

**WHETHER DISCLOSURE OF FUNDS AUTHORIZED FOR
INTELLIGENCE ACTIVITIES IS IN THE PUBLIC INTEREST**

HEARINGS
BEFORE THE
SELECT COMMITTEE ON INTELLIGENCE
OF THE
UNITED STATES SENATE
NINETY-FIFTH CONGRESS
FIRST SESSION

APRIL 27 AND 28, 1977



Printed for the use of the Select Committee on Intelligence

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(II)

CONTENTS

HEARING DAYS

	Page
Wednesday, April 27, 1977.....	1
Thursday, April 28, 1977.....	85

LIST OF WITNESSES

WEDNESDAY, APRIL 27, 1977

Admiral Stansfield Turner, Director of Central Intelligence, accompanied by Anthony A. Lapham, General Counsel; George L. Cary, Legislative Counsel; and Donald Massey, Assistant Legislative Counsel.....	4
Hon. William Proxmire, U.S. Senator from the State of Wisconsin.....	33
William Colby, former Director of Central Intelligence.....	49
Hon. Michael J. Harrington, Representative in Congress from the Sixth Congressional District of Massachusetts.....	63
Richard Helms, former Director of Central Intelligence.....	72

THURSDAY, APRIL 28, 1977

Gerhard Casper, Max Pam Professor of Law and professor of Political Science, the University of Chicago.....	89
Ralph S. Spritzer, professor of law, University of Pennsylvania Law School.....	94
Thomas I. Emerson, Lines Professor Emeritus of Law, Yale School of Law.....	95
Gen. Daniel Graham, former Director of the Defense Intelligence Agency.....	120
Robin Berman Schwartzman, attorney.....	124
Ray Cline, Executive Director, Georgetown Center for Strategic and International Studies and former Deputy Director of Central Intelligence.....	128
David Phillips, President, Association of Former Intelligence Officers.....	130
John Shattuck, Director, American Civil Liberties Union, Washington Office.....	137
Morton Halperin, Director, Project on National Securities and Civil Liberties, Center for National Security Studies.....	141
John Warner, legal advisor to Association of Former Intelligence Officers.....	145

APPENDIXES

Appendix I.—“Fiscal Oversight of the Central Intelligence Agency: Can Accountability and Confidentiality Coexist?”, by Robin Berman Schwartzman.....	151
Appendix II.—“Cloak and Ledger: Is CIA Funding Constitutional?” by Douglas P. Elliott.....	203
Appendix III.—“The CIA's Secret Funding and the Constitution,” by Elliot E. Maxwell.....	243
Appendix IV.—Disclosure of Budget Information on the Intelligence Community, excerpt from the Final Report of the Senate Select Committee to Study Government Operations With Respect To Intelligence Activities.....	273
Appendix V.—“Open Budget: Pros, Cons, and Relevant Statements,” memorandum from the CIA.....	291
Appendix VI.— <i>United States v. Richardson</i> , 418 U.S. 166 (1974).....	295
Appendix VII.—Affidavits of Morton H. Halperin and William E. Colby, Civil Action, No. 75-0676, USDC.....	337

Appendix VIII.—Statements of Past Directors of Central Intelligence.....	Page 349
Appendix IX.—Presidential Spending Power (Chapter 9), by Louis Fisher.....	355
Appendix X.—Material Concerning the Need for Budget Secrecy from the CIA.....	391
Appendix XI.—“The Central Intelligence Agency: Oversight and Accountability,” (Chapter IV), The Association of the Bar of the City of New York.....	411

MATERIAL FOR THE RECORD

Prepared Statement of Hon. Birch Bayh, U.S. Senator from the State of Indiana.....	2
Prepared Statement by George Bush, Former Director of Central Intelligence.....	
Prepared Statement From Hon. Frank Church, U.S. Senator from the State of Idaho.....	81
Excerpt from Farrand and the Virginia Convention on the Statements and Accounts Clause.....	82
Wendell Rawls, Jr., “Intelligence Budget Totaling \$6.2 Billion Is Reported Sought,” New York Times, April 1, 1977.....	423
Leslie H. Gelb, “U.S. Intelligence Cost Is Put At \$4 Billion, New York Times, November 19, 1975.....	425
Letter from Professor Ralph S. Spritzer, University of Pennsylvania Law School.....	427
Letter and Statement from David Cohen, President, Common Cause, concerning Public Disclosure of Budget Figures for U.S. Intelligence Activities.....	429
Statement of Douglas Paul Elliott.....	431
Views of Herbert Scoville, Jr., formerly Assistant Director for Scientific Intelligence and Deputy Director for Research, CIA.....	434
Letter from Harry Howe Ransom, Professor, Vanderbilt University.....	438
<i>Richardson v. United States</i> , 465 F. 2d 844 (1972).....	440
	445

WHETHER DISCLOSURE OF FUNDS AUTHORIZED FOR INTELLIGENCE ACTIVITIES IS IN THE PUBLIC INTEREST

WEDNESDAY, APRIL 27, 1977

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The Select Committee met, pursuant to notice, at 9:46 a.m., in room S-407, The Capitol, Hon. William D. Hathaway presiding.

Present: Senators Inouye (chairman of the committee), Hathaway, (chairman of the Subcommittee on Budget Authorization), Huddleston, Biden, Morgan, Hart, Goldwater, Chaffee, Lugar, and Wallop.

Also present: William G. Miller, Staff Director; and Andrey Hatry, Clerk of the Committee.

Senator HATHAWAY [presiding]. The Intelligence Committee will come to order. I want to thank the chairman of the full committee for allowing me to preside over these hearings which are peculiar to the budget situation.

This morning the committee begins 2 days of public hearings on the question of whether any portions of the national intelligence budget should be publicly revealed. The committee is required to look into this question by the terms of Senate Resolution 400. That resolution requires, and I quote, that "The Select Committee shall make a study with respect to the authorization of funds for the intelligence activities of the Government and whether disclosure of any of the amounts of such funds is in the public interest."

Senator Inouye, who is chairman of the full committee, has asked me, in my capacity as chairman of the Budget Subcommittee, to chair these hearings as the final step in our budget authorization process.

For the past several months, the top officials from each of the intelligence agencies have testified before our subcommittee, presenting their plans and programs for the coming fiscal year. We have gone over their presentations with great care. The work of our subcommittee and staff has included line-by-line review and analysis of the agencies' operations. We know in detail how each of the agencies proposes to spend its money in the coming year. Much of what we have examined involves the most sensitive activities of our Government, and much of what we have studied involves operations which are intimately related to our national defense.

We now reach the end of our committee's work on this subject for this year, and we must soon report to the full Senate a budget authorization bill for these agencies. At this juncture, many people are urging us to share our end product with the public, in short, to publish the amounts of money to be authorized. Some say that such public accounting is required by the Constitution. Others say that it is not. Many are concerned that revelation of these figures might impair our intelligence efforts. Others disagree.

The purpose of these hearings is to solicit and receive the best advice and counsel on this question. We have invited past and present leaders of the intelligence community to give us the benefit of their experience and their insight. We have asked the Nation's leading constitutional scholars to tell us what in their view the Constitution requires. We have sought the guidance of several public interest organizations to better understand what the American people expect and want. And this afternoon, other members of the Congress who have addressed this same question before will also give us the benefit of their advice.

I think that none of us should underestimate the importance of the fact that this proceeding is itself being held in public. It means that no matter what the ultimate outcome on this question, the committee has decided that this issue of secrecy must be debated in a public forum. Whatever the result, we will do our best to reconcile all of the competing interests which are involved, and I trust that our judgment will be sound.

Are there any other opening statements by other members of the committee?

Senator INOUE. There is one by Birch Bayh you can put in the record.

Senator HATHAWAY. We have a statement by Senator Birch Bayh who was unable to be here, and without objection, it will be made a part of the record at this point.

[The prepared statement of Senator Birch Bayh follows:]

PREPARED STATEMENT OF HON. BIRCH BAYH, U.S. SENATOR FROM THE
STATE OF INDIANA

Mr. Chairman, Admiral Turner—I want to make a few opening remarks because I believe we should have the constitutional issues clearly in mind before we begin. The Constitution of the United States is more than a body of law applied by the courts. It speaks directly to each branch of government. Where the courts fail to decide a question because it is not suitable for judicial determination, the other branches must make certain that their own actions conform to basic constitutional principles.

This is the case with the issue before us today. In 1974 the Supreme Court ruled in the *Richardson* case that an individual taxpayer did not have standing to raise the question of intelligence budget disclosure in the judicial forum. Chief Justice Burger said that the subject "is committed to the surveillance of Congress" and ultimately to the voters if their "elected representatives are delinquent in performing duties committed to them." *United States v. Richardson*, 418 U.S. 166, 178-179 (1974).

Therefore, the Congress has to decide whether it has been "delinquent in performing duties committed to" it by the Constitution. Article I seems clear. Congress is directed "from time to time" to publish "a regular Statement of Account of the Receipts and Expenditures of all public money." Article I, section 9, clause 7.

Nevertheless, the Chief Justice noted in the *Richardson* case that this clause may permit "some degree of secrecy of governmental operations" and that Congress might "exempt certain secret activities from comprehensive public reporting," 418 U.S. 178, n.11. The crucial words are "some degree of secrecy," "certain secret activities," and "comprehensive public reporting." They suggest that Congress should draw the line between secrecy and disclosure with great care and that we may be delinquent in our duty under the Constitution if we adopt a blanket policy of secrecy.

As with almost every difficult constitutional question, the answer cannot be framed in absolute terms. We are told that publication of some intelligence budget information would be a "dangerous first step" to more detailed disclosure of information that should be kept secret. In his response to questions submitted by this Committee during his confirmation hearings, Admiral Turner asked "where do you draw the line?"

The implication is that we should not try to draw lines in this area, except an absolute secrecy line. But the Constitution directs the Congress to do otherwise. It imposes upon us a duty beyond our ordinary legislative responsibilities. We must consider not only our personal or political preferences, but also the basic principles which underlie our form of government and are expressed in its founding charter.

The Constitution specifically recognizes the need for secret legislative action in some cases. It requires each House to publish from time to time a journal of its proceedings, "except such Parts as may in their Judgment require Secrecy." Article I, section 5, clause 3. However, where the expenditure of public money is at stake, no similar restriction upon publication is mentioned. This accords with the belief that the people have a right to know how their taxes are being spent.

But that right, too, is not absolute. Congress is empowered to determine the exact form a "regular Statement and Account" shall take. In the course of our history, the Congress has used this power to preserve the secrecy of particular detailed expenditures. Although history cannot validate an unconstitutional practice, it does suggest that there is sufficient flexibility in the Constitution to allow a degree of secrecy.

The Constitution is a living document which must be interpreted to meet changing circumstances, so long as its fundamental values are kept intact. But it is those values and not the claims of short-run expediency—that should guide our decisions.

After World War II, the great crises of international affairs led our predecessors to disregard the constitutional implications of secret expenditures for intelligence activities. The issue did not receive attention until recently.

Last year the Select Committee To Study Governmental Operations With Respect to Intelligence Activities chaired by Senator Church recommended that the total amount of the "National Intelligence Budget" should be published and that its successor committee "should consider whether it is necessary, given the Constitutional requirement and the national security demands, to publish more detailed budgets." "Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities," Book I, p. 470.

Other committees of Congress have taken a contrary view and have concluded that publication of the intelligence budget total would harm the national security.

Those who would maintain that position have a heavy burden to spell out the reasons for absolute secrecy. Where the Constitution is silent, we have greater leeway to choose a proper course of action. But where the Constitution imposes a specific duty, then we must make every possible effort to perform it.

In other words, if there are to be secret expenditures, the secrecy must be justified on grounds of compelling necessity and not just convenience or utility. The constitutionality of our action may depend upon whether we seriously consider alternatives which would, without endangering national security, more fully satisfy one of the fundamental principles of free government—the people's right to know.

I hope our discussion will focus on these alternatives, so that we may begin drawing the line between secrecy and disclosure more carefully than we have in the past.

Senator HATHAWAY. Senator Wallop?

Senator WALLOP. As the vice chairman of the Budget Subcommittee, I want to express my appreciation not only to Admiral Turner and his staff, but the other people who testified in front of us. I think it is a most important decision that this full committee is about to make. There is a fine edge here of freedom. I think freedom demands defense, and defense demands intelligence at all levels. I think the public interest has different definitions by different people. The final determination of the public interest, I think, is how well we defend our country and the tools we have to defend it with.

It strikes me that the work of this committee and the decision that we are about to make has great repercussions on a free society and its ability to survive as a free society. I have no idea what our decision is going to be. I am most interested in hearing from all the groups that come before the committee, but I think that it is important to know that whatever decision is made is not going to be arrived at lightly, nor is it going to be an easy decision. I am sure that on our side, the minority is more than willing to take seriously the charge of the Senate Resolution 400.

Senator HATHAWAY. Thank you.

Any other opening statements?

Senator HART. Mr. Chairman?

Senator HATHAWAY. Excuse me, Gary.

Senator Hart.

Senator HART. I think there is just one simple guiding principle that ought to affect our considerations here, and that is the principle should be that the people's right to know must be protected consistent with national, legitimate national security interests, and I think that ought to be the guiding line that this committee follows.

Thank you.

Senator HATHAWAY. Thank you.

Our first witness this morning is the present Director of Central Intelligence, Adm. Stansfield Turner.

Admiral Turner, we welcome your appearance before the committee, and we look forward to hearing your statement.

TESTIMONY OF ADM. STANSFIELD TURNER, DIRECTOR OF CENTRAL INTELLIGENCE AGENCY, ACCOMPANIED BY ANTHONY A. LAPHAM, GENERAL COUNSEL; GEORGE L. CARY, LEGISLATIVE COUNSEL; AND DONALD MASSEY, ASSISTANT LEGISLATIVE COUNSEL

Admiral TURNER. Thank you, Mr. Chairman and members of the committee.

First may I express my apologies for being tardy.

When I appeared before this committee in February for confirmation hearings, I indicated that I was inclined to favor the releasing of the intelligence community's aggregate budget figure, but that I wanted more time to study that question thoroughly before committing myself. I have since had that opportunity and I am prepared today not to object to your releasing the single, inclusive budget

figure which represents the intelligence community's budget, subject to several important qualifications which I would like to discuss.

The techniques of intelligence collection and analysis change with time and with technology. The breakdown of the intelligence budget accurately reflects those changes. Over time, analysis of that breakdown could reveal to any interested observer our areas of interest and the technologies on which we depend. From such information, others could learn where they should place emphasis in countermeasures in order to nullify the advantages that we have.

In short, the detailed intelligence budget in the hands of our enemies would be a powerful weapon with which they could make our collection efforts more difficult, more hazardous to life, and more costly. The way we spend our intelligence money in this country, then, is one of our necessary secrets.

At the same time, we are a free and an open society. It is appropriate that the citizens be kept as well informed as possible of the activities of their Government. They, in fact, are the best oversight we have for the prevention of possible excesses of governmental activity. The public's right to understand the workings of the intelligence process is part of their being adequately informed.

Some compromise, then, is necessary between the risks of giving an enemy an unnecessary advantage over us, and of protecting the basic openness of our society. Accordingly, President Carter has directed that I not object to your releasing to the public a single overall budget figure of the U.S. intelligence community.

Let me explain precisely what that figure includes. It includes the budget of the CIA and those portions of the budgets of other agencies of the Government which are devoted exclusively to intelligence. Clearly there are many related activities in other departments, especially the Department of Defense, which make some contributions to intelligence. For instance, a military airplane flying on a training mission may well be able as a collateral function to collect some intelligence, or even carried to the extreme, perhaps, a corporal on lookout duty with binoculars could be called an intelligence collector.

The expenses of such operations as these are not included in the intelligence budget for which I am responsible and which is presented to the Congress as the national foreign intelligence budget.

Basically the dividing line is whether we fund the activity for the primary purpose of collecting intelligence or analyzing intelligence, or whether it is for another purpose and we derive collateral intelligence benefits from it.

Finally, I must mention the limitations which must prevail in issuing additional information concerning this budget figure. There will be a natural and an understandable tendency on the part of the press and the public to want a detailed breakdown of the budget figure. This we cannot do either by the deliberate release of additional information, or by comments on the composition or character of the intelligence budget. It is here that, regrettably, we must draw the line between openness and necessary secrecy. Were we to intentionally or inadvertently disclose further details of the budget figure, we would expose those areas of emphasis and expertise regarding collection and analysis of intelligence, and over time, trends in such emphasis would

become obvious. This would jeopardize the interests of our country in my opinion more than the additional information would benefit it. The people of the country can be assured, however, that we are sharing with their Representatives in Congress the full details of this budget breakdown. Hence, our response to further inquiries on the budget in the public forum must simply be "no comment." I will formally direct the members of the intelligence community to so respond to all such inquiries if a budget figure is released.

I recognize that this new policy of supporting disclosure of a single budget figure, and only a single figure, is a major break with tradition. It is not one without risk. I know that you gentlemen of this committee will fully understand the importance of this new openness, but at the same time, appreciate the necessity of rigidly limiting your disclosure, if you choose to make one, to this single figure.

Thank you, Mr. Chairman.

Senator HATHAWAY. I thank you very much, Admiral.

I understand you have an appointment at the White House, and I think for the first round of questioning that we should limit ourselves to about 5 minutes, and then if we have some additional time, we will go into the second round.

You state in your statement that you do not object to our releasing the figure that you mentioned. This does not seem to be a positive statement, but one of, well, if we do it, it is all right, but you are not really advocating it 100 percent.

Do I read that correctly?

Admiral TURNER. Mr. Chairman, I think this is an effort to be as cooperative with the Congress as we can, and a recognition of the fact that in Senate Resolution 400 your committee was asked to report to the Senate on this, and rather than preempt you, we feel it appropriate to have the committee and the Senate pass its judgment on this.

Senator HATHAWAY. On page 2 of your statement, you say that it is appropriate that our citizens be kept well informed of the activities of their Government. They are, in fact, the best oversight body in the prevention of any possible excesses of governmental action, but if we go ahead and disclose the one figure that you suggest, is that going to give the citizens of this country any real basis for oversight? They have only one number.

Admiral TURNER. It certainly is not an adequate basis for total oversight. It is certainly a lot more than they know today, and I think will help them put into perspective the intelligence activity of their country.

I also believe that it will scotch many exaggerated pieces of misinformation that exist. Personally I think after 6 months I could add up all the things of which I am accused in the newspaper and point out that it couldn't possibly be done within the budget figure.

Senator HATHAWAY. But isn't it going to lead to a great deal of public pressure for more details on the budget? You mentioned yourself on the bottom of page 2 and over to 3, just what activities you are covering and what activities you would not be covering by releasing this one figure, and that, in and of itself, will suggest a question, and then there will be more questions as to what the breakdown is in order for the public to get a better evaluation of what we are spending this money for.

Admiral TURNER. No question, there will be additional pressure, but just as today there is pressure to release a figure, I think we can hold the line at one figure almost as well as we can hold it at zero figures.

Every day I am confronted with the necessity of making the difficult choice between openness, which we all desire, and some level of secrecy, which we all believe is necessary, and every day it is a difficult dividing line to draw. If we release one figure, I will constantly have to make very difficult decisions on holding the line at that point, just as we do today on holding it at no figure.

Senator HATHAWAY. But you mention also at the bottom of page 3 in your testimony that if further figures were revealed, that this might suggest trends.

Won't releasing one figure suggest a trend, if the money is x amount this year, and x plus two next year, or x minus one, then someone can deduce from those trends just what we are doing?

Admiral TURNER. Our analysis of the budget figure over the last 10 or 12 years has been that there would be no such indication. It has been a steady, small, or moderately increasing figure in current dollars, which results in a moderately decreasing figure in purchasing power. It has not had big humps and peaks and valleys.

Senator HATHAWAY. How can we predict that this would continue? There may be some world situation which demands an increase in our intelligence capability, and consequently an increase in the expenditures, so the overall figure might change significantly.

Admiral TURNER. There is no way to assure that for the future. I can only say in the past that has not been the case.

On the other hand, if there really were a world crisis of some sort, I think the public might be reassured to see that we were responding and would feel that Congress was in fact responding appropriately by such appropriation.

Senator HATHAWAY. I think that former Director Colby, in his statement that he is going to make later in the hearings, indicates that this would have been the case with respect to the U-2 buildup at one time in our history, and that certain deductions could have been made at that time if we had revealed figures.

Admiral TURNER. That is not my understanding of the case, but I don't want to get into a dispute with Mr. Colby without being sure that we are talking about exactly the same facts.

Senator HATHAWAY. Well, he indicates that there was a bump in the overall amount that was being spent, and that that bump could have been analyzed by our enemies to determine that something was going on.

Admiral TURNER. I would like to specifically review whether we are talking about whether the overall figure had a bump in it or a component had a bump in it, and my understanding was the latter, not the former.

Senator HATHAWAY. One last question before I turn it over to the next questioner.

I have difficulty in my own mind determining that one figure is OK, but that any second figure would be dangerous. It seems to me that if two is dangerous, that one also has a considerable amount of danger.

Admiral TURNER. The second and the third figures begin to tell you whether in collection, for instance, we are emphasizing system A, sys-

tem B or system C, and obviously if the degree of emphasis on one of those systems is well known to somebody who is trying to defeat those systems, he may know better where to put his countereffort. In short, they will match our effort with countereffort in proportion, probably, to what they see as our investment, because that would give some indication of the importance we place on each area, whereas with the aggregate figure they just know we are about so much interested in intelligence.

Senator HATHAWAY. But it does give people some indication.

Admiral TURNER. Yes, sir. I have, of course, not said this is not without risk. That is one of the things I mentioned, that daily I have to draw a line between being secret and being open, and I am sincerely trying.

Senator HATHAWAY. Won't this be the only nation in the world, either free or not free, that is disclosing any figure with respect to its intelligence budget?

Admiral TURNER. I believe so.

Senator HATHAWAY. Thank you.

Senator Goldwater.

Senator GOLDWATER. I won't be long, Mr. Chairman.

