of funds, together with the  
25 independent auditor's opinion of those statements.

1 (b)(1) The financial transactions of the Endowment for  
2 each fiscal year may be audited by the General Accounting  
3 Office in accordance with such principles and procedures and  
4 under such rules and regulations as may be prescribed by the  
5 Comptroller General of the United States. Any such audit  
6 shall be conducted at the place or places where accounts of  
7 the Endowment are normally kept. The representatives of the  
8 General Accounting Office shall have access to all books,  
9 accounts, records, reports; files, and all other papers,  
10 things, or property belonging to or in use by the Endowment  
11 pertaining to its financial transactions and necessary to  
12 facilitate the audit; and they shall be afforded full  
13 facilities for verifying transactions with any assets held  
14 by depositories, fiscal agents, and custodians. All such  
15 books, accounts, records, reports, files, papers and  
16 property of the Endowment shall remain in possession and  
17 custody of the Endowment.

18 (2) A report of each such audit shall be made by the  
19 Comptroller General to the Congress. The report to the  
20 Congress shall contain such comments and information as the  
21 Comptroller General may deem necessary to inform Congress of  
22 the financial operations and condition of the Endowment,  
23 together with such recommendations with respect thereto as  
24 he may deem advisable. The report shall also show  
25 specifically any program, expenditure, or other financial

1 transaction or undertaking observed in the course of the  
2 audit, which, in the opinion of the Comptroller General, has  
3 been carried on or made without authority of law. A copy of  
4 each report shall be furnished to the President and to the  
5 Endowment at the time submitted to the Congress.

6 (c)(1) Each recipient of assistance under this section  
7 shall keep such records as may be reasonably necessary to  
8 fully disclose the amount and the disposition by such  
9 recipient of the proceeds of such assistance, the total cost  
10 of the project or undertaking in connection with which such  
11 assistance is given or used, and the amount and nature of  
12 that portion of the cost of the project or undertaking  
13 supplied by other sources, and such other records as will  
14 facilitate an effective audit.

15 (2) The Endowment, or any of its duly authorized  
16 representatives, shall have access for the purpose of audit  
17 and examination to any books, documents, papers, and records  
18 of the recipient that are pertinent to assistance received  
19 under this title. The Comptroller General of the United  
20 States or any of his duly authorized representatives shall  
21 also have access thereto for such purpose.

22 REPORT TO THE CONGRESS

23 SEC. 609. Not later than December 31 of each year, the  
24 Endowment shall submit an annual report for the preceding  
25 fiscal year to the President for transmittal to the

1 Congress. The report shall include a comprehensive and  
2 detailed report of the Endowment's operations, activities,  
3 financial condition, and accomplishments under this section  
4 and may include such recommendations as the Endowment deems  
5 appropriate. The Board members and officers of the  
6 Endowment shall be available to testify before appropriate  
7 committees of the Congress with respect to such report, the  
8 report of any audit made by the Comptroller General pursuant  
9 to section 608, or any other matter which any such committee  
10 may determine.

#### 11 FUNDING FOR THE ENDOWMENT

12 SEC. 610. (a) The Director of the United States  
13 Information Agency may make grants to the Endowment with  
14 funds appropriated to the Agency for the "Salaries and  
15 Expenses" account.

16 (b) Funds so granted may be used ~~by~~ the Endowment to  
17 carry out the purposes of this title, and otherwise  
18 applicable limitations on the purposes for which funds  
19 appropriated to the Agency may be used shall not apply to  
20 funds granted to the Endowment.

#### 21 ALLOCATION OF FUNDS

22 SEC. 611. Of the amounts made available to the  
23 Endowment for each of the fiscal years 1984 and 1985 to  
24 carry out programs in furtherance of the purposes of this  
25 Act--

1 (1) not less than \$5,000,000 shall be for the  
2 National Democratic Institute for International Affairs;

3 (2) not less than \$5,000,000 percent shall be for  
4 the National Republican Institute for International  
5 Affairs;

6 (3) not less than \$13,800,000 shall be for the Free  
7 Trade Union Institute; and

8 (4) not less than \$2,500,000 shall be to support  
9 private ~~free~~ enterprise development programs of the National Chamber Foundation.

10 TITLE VII--SOUTH AFRICA

11 SHORT TITLE

12 SEC. 701. This title may be cited as the "United States  
13 Policy Toward South Africa Act of 1983".

14 SUBTITLE 1--LABOR STANDARDS

15 ENDORSEMENT AND IMPLEMENTATION OF FAIR EMPLOYMENT PRINCIPLES

16 SEC. 711. Any United States person who--

17 (A) has a branch or office in South Africa, or

18 (B) controls a corporation, partnership, or other

19 enterprise in South Africa,

20 in which more than twenty people are employed shall take the

21 necessary steps to insure that, in operating such branch,

22 office, corporation, partnership, or enterprise, those

23 principles relating to employment practices set forth in

24 section 712 of this Act are implemented.