Admiral, I agree with what you say on this. You have said in various ways—essentially what my position has always been relative to amounts of money spent for intelligence. I think the overall figure is all right, although I think I would oppose even that.

I think there are some things that the American people, including the American Congress, should not know about intelligence or intelligence gathering, and I think the broader we spread information about what intelligence is doing, the weaker we become in the world of nations, and I want to thank you for this statement. It is short. It is right to the point, and I think your arguments on behalf of one figure are very good.

I am going to say I am going to buy them. I may vote against it, but I agree with you, and I have no questions. I won't even ask you why you were late. [General laughter.]

Admiral TURNER. Thank you, sir.

Senator HATHAWAY. Mr. Chairman.

Senator INOUE. Before proceeding, I believe the record should show that Admiral Turner and members of the intelligence community have been most forthright in their presentations before this budget subcommittee, and most cooperative in our efforts to carry out our oversight responsibilities, and I wish to publicly thank Admiral Turner at this time for this cooperation.

Admiral TURNER. Thank you, sir.

Senator INOUE. The process we are now involved in is a most historic one, as noted by you, sir. This is the first time a disclosure will be made officially, or at least an offer to make one is being made, and the hearings that we have been holding themselves are also historic. I don't believe that any other committee in the Congress during our 200 years has had any line-by-line, line-item type of consideration.

I have just a few questions, sir.

No matter whether we are democratic or undemocratic, open or closed, I assume that every country on the face of this earth has some sort of intelligence organization.

I am correct in that assumption, am I not?

Admiral TURNER. I would certainly assume so, unless it were such a minor country that it couldn't afford much of an operation, but they must have some effort.

Senator INOUYE. Are you aware of any country that has as a matter of public policy released either one figure, two figures or three figures, relating to their intelligence budget?

Admiral TURNER. No; I am not.

Senator INOUYE. Does Great Britain release any figures?

Admiral TURNER. No, sir.

Senator INOUYE. By public policy, do the citizens of Great Britain know the name of the head of intelligence there?

Admiral TURNER. No; they do not.

Senator INOUYE. Not even the name of the director of intelligence?

Admiral TURNER. It is not publicly released. Whether it gets out or not, I am not sure.

Senator INOUYE. Article I, section 9, clause 7 of the Constitution of the United States reads as follows: "No money shall be drawn from the Treasury but in consequence of appropriations made by law, and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

Would this requirement of the Constitution be satisfied by disclosing this one aggregate figure?

Admiral TURNER. Senator, on the constitutional issue, the General Counsel of CIA, who sits on my right, whom I will ask to verify my summation of his position, indicates that is within the Constitution not to release any budget figure on the intelligence budget.

Is that correct, Mr. General Counsel?

Mr. LAPHAM. Yes, Admiral, that is my view.

Admiral TURNER. We have a paper, a detailed paper we would be happy to submit for the record as to the basis of the General Counsel's finding on that.

[The information referred to follows:]

Memorandum of law from: Office of General Counsel, Central Intelligence Agency.

Subject: Secrecy in Federal budgets.

1. Secrecy in the appropriation and expenditure of United States Government funds is an aberration from normal practice occurring only under the most compelling circumstances. The norm is openness. And even when funding of particular enterprises is withheld from public disclosure, there is an inherent limitation to the degree of secrecy that our system of government will permit, for the legislative branch must appropriate whatever the executive branch expends. That is, the irreducible minimum which preserves the checks and balances central to our system of government and within which requirements for secrecy must be accommodated.

2. The question of whether secrecy may be achieved in the appropriation and expenditure of Federal funds takes on constitutional proportions when article I, section 9, clause 7 of the Constitution is considered. That clause provides that:

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

This provision places the purse strings of the Federal Government firmly in the hands of the Congress. It also sets up a basic requirement for maintaining accountability in the expenditures of Federal funds. Nonetheless, the clause is not self-defining and Congress has plenary power to give it meaning.¹

¹ *United States v. Richardson*, 418 U.S. 166 (1974) fn. 11; *Harrington v. Bush*, No. 75-1862, D.C. Cir., 18 Feb. 1977.

3. In giving it meaning, the Congress has recognized the rather unusual requirements surrounding the management of an intelligence agency and has chosen, as it is at liberty to do, an appropriation and accounting procedure for the Central Intelligence Agency that is significantly different from the norm. Statutes setting the norm in the appropriations process are to be found at 31 USC §§ 11, 628 and 696. These statutes provide, respectively, that the President is required to present a detailed annual budget to Congress which itemizes proposed expenditures for each agency, that appropriations shall be applied solely for the objects for which made, and that funds appropriated to one agency are not to be transferred to another without express Congressional approval. With respect to the reporting of expenditures, 31 USC § 1029 imposes a duty on the Secretary of the Treasury to annually provide Congress with an accurate combined statement of the receipts and expenditures of public money. In comparison with the foregoing, appropriation and accounting processes for CIA are distinctly different. 50 USC § 403f(a) provides that the Agency is authorized to transfer to, and receive from, other Government agencies such sums as may be approved by the Office of Management and Budget for the performance of Agency mission and functions, without regard to provisions of law limiting or prohibiting transfers between appropriations. This provision permits, in the interests of security, the concealment of the annual CIA appropriation within the appropriations requests for other agencies in the President's annual budget proposal. After having been appropriated in this concealed fashion, the funds are transferred by OMB to CIA. With regard to reporting, 50 USC § 403j(b) authorizes the Director of Central Intelligence to certify the expenditure of funds for objects of a confidential, extraordinary, or emergency nature, with such certificate to be deemed a sufficient voucher for the amount certified. This provision permits, again in the interests of security, the exemption of certain intelligence operations from the risks of disclosure arising from normal Government audit procedures. The remainder of the Agency's expenditures can be audited in more normal fashion.

4. Upon reflection, it can be seen that the statutory provisions directed at accommodating the special requirements of conducting an intelligence program do not conflict with previously cited article I, section 9, clause 7 of the Constitution. It is still the Congress that specifically appropriates funds for the purpose of intelligence, and the Director of Central Intelligence reports to the Congress regarding the expenditure of such funds. The primary difference in regard to the appropriation and expenditure of CIA funds is that budget figures are not publicly disclosed. Both in connection with the President's appropriation request and in connection with the annual statement and account of expenditures, the precise figures for CIA are concealed within figures for other portions of the Government budget. For example, while the budget for CIA might be appropriated and accounted for as part of the Department of Defense budget, the CIA budget figure is not specifically identified.

5. The critical question thus becomes whether the power of the Congress to modify and specially tailor appropriations and accounting procedures under article I, section 9, clause 7 of the Constitution extends to maintaining a degree of secrecy in Government operations in derogation of public disclosure. The Supreme Court in *United States v. Richardson*² suggests that the Congress does have this power. In footnote 11 the Court states that:

"Although we need not reach or decide precisely what is meant by 'a regular Statement and Account,' it is clear that Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest. . . . While the available evidence is neither qualitatively nor quantitatively conclusive, historical analysis of the genesis of cl 7 suggests that it was intended to permit some degree of secrecy of governmental operations. The ultimate weapon of enforcement available to the Congress would, of course, be the 'power of the purse.' . . ."

"Not controlling, but surely not unimportant, are nearly two centuries of acceptance of a reading of cl 7 as vesting in Congress plenary power to spell out the details of precisely when and with what specificity Executive agencies must report the expenditure of appropriated funds and to exempt certain secret activities from comprehensive public reporting (citing authority)."

At issue in *Richardson*, of course, were the very CIA statutes with which we are here concerned. The Court went on to conclude that the plaintiff lacked standing to challenge these enactments.

² See note 1.

6. In *Harrington v. Bush*,³ the United States Court of Appeals for the District of Columbia arrived at a similar conclusion regarding the authority of the Congress to provide for the appropriation and accounting of CIA funds as it has done at 50 USC §§ 403f and 403j. The D.C. Circuit also found that the Congress has plenary power to implement and give meaning to article I, section 9, clause 7 of the Constitution. This finding was based squarely on *Richardson*, and also on *Hart's Case*.⁴ In *Hart* the claimant sought payment on contract for supplies sold to the United States. Barring such payment was an 1867 joint resolution making it unlawful to pay any claim accruing prior to 13 April 1861 to any person who in any manner sustained the Confederate cause. Although claimant's intestate received a full pardon from criminal penalties arising from his engaging in rebellion against the United States, his disability to receive amounts due him was not made a consequence of any offense and therefore was unaffected by the pardon. As arbitrary as this may sound and in the face of an attempt to base the right to payment on Constitutional grounds, the court found that:

"The absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people."⁵

In affirming the Court of Claims decision, the Supreme Court stated that a creditor of the United States could be paid only in accordance with article I, section 9, clause 7 of the Constitution, and that the joint resolution of the Congress made all appropriations unavailable for purposes of paying the claimant. The very severity of the burden placed upon a class of creditors by the joint resolution makes its endorsement by the Court a persuasive argument in support of the plenary powers assigned to the Congress in the appropriations area by the court in *Harrington*.

7. The *Richardson* Court alluded to the fact that for two centuries it has been accepted that article I, section 9, clause 7 vested in Congress plenary power to spell out the details of precisely when and with what specificity executive agencies must report the expenditure of appropriated funds and to exempt certain secret activities from comprehensive public authority. There is, in fact, ample evidence that such power includes authority to provide for secrecy.

8. The very wording of the clause exists as evidence of the fact that the framers of the Constitution desired to leave room for legislative discretion and some secrecy in fulfilling the requirement for an accounting of receipts and expenditures. The Statement and Account Clause was not contained in the original draft of the Constitution. It was suggested from the floor during the final stages of the Constitutional Convention, when George Mason moved to require an annual account of public expenditures. James Madison proposed to amend this motion so that the envisioned reporting would take place "from time to time." This change was proposed in order to "leave enough to the discretion of the Legislature." Madison's amendment was adopted.⁶ The debate between Mason and Madison was renewed in the Virginia convention in 1788. Mason opposed Madison's "from time to time" terminology because he viewed it as making provision for secrecy, and he felt there should be no room for secrecy. According to Farrand:

"The reasons urged in favor of this ambiguous expression, was, that there might be some matters which might require secrecy. In matter relative to military operations, and foreign negotiations, secrecy was necessary sometimes. But he [Mason] did not conceive that the receipts and expenditures of the public money ought ever to be concealed. * * * But that this expression was so loose, it might be concealed forever from them."

Patrick Henry also recognized Madison's language as a provision enabling secrecy when required and opposed it for that reason. Henry feared that the adoption of Madison's language meant that: * * * the national wealth is to be disposed of under the veil of secrecy; for [with] the publication from time to time * * * they may conceal what they think requires secrecy. * * *

The debates indicate, therefore, that one of the reasons, besides allowing for administrative flexibility, for modifying Mason's original phrasing of the Statement and Accounts Clause was to permit secrecy in matters which required it. Even though Mason failed to conceive of circumstances under which expenditures ought to be concealed from the public, the language which Patrick Henry viewed

³ See note 1.

⁴ 16 Ct. Cl. 459 (1880), aff'd, 118 U.S. 62 (1886).

⁵ Quoted in "Harrington" at p. 4 of the slip opinion.

⁶ 2 Farrand, *The Records of the Federal Convention of 1787*, pp. 618-619 (1911).

⁷ 3 Farrand, *supra* at 326.

⁸ 3 Elliot's *Debates on the Federal Constitution*, 462 (1836).

as allowing Congress to "conceal what they may think requires secrecy" ultimately was adopted. It therefore seems clear that the framers contemplated that Congress would have the power to withhold certain appropriations and expenditure data from the public. Madison, at least, was of the opinion that Congress should have such power to authorize secrecy in certain cases:

"The congressional proceedings are to be occasionally published, including *all receipts and expenditures* of public money, of which no part can be used, but in consequence of appropriations made by law. This is a security which we do not enjoy under the existing system. That part which authorizes the government to withhold from public knowledge what in their judgment may require secrecy, is imitated from the confederation * * *."

9. To entertain for the moment a view opposite to the foregoing, that is, that Congress has no authority to make any appropriation or expenditure in secret, can be seen to result in a striking anomaly. The Statement and Account Clause, article I, section 9, clause 7, does not in express terms authorize secrecy, but Article I, section 5, clause 3 does:

"Each House shall keep a Journal of its Proceedings, and from time to time publish the same, except such Parts as may in their Judgment require Secrecy."

It would appear foolish to attribute to the framers an intention to include in the Constitution an absolute obligation that every appropriation and expenditure be publicized, even though the Constitution explicitly authorizes each House to keep secret its debates and decisions on these very matters.

10. The history of congressional understanding of the Statement and Account Clause shows that it has not been interpreted as preventing Congress from deciding (as it has in enacting the Central Intelligence Agency Act) that certain classes of Federal expenditures should not be disclosed where delicate questions of foreign policy or national security are involved. Not long after the Constitution was adopted, Washington declined to make public the amount of money expended by General St. Clair in furtherance of a secret mission in the territory of Florida.⁹ Shortly after the Constitution was adopted, President Madison (who had proposed the more flexible language of the Statement and Account Clause) sent a confidential communication to Congress outlining his recommendation that he be authorized to take possession of parts of Spanish Florida. Congress then passed a Secret Appropriation Act appropriating \$100,000 for such occupation, and forbidding the publication of the appropriation law.¹⁰ The enactment was not made public until 1818 when the controversy over Florida had ended. And almost from the foundation of the Government under the Constitution there was a fund, to be later denominated the Secret Fund, which was used by the President to finance the secret operations of the Government, including intelligence gathering. The legislation was passed in response to Washington's first annual message.¹¹ The use of the fund by Washington is well documented, including payments "to facilitate the use of informal agents."¹² The warrants were evidently made payable to a member of Washington's family to conceal their true purpose.¹³ The expenditure of these funds was recorded in the "private journals" of the Treasury "as a want of secrecy (might) endanger the money."¹⁴ The legislation establishing the fund provided that the President might account for the same: . . . By causing the same to be accounted for specifically in all instances wherein the expenditures thereof may in his judgment be made public, and making a certificate . . . of the amount of such expenditures as he may think advisable not to specify; and every such certificate shall be deemed a sufficient voucher for the sums therein expressed to have been expended.¹⁵

The similarity of purpose and language between this early legislation and the present 50 U.S.C. § 403j(h), set out above, is striking.

11. The use of the Secret Fund continued and was referred to at various times during the tenures of later presidents. The fund was used during the negotiations of the treaty between the United States and Turkey,¹⁶ and it is noted that this fund was designed for secret business and called the Secret Fund. The fund was used to send "ministers" to Central America to derive information.¹⁷ So sensitive were

⁹ 3 Farrand, *supra* 312.

¹⁰ 10 Federal Bar Journal 109 (1949).

¹¹ Miller, *Secret Statutes of the United States*, 4-5 (1918).

¹² 1 Annals of Cong. 1058 (1790).

¹³ 1 American State Papers For. Rel. 137-138.

¹⁴ Wharton, 6 Diplomatic Correspondence of the American Revolution 225-226 (1889).

¹⁵ Wharton, 4 Diplomatic Correspondence of the American Revolution 428 (1889).

¹⁶ Act of Feb. 9, 1793, 2 Annals of Cong. 1412, 1 Stat. 299.

¹⁷ Forsyth's speech, VII Cong. Debates, 21 Cong., 2d Sess. 295.

¹⁸ Cong. Globe, 27 Cong. 2d Sess. 469, 473.

the purposes for which the fund was used that President Polk refused to divulge the information about the details of the fund to Congress when requested to do so.¹⁹ Later, the fund was used to pay agents employed during the negotiation of the Fisheries Treaty between the United States and Britain.²⁰

12. More recently, Congress has found secrecy to be in the national interest in several settings. For example, over \$2 billion was secretly expended on the Manhattan project to develop the atomic bomb during World War II. Of the statutes that similarly make provision for a confidential, or restricted, accounting for the funds involved, that for the Atomic Energy Commission²¹ dates from 1946 and was amended in 1963, and that for the Federal Bureau of Investigation²² dates from 1950 and was added to in 1966. The provision for the Department of the Navy²³ was enacted in 1916 and has not since been amended. The provision for the confidentiality of expenditures pursuant to foreign relations²⁴ may be said to span all periods of our history as a nation inasmuch as its first enactment was in 1793 and a companion provision²⁵ permitting delegation by the Secretary of State of certification authority, was contained in each Department of State Appropriations Act from 1947 to 1953, and codified in 1956.

13. In light of the foregoing, it seems clear that Congress is authorized to exercise considerable flexibility in establishing procedures by which the requirement for maintaining accountability between the executive and legislative branches, as mandated by the statements and accounts clause, is to be fulfilled. The origins of the clause itself and subsequent history indicate Congress is at liberty to adopt special accounting procedures whereby certain appropriation and expenditure information is restricted to Congress and the executive branch in a way designed to protect national security. It is for this purpose that 50 U.S.C. § 403f and 50 U.S.C. § 403j were enacted, and their continuing validity is grounded in the recognition of the fact that the secrecy required for the success of national intelligence efforts must be matched with similar secrecy in the attendant financial processes.

Senator INOUYE. At this time, can your counsel very briefly tell us how he came to that conclusion?

Mr. LAPHAM. Senator, the portion of the Constitution to which you refer has been twice construed, once in 1974 by the Supreme Court, and more recently by the Federal Court of Appeals, the U.S. Court of Appeals in the District of Columbia.

In both those instances, what the courts have had to say is that the meaning of that particular portion of the Constitution is not self-executing or self-defining. It essentially means what the Congress may say that it means.

So the rights of the Congress in respect of implementing and interpreting that provision of the Constitution have been described as plenary, or complete. Those decisions have gone on to say that Congress has, in an informed way, created a scheme by which the funds needed to operate the CIA and the accounting for the expenditure of those funds are departures from the norm in the budget process, the norm being openness and full disclosure.

So, essentially, I rely for my judgment on the language that I find in those two opinions, one by the Supreme Court and one by the Court of Appeals.

Senator INOUYE. I have just one more question. I believe my time has just about expired.

We have noted many books and articles revealing, supposedly, budget figures. Of the operations of your agency, one by former members of your staff, for example, the "CIA and the Cult of Intel-

¹⁹ Quilley, I, The Diary of James K. Polk 331-334 (1910).

²⁰ Misc. Doc. 109, 50th Cong., 1st Sess., Senate, pp. 103-104.

²¹ 42 U.S.C. § 2017(6).

²² 28 U.S.C. § 537.

²³ 31 U.S.C. § 108.

²⁴ 31 U.S.C. § 107.

²⁵ 22 U.S.C. § 2671.

ligence," by Marchetti and Marks—that book included a citation of three-quarters of \$1 billion as being the CIA budget, and I recall that the CIA originally objected to that figure, but later withdrew its objection and permitted that figure to be published.

Would further disclosures of, say, the intelligence-related activities, cause irreparable harm to our Nation?

Admiral TURNER. A disclosure such as the one Marchetti and Marks have made is, of course, totally unauthorized and unsubstantiated, and my concern is that we in no way, such as commenting on the veracity of that report, confirm or deny those reports so as to lead to the breakdown of any single figure that might be released.

I do believe that a detailed breakdown of our budget would do irreparable harm to the country.

Senator INOUE. Thank you very much, sir.

Thank you, Senator.

Senator HATHAWAY. Senator Wallop?

Senator WALLOP. Admiral Turner, is there any public information about the NATO intelligence budget?

Admiral TURNER. No, sir.

Senator WALLOP. Does that figure just appear within the contribution of given countries to NATO? Is it just blended?

Admiral TURNER. To the best of my recollection, there is very little, if any, actual appropriation for strictly NATO intelligence. NATO intelligence is the sum of intelligence of its 15 nations, so there would not be a line item for NATO intelligence. It would be a fraction of U.S. intelligence, British intelligence, and so on.

Senator WALLOP. In your opinion, would release of this single figure cause any consternation among the U.S. allies?

Admiral TURNER. I suppose that in all honesty intelligence communities in general are very reluctant to see any information released whatsoever. I do not think it would cause a substantial problem with our allies, but I think they would probably on the whole prefer nothing be released.

Senator WALLOP. Do you think they would be inclined to lessen their cooperation with our intelligence efforts if we take this route?

Admiral TURNER. I do not think that would be a major problem, no. I think that they have a basic confidence in us, and I think our security is comparable with anyone's.

Senator WALLOP. What about your people in the field, or the intelligence people in the field? Do you think it would have an effect on their morale? Do you think that they look down the road to such things as Senator Hathaway was talking about? If one figure is out, then the second figure is going to be demanded, and then the pressure to become more detailed?

Admiral TURNER. It is a natural instinct of all of us in the intelligence community to withhold as much as we can, because of the risks that are involved in every disclosure, but as I say, we all, in the community and out, have to be conscious of our responsibility to the American public as well.

Senator WALLOP. I have no further questions, Mr. Chairman, but I would like to join with Senator Goldwater in complimenting you on a very short and very succinct statement.

Admiral TURNER. Thank you very much, sir.

Senator WALLOP. I think it fulfills the role perfectly.

Admiral TURNER. Thank you.

Senator HATHAWAY. Senator Morgan?

Senator MORGAN. Admiral Turner, with regard to the constitutionality of withholding this information, I wonder if counsel would tell us whether or not he took into consideration the two cases, the *Richardson* case and the other case, the name of which I forget—I do not recall—that turned on the issue of whether or not the parties had a standing to bring the lawsuit rather than on the issue of constitutionality?

Mr. LAPHAM. Yes, indeed, Senator. I took that fact into account entirely. The name of the other case was *Harrington v. Bush*. That was a lawsuit brought by Congressman Harrington.

Senator MORGAN. So your conclusions with regard to the constitutionality of withholding this information really are drawn from the language of the case and not specific holdings?

Mr. LAPHAM. I agree that the language does not represent the holding in either case, Senator, but it is language somewhat less than a holding that elucidates these points upon which I relied.

Senator MORGAN. One other question or statement along this line. The statements and accounts clause was discussed by Justice Story in an article many, many years ago, and it pointed out that the purpose of the clause was to allow the people to check Congress as well as the executive branch through publication of information on what money is expended for. I wonder later on if you would comment.

Are you familiar with that article or discussion by Justice Story?

Mr. LAPHAM. I am not fresh on that, sir. I think I read it at one time.

Senator MORGAN. I wonder if you would refresh your recollection and give us your comment in writing later on?

Mr. LAPHAM. Yes, indeed.

[The information referred to follows.]

June 9, 1977

HON. ROBERT MORGAN
Senate Select Committee on Intelligence,
Washington, D.C.

DEAR SENATOR MORGAN: During the course of Admiral Turner's testimony on 27 April regarding the intelligence community budget figures, it was suggested by you that a comment by this Office addressed to Justice Story's view of article I, section 9, clause 7 of the Constitution would be helpful. I understand your reference to be to Story's *Commentaries on the Constitution of the United States*, section 1348 of which pertains to the clause in question.

Justice Story is, of course, very direct and forthright in expressing his view on this matter. He says with regard to the subject clause that "The object is apparent upon the slightest examination. It is to secure regularity, punctuality, and fidelity in the disbursements of the public money." With this the intelligence community would most certainly agree. The legislative and executive branches must keep faith with each other, and each to the electorate, in the handling and disbursement of the public money.

Current procedures for the appropriation and expenditure of intelligence community funds are consistent with Justice Story's view of what the Constitution requires. No funds are made available for intelligence without being appropriated for that purpose by the Congress. The intelligence agencies remain strictly accountable to the Congress for their stewardship in using the funds appropriated to them, as ongoing budget hearings make abundantly clear. The electorate is apprised through a regular statement of accounts and expenditures of the amount of money being expended for national defense and security, albeit that the figures are not divided in such a way as to make evident the expenditures for intelligence.

The decision to not separately identify the figures for our intelligence programs is one made jointly, as of course it must be, by the Congress and the Executive. In my view it is a decision which is valid and constitutional. Indeed, the Supreme Court has said in this connection that "it is clear that Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest." *United States v. Richardson*, 418 U.S. 166, 178 n. 11 (1974). Justice Story's comment is not at variance with this view. He says that "As all taxes raised from the people, as well as the revenues arising from other sources, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper, that Congress should possess the power to decide how and when any money should be applied for these purposes."

In the end, however, it must be recognized that the thrust of Justice Story's comment is directed at the fact of Congress' control of the purse strings and its power to appropriate in such manner as it sees fit. The comment is therefore of limited utility with regard to the questions presently before us. I perceive that, to the extent differences of opinion exist regarding the question of not publishing certain budget figures, these differences arise not so much from considerations of the power of Congress to appropriate as it deems proper, as from varying interpretations of the requirement for a statement and account of expenditures. On this latter point by itself, the comment of Justice Story is quite brief, and infuses the accounting requirement with little meaning not evident from a reading of the clause itself. "Congress is made the guardian of the treasure; and to make their responsibility complete and perfect, a regular account of the receipts and expenditures is required to be published, that the people may know what money is expended, for what purposes, and by what authority."

Ultimately, the best answer regarding the requirements of the statement and account clause is probably that indicated by the Supreme Court in *Richardson*. The Court viewed this clause as a general directive to the Congress and the Executive that is not self-defining. On the contrary, the Congress possesses the power to give it definition through its plenary power to establish reporting and accounting requirements. The Court also made it clear that this power extended to making provision for secrecy in the national interest, deriving support for this conclusion both from the origin of the clause itself and the nation's long history of exempting certain secret activities from comprehensive public reporting. The message is unmistakable. The Supreme Court is telling us that this is not an area where the Constitution mandates a particular result irrespective of whether a majority favors that result (as might be the case, for example, in the First Amendment area). Rather the Congress, pursuant to its article I powers and subject to the political process, possesses authority within broad limits to define the nature and extent of the required accounting of public expenditures.

The opinion of the Court of Appeals for the District of Columbia in the *Harrington* case recognizes the law to be as set forth in *Richardson*, and restates it in terms that are crystal clear for purposes of our present discussion: "Since Congressional power is plenary with respect to the definition of the appropriations process and reporting requirements, the legislature is free to establish exceptions to the general framework, as has been done with respect to the CIA." *Harrington v. Bush*, No. 75-1882, D.C. Cir., 18 Feb. 1977.

The lessons of *Richardson* and *Harrington* to be applied in the instant case would seem to be that, to the extent there is a consensus that nondisclosure of intelligence budget figures is in the national interest, the government is not prohibited from taking that course. My reading of Justice Story's comment on article I, section 9, clause 7 does not place him in conflict with this view.

Sincerely,

ANTHONY A. LAPHAM,
General Counsel.

Senator MORGAN. Admiral Turner, if I could ask you one question which might call for a much longer answer, for nearly 30 years now the various directors of the Central Intelligence Agency as well as the administration and the Congress have acquiesced in the withholding of the budgetary figure, even the single item amount from the public.

Could you as succinctly as possible give me the reasons, their reasons or the reasons of the Agency for the withholding of the single item amount which you say today you no longer object to?

Admiral TURNER. Do you want me to summarize the opinion of the other directors?

Senator MORGAN. Yes; because if I am to vote on this matter, I would like to know what have been the arguments for withholding this information through the years.

Admiral TURNER. Yes, surely. In my view, when you boil down all rhetoric on this topic, it is simply a question of whether releasing one figure is going to inevitably lead to the release of more figures or to the logical deduction of what those figures are on the part of opposing intelligence agencies of the world.

I think that really it all comes down to that one issue, because I have unequivocally agreed that release of several figures would be injurious to the country. So, it was a simple judgment, and the others who have made that judgment in the past have felt that it was not worth the risk.

In my view, I am not necessarily in contradiction with them as much as it might appear. Times change. Attitudes of the country change. The needs of the country change. The credibility of the intelligence community of our country has, unfortunately, lessened over the past few years. I believe it is very important to the country to rebuild that confidence and that credibility, and because I believe so sincerely that a capable intelligence service is an essential ingredient of our country's security today.

Senator MORGAN. Then in your opinion it would be a fair assumption to say that the agency in the past has not really seen any great harm that could come from releasing this one figure, but merely that it might be an opening of the door for release of additional data.

Admiral TURNER. That is correct, sir. That is my understanding and interpretation, and again, I would emphasize that my statement at the beginning was to ask the Congress to interpret and understand the public feeling on this, and the desire and the importance of the balance between openness and secrecy in this case.

Senator MORGAN. But in your opinion, the desirability of openness and secretness on this issue would stop at the releasing of one single figure?

Admiral TURNER. Yes, sir.

Senator HATHAWAY. Senator Chafee?

Senator CHAFFEE. Thank you, Mr. Chairman.

Admiral TURNER. I think it would help in our decision here if we could explore a little further the pros and cons that went into your thinking as you arrived at your conclusion. Now, as I understand, the big item that went into your thinking was, by revealing this one figure, are we opening the door for demands for further figures? Also, I think, probably, as I gathered from your testimony, there is some concern about whether by giving this year's figure, next year's figure, eventually there will get to be a problem of comparisons, and then your thinking went to the pros and cons of, free and open societies need to know versus the risks as you mentioned in your statement of giving the enemy an unnecessary advantage over us.

Are there any other factors that you can think of that went into your decisionmaking process, pro and con, as you arrived at your decision?

Admiral TURNER. Well, part of the credibility issue, part of the openness with society issue, is trying to restore the necessary level of confidence in the intelligence activities of our country.

Senator CHAFEE. Is it your feeling that by revealing an overall figure, and by your agency stepping forward and not objecting to this process, it would restore confidence and credibility in the agency?

Admiral TURNER. That is my hope, sir. As I said, somewhat facetiously, we are accused of doing so many things that I really do not think they could be done within the figure.

Senator CHAFEE. Would you gain anything by knowing what the overall Soviet intelligence budget was?

Admiral TURNER. I do not believe a great deal, no.

Senator CHAFEE. It probably would be very useful to bring before this committee to indicate how much they are spending versus us.

[General laughter.]

Senator CHAFEE. But seriously, I suppose it would be probably suspect in your mind to start with.

Admiral TURNER. Yes, sir.

Senator CHAFEE. You mentioned that you support an overall figure, but then we get into problems with it if we go on to figure B, C, and D, because that would reveal what system A or system B or system C might be doing. However, could you not apply that same rationale to our military defense budget? The Soviets could see what we are spending in ASW (antisubmarine warfare) or what we are spending in tank development, what we are spending in new aircraft, and therefore they could prepare to retaliate against that system. Doesn't the same logic apply there?

Admiral TURNER. Absolutely. It certainly does. We give a great advantage away there. The line between openness and secrecy has been drawn differently in that instance. I think it would be unwise in the intelligence field, where the balance of measure and countermeasure is so delicate, and where the difficulty of keeping an advantage is so easily offset in many cases, to give them those clues.

The ability of an enemy to offset our antisubmarine warfare capability, for instance, is a much more complex and difficult task than it would be to deny us intelligence if they knew precisely the systems on which we were relying most for it.

Senator CHAFEE. Thank you, Admiral. Thank you.

Admiral TURNER. Thank you.

Senator HATHAWAY. Senator Huddleston?

Senator HUDDLESTON. Thank you very much, Mr. Chairman. Admiral Turner, I join with the other members of the committee in welcoming you here today. I welcome the statement that you have made, which I did not have an opportunity to hear but which I have read and I think it is a tremendous step forward. It shows that you and the President have real confidence in the American people.

I personally do not believe that this disclosure will compromise our intelligence operations. As Senator Chafee was pointing out, in so many other sensitive areas we are a great deal more specific. Trade magazines carry very specific details about weapons that certainly give our adversaries a great deal more information than you are suggesting that we give.

I am just wondering if there is any way that we can be even more forthcoming beyond the aggregate figure that you are suggesting. While the public will not understand all of the ramifications of an aggregate figure, I think they will see that there are limits on the

intelligence community spending. I am wondering whether or not there could be other broad categories, subdivisions of this aggregate figure, that might be even more helpful, but would not betray our secrets.

Admiral TURNER. That is strictly a judgmental factor, Senator Huddleston. I would not contend that my judgment is absolute or infallible on it. I really think the risks would be substantially high. I think the next time we are in a closed session I could give you some specific examples of the type of information that could be deduced from such a breakdown and reasons why I believe that would lead the other side to come to countermeasures that they might not come to otherwise.

Senator HUDDLESTON. Is there an advantage in disclosing authorizations rather than actual outlays?

Admiral TURNER. I think it would be preferable to do the authorizations, but I am not sure that it makes a tremendous difference, as long as we are consistent from year to year.

Senator HUDDLESTON. Well, if there were heavy outlays in one specific area, say in the development of a particular intelligence gathering system that might alert an adversary that something is going on. It seems to me, however, that even if you had a figure for each of the various elements, such as the CIA, or DIA, you might not be giving away too much.

Admiral TURNER. Well, I would like to debate that with you in a classified forum, sir, because I am afraid to—

Senator HUDDLESTON. This committee has heard a great deal, of course, in closed session about these matters, and I would just like to begin to explore this because it is something that we ought to continue to look at.

As I said at the beginning, I think you are making a great step forward here. I commend you for this. As you know, this was a question that our previous committee dealt with, wrestled with. We never resolved it, as a matter of fact, but I think we have moved a step forward here today.

Mr. Chairman, I have no further questions of Admiral Turner on this matter at the present time.

Senator HATHAWAY. Senator Lugar?

Senator LUGAR. Thank you, Mr. Chairman.

Obviously, the consensus of the committee at least would appear to be in favor of disclosure of at least the single figure, as your testimony has suggested would be permissible. Trying to get some balance in this for a moment, let me raise these questions.

Is it not true that if you had the single figure released this year, there would be the predicament of a single figure to be released next year and the year thereafter, and some analysis, not only by people in our country but also elsewhere, as to what was going on?

Now, perhaps the figure next year will be the same, or we could say that the cost-of-living index in our country has gone up .5 or 6 percent, and intelligence is doing no more, no less than following inflation internally, but what if for some reason the intelligence budget and the total figure should be up by 30 percent next year?

Is your testimony that at that point you would simply state that figure and, as people in public sessions ask you about it or ask members of this committee, that our response would be no comment?

Admiral TURNER. I think that if a dramatic increase of that sort were required, the public would be justified in wanting to understand why it was such a dramatic increase. I think with a 5- or 8-percent aberration, we should have a no comment. I think a 30-percent change would have to be reflected in some major change in the world situation, and I think I mentioned earlier I believe the public might be very pleased to see we were responding if that were the case.

Senator LUGAR. But do you not have to get into a sort of explanation, if not in a detailed way, breaking it down, saying, for example, something is going on in the Middle East or in Africa this year that was not going on last year, or maybe a vague thought that general conditions in the world are unsettled, 30 percent more unsettled, for example?

I suppose the point that I am driving at with regard to even the fundamental figure, I appreciate the pledges made by the President in the campaign and reiterated by the Vice President and by the Church committee and many others. It has not been an individual thing, but are we now locked into really an irrevocable position in which essentially this single figure comes out and serves as a benchmark against which we shall all in the shared responsibility have to make many explanations for each succeeding year?

I am just trying to raise the question of how in a free debate of the Senate, with people on the floor raising questions with many persons who might not share our enthusiasm for the need for intelligence agencies at all, and wonder why we even have them, or wonder why we have these sorts of activities, is it realistic to anticipate that a single figure is going to stand the test for very long?

Admiral TURNER. Well, that is really the responsibility we are placing on you today, sir, but I think it is my view that if there is a dramatic change in the budget, that is when we are crossing the line, when the public does have a right to know. You and I and others, if a figure is released this year, are going to have to decide when that threshold is crossed every year, as to whether it warrants some amplifying comment.

So, I would always hope and insist in my sphere of responsibility that any amplifying comment be limited to the reason for a change in the aggregate rather than any description of the internals of the aggregate.

It is not an easy decision, and it never will be, but I think that the relationship between this budget and the whole national purpose is very close, and therefore there is some rightful connection between it and the public.

Senator LUGAR. Would your response be the same on the down side? Would you say that after an escalation of 30 percent, hypothetically next year, the budget was cut 20 percent the following year, once again these radical departures do you think might call for some explanation that would get us farther down the road of revelation of what we were doing?

Admiral TURNER. I think again where there is a dramatic cut in this important function of the Government, that the people have some right to understand that, to understand their security is being treated in a quite different manner, and when you talk about, you know, the opponents of the budget, I think that in some ways those who oppose

the intelligence community as just a matter of principle may be somewhat mitigated when they recognize the size of the budget and that it isn't some absurd figure that people sometimes publish.

Senator LUGAR. Thank you, Mr. Chairman.

Senator HATHAWAY. Senator Hart?

Senator HART. Admiral Turner, you have raised two arguments in favor of your position. One is what might be called the floodgates argument; namely, that if you go a step or two, then there is going to be great demand to go more steps. I don't think we can lend a great deal of credibility to that, otherwise we wouldn't go the first step.

You have said that you have reached the judgment that you can hold the line, to use your term, at one lump-sum figure. That suggests that you don't think you should hold the line at two figures or three figures or four figures.

Obviously you have made some tradeoff that it is worth something to try to hold the line at one figure, and what it is worth is restoration of public confidence.

Now, I think this committee could reach a similar conclusion, that it is a legitimate tradeoff to try to hold the line at four figures or five figures in return for the restoration of public confidence in us, because our confidence is on the line here also, not just the CIA's, but the U.S. Senate's, so we have to make that kind of decision. And I think if one decides arbitrarily that one can hold the line at one figure, one can arbitrarily decide just as easily that you can hold the line at four or five figures.

The second argument you have raised seems to me the more profound one, and that is the so-called trends or fluctuations argument—that by extrapolations from year to year, figures can lead to deductions and countermeasures. And that is the one I would like to explore, because I think that is the more significant one.

What could the Soviets, for example, deduce if this committee were to release agency by agency budgets, year by year, CIA budget, National Security Agency budget, DIA budget, State Department intelligence budget, four figures, year by year? What could the Soviets deduce and what countermeasures could they take from those figures?

Admiral TURNER. If they understand the quality and character of the effort made by each of the components you would release, and they saw those changing over time, more dependence on subcomponent A, B, or C—

Senator HART. No; I am just talking about a lump sum figure for the CIA, not components CIA, DIA—

Admiral TURNER. CIA is one component of the budget figure I am proposing to be released.

Senator HART. All right, CIA goes up and the DIA goes down.

Admiral TURNER. Yes, sir. If they thoroughly understand what each of those do, they may say, ah-hah, the new effort in the intelligence community of the United States is in this direction, and therefore we can circumvent that by the following means. Again I am circumscribed in this public forum, Senator Hart—and I would be very happy to come talk to you personally about it in classified detail, but it is essentially a matter of tying the capabilities of whatever breakdown you make, whether it is by organization, CIA, DIA, and so on, or

whether it is by collection, analysis, dissemination, the functions that we provide, or whether it is by the systems with which we do our work, whatever method you choose of selecting category 1, 2, 3, 4 that you would release in addition to the basic figure, I believe that they would be able to deduce from that where the emphasis was shifting in our collection efforts and our analysis techniques.

Senator HART. The fact of the matter is, former intelligence officials, such as General Keegan and General Graham and others, have gone into rather specific detail about what the overlaps are between the DIA and the CIA, and what functions both agencies perform, and the competition between those agencies, and the difficulties that causes, at least to their point of view.

I am not sure what a lump sum amount is going to offer the Soviets or anybody else in terms of extrapolation into the character of our intelligence effort. I think the Soviets, all they have to do is read those Generals' and others' statements to know that the CIA does a lot of things and the DIA does a lot of things, and a lot of those things are the same.

Admiral TURNER. There is simply no way I can respond to that question in an unclassified form, sir. I only give you my judgment that if I knew the corresponding breakdown of the intelligence community of the Soviet Union, I would be very pleased. I would use it to great advantage.

Senator HART. You don't know that?

[General laughter.]

Senator HART. You said in your statement, I believe, that we should refrain from comments on the composition and character of the intelligence budget.

Does that go to the community itself as well? I mean, the same logic, it seems to me, would apply to the composition and character of the intelligence community, which would almost put this committee out of business, I would think.

Admiral TURNER. No, sir, I certainly don't feel we need be any more inhibited than we are now as a result of producing this one figure. The discussions we now have on the composition and character of the community are perfectly proper, in my view, and I don't think—

Senator HART. Those contain, I think, some references to the numbers of employees. They certainly contain references to facilities in various places, on the public record, by this committee and previous committees, I believe. I am just trying to carry out what I think you called the deduction and countermeasure theory to its logical extremes. I think that restraint in those areas would really restrain this committee from doing an awful lot of things that we are already doing without much qualification.

Admiral TURNER. I can only say the whole intent here today was to allow you and the public to discuss more, not less, and I don't see this as leading to an inhibition.

Senator HART. What would be your opposition to release of previous budgets? Previous years.

Admiral TURNER. There is no logical way to oppose that in my view because over the next 10 years, if this committee and the Senate, the Congress decides to release a budget, that kind of data will be available.

I have a reluctance to jump in and say I would favor that. I think let's not jump in all the way, let's get our toe in this thing. I don't know what to say, Senator. I—

Senator HART. You don't close the door to that.

Admiral TURNER. I don't close the door to it, but I really have a reluctance there to give all that at once.

Senator HART. Thank you.

Senator HATHAWAY. Senator Biden.

Senator BIDEN. Admiral, I am a little confused by your last answer. Would it follow that release of the previous years' budgets would give the Soviet Union or any other adversary a fairly close picture of the character of our operation?

Admiral TURNER. I am saying, Senator, that our analysis of the budget trends over recent years does not indicate such humps and valleys as to give clues to anybody.

Does that respond to your question, sir?

Senator BIDEN. Well, yes, it responds.

I—if I can be the devil's advocate for a moment, I have been inclined and so voted in the Senate for disclosure of the aggregate figure, but I am—Senator Hart stated that your rationale for disclosure of the aggregate figure was in part your recognition of the need to restore public confidence. Senator Hart went on to say—and correct me, Gary, if I misstate your position—that release of four or five additional figures might be necessary in the judgment of this committee in order for us to have—feel that the public might have additional confidence in us. We might feel the need to restore public confidence in the Senate. And I am just not sure what—why the public's confidence would be any more restored with one figure or five figures if we all are assuming that whatever we reveal would not be enough to give anybody an understanding of the character of our intelligence operation. Do you follow me?

Admiral TURNER. Yes, sir. To me it is very simple. Some of the public think we spend x billion dollars a year on intelligence when in fact we spend one-tenth of x , and I think knowing that it is within that ballpark will restore some confidence. There is a limit to what malicious things we could possibly do if we are limited to our money.

Senator BIDEN. So we agree that the aggregate, then, could have some impact, and that is the reason for your statement in terms of public confidence.

I guess that what I am saying, I am not sure what release of additional figures does to restore that confidence, if that is the objective, on the part of the general public, unless, somehow, it gives a better picture of the character of the intelligence operation. If we all agree that we want to avoid giving the picture of the character of the intelligence operation, which I am not sure yet I do, then it would seem to me that it doesn't do much good to release more than the aggregate figure.

But at any rate, now to stop being the devil's advocate and to start to be your advocate for a moment, back to the release of the previous figures, is it the humps and valleys that most concern you in release of

intelligence figures, or is it—is that the only way that we stand to jeopardize the intelligence community's operations vis-a-vis our international opposition as a consequence of the humps and valleys?

Admiral TURNER. No, sir. It is a matter of indicating from breakdowns within the intelligence overall figure where our areas of emphasis are.

Now, within that there are humps and valleys, yes. The overall budget has not had humps and valleys large enough to give a discernible assistance to an enemy.

Senator BIDEN. But if there were a major hump or valley over the period of the next 3 years, is it enough to give an enemy a discernible picture of what we are doing?

Would it be enough, by the aggregate figure?

Admiral TURNER. I don't think so. It is a difficult judgment to predict why we would have that big a hump rather than a gradual trend, and if it is related, as we discussed with Senator Lugar, to a major change in the international environment, then I think it is easily explained.