25 STATEMENT OF PRINCIPLES



MAY 23 1983

MEMORANDUM TO THE ATTORNEY GENERAL

Re: S. 653, a Act to Establish a Foundation  
for the Advancement of Military Medicine

We have had several conversations regarding our constitutional objections to this enrolled bill. On Friday, May 20, 1983, the Department, with the Deputy Attorney General's concurrence, recommended a veto. In that regard, certain individuals have cited the example of the Smithsonian Institution as a precedent with respect to the constitutionality of the proposed foundation. The fact is that the Smithsonian Institution is, indeed, a very unusual entity. It does have various members of Congress as well as the Chief Justice of the United States on its Board of Regents. However, the Smithsonian Institution is an historical and legal anomaly and should not be relied upon as a precedent for the transfer of additional Presidential responsibilities to Members of Congress.

In 1927, the Smithsonian Institution was cited to the Supreme Court as a precedent for the creation of another Executive Branch agency with a governing board composed in part of members of the Legislative Branch. In the case of Springer v. Philippine Islands, 277 U.S. 189 (1927), the Supreme Court rejected the analogy, stating:

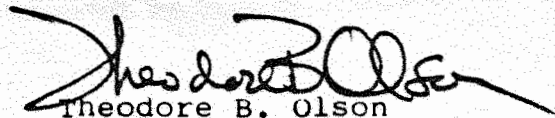
"Many instances of this kind are cited by the Solicitor General, but it is not necessary to repeat his enumeration. It is enough to say that, when we consider the limited number of acts of Congress which fall within the first class spoken of above, as well as the peculiar character of the institutions dealt with, and the contrary attitude of Congress toward corporations of a different character, such acts cannot be regarded as lending support to a construction of the Constitution which would justify Congressional legislation like that here involved."

As Justices Holmes and Brandeis recognized in their dissent in Springer, everyone seems to have accepted the unusual structure and composition of the governing board of the Smithsonian Institute and tampering with that organization would be, as they put it, like laying hands on the "Ark of the Covenant". Id. at 211.

Shortly after the Supreme Court's decision in Buckley v. Valeo, 424 U.S. 1 (1976), in which the Supreme Court made it clear that the power to appoint persons performing Executive Branch functions could not be lodged in Congress, even the Congressional Research Service acknowledged that "a serious constitutional question may be raised as to the validity of the present method of selection of members of the Board [of Regents of the Smithsonian Institution]."

It is perfectly understandable that Senators Jackson and Tower would be in favor of this legislation since it will invest additional power in the two of them. They are two of the four Members of Congress who would be given the appointment authority under the proposal. However, they are not likely to be overly-sensitive to constitutional questions concerning the power of the Presidency. The fact is that no one has refuted our concerns over the constitutional question. We do not regard this as a particularly close case. Since my previous memorandum I have also consulted with the Solicitor General who regards this proposal as clearly unconstitutional.

The President simply should not sign into law an act of Congress that sets up another agency which transfers the President's authority to members of Congress. As I noted in my memorandum of May 19, these precedents, however slight and insignificant they might seem at the time, tend to become important in the structuring of future government entities. The President has an obligation to defend the powers of the Presidency.



Theodore B. Olson  
Assistant Attorney General  
Office of Legal Counsel

cc: Edward C. Schmults  
Deputy Attorney General  
  
Rex E. Lee  
Solicitor General

Robert A. McConnell  
Assistant Attorney General  
Office of Legislative Affairs  
  
Jonathan C. Rose  
Assistant Attorney General  
Office of Legal Policy

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Richard A. Hauser  
Deputy Counsel to the President  
White House  
2nd floor  
West Wing

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MEMORANDUM FOR: *Joh*

FROM: **DIANNA G. HOLLAND**

**ACTION**

- Approved
- Please handle/review
- For your information
- For your recommendation
- For the files
- Please see me
- Please prepare response for \_\_\_\_\_ signature
- As we discussed
- Return to me for filing

*file  
w/  
military  
Medicare  
Act*

**COMMENT**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Office of Legal Counsel



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MEMORANDUM FOR RICHARD A. HAUSER  
Deputy Counsel to the President

Re: S. 653, "The Foundation for the  
Advancement of Military Medicine  
Act of 1983."

Per our telephone conversation,  
enclosed is a copy of the Memorandum  
to the Attorney General from  
Theodore B. Olson, dated May 23, 1983,  
concerning the above-referenced enrolled  
bill.

A handwritten signature in cursive script, appearing to read "R. Shanks".

Robert B. Shanks  
Deputy Assistant Attorney General  
Office of Legal Counsel

MAY 24 1983

THE WHITE HOUSE  
WASHINGTON

W  
5/27

TO: *DOJ*

FROM: *Richard A. Hauser*  
*Deputy Counsel to the President*

FYI: \_\_\_\_\_

COMMENT: \_\_\_\_\_

ACTION: \_\_\_\_\_

*Additional materials  
for the op recipient  
of this matter.*