Senator BIDEN. How about if it has changed as a consequence of a major change in technology? Assume for the sake of argument that the United States developed a facility whereby we could aid our intelligence operations significantly, move back to the 1960's, you know, the U-2 plane kind of thing. We ended up with a new device which would cost a great deal of money, which would have to be reflected, I guess—or would it? Maybe that is the question, would it be reflected in the present intelligence budget, the R. & D. for a major new technological device that was used by the intelligence community?

Admiral TURNER. Yes, it would be reflected, and that is in fact in my view the greatest danger of releasing a single budget figure, but we are talking about a somewhat—I mean a rather unusual event where it just goes up like a skyrocket. I mean, most R. & D. programs take some time to take off, and then get into production. It is possible, Senator.

Senator BIDEN. OK. My time is up.

Thank you very much.

Senator HATHAWAY. Admiral, thank you very much.

I take it you can stay until about 10 after. It has become pretty obvious from the questions that have been asked that we may—we will have to call you back for further testimony and maybe some in a secret session in view of the answers you gave to some of the questions asked by Senator Hart.

But I wanted to ask you just a couple of questions. I will divide up the remaining time and give us about 3 minutes each for a second round.

I think that we are focusing too much on this one figure as if the Russians or any other country don't know any other figure, and it may be that in giving them the one overall figure, they may already know what the figure is for personnel, for example. So we give them the one overall figure, they subtract personnel from the overall figure, and then they can make the deduction that we are spending the rest for something other than personnel, and if your argument is true that we should give them no more than one figure, we should know before

we even decide that how much they already know, because you would agree that if we give a second figure, it would be dangerous. So how could we even give the one figure without knowing how much they know already about the rest of it?

Admiral TURNER. I think there is a higher probability that they have got a good guess on the overall figure than they do on the breakdown if they have anything at all.

Senator HATHAWAY. There may be a higher probability but I don't know how much higher it is than the fact that they know how many personnel we have. That probably is not too hard to come by. The tables of how much we pay people is in the white, and they could probably make some pretty good deductions about the numbers and multiply it by the pay scale and come up with a pretty close figure, I would think. So that I think it is dangerous unless we know what they know before we release any kind of figure.

Admiral TURNER. Our personnel figures are classified. They may well have some of them or have guesses at some of them, but I am not sure I can assure you as to what they really know. We have estimates, you know, I don't have that much certainty that I am sure—

Senator HATHAWAY. You know, we may be making the mistake, some of us, in believing that because we don't think that this would give us much if any information, that it won't give the Russians or the Chinese or some other country some information, and they have been working at this intelligence analysis business a lot longer period of time than at least we on the committee have.

And another thing I wanted to ask, you mentioned that one of the reasons for revealing the figure was to restore the credibility of the intelligence community, if it has been hurt at all in the past, is because of the covert operations and not because of how much money they are spending. That is the complaint, at least, that I receive, and that is the complaint that has been publicized the most. And so that that really doesn't seem to me to be—doesn't seem to me that it is really going to help with respect to restoring credibility. As a matter of fact, it may hurt in credibility because of the further questions that we can't answer such as, you know, what about these intelligence related matters that you say will not be included in the figure that you want us to reveal, and furthermore, on the second basis, on public oversight for a reason for giving the figure away, we must remember that there are 50 out of 535 Members, approximately, in the Congress who know what all of the figures are in detail, and when you go through the entire budget process, and remember that the Chief Executive and the OMB and all of the others in the executive go over it very thoroughly, and you have these 50 Members of Congress who also go over it quite thoroughly, it seems to me that the public oversight factor is well taken care of, and when you add on top of that the fact that this committee is a committee where we have rotating membership, so that the possibilities of a sweetheart arrangement between the intelligence community and the Congress is diminished if not eliminated altogether, I think that the public is really adequately protected, and so why run the risk of putting out the one figure?

Admiral TURNER. Senator, I am not one to question your judgment on the relationship between the Congress and the public here as to

what it takes to restore credibility. I only say that I received questions that seemed to me to indicate a general lack of public confidence in the intelligence operation, not just with the covert activities, and it seems to me that putting it in some proportion for them may be a help, but I don't profess to be an expert in that area.

Senator HATHAWAY. Senator Wallop?

Senator WALLOP. Admiral Turner, I can't really think of anything that would give the public less confidence in the Congress than to have us take off on flights of disclosure of the Nation's secrets in some kind of misperceived public crusade.

I think maybe right here we have a good moment since I think there is a great misperception in the public's mind and certainly most of what I read in the press has great misperception. I wonder if you would just for the public, since it is a public hearing, define intelligence and the role that it plays in the Nation's security, and its operations in the contemporary world.

Admiral TURNER. Yes, sir.

Our intelligence operation is the gathering of information on events, trends and facts in foreign countries, about those countries, and foreign people, not related to events and people inside the United States of America.

The effort of the intelligence community is to provide a factual basis on which our policymakers in the executive branch and in the legislative branch may make the best educated decisions that they can as they come before them.

It is our role to provide to those of you in policymaking positions objective information, objective as we can make it. We provide evaluation of the meaning of facts and trends and events that we perceive around the world, so that there is always available to you, to the President, to the Cabinet officers, somebody analyzing events of an international nature that affect the United States, an organization which has no ax to grind, no role to play in the policymaking function.

It is that objectivity, that separation from the policy process that is so important.

And if I might digress for just a moment, at your pleasure, sir, it is why I am frankly quite personally upset with some of the press comment in the last day or two regarding my effort to be more open with the public in releasing data about the oil and energy situation around the world. I would like to assure you, Senators, as my advisers and my oversight committee, that there was no connection whatever with either the construction of those studies or their release and the policy function of our Government. The studies were commenced long before I came into this Government post. When I handed it to the President, it was the first he knew of it, and 5 minutes later I had a call from Mr. Schlesinger saying where did this come from?

There was no effort here, either in the production or the declassification, to be a part of the policy process, and I am disturbed that I have been so interpreted, because I am going to continue with your advice to release to the public as much of the information as we can, because I believe it will be of assistance to them in observing and participating in the debates that must be made on our overall public policies.

I am sorry to have digressed, but—

Senator WALLOP. Well, that to me would do more and does more for me as a means of restoring credibility or confidence or whatever have you than any act you could have taken, and I share with you that concern. I think it has been remarkably unfair.

But I think the other thing that the public and the press sometimes doesn't realize, is that intelligence is carried on by professionals and not a bunch of guys in broadbrimmed hats and cloaks running up and down the streets of Vienna, and the kinds of things that are covert are perhaps less of your role than the purely professional analyst role.

Is that a correct assumption?

Admiral TURNER. Yes, sir, very much so.

Senator WALLOP. Thank you.

I hope that does some good in the world of public information. Thank you.

Senator HATHAWAY. Mr. Chairman.

Senator INOUE. From your response, it has become evident that you want the hallmark of your service of this Agency to be described by two words, "confidence" and "credibility," and in line with these two words, I would like to ask you a question which is not directly related to our discussions this day, but I believe has some significance in the attempt on the part of your agency to be open with the public, and to be as honest as possible, and I relate to your decision of yesterday to seek the resignations of two of your staff people.

I would like to have you for the record tell us what was involved and what led you to this decision, sir.

Admiral TURNER. I would be happy to, Senator Inouye.

The decision I made yesterday on these two employees was a very difficult one on which I worked very hard for some days, had great pangs of conscience to decide what was best in terms of fairness to the individuals and in terms of the welfare of the intelligence operation of our country.

After careful investigation, I found that the two employees concerned were both very capable, very dedicated, very patriotic individuals. They had great potential for continued service in the intelligence community. Neither one, based on my investigation, could be accused of illegal activity. Neither one could be accused of anything that would deliberately harm the intelligence community. Neither one could be accused of having done something for personal gain as far as I was able to determine. But each was entrapped by the same mechanism, and that mechanism consisted of trying to be kind and to do a favor for an old friend. In both cases, the old friend happened to be a former member of the CIA, who had improperly imposed upon his former friend.

In both cases there was, in my opinion, simply a lack of good judgment, a lack of sensitivity to the implications for the intelligence community of what these people were doing. It was not done with maliciousness. And when I looked at this and realized that there were unauthorized activities taking place, when I realized that these people were merging their nonofficial activities with their official in supporting these friends in what they believed was quite an innocent way, I found that I could not go to sleep at night with a feeling of confidence that the intelligence agency was under full control and that it was doing only what was authorized and nothing more.

And therefore I felt it was necessary not to have these individuals in the community. And I have today spoken to the top leadership of the Central Intelligence Agency, and I have explained to them that because our business is such a delicate business, and because it is so important to the country that if we are going to stay in that business, we must treat our responsibilities with very great respect and very great sensitivity, and I have urged them to pass the word through the entire Central Intelligence Agency that while loyalty to friends is an admirable trait, they must put loyalty to the Agency and loyalty to the country first, and that they must understand that there can be no mixing of nonofficial activities with official activities any more than with oil and water, and that they must further understand that the standards of propriety and sensitivity must be so meticulously adhered to in the intelligence world, much more so than in any other agency of government.

And I have great confidence, Senator, that that is the way the overwhelming majority of those people are performing today. And by asking for the resignation of these two, I hope to preserve the reputation, the deserved reputation of the many, many others who are doing the job exactly as you would want it done.

Senator INOUYE. Thank you very much, sir.

Senator HATHAWAY. Senator Chafee.

Senator CHAFEE. Admiral Turner, as our chairman has mentioned, our theme today seems to be the restoration of credibility and confidence. It seems to me that there are several factors that are contributing to this restoration of confidence and credibility which you mentioned. The oversight that rests in Congress has been mentioned by Senator Hathaway, the restrictions in covert activity, the restrictions to solely overseas activities, the restrictions, as you mentioned, to solely authorized activities in the case of these two employees. A fifth factor is your own openness and your public appearances, and your willingness to discuss these matters with the press.

And I don't know how you have found it since you have been on the circuit in this new job, but certainly I have found that I have not been besieged by people demanding to know the overall budget of the intelligence operations of this country. Furthermore I am not sure that taking that step is going to achieve the results that you seek. I think the other activities are far more important, and I wonder if you feel, and from your public appearances, that this is a major factor in this restoration of confidence and credibility.

Admiral TURNER. I would agree with you 100 percent, Senator. I believe the other actions are more important. I had thought that this would be a useful one, but again, having come here today not to release the figure but to suggest that you decide that is, I think, putting the responsibility where it belongs. You have far better judgment than I as to the impact it will have on the people of this country.

Senator CHAFEE. Solely wearing your intelligence hat, not worrying about credibility in the Agency, would you feel more comfortable if the figure were not revealed, the gross figure?

Admiral TURNER. Oh, yes. I mean, as I say, the natural inclination of every intelligence officer is to withhold as much information as is reasonable because there is a risk in every disclosure. But all of us also feel that responsibility to be as open with the country as we can.

So I am not sure I am answering your question explicitly, but yes, I have characterized this as a risk. I have characterized it as one that it seems to me the combination of credibility and the necessity for a measure of openness in our particular society warrants taking.

Senator CHAFFEE. Thank you very much.

Senator HATHAWAY. Senator Huddleston?

Senator HUDDLESTON. Thank you, Mr. Chairman.

Admiral TURNER, have you given consideration to comparing the harm caused by disclosure of budget figures as opposed to the harm caused by disclosure of other types of information that might fall into the hands of an adversary?

How would you rate the disclosure of budget figures? Are they exceedingly damaging or somewhat damaging or maybe possibly damaging?

Admiral TURNER. Well, it is very difficult to compare the release of a single budget figure with some unspecific piece of intelligence, Senator Huddleston, but—

Senator HUDDLESTON. As compared to the identification of a station chief in a faraway country.

Admiral TURNER. Well, I mean the problem there is that you can replace the station chief. Once you release a budget figure, it is in the public record for all of history. So—

Senator HUDDLESTON. How would you rate the damage or potential damage of disclosing funds for the various components of the intelligence community? With the CIA Act of 1949, I believe it is, you have the authority for almost unlimited transfers and advances. Wouldn't this allow you to still conceal pretty well just how the money is being spent?

Admiral TURNER. I don't really believe that today I have that kind of transfer authority, Senator, and in any event we report by reprogramming requests all important or substantial movement of funds.

Senator HUDDLESTON. You report it to the Congress, but not to the general public.

Admiral TURNER. Yes, sir, not to the public.

Senator HUDDLESTON. You would still be concealing from the public just exactly how you might be spending those funds.

Admiral TURNER. Yes, sir; with the knowledge of the Congress we would not be revealing the breakdown of expenditure within the single budget figure.

Senator HUDDLESTON. Admiral, I know you need to get away, and my time is up. I would just like to commend you for the action you took yesterday. I recognize in the light of information you have already given to this committee how difficult it was, and how it was almost impossible to be entirely fair with all concerned, but I think in the interest of the Agency, and the country, you took the right action.

Admiral TURNER. Thank you, Senator.

Senator HATHAWAY. Senator Lugar.

Senator LUGAR. Two quick questions, Admiral.

First of all, in my first line of questioning I was discussing changes in the future and abnormal changes in the budget might lead to some explanation of conditions.

Now, in response to Senator Biden, when we began to look the other way, that is, in terms of budgets of the past, you reserve judgment

finally as to whether there would be damage in giving a single figure for this year and the year before and so forth, but you were reticent to commend that to the committee.

Once again arguing the devil's advocacy position, would it not be more helpful if a single figure was finally to be arrived at as something we ought to do, to offer a 5-year history or a 10-year history or something of this sort? What I fear is that a single figure thrown into the public arena without any perspective may not lead to the consequences you suggest, that people would feel that the community is not doing one-tenth of what it is accused of doing; rather the contrary, that people might not have any idea that so much money was being spent at all, and be led to surmise all sorts of things were occurring.

In other words, the problem of a single figure is always the problem of lack of benchmarks or perspective, anything around it, and just for your own considerations, would you comment on that thought that there has to be some perspective in this picture?

Admiral TURNER. Point well taken, Senator. My hesitation in releasing a history of the single budget figure is only that the impact, psychological impact on the intelligence community, on others of such a large release from nothing to say 10 figures might be a little bit more than we should use as a shock treatment to begin with here. It is a judgment call as to whether you would go back into history.

Senator LUGAR. But it is consistent with your judgment call essentially that in terms of intelligence, per se, there would be no particular reason to release any figure. As you pointed out, the decision that you are asking us to make is one of several factors, but one is you are asking us to decide whether the credibility of the intelligence agencies in this country is at stake, and this figure would help, or the integrity of the committee, of the Senate, all these sorts. So the question running through my mind is, the same that Senator Chafee has just raised, and that is, is there a feeling in the country at large that for the expiations of whatever the sins of the Senate or the intelligence community may have been in the past, that we offer up this figure presently, as a peace offering, and hope that we buy our peace, that this may be a severe dereliction of duty with regard to what the country anticipates of us, that we will have a first-class intelligence operation.

And I would just simply say that my general reading of my constituents is they want a first-class intelligence operation. They don't want a lot of guilt-ridden people running around offering figures hoping somehow to offer expiation for whatever occurred in the past.

This is just an observation; I appreciate your frankness.

Admiral TURNER. Thank you, sir.

Senator HATHAWAY. Thank you very much, Admiral Turner. I hope you make your appointment on time.

Admiral TURNER. Thank you very much.

[Whereupon, Admiral Turner left the hearing room.]

Senator HATHAWAY. Our next witness is the distinguished Senator from Wisconsin, Senator Proxmire.

Senator, we are glad to have you here. We have copies of your statement, which you may read or summarize at your own discretion.

[The prepared statement of Senator Proxmire follows:]

PREPARED STATEMENT OF HON. WILLIAM PROXMIER, U.S. SENATOR FROM THE
STATE OF WISCONSIN

Mr. Chairman, before beginning I want to compliment you and the Subcommittee for holding open hearings on this subject. It is essential that we share as much information as possible with the American public.

There are many subjects I would like to discuss today but I intend to keep my remarks short and to the point. Therefore, I will not evaluate certain issues of vital importance to the disclosure issue: for example the Constitutional argument that Article 1, Section 9, Clause 7 clearly states "No money shall be drawn from the Treasury but in Consequence of Appropriations made by Law and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." The published Statements and Accounts provision and the "from time to time" requirements of this clause have not been met. Even though the courts have seemed to rule this a non-judiciable matter (*Richardson v. United States*) the Schwartzmann, Maxwell, and New York City Bar Association articles strongly argue that the Constitutional provisions have been systematically violated under the present procedures.

Further, given more time I would have discussed 31 USC 1029 which requires the Secretary of the Treasury to make public the results of the financial operations of the Government—thus giving us the Combined Statement of Receipts Expenditures and Balances of the United States Government. This document now fails to account for intelligence funds.

It would also be appropriate to note the public statements of Messrs. Schlesinger, Helms, Kirkpatrick and Richardson on the lack of a national security threat if we should publish the combined national intelligence program budget. I am sure these matters will be addressed by others before you today and tomorrow.

Instead I want to closely examine the defenses voiced by those who do not want the budget made public. If these defenses can be proved faulty, as I believe they can, then the obligation on the Congress to make public an overall figure is obvious.

THINGS THAT GO BUMP IN THE BUDGET

The primary defense against disclosure is the "Bump in the Budget" argument. Used by former Director Colby in his interrogatories in the *Halperin v. Colby* suit, the premise is that a yearly public CIA budget would allow adversaries to measure "bumps" and conclude, after correlation with other data, just what major new programs are underway. The U-2 program is offered as a budgetary bump that could have been noted by the Soviets.

This reasoning is faulty on several grounds. First, there is a distinction between seeing a bump and interpreting it correctly. With one public national intelligence budget figure, an increase could represent any of the following: rising manpower costs (not all of which can be observed by counting cars in parking lots); new foreign aid or covert paramilitary operations such as in Laos; particularly large fixed cost purchases such as buildings; several miscellaneous programs coincidentally peaking at the same time; or bookkeeping modifications involving out-year expenditures (large commitments in budget authority but little or no immediate outlays). In other words an increase may or may not be significant, may or may not relate to one program, may or may not represent true increased effort or value rather than inflation or coincidental jumps.

If the budget total decreases—what would that signal? It could mean that overall the intelligence community has become more effective rather than less—that productivity has increased dramatically—perhaps from the capital increases noted in a prior year. It may mean that manpower has declined proportionally to capital intensive programs. If given in budget authority, a decrease in BA might camouflage an increase in outlays and give a totally false impression.

And of course the bump would not pinpoint which agency is spending the money—be it the CIA, DIA, NSA or Special Activities.

Therefore, the bump or dip is not materially valuable as an intelligence tool. In fact it might well eat up some resources of potential adversaries in false trails.

Second, it is naive to believe that the U.S.S.R. does not know of major U.S. intelligence programs that could provide such bumps. They knew about the U-2 soon after it flew over their country beginning in 1956. They didn't get the tech-

nology to shoot it down until May 1960. The Russians certainly knew about our huge resource expenditures in Laos—in fact well before the American people or the Congress knew.

Radar sites, satellites, and communications stations are all subject to aerial and electronic inspection. Programs large enough to create a bump in today's budget are large enough for recognition by other means. Smaller programs, which should be the forte of the intelligence community, would remain unaffected. The large programs seemed to get us in a lot of trouble anyway.

DEFENSE DISINFORMATION

Third, we fear the Russians' access to the overall budgetary intelligence figure. Then we hand them thousands of pages of detailed knowledge on the defense budget. What a contradiction!

Congress not only publishes the overall defense budget figure. We publish figures for each Service, for each function, for each category, for each mission, for each appropriations title, for each program. We publish the details of each program in R. & D. or procurement including cost, mission description, initial operational capability, quantities, unit costs, and weapons characteristics in many cases.

Consider what we disclose to our potential adversary. Consider what emerges from the House and Senate Armed Services Committees, Defense Appropriation Subcommittees, Budget Committees, Congressional Budget Office, Library of Congress, Office of Technology Assessment, General Accounting Office, Defense Department Posture Statements, speeches by defense officials, think tanks, official leaks and newspapers. Literally tens of thousands of pages of defense information are produced each year.

If we have trouble understanding how our own Government works what with cost overruns, contractor disputes, Congress challenging the executive branch and the myriad of defense statistics printed each year, what must the Russians think? It is probably the best disinformation program we could invent.

For example, the defense budget each year is referred to in a bewildering array of terms: Military Functions; Department of Defense Budget; National Defense Budget; Military Procurement Authorization Bill; Defense Appropriations Bill; preliminary submissions to the Budget Committee; First, Second, and Third Concurrent Resolutions on the Defense Budget; statistics in each category in percentages; simple growth; real growth; budget authority; outlays; and total obligatory authority backlog; rescissions; transfers; supplementals; and re-programming. None of these terms are the same. It must drive the Russian analysts crazy.

Next to that, publication of one overall figure for the combined intelligence budget is hardly worthy of the argument that we are giving away secrets.

OF CAMELS AND TENTS

The second objection, and I suspect the real reason for the reluctance of some to disclosing the overall intelligence budget total, is the camel's nose under the tent proposition. If we start with the budget total we will end up with the names of all our agents on the Record. That is the thrust of the argument—the inevitable prying of Congress into what the intelligence community is up to.

Now there is some truth to this. Disclosure always raises new questions and we must recognize that. But we can handle this program by drawing a new line and living by it. The Senate has an extraordinarily good record of keeping intelligence secrets—this Committee and the Church Committee are excellent examples. If we draw the line at one overall budgetary figure each year, we can live with that rule. No longer would the defense budget be artificially inflated. The Constitutional requirement would be met. We need not go beyond this formula. There will be continuing pressure to break down that budget figure but as long as a simple explanation of the budget is made known—that is its definition—then the Congress and the Director of Central Intelligence will have demonstrated their good faith with the public.

Finally, Mr. Chairman, there is the fact that various intelligence budgets already have been disclosed from time to time. I refer to the calculation formula contained in the Church Committee report; to the figures used in the debate on the House floor last year; to the Leslie Gelb article in the New York Times; to

the Marchetti and Marks book; to the CIA percentage figure given by one knowledgeable former Senator; to the 1973 wire service article carrying a statement of a total budget figure by a member of one of the CIA oversight committees; to the DIA figure which has been officially made public from time to time; and to the Schlesinger so-called 10 percent slip. In 1970, we officially released the combined defense intelligence figures. If the Russians can read, they are one step ahead of the American public which does not have the time or resources to put two and two together.

Under these circumstances, I urge the Subcommittee to make public the national intelligence budget total on an annual basis prior to the final vote on the Defense Appropriations Bill.

TESTIMONY OF HON. WILLIAM PROXMIRE, U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator PROXMIRE. Thank you very much, Mr. Chairman.

Mr. Chairman, I will deliver part of the statement and I will skip part of it, too, so it can go on the record.

Before beginning, I want to compliment you and the subcommittee for holding open hearings on this subject. It is essential that we share as much information as possible with the American public. What I want to do is to closely examine the defenses voiced by those who do not want the budget made public. If these defenses can be proved faulty, as I believe they can, then the obligation of the Congress to make public an overall figure is obvious.

The primary defense against disclosure is the bump in the budget argument. The premise is that a yearly public CIA budget would allow adversaries to measure bumps and conclude after correlation with other data just what major new programs are under way. The U-2 program is offered as a budgetary bump that could have been noted by the Soviets.

That reasoning is faulty on several grounds. First, there is a distinction between seeing a bump and interpreting it correctly. With one public national intelligence budget figure, an increase could represent any of the following: rising manpower costs, not all of which can be observed by counting cars in parking lots; new foreign aid or covert paramilitary operations, such as in Laos; particularly large fixed cost purchases, such as buildings; several miscellaneous programs coincidentally peaking at the same time; or bookkeeping modifications involving out-year expenditures, that is, large commitments and budget authority but little or no immediate outlays.

In other words, an increase may or may not be significant, may or may not relate to one program, may or may not represent true increased effort or value rather than inflation or coincidental jumps.

If the budget total decreases, what would that signal? It could mean that overall the intelligence community has become more effective rather than less, that productivity has increased dramatically, perhaps from the capital increases noted in a prior year.

It may mean that manpower has declined proportionally to capital intensive program. If given in budget authority, a decrease in BA might camouflage an increase in outlays and give a totally false impression.

And, of course, the bump would not pinpoint which agency is spending the money, be it the CIA, the DIA, the NSA, or special activities.

Therefore, the bump or dip is not materially valuable as an intelligence tool. In fact, it might well eat up some resources of potential adversaries in false trails.

Second, it is naive to believe that the U.S.S.R. does not know of major U.S. intelligence programs that could provide such bumps. They knew about the U-2 soon after it flew over their country beginning in 1956. They did not get the technology to shoot it down until May of 1960. The Russians certainly knew about our huge resource expenditures in Laos, in fact, well before the American people or the Congress knew.

Radar sites, satellites, and communications stations are all subject to aerial and electronic inspection. Programs large enough to create a bump in today's budget are large enough for recognition by other means. Smaller programs, which should be the forte of the intelligence community, would remain unaffected. The large programs seemed to get us in a lot of trouble anyway.

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Now, if we have trouble understanding how our own Government works what with cost overruns, contractor disputes, Congress challenging the executive branch and the myriad of defense statistics printed each year, what must the Russians think? It is probably the best disinformation program we could invent.

For example, the defense budget each year is referred to in a bewildering array of terms: Military functions; Department of Defense budget; national defense budget; military procurement authorization bill; Defense appropriations bill; preliminary submissions to the Budget Committee; first, second, and third concurrent resolutions on the Defense budget; statistics in each category in percentages; simple growth; real growth; budget authority; outlays and total obligatory authority; backlog rescissions; transfers; supplementals; and reprogramming.

None of these terms are the same. It must drive the Russian analysts crazy.

Next to that, publications of one overall figure for the combined intelligence budget is hardly worthy of the argument that we are giving away secrets.

The second objection is the camel's nose under the tent proposition. If we start with the budget total we will end up with the names of all our agents on the record. That is the thrust of the argument. I think that is the principal argument against this proposal.

Now, there is some truth to this. Disclosure always raises new questions and we must recognize that. But we can handle this program by drawing a new line and living by it. The Senate has an extraordinarily good record of keeping intelligence secrets. This committee and the Church committee are excellent examples. If we draw the line at one overall budgetary figure each year, we can live with that rule.

No longer would the defense budget be artificially inflated. The constitutional requirement would be met. We need not go beyond this formula. There will be continuing pressure to break down that budget figure, but as long as a simple explanation of the budget is made known—that is, its definition—then the Congress and the Director of Central Intelligence will have demonstrated their good faith with the public.

Finally, Mr. Chairman, there is the fact that various intelligence budgets already have been disclosed from time to time. I refer to the calculation formula contained in the Church committee report, to the figures used in the debate on the House floor last year, to the Leslie Gelb article in the New York Times, to the Marchetti and Marks book, to the CIA percentage figures given by one knowledgeable former Senator, to the 1973 wire service article carrying a statement of a total budget figure by a member of one of the CIA oversight committees, to the DIA figure which has been officially made public from time to time, and to the Schlesinger so-called 10-percent slip.

In 1970, we officially released the combined defense intelligence figures. If the Russians can read, they are one step ahead of the American public which does not have the time or resources to put 2 and 2 together.

Under these circumstances, I urge the subcommittee to make public the national intelligence budget total on an annual basis prior to the final vote on the defense appropriations bill.

Senator HATHAWAY. Senator, thank you very much for your statement. You are advocating the same thing as Admiral Turner. Did you hear his statement?

Senator PROXMIRE. Yes. I did not know that until this morning. I got a copy of his statement just this morning, and I am delighted to see it. I think that that certainly is precisely what I am urging the Congress to do.

Senator HATHAWAY. You are saying we should not go beyond that figure?

Senator PROXMIRE. I am saying that I understand not going beyond that figure. I think you can make a strong case for going somewhat beyond it, but I think that the important thing is that the Congress knows and the public knows what our overall intelligence expenditures are. I think we have an obligation to make that public unless there is some strong security reason for not doing so, and I think that the case is very powerful for doing what Admiral Turner suggested.

I think if we go beyond that figure the case becomes weaker, because I think that the more we disclose if we go beyond that, I think the more useful it may possibly be to an adversary.

Senator HATHAWAY. What useful purpose would disclosing the one figure do for the general public?

Senator PROXMIRE. Well, at long last the public would know something that it thinks it knows or perceives by rumor. There have been all kinds of estimates, \$1 billion, \$10 billion, \$5 billion. Nobody really knows precisely outside of those who have had access to this intelligence figure what it is. I think after all it is the public's money, and the public has a right to know roughly how much is being spent in this area and understands that if more detail is disclosed, it could be damaging to the country's national interest.

Senator HATHAWAY. Well, the public does know now that it is a part of the national defense budget, so they know it is included there.

Senator PROXMIRE. Well, they know it is included. It is less than \$100 billion. They do not know how much less it is.

Senator HATHAWAY. Do you think if they knew the total they would really have any more significant information than they have now?

Senator PROXMIRE. I think so, yes, indeed. I think that they would know how much we are spending on trying to gather intelligence. They would be in some position to feel as the total went up or as it went down over a period of years, they would be in some position to assess what we were doing.

As I say, it would be desirable to give the full details from the standpoint of letting the public know everything, but we obviously cannot do that, should not do it. I think everybody would draw the line somewhere, and I think that if we provide this kind of information, that we are telling the public more than it knows at the present time, and gives them some understanding of what our overall intelligence burden and obligation is.

Senator HATHAWAY. But there are already approximately 50 Members of both the House and the Senate who have access to and know the details of the intelligence budget. The administration as well goes through a very lengthy budgetary process before making a recommendation to this and the other committees. Don't you think that is a sufficient safeguard for the public interest, and is much better than just releasing a ballpark figure?

Senator PROXMIRE. Well, I think that what you say is undoubtedly right, but I think that does not obviate the desirability of releasing the ballpark figure. I think it is, of course, essential that we have people in the Congress and in the administration who understand the details fully. I think you are probably right. There are at least 50 Members of the Congress and undoubtedly members of the administration who have to know that.

I am saying that in addition to that, since it is the public's money, the public ought to know as much as we can safely tell them, and this I think we can safely tell them, particularly in view of the fact that Admiral Turner, who is perhaps in the strongest position to be aware of whatever adverse effect this may have, agrees that this can be safely told.

Senator HATHAWAY. Well, he didn't quite say that. He said that it could be revealed, but with some risk, and his statement as I understood it was to the effect that they would not object, the administration would not object if we released it, but they were not telling us to

positively go ahead and release it, because he said at the end of his testimony, sure, any intelligence officer would rather keep secret whatever information they can keep secret.

Senator PROXMIRE. Well, that is right. I think that is just about as far as you could possibly expect the head of the CIA to go, and I think it is an indication that the Congress can properly proceed along that line. I would not expect and you would not expect the head of the CIA to take the position that there is no possible risk of any kind. There may be. I perhaps have overstated my case a little bit here.

Senator HATHAWAY. But you agree that we should not go beyond this to reveal any other figures, any breakdowns under the gross figure?

Aren't you necessarily assuming that our enemies or potential enemies know nothing?

Senator PROXMIRE. No; as I said in my statement, I think you are right. Our enemies or potential enemies know an enormous amount. After all, this is an open society. Through all kinds of sources, including congressional reports of all kinds, newspaper reports that go into great detail, they know a very great deal, but I think that this step of disclosing the overall global intelligence budget is one that would be of use to the American public in evaluating how much we are spending in this area, and would be of little or no use to the opposition, because I think they understand what it is now pretty much, and they have details in addition to that.

Senator HATHAWAY. Well, then, why not give it all?

Senator PROXMIRE. By all, you mean—

Senator HATHAWAY. The details of it, if you think they already know it.

Senator PROXMIRE. I think they know many of the details. I think there are many they do not know. For instance, I think we would all agree that we would not want to give the figures on the amount that the CIA is paying for agents to operate in various parts of the world and specify which parts of the world, and how much we are paying there, and so forth. Obviously, that is something that I think they probably do not know, and I think that probably nothing like 50 Members of Congress know that. Probably a very few Members, if any, know it. I think that should be kept as limited as possible.

Senator HATHAWAY. Don't you think it is risky for us to get into this guessing game of what they may know, what they may not know? We can say with a great deal of confidence that they know something about how much we are spending in certain areas, but why give them this one additional piece of information of the total amount being spent, which they can use to make other deductions?

Senator PROXMIRE. I don't think they can. The burden of my testimony was that they cannot make any very useful deductions from their standpoint on this overall global figure of several billion dollars.

Senator HATHAWAY. That is true. You may be right, but I am presuming that they do know something about these others.

Senator PROXMIRE. Oh, I think they know a great deal, and I do not think that this additional—

Senator HATHAWAY. Or they can figure out fairly easily, say, on personnel, so if they know what the overall is, they can subtract the personnel and they know what the rest is. So then we have given them more than just the overall. We have given them some other information.

Senator PROXMIRE. A little additional information, yes, but I think it is so limited compared to what we give them elsewhere, in the number of ships, tanks, missiles, planes that we have in great profusion. It is disclosed again and again, and kept up to date, and made a matter of public record constantly, in debate on the floor of the Senate and hearings that are open before the Armed Services Committees and the Appropriations Committees, and so forth.

Senator HATHAWAY. Of course, that might be an argument for not disclosing that, either.

Senator PROXMIRE. But we do, and we are not going to change it.

Senator HATHAWAY. I think that could probably easily be discovered also, even if we did not, don't you think, the number of planes?

Senator PROXMIRE. Not easily. I think it might be more difficult for them. I think it is much harder for us to find out about their operations in their closed society, because all of that is intensely classified by them.

Senator HATHAWAY. In regard to your bump argument, I think that the one flaw I find in it is that although you could say that it would be difficult for the Russians to determine because of an increase or a decrease just exactly what we spent it for, I think that assumes that the Russians don't know too much about our intelligence activities, and I do not think we can fairly make that assumption. So, the bump may be quite significant to them.

Senator PROXMIRE. I would disagree with that. I think the Russians know a very great deal about our operations. Sure they do. They must know a lot. Any thoughtful person who spends any time just reading newspapers knows a great deal about our operations and can find it out.

I think the bump argument is a valid argument inasmuch as the overall amount for intelligence is so substantial that I do not think that they would be able to have any significant increase in their intelligence. As I say, the number of personnel that we have in a particular part of the world, what that personnel is being paid to do, and so forth, I don't think they could possibly derive that from a figure of several billion dollars for the overall amount spent by intelligence, or that it went up or down.

As I pointed out, the changes can be related to any number of things. We may have more people working. We may have more resources working in a year, but the obligational authority would not reflect that. The obligational authority may be going up when the resources are going down, and vice versa.

Senator HATHAWAY. They may have a pretty good watch on our personnel, and so if we do have a bump they know that it is something other than personnel.

Senator PROXMIRE. Well, something other than personnel is an enormous area of speculation that could include weapons, it could include particular kinds of personnel, any number of things.

Senator HATHAWAY. Thank you. Senator Wallop?

Senator WALLOP. Senator Proxmire, I would like to pursue this one thing a little further, because it concerns me. At least it strikes me that

there is a marked inconsistency in what you are saying. You appear to give credibility to the Gelb articles and Marchetti's book, and a number of pieces of information. Is that a fair assessment of what you are saying?

Senator PROXMIRE. Well, I would not necessarily give credibility to those articles. I would say that that kind of speculation by reasonable and competent people indicates that there may be some validity to it. Whether they are accurate or not, of course, is something I do not know personally. I don't know whether the Gelb approach was accurate or not. I just don't know. It may not be.

I am saying that there is enough so that a highly responsible newspaper like the New York Times and a very capable writer like Gelb could put something together here that does seem reasonably logical, but I do not know how much credibility to place on that.

Senator WALLOR. Well, if it is a highly responsible newspaper, and we will leave that for a later discussion—

Senator PROXMIRE. Well, I am sure there may be—

Senator WALLOR. All right, but if there is credibility to that figure, and a bump comes along, you know, by deduction you can begin to place where expenditures might be. If you know pretty much that the New York Times says such and such is so, and if you are a Russian and care to believe them, and you see a bump, and the next year it is not there, then you know. Aren't there reasonable powers of deductions that can be attributed to the Russians?

Senator PROXMIRE. Oh, very, very high powers of deductions. They have brilliant people working on this, I am sure but I do not think that they can deduct from the fact that—I think that article indicated something like a \$6 billion figure. If it was \$6 billion, or \$5.5 billion, or \$7 billion, what kind of deduction can they make as to useful information with respect to the allocation of our intelligence resources, and what they might be able to do therefore to counteract that kind of expenditure?

Senator WALLOR. If Mr. Gelb continues to release figures which they find credible year after year and they apply them to the total overall budget figure as proposed to be released by this committee, then it would seem to me that they can obviously find out where emphasis is in certain other programs that they know to exist. Wouldn't that be—

Senator PROXMIRE. Well, I do not think it sharpens their real understanding of any vulnerable area of information that they don't already have. I would like to have an example. I cannot think of any, and I spent some time with the staff trying to figure what they would be able to conjecture on the basis of this overall figure of, as Mr. Gelb argued, \$6 billion, which may be right or may be wrong.

Senator WALLOR. Well, I think the same thing is true. Admiral Turner said that he could demonstrate that quite clearly in a closed session, but it is very difficult in an open session like this to get into details of how they might be able to deduce one thing or another. I don't know. I have a feeling from your statement that you suppose really we do not have any secrets, and if that is the case—

Senator PROXMIRE. No; I am sure we do. I do not know how you get that impression, because I have indicated in my so-called camel's nose

under the tent rebuttal that if there is further information that is disclosed, it might be damaging to us. I think we do have very important information that has not been disclosed and should not be disclosed and would not be disclosed on the basis of what I am asking for and what Admiral Turner is asking for, which is the same thing. I take that back. The chairman corrected me. I am not saying Admiral Turner asked for it. He indicated that they could do it with a reasonable degree of risk.

Senator WALLOP. Yes; I would not call him a leading crusader for the release of the figure.

Senator PROXMIRE. No; that is true.

Senator WALLOP. You said, though, and it concerns me, in another remark, that you think there is a strong case that could be made for going further. If that is the case, isn't that the camel's nose under the tent?

Senator PROXMIRE. No; I think not. I think we all recognize that the situation changes as time goes on, technology changes. The amount of information we have available changes. Our relationship with our adversaries changes in the world, and the situation may be different next year or 10 years from now from what it is now.

As of now, I think this is all that we should do, and I think that while there is a strong case to be made for it, I think there is an even stronger case for not going further right now.

Senator WALLOP. Well, in the historical past there was a strong case, obviously, a stronger case for not releasing that than for releasing it.

Senator PROXMIRE. No, I don't think it was a weaker case, but it prevailed.

Senator WALLOP. Well, you are right.

Senator PROXMIRE. I tried to do this on the floor of the Senate. I put an amendment in, and we had a reasonably good vote in favor of releasing this figure some 2 years ago. I lost the debate, but the amendment received substantial support. I think those of us who were in the minority were right.

Senator WALLOP. Well, I have a concern, and I have not made up my mind on this by any stretch of the imagination, but I have a real concern that this is a threshold that not be jumped over lightly.

Senator PROXMIRE. I would agree with that.

Senator WALLOP. I mean, it really does concern me. I appreciate what you had to say this morning.

Senator PROXMIRE. Thank you, Senator Wallop.

Senator HATHAWAY. Senator Huddleston.

Senator HUDDLESTON. Senator Proxmire, do you feel that releasing only the aggregate figure satisfies the constitutional requirement relating to budget appropriations?

Senator PROXMIRE. Well, I think that you can argue that either way. Obviously, any requirement is subject to modification. You could argue that for many years we have been violating the constitutional requirement by not disclosing it.

Senator HUDDLESTON. At least this is closer to satisfying it.

Senator PROXMIRE. This is closer to it, yes. I think from the standpoint of strict construction I suppose you could argue that we should disclose all the details, but I think we have to recognize that we have a countervailing problem here, the protection of our national security.

Senator HUDDLESTON. I have been listening to the arguments pro and con on this now for over 2 years, and I have come to the conclusion that the aggregate figure offers no risk at all to this country. I think we probably could go further without any substantial risk. There is one point to be made, of course. There is a vast difference between the Government's confirming a figure and an adversary's reading it in a book or in a newspaper article or whatever. I think we have to bear in mind that that is a factor.

Senator PROXMIER. I would agree with that. That is precisely the issue. That is right. There is a vast difference.

Senator HUDDLESTON. You have got to take into account the fact that it is a lot better to have them speculating about it than to have it officially confirmed.

Second, I can't see that even if they knew the figures in detail, that it would involve any great damage. As you say, there are so many ways to spend the money that the total amount of money is not really that significant. I think we are making a great step forward here today. I am not going to be pushing very hard, at least in the immediate future, for any further disclosure, but I do believe we need to take this step.

I think it will put additional pressure on our intelligence community. It will give the American public some sense of our priorities in expenditures and some sense of what our intelligence is costing. If there are major deficiencies that are revealed, then the public might be somewhat agitated by the amount of money that is being spent for the purpose.

If, for instance, the CIA's energy report should prove to be substantially in error, then I would suspect that the people would wonder whether or not we are getting our money's worth in this kind of endeavor, but that can be only good, as I see it. I don't think it is going to be very detrimental to us.

Senator PROXMIER. Well, you have said something I omitted and perhaps should have stated, or at least referred to, and that is that the positive case here—I just stated the rebuttal to the arguments. The positive case is very, very powerful, that people not only have a right to know, but you are going to have a much more efficient government when they do know. We only make improvements when we get criticized, and you can only criticize when you know what you are talking about, when you have some information.

If you know that there is a certain amount being spent on intelligence, then you are in a much stronger position to criticize what you are getting for that expenditure.

Senator HUDDLESTON. I think people need to be reminded on occasion that our society is vastly different from most other countries, from the standpoint of being open. It has been stated before this committee and, I think, accurately, that many times we have to spend \$1 billion to get the kind of information from behind the Iron Curtain that they can get from us by either just perusing the Congressional Record or spending \$1.25 for a magazine that outlines all kinds of details about our defense posture and our weapons, their capabilities, where they are deployed, and whatever.

So, I think the American people will recognize that a substantial expenditure is necessary for us to have the kind of information that we need.

Senator PROXMIRE. I agree with that wholeheartedly.

Senator HUDDLESTON. Thank you, Mr. Chairman.

Senator HATHAWAY. Senator LUGAR?

Senator LUGAR. Mr. Chairman.

Senator PROXMIRE, in your experience in the Senate, how would you characterize the mood on this question 15 years ago? We probably would not have been having a hearing of this variety at all, I suspect, and why not? In other words, why is this an issue in 1977, whereas it might not have been in prior years?

Senator PROXMIRE. Well, I think that there are several reasons. One is, I think that frankly, and many people will disagree, I think the caliber of the Senate has improved. I think that the quality of people in the Senate is better than it was. I think people in the Senate are more sensitive to the burden that the Government imposes on their constituency, the inflationary effect. I think whenever we spend billions of dollars in an area, we should know about it. We should be in a position to criticize it. We should be in a position to have that information made available to us and made available to the public.

I think we have made progress in the Budget Reform Act that is beginning to provide a framework in which we can make these arguments, and I think that there was not that sense. Furthermore, we were not spending anything like this amount of money 15 years ago. As a matter of fact, the entire budget 15 years ago was around \$100 billion. Now, as you know, it is crowding \$500 billion, five times as much. I think that for that reason we are all sensitive about these multibillion dollar expenditures, and more anxious to act on them.

Furthermore, I think there is a greater self-confidence on the part of the Senate and on the part of the people that we can do something about intelligence, and military matters, for that matter. We do not have to leave these to experts. It is our responsibility as Members of Congress. We have to decide how this money should be spent. We should not pass the buck to others, and we do exactly that when we don't disclose this kind of information.

Senator LUGAR. In other words, the argument that was made earlier today, or at least discussed, that for some reason the need to disclose this figure is related to a credibility factor of the Senate as an institution, or the intelligence community as an institution, your argument really is very different from this.

You are suggesting that in fact the caliber of Senators has improved, that we are more sensitive to these issues, that the issue is not one of expiation for past—

Senator PROXMIRE. Oh, not in any way. As a matter of fact, this has been an issue in prior years. You certainly are right in asking why Congress didn't act on it.

Senator Mansfield in the fifties tried to achieve this. Senator Gene McCarthy tried to do this in the sixties. Senator Stennis and I introduced an amendment to make this public in the 1973-74 period. So, it is something that many people in Congress feel should have been done before.

Of course, I don't know whether it will be done now, for that matter. We still might be in the minority, but I have a feeling that we are not, especially with the head of the CIA coming on and saying that this would do minimum damage.

Senator LUGAR. If we got the total figure, how would this allow analysis or judgment on efficiency of the expenditure? For instance, some would argue that if you had a figure of several billions of dollars, that it would be hard, really, to make much of an analysis in an accounting sense of efficiency. As a matter of fact, one argument is that after an initial figure has been released, that the intelligence community might labor mightily to keep the figure roughly the same or within the cost-of-living index year by year, subject only to rise in inflation, whereas underneath the blanket all sorts of things occurred.

How can we reconcile this idea of the single figure with the point that is often made?

Senator PROXMIRE. Well, when you have the single figure, you have it confirmed, you have something you have not had in the past. You have the basis for evaluation and criticism and discussion publicly, public debate, and I think your experience must convince you, as it certainly convinced me, that it is very, very hard to operate in executive session, to just have a few Senators know about these things, not be able to bring it out on the floor or in the committee report, not be able to have any public comment by able people outside of the Senate who could contribute a great deal in the way of criticism.

I think that all of that will be advanced to some extent. I agree that there are great limitations on it, because you only have that global figure, only one figure, but it is an advance over what we have had, and I think it gives you some perspective as to how much we are spending overall on intelligence.

Senator LUGAR. If you were in Admiral Turner's position, and arguing strictly in terms of what would bring a stronger intelligence community and intelligence effort to this country, would you still argue in favor of revelation of the single figure or any figure?

Senator PROXMIRE. Absolutely. Absolutely. In fact, I think that is probably the single most important consequence of this kind of thing. I think when we begin to challenge how much people are spending—justify it. How can you justify the fact that we have had this increase by 50 percent or 100 percent over a period of years when we are not getting results? Why aren't we getting the results? I think that kind of criticism and challenge is the only way to make progress, and I think that it is going to mean a much better intelligence community if we have more people understanding what is going on.

I think that inefficiency and waste, just like corruption, thrive when we do not have the information.

Senator LUGAR. Thank you.

Senator HATHAWAY. Thank you very much for your testimony, Senator, but I want to ask you one more question along the same line that Senator Lugar was questioning.

Aren't you placing the committee in a very difficult position in defending a single figure on the floor of the Senate when you have got people who will offer an amendment to cut by 10 percent, let's say. That is a customary amendment that we have to both the defense budget and to other budgets as well.

Now, what are we going to say, without going into the details of what makes up the big future? We can just keep repeating that this is a nice figure and is justified, but we are sorry, we can't give you the details of the justification. So, it is subject to that kind of abuse.

Senator PROXMIRE. Senator, in the 20 years I have been in the Senate, I can recall only one or two occasions when the percentage cuts prevailed, and usually they are assessed not against—in fact, the only time it has prevailed, as I recall, it has been assessed against the entire defense budget. It was the Saltonstall amendment back about 15 years ago that was, I think, a 1- or 2-percent cut, and that passed. At least it passed the Senate. I don't know whether it survived conference or not.

Those amendments are very, very hard to justify, on the grounds that if you are going to cut, say what you are going to cut, and cut it. I suppose you might have to confront that. That is one of the hazards that you might go up against, but I would think that it would be unlikely, not only for the reasons that it is hard to defend, but it is hard to attack, hard to defend the amendment.

If somebody comes in and says, we are going to cut the budget by 5 or 10 percent, the intelligence budget, how do they justify that? What do they point out that we would achieve by that kind of reduction?

I don't think you are going to get the meat ax cut when you have a global figure of that kind.

Senator HATHAWAY. If what you say is true, it seems to me that the one figure is not that valuable, and because of the security risk we ought not to—

Senator PROXMIRE. It is a very limited value. It is a very limited value, but I think it is important to have a basis, as I say, for challenge and criticism of the overall intelligence operation, so that people know where their money is going when it is going in this very large proportion.

Senator HATHAWAY. Thank you. Senator Wallop?

Senator WALLOR. Just one or two more points on this very same thing. One of the statements that you made was that it will be the basis of debates and some kind of means by which we can demand results, but the plain fact is that if you have intelligence results, you are not going to display them except in certain instances, such as the report on energy, but nobody is going to be able to display the results, or then you really will be in trouble.

Senator PROXMIRE. Well, I think there are many occasions when we have found in the past that our intelligence was not adequate with respect to a buildup that we discovered at a later time, and then we can say, why didn't we know about that particular buildup by the Soviet Union? Is there some kind of a development in some part of world that the intelligence community should have been able to inform us about and they failed to do so?

Then we can again have some overall basis for challenging their inability to let us know in view of all the resources we are putting into that area. I agree that it is a very, very rough, overall kind of estimate, and it would be much sharper and more effective if we had the details, but again, I agree that we cannot go much farther than this, at least, not at the present time, because of the danger of disclosing too much to our adversaries.

Senator WALLOR. One of the things that concerns me, the press does, can, and will still indulge in endless speculation as to how this gets broken down, whether we are getting so-called bang for the buck. It

strikes me that nobody on this committee nor within the community is going to confirm or deny any given figure that they come up with as a proportion of the defense budget being spent on DIA or anything else.

I am really just casting around for some real value that would be generated by the disclosure of this single figure.

Senator PROXMIRE. Well, at the present time we don't know what the figure is. We have had speculation, as you say. The Gelb article was the most recent example of that. We don't know how accurate that is, and most people in the public don't know whether that was on the nose, whether it was off by several billion dollars or not.

I think as time goes on we would be in a better position to have an evaluation, criticism, and understanding of our intelligence operation, if we knew how big it was, whether it was growing, whether it was declining, how much of our resources were pouring into this kind of an operation.

If the Gelb article is anywhere near correct, if we are putting \$6 billion into this operation, we ought to get \$6 billion of return. We certainly ought to get a substantial return. We ought to have a very good, effective, strong intelligence operation, and I think we have some notion, we have developed some notion of whether we have that or not.

I think probably a few years ago we were spending \$1 billion or \$2 billion.

Senator WALLOR. But the singular answer is going to be, yes, that we do. You can't say, yes, we do, because we know how many field mice there are in Russia. I mean, it is just not going to work that way. It seems to me that we are going to lay on, as Senator Hathaway said, incredible additional pressure to continually justify this figure, without being able to in public, and without being able to and still maintain the value of the defense mechanism that we have.

Senator PROXMIRE. Well, the pressures will increase. I think that is right, and I think that is good. I think that is wholesome. I think that is what we ought to have. I think that is the way you are going to get better results on the part of the intelligence community.

Senator WALLOR. That may well be the way the Russians get better results, too.

Senator PROXMIRE. I doubt it.

Senator WALLOR. Well, I hope that I can see some merit in that before it is over.

Thank you, Senator.

Senator PROXMIRE. Thank you, sir.

Senator HATHAWAY. Thank you very much. Senator Proxmire.

The committee will stand in recess until 2 o'clock this afternoon.

[Whereupon, at 11:55 a.m., the hearing was recessed, to reconvene at 2 p.m. of the same day.]

AFTERNOON SESSION

Senator HATHAWAY. The committee will resume the hearings which we began this morning with regard to disclosure of any intelligence budget figures.

Our first witness this afternoon is Mr. William Colby, who was Director of Central Intelligence from 1973 to 1976. Mr. Colby, we

appreciate very much your coming here today. We have a copy of your statement which we will put in the record.

You may read it or summarize it as you prefer.

[The prepared statement of William E. Colby follows:]

PREPARED STATEMENT OF WILLIAM E. COLBY, DIRECTOR OF CENTRAL INTELLIGENCE,
1973-76

Mr. Chairman, I appreciate very much the Committee's invitation to express my views whether the budget for intelligence should continue to be a secret or should be revealed in public. I spoke to this issue publicly when I was Director of Central Intelligence on August 4, 1975 before the Select Committee on Intelligence of the House of Representatives. I am pleased to supplement those comments with some more timely ones as this Committee considers this question.

Let me first say that under our Constitution and form of government there is a presumption against secrecy in our governmental activities. I fully accept this presumption and support a change from the centuries old tradition of total secrecy about intelligence. Some of intelligence's recent difficulties were the result of holding too long to this tradition in a new and American political atmosphere. We are now developing a new approach to intelligence, making public as much of its activities and reports as possible. For example, many of the information reports and assessments of our intelligence can be made available to Congress and to the public who must share in the foreign policy decisions of our government, as President Carter did with the recent oil study. I believe we need further steps in this direction to change existing habits and procedures toward the regular provision of open information and assessments on foreign matters to our public.

I also believe that many of the overall policies and procedures of our intelligence agencies can be made public, and I participated in opening some of these while I was in office. I am happy to see that an open Presidential Executive Order has clarified the proper limits and improper activities which might otherwise be conducted by intelligence, replacing previous vague, secret, and ambiguous directives. I understand that this Committee is considering amendments to the National Security Act of 1947 to incorporate into law specific missions, responsibilities and limitations for American intelligence. I fully support this effort.

But our nation does, and must, have secrets. Certain important contributions to our free society will only work if their secrecy is protected. The secret ballot box is vital to our free country. The privacy of our income tax returns is protected by criminal sanctions against an Internal Revenue Service officer who would expose them without authorization. Approximately thirty such statutes exist in our Code today in order that certain important functions be protected if they must exist in secret. None of us knows who "Deep Throat" was but we have all benefited by his revelation of abuses of power. Public identification of him could discourage future "Deep Throats"; consequently his identity is being protected by the journalist who dealt with him.

It is equally necessary that our nation protect the sources of information necessary to keep it safe and free in the complicated and dangerous world in which we live. The present National Security Act requires that the Director of Central Intelligence protect intelligence sources and methods. It is from this statutory charge that I think we should consider the question of opening the intelligence budget to public, and inevitable foreign, scrutiny.

A contention exists that secrecy of the intelligence budget conflicts with Article 1, Section 9, Clause 7 of the Constitution which states that "No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the recipients and expenditures of all public money shall be published from time to time." This clause of the Constitution was adopted after debates in the Constitutional Convention over whether concealment of certain expenditures should exist in the public interest, and was not part of the initial draft. Language was first suggested by George Mason which would have required an annual account of public expenditures. James Madison, however, argued for a change only to require reporting "from time to time" and explained that the intent of his amendment was to "leave enough to the discretion of the legislative." Patrick Henry opposed the Madison language because he said it made concealment possible. But when the debate

was over, it was the Madison language and purpose which prevailed. An indicator of what the "discretion of the legislature" might include appears in Article 1, Section 5, Clause 3, stating that "Each House shall keep a journal of its proceedings and from time to time publish the same, except such parts as may in their judgment require secrecy."

Confidential expenditures have existed from the earliest days of the Republic. President Washington in his first annual message requested a special fund for intelligence activities. Congress, with many Members having participated in the formulation of the Constitution, agreed and provided for expenditures from the fund to be recorded in the "private journals" of the Treasury. Later Congresses provided secret funds to a series of presidents, Madison, Polk, and others, and a number of examples of confidential budgets can be found in our history. To contend that the Constitution requires total exposure of our intelligence budget is to contest two hundred years of consensus about the Constitution and the need for secrecy in certain of our affairs. In this, of course, the United States is similar to every other nation of the world which provides for the possibility of secret budgets for intelligence; indeed to my knowledge there is no nation which publishes its intelligence expenditures.

It is important also to clarify how secret the intelligence budget really is. In fact a number of bodies review it in as much detail as they wish and have the ability to reduce or conceivably add to it. Within the Executive Branch the budget of each intelligence agency is reviewed by the Committee on Foreign Intelligence reporting to the National Security Council. The Office of Management and Budget also reviews these budgets in detail and has independent examiners who question the need for each separate item in these budgets. The budget is then incorporated in the President's recommended budget to the Congress so that the President, himself, is fully aware of the amount and the make-up of the intelligence budget. Within the Congress, the intelligence budget requests are submitted to the Appropriations Committee of each House and to the appropriate substantive oversight committees, in the Senate now the Senate Committee on Intelligence, in the House the Armed Services Committee. Detailed briefings on these budget requests are provided and questions are answered in whatever detail the individual Members of the subcommittees charged with these reviews request. I understand that the final figures are then certified to the Budget Committees of each House, which then also become aware of the size of the intelligence budget. Certainly this degree of availability enables the Congress as well as the Executive to set the proper level of our intelligence expenditures through its qualified representatives, and audit and monitor the effectiveness of the agencies' use of the funds appropriated.

To relieve the concern of some Members of the Senate or the House that they could be kept in ignorance of something on which they are required to vote, the Chairmen of the Appropriations Committees of the Senate and of the House on the floor have offered to inform any Member of the final figure for intelligence in the annual appropriation bill. Thus any member willing to undertake to respect the confidence extended by these Chairmen could be aware of the figures involved. Lastly, the Chairmen of the Senate Appropriations Committee and of the House Appropriations Committee have stated on the floor that the entire expenditure for the CIA budget is included within the budget for the Defense Department, so that the total sum expended for defense is known to include whatever is necessary for intelligence.

Mr. Chairman, the intelligence budget may be secret, but it is subjected to a great deal of intensive review by the Executive and the Legislative Branches of our Constitutional system. In this light, it is significant that the Senate in June 1974 by a vote of 55 to 33 decided to retain its secrecy and the House made the same decision in the fall of 1975 by a vote of 260 to 140.

I believe no one seriously contends that the budget of the Central Intelligence Agency or of the other intelligence agencies should be made totally available to any public scrutiny, thus exposing its detailed activity to foreigner as well as citizen alike. This would clearly make it impossible to conduct secret intelligence operations or protect the nation's sources and vulnerable technology. But the contention is made that a total figure could be published as a compromise between the present secrecy and total exposure. A short review of this question will show how unreal this suggestion is.

On April 1st the New York Times carried a front page story to the effect that an intelligence budget totalling 6.2 billion was being requested for fiscal year

1978. A review of that story clearly shows the problems which would arise in any effort to reveal a total figure for the intelligence budget. The story indicates serious question as to exactly what the 6.2 billion refers to. It refers to figures published elsewhere of 4 billion, and of 10 billion, and states that these refer to different ways of determining what is in the "intelligence budget." I do not know the 1978 request, but I am in no way assisted in determining the value or lack of value of the 6.2 billion requested for 1978 by that story. I am left in total confusion as to exactly what is meant by the figure and what it covers.

Thus any effort to release an official figure for the intelligence budget would have to be accompanied by considerable description of exactly what kinds of programs were covered and what kinds of programs were excluded. For example, language would be necessary to explain whether the radar, the intercept devices, the intelligence staff on a United States cruiser would be included in the figure or not, and exactly which agencies were included and which not. This kind of clarification would have to go on until a very clear line appeared between the kinds of operations covered under the budget, and those left out. The process would be accompanied by debate as to the wisdom of the dividing line selected, which could only reveal considerable detail about our intelligence programs.

These difficulties in one year would be compounded by the figure for a second and subsequent years. The immediate question would arise as to why the figure went up or went down. Any changes in the coverage of the figure through transfer of programs from one service to another, or one category of activity to another, would have to be explained to avoid presenting a false picture. Again the result would only be to outline in public more and more details of our overall intelligence program.

The public debate apparently sought by publishing the figure would inevitably erode the secrecy of detail which had been agreed at the outset. The demand would rise for the breakdown of the total figure into its component major elements of investment, personnel, operations, by type, regional allocations, etc. Each such breakdown would then provide the basis for separate trends over the years, revealing the variations in the composition of our intelligence program as it adjusted to new circumstances.

My concern is not theoretical, Mr. Chairman. In 1947 the Atomic Energy Commission account for our then-secret atomic weapons program was felt to be so sensitive that only a one-line item was placed in the budget that year to account for all such weapons expenditures. In theory many of these expenditures are still secret, but that one line item by 1974 had expanded to 15 pages of detailed explanation of the Atomic Energy Commission's weapons program. I could only foresee a similar erosion of the secrecy which will be necessary to successful intelligence operations in the future.

Another real example shows the probable effect of such a move. The Chinese Government did not publish the value of its industrial production after 1950. But they did publish percentage increases for the nation and most of the provinces, apparently believing this would not reveal the absolute figures. The revelation of one key figure made it easy to determine the absolute figure for all this data, when the Chinese reported that the value of industrial production in 1971 was 21 times that of 1949. Since we did know that figure for 1949, it was easy to determine the 1971 figure and to reconstruct the absolute figures both before and after that date, both nationally and by province. Other nations have followed our example in expanding the intelligence discipline to include the scrutiny and study of public releases of information. With a public budget figure for intelligence, and its inevitable erosion to specify its sub-programs, it would be easy for foreign nations, and our own energetic investigative reporters, to associate increases in intelligence funding with new ventures in operations or in technology, thereby stimulating countermeasures by their targets to make such programs fruitless, and leave America in ignorance.

Mr. Chairman, you are being asked to make a watershed decision on this question. If you decide to make this total budget figure public, I confidently predict that you will be inundated by a series of questions in the coming years as to what the figure includes and what it excludes. Why does it go up? Why does it go down? Is it worth it? How does it work? And I believe that we will in very short time be losing much of the value of the sums appropriated for these intelligence activities.

Thus, I believe that it is not necessary, that it would not be helpful to the public, that it would be destructive to our future intelligence operations, and that it would be unwise for our nation to be the first in the world to reveal its intelligence budget.

TESTIMONY OF WILLIAM COLBY, FORMER DIRECTOR OF CENTRAL INTELLIGENCE

Mr. COLBY. Thank you, Mr. Chairman. I appreciate very much the committee's invitation to express my views on whether the budget for intelligence should continue to be secret or should be revealed in public. I spoke to this issue publicly when I was Director of Central Intelligence on August 4, 1975, before the Select Committee on Intelligence of the House. I am pleased to supplement those comments with some more timely ones as this committee considers the question.

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I also believe that many of the overall policies and procedures of our intelligence agencies can be made public, and I participated in opening some of these while I was in office. I am happy to see that an open Presidential Executive order has clarified the proper limits and improper activities which might otherwise be conducted by intelligence, replacing previous vague, secret and ambiguous directives. I understand that this committee is considering amendments to the National Security Act of 1947 to incorporate into law specific missions, responsibilities and limitations for American intelligence. I fully support this effort.

But our Nation does, and must have secrets. Certain important contributions to our free society will only work if their secrecy is protected. The secret ballot box is vital to our free country. The privacy of our income tax returns is protected by criminal sanctions against an Internal Revenue Service officer who would expose them without authorization. Approximately 30 such statutes exist in our code today in order that certain important functions be protected if they must exist in secret. None of us knows who "Deep Throat" was, but we have all benefited by his revelation of abuses of power. Public identification of him could discourage future "Deep Throats". Consequently his identity is being protected by the journalist who dealt with him.

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A contention exists that secrecy of the intelligence budget conflicts with article I, section 9, clause 7 of the Constitution. That clause was adopted after debates in the Constitutional Convention over whether concealment of certain expenditures should exist in the public interest, and was not part of the initial draft. Language was first suggested by George Mason which would have required an annual account of public expenditures. James Madison, however, argued for a change only to require reporting "from time to time" and explained that the intent of his amendment was to "leave enough to the discretion of the legislature." Patrick Henry opposed the Madison language because he said it made concealment possible. But when the debate was over, it was the Madison language and purpose which prevailed. An indicator of what the discretion of the legislature might include appears in article I, section 5, clause 3, which states:

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and monitor the effectiveness of the agencies' use of the funds appropriated.

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Mr. Chairman, the intelligence budget may be secret, but it is subjected to a great deal of intensive review by the executive and the legislative branches of our constitutional system. In this light, it is significant that the Senate, in June 1974 by a vote of 55 to 33, decided to retain its secrecy, and the House made the same decision in the fall of 1975 by a vote of 260 to 140.

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This would clearly make it impossible to conduct secret intelligence operations or protect the Nation's sources and vulnerable technology. But the contention is made that a total figure could be published as a compromise between the present secrecy and total exposure. A short review of this question will show how unreal this suggestion is.

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The public debate apparently sought by publishing the figure would inevitably erode the secrecy of detail which had been agreed at the outset. The demand would rise for the breakdown of the total figure into its component major parts of investment, personnel, operations by type, regional allocations, etc. Each such breakdown would then provide the basis for separate trends over the years, revealing the variations in the composition of our intelligence program as it adjusted to new circumstances.

My concern is not theoretical, Mr. Chairman. In 1947, the Atomic Energy Commission account for the then-secret atomic weapons program was felt to be so sensitive that only a one-line item was placed in the budget that year to account for all such weapons expenditures. In theory many of these expenditures are still secret, but that one line item by 1974 had expanded to 15 pages of detailed explanation of the AEC's weapons program. I could only foresee a similar erosion of the secrecy which will be necessary to successful intelligence operations in the future.

Another real example shows the probable effect of such a move. The Chinese Government did not publish the value of its industrial production after 1950. But they did publish percentage increases for the nation and most of the provinces, apparently believing this would not reveal the absolute figures. The revelation of one key figure made it easy to determine the absolute figure for all the data, when the Chinese reported that the value of industrial production in 1971 was 21 times that of 1949. Since we did know the figure for 1949, it was easy to determine the 1971 figure, and to reconstruct the absolute figures both before and after that date, both nationally and by province.

Other nations have followed our example in expanding the intelligence discipline to include the scrutiny and study of public releases of information. With a public budget figure for intelligence and its inevitable erosion to specify its subprograms, it would be easy for foreign nations and for our own energetic investigative reporter to associate increases in intelligence funding with new ventures in operations or in technology, thereby stimulating countermeasures by their targets to make such programs fruitless, and leave America in ignorance.

Mr. Chairman, you are being asked to make a watershed decision on this question. If you decide to make this total budget figure public, I confidently predict that you will be inundated by a series of questions in the coming years as to what the figure includes and what it excludes. Why does it go up? Why does it go down? Is it worth it? How does it work? And I believe that we will in a very short time be losing much of the value of the sums appropriated for these intelligence activities.

Thus, I believe that it is not necessary, that it would not be helpful to the public, that it would be destructive to our future intelligence operations, and that it would be unwise for our Nation to be the first in the world to reveal its intelligence budget.

Thank you very much, Mr. Chairman.

Senator HATHAWAY. Thank you very much, Mr. Colby.

During your years with Central Intelligence, were any studies or analyses done on this particular problem, what harm it could bring about?

Mr. COLBY. We analyzed the question on several occasions in order to present the testimony, for instance, in 1975 as to what the implications might be of revealing the figures, and it was out of that kind of a study that we found that reference to the AEC experience. We looked into the trend lines of our expenditures over the years and saw the bulges that have appeared in it at certain times, and the drops that have appeared in it in certain times.

Some of these bulges clearly reflected the advent of some new technological effort or in some cases, some new political or even intelligence effort in various places in the world.

Senator HATHAWAY. Is there any documentation of these studies that you think this committee ought to see?

Mr. COLBY. I just don't—

Senator HATHAWAY. Secret or open?

Mr. COLBY [continuing]. Know of any. The Agency probably would have some, but I just don't know for sure. I remember looking at the budget graphs myself. I think if you look at the graphs of the intelligence budget over the years with an explanation of the bulges that appear in it you begin to see that the total figure does reflect decisions made about the composition of the intelligence budget.

Senator HATHAWAY. You mentioned the AEC budget and how that was broken down more and more over the years, but what harm was done as a result of that?

Mr. COLBY. Well, I think the problem there is that much of what was formerly very secret about atomic weapons is now public knowledge. We all know that much of this material has come out in public that we thought at the time in 1947 should remain secret.

I think that if you apply that experience to intelligence you are making a wrong relationship because the advent of atomic studies, nuclear studies has inevitably spread information about things that were very secret when they were in the early stages.

I think intelligence is a different subject, however, because intelligence is fundamentally the ability to look at some other country in a way that they don't realize is taking place, and if you do open up these ways of looking at them to detailed scrutiny, detailed knowledge, why, then, they can be frustrated without too much trouble.

Senator HATHAWAY. The argument was made this morning, though, that release of one figure would help restore for the public the credibility of intelligence operations.

What do you say to that argument?

Mr. COLBY. I don't think that necessarily follows, Mr. Chairman. I think that the public has heard a lot of figures about intelligence, high ones, low ones, middle ones. I don't think that is where the question of credibility and the question of confidence in intelligence has really come into question. I think the question about intelligence has been its limitation to a proper set of standards of activity, the effectiveness of the final product of intelligence, which as you notice I say we should make more available to the public, because I think this is the best way

of providing a base for greater public confidence in the value and the excellence of our intelligence.

We have certain restrictions. We do not publicly admit certain kinds of intelligence activities for diplomatic reasons, and that prevents us from giving the specific information we get out of these activities to the public, even though in many respects we provide the overall conclusions. You can find in any journal, any reference book the number of Soviet missiles today. Those are made available without revealing the specific techniques by which we found those out. I think that this is a positive way of building public confidence, that indeed we do know things that we used to wonder about and even debate about during the missile gap debate of 1960, and we don't have that kind of debate any more. Most of the present debates assume the same factual base and then debate about what the meaning of them is.

I think this can be done independently of the financing budget. I don't think that is the real issue.

Senator HATHAWAY. You referred to the National Security Act. Do you think that that precludes us from revealing this number?

Mr. COLBY. No; I think the Congress could pass a law if it wanted to. There is no question about that.

Senator HATHAWAY. Do you think that was considered at the time? Was it a matter of sources and methods that the head of the CIA should—the Director of Central Intelligence—

Mr. COLBY. No; I don't believe so. I think that the concept that the figure should be secret I think came up in the CIA Act of 1949, which says that the CIA can keep its organization and its personnel and things of that nature secret. It also—the 1947 act does allow the Director of Central Intelligence to certify certain expenditures. I think that giving that rather exceptional power to an official in our Government indicated that it was desired that those figures not be released for further public scrutiny by the normal systems of review.

Senator HATHAWAY. One last question.

You mentioned in your testimony that if we were to disclose the budget figure, it would depart from 200 years of a consensus about the Constitution. You realize, of course, that the courts have never made a decision with respect to this matter, and, in fact, in the *Richardson* case, the Supreme Court said there was no—

Mr. COLBY. They didn't get to the issue.

Senator HATHAWAY. Do you think Congress should confer standing on some plaintiff so that this matter could be decided by the Supreme Court?

Mr. COLBY. Well, I think that—I again go to the 200 years of consensus given by the actions of a series of legislative and executive leaders of this country for all that time, and I frankly think that a very good substantive argument can be made that the Constitution does not require the publication of every budget figure.

Now, not referenced particularly to intelligence, but anything that in the judgment of the Congress, as it says in the other clause there, in the judgment of the Congress, certain things can be kept secret. I think that language could be applied to the judgment, the decision of the Congress that the appropriation should be secret, if that is desired.

Senator HATHAWAY. If it is a constitutional question, why shouldn't the Supreme Court make the decision?

Mr. COLBY. Well, I think that the question, presumably somebody will be able to have an issue. I think it could be gotten at that way, but I really don't think that is the way to solve this problem. I think we have an immediate problem before us as to whether the Congress should leap over the issue and make a decision or whether it should stay where it is.

Senator HATHAWAY. Well, the Congress could decide, rather than to release any figure, just to confer standing to sue, so that the Supreme Court could decide it.

Would you go along with that?

Mr. COLBY. That really wouldn't solve the substantive question. That would really be bucking the decision off to the Supreme Court. I think the more substantive question is to whether the Congress believes that it should be secret or whether the Congress believes that it should be open. I think the Supreme Court would look to Congress' attitude on this. If the Congress indicated that it should be open, then I would say that the Congress has every right to go ahead and make it open, and that you don't have to ask the Supreme Court to solve a problem that the Congress can solve for itself.

Senator HATHAWAY. Senator Wallop.

Senator WALLOP. Thank you, Mr. Chairman.

Mr. Colby, in your opinion, can any use be made of a single aggregate figure released for the total intelligence budget?

Mr. COLBY. I don't get emotional about the single figure, no, I certainly don't. I do get emotional about the importance of protecting the names of our people and things like that, but I don't get emotional about protecting the figure. It is just my judgment that the figure would be the first step down a very clearly indicated path that would in not too long a time end up in our revealing a lot of other things.

So the single figure I don't have any great problem with one way or the other. I just think it is a mistake to take that first step.

Senator WALLOP. Well, is it fair to say that you feel that since the single figure is of no use, that it will necessarily generate demand for more detailed—

Mr. COLBY. Yes. I don't think the single feature is going to answer any questions of any citizens or any outsider, that it will generate the questions which will inevitably force the Congress to answer the questions as to where it came from.

Senator WALLOP. Even supposing the Congress went into more specific detail in releasing the figures, is it possible for any meaningful public debate to be generated as to results of the intelligence program?

Mr. COLBY. Oh, I think a lot of debate can be generated as to the value of the material that comes out of the intelligence program. In other words, are the assessments accurate, is the information valid, these are the real tests. Whether it goes up or down \$500,000 isn't really going to make the big difference. The big difference is going to be what is the value of the material that finally appears, and that is not going to be given a monetary value, it is going to be given a judgmental value.

Senator WALLOP. But can that be a public debate without getting into disclosing whatever it is that we have collected by way of information and the means by which we have collected it?

Mr. COLBY. Oh, I think a lot of it is disclosed now, and I think more should be disclosed of the information and of the assessments, and that this will provide a basis for judgments as to the efficiency, effectiveness of our intelligence, or the lack thereof. That will certainly put pressure on the intelligence agencies to do a good job, it will put pressure on the proper representatives of the Congress in deciding on the amount of money to be given to intelligence, as to whether its general reputation stands up to that kind of a demand for resources.

Senator WALLOP. How could we do that? I mean, how could we really get involved in a Defense intelligence debate over what we presently do or don't know about Russia without revealing how we find it? I mean, how in your opinion can you as a former Director or we as Members of Congress ever really get involved in a public debate with any specificity about the quality of results on a general basis from year to year?

Mr. COLBY. Well, the House Committee on Intelligence issued a final report, and we had a lot of arguments with them about it and about the material that they released in the process. The one instance on which we came to issue, on the release of four words, was a situation in which we had released almost the whole of an estimate as to what was going to happen in the Arab-Israeli war, an estimate, I might add, which proved to be wrong. But we released most of that material. We objected to four words because in my view at the time, when I had to make the decision on the phone, but I checked it later and it was correct, those four words, looked at by some very expert analysts in other countries, would give them an idea of what we were covering and what we weren't, and give them confidence to continue to do their work or to change their systems.

We could debate the accuracy of that estimate about the situation without those four words. They were incidental to it. The real question was, was the estimate right or was it wrong? In that case it was wrong, but I think there have been a lot of others that have been right, and I think this kind of a batting average or maybe fielding average, to put the percentages in the right level, you can build up over time, and that is the best way to establish confidence that our intelligence really is doing a good job.

Senator WALLOP. Historically, would you say that it was probably the case that the failures gained considerably more public scrutiny than the successes?

Mr. COLBY. Well, of course, President Kennedy said that in somewhat the same words: "Your successes are unheralded; your failures are trumpeted." But I do not have any fundamental objection to that. The way our Government works, we do concentrate on failure in order to deter future failures, and I think that that is a normal part of the political life of our country, but nonetheless I think it is unfortunate that we do not make available the entire part of our information and assessments that can be made available without revealing the source.

I compare it to the journalist who does protect his source but does reveal the substance of what he puts out, and I think intelligence could do a great deal of this, a great deal more than we have done. We are moving in this direction. I think that building confidence in our intelligence can come better through formally releasing this kind of report rather than having a Secretary of State or Defense pick phrases out

of one end of it and a disgruntled officer somewhere in the bureaucracy leaking other elements of it.

I think it would be much better if we could release formally the entire assessment and the entire information so that the public can judge whether it is good, whether it is bad, subject it to criticism, which can only make it better, and I think that that is the way to build confidence in the quality of the scholars and analysts, the quality of our collection devices, the quality of our collection abroad. Much of this can be done without revealing the specific source from which it comes.

Senator WALLOR. Thank you very much.

Senator HATHAWAY. Senator Hart?

Senator HART. Mr. Colby, let me try to recapitulate and see if I understand your argument.

You have identified a constitutional requirement that says that the Congress shall tell the taxpayers how their money is being spent. You have also indicated that over the 200-year history of that provision of the Constitution, the Congress has seen fit on occasions to not reveal specific expenditures of taxpayers' money, that over the 30-year history of an organized intelligence community in this country the presumption has uniformly been against disclosure. Because the Supreme Court has not seen fit to overturn that practice therefore that is not in conflict with the provision of the Constitution.

Well, what that suggests—

Mr. COLBY. The Supreme Court didn't rule on it.

Senator HART. OK, there has never been a ruling.

What that suggests is a presumption that anything having to do with intelligence and money spent for anything having to do with intelligence should not be disclosed.

Now, I would like to try to stand that presumption or that proposition on its head, and ask you whether it might not make more sense to carve out specific areas of intelligence of the sort that I think you have been doing in some of your responses here and say that none of the funds spent in those areas shall be disclosed. But that lump sum figures by agency or something else for other kinds of operations, say, heat on the building at Langley, and a lot of things like that, should be made public.

Now, let me list about half a dozen categories of things that we could carve out and say that funds for these activities shall not be disclosed. First of all, cryptological intelligence and signal intelligence from sources that could be encrypted. The reasoning behind that is obvious. If the other side knows or can extrapolate that we have that information, they are going to find out that we have cracked their code.

Second, the names of foreign agents and probably our own official cover officers, even in spite of the fact that in many countries the cover officers are known for what they are.

Third, covert action and sensitive collection operations.

Fourth, the details of third party relationships and information that we get in conjunction with a collaboration with our allies.

Fifth, detailed summaries of weapons intelligence reports. For obvious reasons, that we don't want the other side to know the details that we have about their weapons systems.

Sixth, and finally, finished intelligence that by its nature would clearly identify the source that could be compromised or shut down.

We could carve out those areas, and those are just suggestions, and say any money spent directly or indirectly for those kinds of activities shall not be disclosed. But all other funds, to heat the building at Langley, to pay other people's salaries, by agency, shall be disclosed annually.

What is your response to that proposition?

Mr. COLBY. Well, we essentially tried that approach one time, Senator, as you perhaps know. In the earlier days we tried to distinguish within CIA the expenditures which were so-called vouchered and those which were so-called unvouchered, and the concept at that time was that the vouchered, or the heat-in-the-building kind of problems, should be reviewed by the General Accounting Office, in the same way that it reviews other budgets.

The General Accounting Office finally came to the point at which they said that they really could not make a sensible decision about those figures without knowing the whole in which they existed, that you couldn't really determine how much heat should be used in the building in Langley until you learned how many people were in the building in Langley, and more or less what they did, and how much was machinery and how much was desks, and all the rest of it.

That is a hypothetical example, but it is that kind of a question. Therefore, they said, unless we can do the whole thing, we are going to withdraw from participation.

I think that is probably the best answer to your question, that it is very difficult to make those distinctions. In principle, I agree with it. Certainly the cost of the Langley building was a publicly appropriated figure. I think \$51 million or whatever it was, in the fifties, which was publicly appropriated by the Congress at that time, and that went off all right, and there was no great problem about it, except that we pretended that it wasn't there for a number of years, and didn't have a sign on it until Dr. Schlesinger put one on, which was kind of ridiculous.

Senator HART. In fact, you had a different kind of sign.

Mr. COLBY. Well, that was a true sign, but it was a diversion, really. But in principle, you are right. But if you took the points you raise there, and apply them to finished intelligence, your question really is, How do you determine how much of that would reveal the source and how much wouldn't? How much comes from the photographs, from the electronic machinery? How much can be made available in general anyway?

We do make available a great deal of information about Soviet weapons systems, for instance, and I think that we can make a great deal available. The Russians know we are getting it from a wide variety of our operations, but that doesn't tell them which particular one is giving us which particular item of information.

I think that leaves them still a little obscure as to where it all comes from. They know that all this panoply of devices is producing, but they are not quite sure which one. So, I would say that in principle your concept—I certainly would accept that there certainly are a lot of things that could be published about our budget, so long as the material which does need to be protected in order to protect the source is kept secret, but once you then try to divide them into separate columns, I think you start an enormous debate and discussion, and then

you get into the accusations that people are fudging and putting things into one column that used to be in another, and all that sort of activity. I just think it would be an enormous bureaucratic exercise, again, without a great deal of value, because we would end up with a figure which would be publicly known as only part, and really, the least interesting part, of the intelligence budget, and I don't think that that would solve anything that we have today.

Senator HARR. Well, the problem is, Mr. Colby, that this pressure, whether real or imagined, or of what degree, is not going to go away just because this committee makes a decision this year not to release any figures. I think that is sticking our heads in the sand. I believe that we are going to solve the problem by believing that we can force it to go away by releasing no figure. The pressure is going to remain.

So, I think the best question is how to deal with the pressure, either from the CIA point of view or from the congressional point of view. That is what I am trying to do, because I think, if you will pardon the reference, the stonewall approach will not succeed. We may be in a post-stonewall era, for a variety of reasons, and I think, as I indicated to Admiral Turner this morning, it is not just the CIA that is on the line here. It is the Congress of the United States, and particularly this committee. There is not citizen pressure to disclose our secrets. There is citizen pressure to guarantee that their tax dollars are not being used to assassinate people and do a lot of things like that, and maybe we can stonewall for a year or two and it will go away, if you believe in the pendulum theory of human events.

So, I believe that reasonable people sitting down can allocate funds to what you might call nondisclosable activities of the sort that I tried to outline, and then allocate funds to disclosable activities.

The fact of the matter is, as a theoretical proposition, you are going to solve your problem or we are going to solve our problem if we leave one item and say that there is one item here in this budget, we are going to release the whole budget figure, agency by agency, but there is one item in here that we are not going to tell you what it is, or we are not going to tell you how much it costs.

That throws the whole extrapolation theory right out the window, in my judgment, because then the Soviets don't know what the item is, and they don't know how much we are spending on it.

Mr. COLBY. Senator Hart, I agree, but I think every journalist in town would be after that figure.

Senator HARR. That is what they are paid for.

Mr. COLBY. That is what they are paid for, and I am pretty sure they get it in this town today.

I don't believe in the stonewall. I agree with you. Let's get out of this pressure. I think the pressure is on the wrong thing. I think the pressure is on the number, because there is this desire to be reassured about intelligence.

Now, I think we ought to reassure about intelligence in two ways, by passing a law which says very clearly what intelligence shall do and what it shan't do, so that we don't have any ambiguity or fuzz or anything else on it, but second that we release more of our material, and build up confidence in the value of the material which is produced.

Those are my solutions to this very real pressure. I accept, but I think that giving in on this figure really does not solve either of those questions, as to the value of the product or the propriety of the activity.

I think those pressures will continue, and they are legitimate questions which must be answered, and I agree that this is the area in which we must move ahead and provide some good answers, but I don't think the figure is going to make that much difference one way or the other in solving that pressure problem.

But I think, as I say, it will start the erosion of the details, whether you start with one figure or just part of the figure open and part closed. I think you will still get the pressure for the remaining closed part of the figure.

Senator HATHAWAY. Senator Pearson?

Senator PEARSON. Mr. Colby, under a wide variety of statutes or Executive orders—the nature of which will come more quickly to your mind than to mine—highly sensitive secret information may now be disclosed after a period of time. If we accept the arguments you make in your statement today, is it feasible to think that after a period of time, the number of years you might speculate, that the budget of the CIA might be made public, with much greater particularity than merely an aggregate figure as Mr. Turner now contemplates?

Mr. COLBY. Yes; I think, Senator, that is a good idea. I don't think you have to go back as far in time as George Washington, but I think you have to go back beyond a period in which the revelation would assist in a current appreciation of what is going on, but you push that back to the kinds of time frames involved in the declassification legislation of 10 years, even a 30-year situation.

Senator PEARSON. Do you think 30 years is a reasonable period?

Mr. COLBY. Well, I think the legislation today says that it is automatic unless a decision is made to keep it, and then up to 30 years another decision must be made that it still is essential to keep it. I think that approach is a logical way, that much of it, like the cost of the heating for Langley, could go out very quickly. Some of it you might want to keep for a long time. In other words, if you had conducted some very secret intelligence collaboration with some country whose leadership was still in office, you might well not want to release that, even at the end of 30 years.

Senator PEARSON. Well, within your experience, what would you speculate to be the nature of disclosure within a 10-year period?

Mr. COLBY. Well, I think we might be able to do some broad categories. I think no one would advocate that we reveal the amount of funds paid to some individual agent somewhere. I think the broad categories, maybe the total size of the organization, after a few years. If you then did the extrapolation, which you could do, then you would still be 10 years behind the present time, and it would not really give a foreign nation very much help.

I think in a way some of our ex-CIA members who have written books and so forth have given people a pretty good idea of the major thrust of the CIA's activities even in more recent times than 10 years.

Senator PEARSON. Thank you very much.

Thank you, Mr. Chairman.

Senator HATHAWAY. You are welcome.

Senator MOYNIHAN?

Senator MOYNIHAN. I should like to welcome an old friend, Mr. Colby, to this committee. I had the privilege of serving as an American Ambassador during the time when Mr. Colby was Director of the

Central Intelligence Agency. I have not met a more honorable man or a more dedicated public person.

Mr. COLBY. Thank you very much, Senator. That is very kind of you.

Senator HATHAWAY. Senator Chafee?

Senator CHAFEE. I would just like to also welcome Mr. Colby and say I had the privilege of knowing him when I was Secretary of the Navy and he was serving in Vietnam, and it is a treat to see you again. I share the high opinion of Senator Moynihan.

Mr. COLBY. Thank you, Senator. Thank you.

Senator HATHAWAY. Mr. Colby, I have one more question I want to ask you. In 1973, you were asked by Senator Symington if you saw any reason why overall budget information or a breakdown of the intelligence budget would endanger national security, and at that time you said, "I propose to leave that question, Mr. Chairman, in the hands of the Congress to decide." It sounds like today you are saying, "No, don't do it."

Mr. COLBY. It still is in the hands of the Congress to decide.

Senator HATHAWAY. But you are saying very strongly that we shouldn't release it. Have you changed your mind, or is this what you meant to say then? And if you changed your mind, why?

Mr. COLBY. Yes; I think I have withdrawn a little bit. At that point I really thought that the Congress itself could make that decision, and that the single figure issue, as I have indicated here, is not the real issue, it is the further steps. I began to think about it in more detail after I was in office. Sometimes you look at things a little differently when you aren't in the seat from when you are in it, and I think that applied to me.

As I looked at it, after I got familiar with the problems and after I got more familiar with the relationship with the press, with the Congress, and so forth, which I had a rather rich exposure to—
[General laughter.]

Mr. COLBY [continuing]. I got an idea of what might happen.

Senator HATHAWAY. Are there any other members with questions?

Senator Wallop?

Senator WALLOP. I just have one, and I would like to get back to Senator Pearson's question. If we go back, say 10 years or whatever the figure is, and begin to release certain specific budget items, do we run a risk of a snowball effect if we begin now undertaking the release of an annual aggregate figure. By extrapolation wouldn't it be fairly simple for a foreign intelligence source to take those figures from 10 years ago, and know that we have been increasing it annually by 5 percent or 8 percent, and then fairly specifically single out the real intelligence effort of the country?

Mr. COLBY. Well, if we did release the current ones, yes. I do think so. You see, the present law requires what Senator Pearson suggested. It requires a conscious decision to keep something secret after a certain number of years. I don't think we have hit the time—

Senator WALLOP. The present law does not refer to the CIA budget.

Mr. COLBY. No; it is classified information, Senator. It is not the law, excuse me. It is an Executive order. There isn't a law on this subject. I think that what that does in a way is to require a conscious decision to keep it secret after the period set. I think that conscious

decision is something that could be looked at, and maybe change the automatic way we have tended to look at it in the past, but I think your question, if you released the figure years ago, and I would rather not state the term of years, because right offhand I would hate to come up with a figure and then be stuck with it, but sooner or later, I would say that is no great problem, and then if you don't have a present figure to hook it to, then you cannot do that process that you were talking about.

Senator WALLOP. Would it be fair to say that you would caution the committee to look at that possibility before taking this kind of a step?

Mr. COLBY. Yes; very much so. I think that in other words the decision to open it is going to be a watershed, as I say, and I think after it is open there is no way of putting the horse back in the barn, clearly. So, I think that we should look very carefully at this, and look at the alternatives that can respond to the very real pressures that Senator Hart was referring to and that I understand.

Senator WALLOP. Thank you very much.

Senator HATHAWAY. Thank you very much, Mr. Colby. We appreciate your testimony and answers to questions.

Mr. COLBY. Thank you very much, gentleman.

Senator HATHAWAY. Our next witness is Congressman Michael Harrington from Massachusetts.

Mike, we are glad to have you here. We have a copy of your written statement, which we will put in the record, and you may read it or summarize it, whatever you desire.

[The prepared statement of Mr. Harrington follows:]

PREPARED STATEMENT OF HON. MICHAEL J. HARRINGTON, A REPRESENTATIVE IN CONGRESS FROM THE SIXTH CONGRESSIONAL DISTRICT OF MASSACHUSETTS

Mr. Chairman, I am pleased today to participate in an OPEN session of this Committee to publicly discuss the disclosure of the intelligence budget. In a sense, it is this very process of open debate which must serve as the guidepost for the Senate Intelligence Committee. As the Final Report of your predecessor committee noted, the basic issue faced in the intelligence area is "to reconcile the clash between secrecy and democratic government." That is the issue today, and it poses implications far broader than whether to include a single dollar figure item in the published budget of the United States. With the Committee's indulgence, I will briefly outline the reasons for my concern that the particulars of the debate engaged in this week do not obscure the larger context in which the secrecy issue must be considered.

To even start with the premise that proponents of disclosure must make the case reveals just how far this society has wandered from its democratic principles in the area of intelligence operations. A history combining studied deception by some Executive Branch officials and blissful ignorance displayed by Congressional overseers, has granted the intelligence community what amounts to near license within a self-definition of the national interest.

Even after two years of investigative effort by Committees in both Houses of Congress, by a special Executive Branch committee, and by a special task force in the Justice Department, the public debate has come full circle, to rest on the fundamental question of whether its proponents can justify disclosure. Have we not just gone through the most intensive period of public disclosure involving intelligence agencies in our nation's history? Have we not seen serious violations of law, questionable international intrigues, and lapses of both internal and external control mechanisms documented by the various investigations? Have we not seen all elements of the public endorse at least some reform in the intelligence community?

Despite some general protestations from those with vested interests within the intelligence community, few have identified specific serious repercussions of the open approach of the last few years. The nation survives, our intelligence

agencies still gather information effectively, and in fact the United States has quite successfully avoided the kind of secret political entanglements that characterized an earlier era when secrecy of intelligence actions was even greater. That is the truest measure of the success of the disclosure route.

Rather than restating the obligatory caveat that my advocacy of disclosure does not seek to undermine the legitimate intelligence-gathering role of these agencies, allow me to use it to illustrate my point. The lesson of the last few years of controversy has moved the public debate beyond such a naked choice between effective intelligence and an open society, between secrecy and democracy. My concern is that in making the necessary reconciliation, we no longer ask if the "national security" can withstand some particular degree of disclosure, but rather, whether the nation can survive continued abuse to the democratic process wrought by excessive secrecy in the past.

Until all agencies and institutions of government move from posturing over the risks of even such minimal public disclosure as the Committee is considering today to a sincere attempt to reform the basic structure and approach of intelligence agencies, we will continue to see our national values "sanitized" out of existence like the secret documents so often released for public consumption.

I recognize that this Committee feels that it must move carefully when dealing with information that some have identified as damaging to the national interest if disclosed. However, as elected representatives of the American people, you have a more important obligation to uphold the underlying democratic principles that have suffered so seriously from intelligence agencies construing their mandates as broadly as an elastic Constitution and vague statutes might allow. Let the Constitution and our democratic values, and not some Cold War definition of the national interest, serve as the starting point for this public debate.

What is the logic of lump-sum budget disclosure when the agency which is reputed to have among the highest allocations—the National Security Agency—continues to operate without legislative charter under an executive mandate that is classified? In one sense, the former CIA directors who have argued that lump-sum disclosure would lead to demands for more detailed information are correct. But to use that argument against initial disclosure is to reverse one's priorities. Secrecy again is elevated as a result of its own momentum.

Instead, I urge this Committee to reverse the process in which years of erring on the side of secrecy have led to very dubious political involvements abroad at a terrible price to our domestic institutions. I seriously doubt whether our society can withstand another era of public mistrust of government institutions, fueled by the excessive secrecy that categorized the Vietnam War, Watergate, and covert intelligence operations. That sort of threat to our national security is far more serious, and should serve to focus any inquiry into disclosure.

Let me reiterate that my implied criticism of this procedure should in no way be considered as unreflective of my basic support for this kind of endeavor. What I feel is necessary, given the well-documented record that has been placed before the American public only against the strenuous efforts of the secrecy mentality we are debating today, is a more broad-ranging movement away from the enshrining of secrecy. The perceived problem of excessive disclosure must not obscure the real danger for a democracy which elevates secrecy to a preferred place in a catalogue of the national interest. To deny public debate, with as much information as possible, of what kind of intelligence operations this society should have denies all that sets us apart as an open and responsive society. Without such a debate, the real task ahead—reform of the intelligence agencies—becomes a promise that can never be fulfilled.

TESTIMONY OF HON. MICHAEL J. HARRINGTON, REPRESENTATIVE IN CONGRESS FROM THE SIXTH CONGRESSIONAL DISTRICT OF MASSACHUSETTS

Mr. HARRINGTON. Mr. Chairman, in the interest of preserving some semblance of syntax, I think I will read it and then comment, if I may, afterward, on some observations which may go beyond this.

First, my appreciation to the members of the committee for the chance to come and participate in an open session to publicly discuss

the disclosure of the intelligence budget. In a sense, it is this very process of open debate which must serve as the guidepost for your committee.

As the final report of your predecessor committee noted, the basic issue faced in the intelligence area is to reconcile the clash between secrecy and democratic government. That is the issue today, and it poses implications far broader than whether to include a single dollar figure item in the published budget of the United States.

With the committee's indulgence, I will briefly outline the reasons for my concern that the particulars of the debate engaged in this week do not obscure the larger context in which the secrecy issue must be considered.

To even start with the premise that proponents of disclosure must make the case reveals just how far this society, in my opinion, has wandered from its democratic principles in the area of intelligence operations. A history combining studied deception by some executive branch officials and blissful ignorance displayed by congressional overseers has granted the intelligence community what amounts to near license within a self-definition of the national interest.

Even after 2 years of investigative effort by committees in both Houses of the Congress, by a special executive branch committee, and by a special task force in the Justice Department, the public debate has come full circle, to rest once again on the fundamental question of whether its proponents can justify disclosure.

Have we not gone through the most intensive period of public disclosure involving intelligence agencies in our Nation's history? Have we not seen serious violations of law, questionable international intrigues, and lapses of both internal and external control mechanisms documented by the various investigations? And have we not seen all elements of the public endorse at least some reform in the intelligence community?

Despite some general protestations from those with vested interests within the intelligence area, few have identified specified serious repercussions of the open approach of the last few years. The Nation survives. Our intelligence agencies still gather information effectively, and in fact, the United States has quite successfully avoided the kind of secret political entanglements that characterized an earlier era when secrecy of intelligence actions was even greater. That is the truest measure of the success of the disclosure route.

Rather than restating the obligatory caveat that my advocacy of disclosure does not seek to undermine the legitimate intelligence gathering role of these agencies, allow me to use it to illustrate my point. The lesson of the last few years of controversy has moved the public debate beyond such a naked choice between effective intelligence and an open society, or between secrecy and democracy. My concern is that in making the necessary reconciliation, we no longer ask if the national security can withstand some particular degree of disclosure, but rather, whether the Nation can survive continued abuse to the democratic processes wrought by excessive secrecy of the past.

Until all agencies and institutions of government move from posturing over the risks of even such minimal public disclosure as the committee is considering today to a sincere attempt to reform the basic structure and approach of intelligence agencies, we will continue to

see our national values "sanitized" out of existence, like the secret documents so often released for public consumption.

I recognize that this committee feels that it must move carefully when dealing with information that some have identified as damaging to the national interest to disclose. However, as elected representatives of the American people, you have an important obligation to uphold the underlying democratic principles that have suffered so seriously from intelligence agencies construing their mandates as broadly as an elastic Constitution and vague statutes would allow. Let the Constitution and our democratic values, and not some cold war definition of national interest, serve as the starting point for what I hope will be a public debate.

What is the logic of lump sum budget disclosure when the agency which is reputed to have among the highest allocations, the National Security Agency, continues to operate without legislative charter under an executive mandate that is classified? In one sense, the former CIA directors who have argued that lump sum disclosure would lead to demands for more detailed information are correct, but to use that argument against initial disclosure is to reverse one's priorities. Secrecy again is elevated as a result of its own momentum.

Instead, I urge this committee to reverse the process in which years of erring on the side of secrecy have led to very dubious political involvements abroad at a terrible price to our domestic institutions. I seriously doubt whether our society can withstand another era of public mistrust of Government institutions, fueled by the excessive secrecy that categorized the Vietnam war, Watergate, and covert intelligence operations in general. That sort of threat to our national security is far more serious, and should serve to focus any inquiry into disclosure.

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The perceived problem of excessive disclosure must not obscure the real danger for democracy which elevates secrecy to a preferred place in the catalogue of national interest. To deny public debate with as much information as possible of what kind of intelligence operation this society should have denies all that sets us apart as an open and responsive society. Without such a debate, the real task ahead, reform of the intelligence agencies, becomes a promise that in my opinion can never be fulfilled.

Mr. Chairman, if I could, having dispensed with the obligatory part of my performance, the structured statement, let me comment from the perspective of someone who had some very interesting and to a degree permanent involvement in terms of this issue as it emerged a couple of seasons ago. Frankly, I guess that I have had a great deal of trouble in attempting to prioritize intellectually what part of this whole experience to stress to this committee.

I do think as belated and as, in my opinion, timid as the response has been to date in dealing with these problems, it is preferable to the kind of studied avoidance which particularly has characterized my

branch, which to date has not even begun to act on the outlines of legislation to deal with the questions of oversight.

We have replete on the record in the House, at least, over the last couple of seasons, the decision not to disclose for public consumption the final report of the Pike committee, the decision not to disclose the budget, rejecting the initiative of the chairman of our Budget Committee, Mr. Giaimo, the decision in general made, at variance with our rules, not even to conform to the minimum requirements of the so-called Hughes-Ryan amendment, which required the CIA to disclose to congressional committees the general outline of what their covert activities were.

My problem, I suppose, is what to do now with the trail cold, with attitudes deflected, understandably, to domestic concerns, with the lesson of the Ervin committee as far as bringing the public along and broadly educating them not understood, in my opinion, either by the Church committee or by the Pike committee, or its predecessor, the Nedzi committee.

What can we do now that will join this issue again? The narrowest part of it is what you deal with and perhaps the easiest part, since it involves really, in a way, more symbolism than substance, as far as what the total is of an intelligence community budget. The fundamental question, and the one that I think unfortunately has not been joined in any sustained public debate, and unfortunately, unlike the whole episode involving the process of the Nixon White House, does not have any broad public constituency because of a choice made to favor secrecy in the earlier hearings rather than openness, is one that still, I think, awaits initiatives both in your branch and in ours.

I hope, though, that not only in terms of a beginning but in terms of broadening this debate, to raise fundamental questions about the role of these agencies, typified today perhaps by the CIA, will be something that your committee will address comprehensively and, to the degree it is at all possible, in a timely fashion.

I think it is most important before we lapse into a perhaps premeditated or resigned acceptance or acquiescence of things as they were, as evidenced as recently as this week by the acceptance of the defense authorization bill by the House with barely a murmur, that we at least can find a way, with this being one of the forums, to raise these questions, and not leave it to that rather dubious rationale offered us in the fall of 1974 in the aftermath of the Chilean disclosures by the then President Ford: They do it, so we have to.

I think we must take a risk if we mean it to preserve the differences in the society that we think exist. If we don't, I suggest that to an increasing number of our own citizens, and certainly to an increasing number of the global population, there is no distinction to be drawn between this society and those that we have called closed for a number of years.

I hope that I can suggest to you in closing that I understand some of the difficulties, but I also suggest that one only has to look at the evidence that presently litters the landscape of this country's experience over the better part of the last generation to raise the question, what is preferable, continuation of the mind-set, the philosophy, the general shifting of burden that has characterized the better part of the last 30 years of this country's history, or an effort made to confront that, to alter it, and to be as open as we profess we feel we are.

That is where I hope this will go, and I hope it will go on our side, coincidental with yours, to at least begin to raise this to the level of sustained and to a degree far more encompassing debate.

Senator HATHAWAY. Michael, I agree with you wholeheartedly when you say in the fifth paragraph, I guess it is, on the first page, that the "Nation can survive continued abuse to democratic processes wrought by excessive secrecy in the past," but I think the nature of the secrecy you are talking about is not the fact that the public is not getting the amount of money that the intelligence community spends every year, the fact of the covert activities—you mentioned the Chilean affair—and the others, but rather the activities that are going on without any public knowledge, and certainly without public approval is what they are really concerned about, and that just the release of this figure is going to antagonize people more than satisfy them. It is just tokenism. We have told them what the figure is, now shut up. And we, furthermore, are going to run some risks, security risks, by revealing that figure.

Would you agree with me that we ought to study this more along the lines that Senator Hart mentioned earlier—I don't know whether you were here when he was questioning Mr. Colby—or along the lines that Senator Pearson mentioned when he said that maybe we could wait a period of years, in other words, that we should give more thought as to what substantive matters can we disclose to the American public, and not just rush into just giving them a figure, and saying, well, that is the end of it?

Mr. HARRINGTON. I agree that there has to be an effort made to build on what I think is a very narrow beginning, and I think that we have got to give a great deal more thought to what basically letting the burden run entirely counter to where it should in recent years has been by way of a price paid of alienation, distrust, and cynicism on the part of a substantial segment of this country's population toward its Government and its intelligence agencies.

I guess my only point is, and I don't really want to filibuster on your time, Senator, is that I—

Senator HATHAWAY. Take all the time you want.

Mr. HARRINGTON [continuing]. Really don't yet understand in my own mind what people perceive as the risk of being open against what the price is that has been demonstrated over the last half generation we have paid for being closed. That price can be measured in terms of the alienation, the frustration, and the gap between a good part of our people and what they perceive of as their Government today. I think the danger, frankly, is inherently there and internal rather than anything I could conjure up in my own mind as being external at all. That is the concern I have, that if the damage has been done, it has been self-induced damage and not damage as a result of the excesses of disclosure on the part of people who are privy to information largely, in my opinion, irrelevantly classified, and certainly not dealing with the national interest.

Senator HATHAWAY. But my point is, wouldn't we be better off if we did a little study and ferreted out those areas where we are sure that if we gave the public the information on how much we were spending, that would be very detrimental to our national security, and take those areas that would not be, and let them know the latter

and not the former, rather than just say, well, here is the figure that is spent for intelligence, and that is the end of it?

Mr. HARRINGTON. I agree, and I would put the burden on those that claim it is detrimental to establish it beyond the mere rhetorical exercise of suggesting that that is the case.

Senator HATHAWAY. Thank you. Senator Wallop?

Senator WALLOP. Congressman, I have only really one area that concerns me, and I am not quite sure of the total gist to be derived from your prepared statement.

Do you see a need for the country to have any secrets?

Mr. HARRINGTON. Yes.

Senator HATHAWAY. Where do we go about—

Mr. HARRINGTON. I don't know, Senator, that I really could profitably, from your point of view and mine, engage in an exercise that would have us try to find a way to close that gap. I think that we have seen in whatever fashion one can use as an objective degree of evidence an enormous growth, recognized by both Republicans and Democrats, conservatives and liberals alike, over the last 30 years of a classification process which by its success has rendered the preservations of secrets of relevance, I think, suspect in general. I think there has got to be a need, whether we agree or not on some of the other premises, to recognize that there is as much damage in excessive or overindulgent classification as far as secrets as there is in attempting to suggest there shouldn't be any at all.

Senator HATHAWAY. Well, I wouldn't argue with you there, but presumably, that is what this committee has been established to try to do, to determine, for instance, in the development of charters for the CIA and the FBI and the other intelligence gathering agencies of the Government, some means of determining what is legitimate for these agencies to participate in and what is not.

I am concerned because, if it sounds as though the debate should start from the other end with everything open, and you start closing, rather than—

Mr. HARRINGTON. If I had to opt for that rather generalized expression or characterization of my viewpoint, I would certainly say that I would opt for the side that said, openness should be the characteristic of this society, I'd rather take the chances against the toll exacted by an excessive reliance on secrecy and the admonition, trust us, we are honorable men, that we have had as a dictum for the last generation.

Senator HATHAWAY. It has indeed been a dictum, but it's been one of the more remarkable things, at least to me, about our society that is that there have been pretty broad disclosure of abuses. I am speaking as a part of a dialog between us. I would rather depart from that point than open it all up and then decide what to shut later.

Mr. HARRINGTON. Well, I suspect, Senator, that that point of view, whatever my agreement or not, will prevail, and that we will depart from that point. I just hope we depart.

Senator HATHAWAY. Thank you very much. Senator Hart?

Senator HART. I don't have any questions at the present time.

Senator HATHAWAY. Senator Pearson?

Senator PEARSON. I have no questions. The Congressman makes a very strong, persuasive case.

Senator HATHAWAY. Senator Moynihan.

Senator MOYNIHAN. I would like to thank the Congressman for coming. I have no questions.

Senator HATHAWAY. Senator Chafee?

Senator CHAFEE. We are here today, as I understand it, to consider whether to make a lump sum available on the budget, but also there has been discussion as to whether we would go beyond that. I take it from what you say that you have no problem at all with the lump sum, no problem with going considerably beyond that.

Mr. HARRINGTON. Correct, Senator.

Senator CHAFEE. I take that from your statement:

Until all agencies and institutions of government move from posturing over the risks of even such a minimal public disclosure . . . we will continue to see our national values sanitized out of existence . . .

I am not sure where you would draw the line, but it would be way, way beyond anything being considered here today, although there are no limits in what we consider today.

Do you have any idea where you would draw the line? Name of agents?

Mr. HARRINGTON. I am not sure, Senator, I am very good at line drawing, but I do think, as I have indicated to Senator Wallop, that we have seen a good, healthy run at the other point of view, and I will leave it to you to decide, from the perspective shared with me in the Northeastern part of the country, where that has gotten us as an institution in terms of the approbation of our people and the approbation of the rest of the globe. I leave it to you to decide whether or not that should be something that one derives comfort from, or should be addressed from the point of view of attempting to grope for a definition that may lead to the drawing of new lines. I opt for the other side.

Senator CHAFEE. Thank you very much.

Thank you, Mr. Chairman.

Senator HATHAWAY. Senator Huddleston?

Senator HUDDLESTON. Congressman, we are very glad that you came over and shared your point of view with us, and I think we all agree that there has been excessive secrecy in the past, and I would assume from your dialog with Senator Wallop that you agree that there could be excessive disclosure. I suppose what we have to do is to assess the question of second guessing the advice of the director in the extent of risk and the extent of damage that could be created.

I know you have thought about this. You have been very eloquent on it over a period of time. Have any principles or standards occurred to you by which we could apply the element of risk, the assessment of damage?

I think you said a minute ago that you need something beyond the mere rhetorical repetition of the fact that damage will occur, but I think the most useful thing this committee could do is to try to identify the standards that could be used.

Mr. HARRINGTON. Let me try to answer that two ways, Senator.

First, I have made an effort in a somewhat more comprehensive fashion at the conclusion of the Pike committee's altogether too short tenure in December 1975, to outline a number of specific suggestions which would in my opinion at least go to the reflections I had at the

time of the questions posed by dealing with the intelligence agencies and their oversight and their function and role. I have submitted legislation in 1976 and 1977 which attempted to embody those suggestions.

Let me say that one of the things I think we could do outside of the art forms developed of that kind would be to not play act, and I am talking about the House, now, at the supposed sharing of responsibility for the conduct of these activities.

There was a broad public perception, created in part by those disclosures and the investigation and by legislation I have referred to, called the Hughes-Ryan amendment to the Foreign Assistance Act, that there would be a sharing with a number of separate committees, House and Senate, of a variety of CIA covert activities.

Let me suggest to you that not only was that not observed even in the breach, but not increasingly observed at all on the part of the House International Relations Committee, and has not been the subject of one meeting so far in the 95th Congress, never mind the dreary record of the 94th, while we theoretically, or at least attempt to wrestle with the question of what we do to discharge that responsibility.

The timidity continues, the willingness to play at the game of suggesting to the public that there is a conjunctive, cooperative, informed effort continuing. One of the minimal things we can do is to pierce that fiction, and suggest that I will certainly leave to you people to decide to the extent and scope of your disclosure. The Hussein story interested me to the degree that even in 1976 or thereabouts, if the story in the Post was to any degree accurate at all, that there had been some withholding of information from this committee.

I am just suggesting one of the things you can do short term is have it a shared responsibility. That in itself is a disincentive, in my opinion, to the kind of fiction perpetuated that we really are cognizant of and participatory in the furtherance of this country's policy in the aftermath of those investigations, which I think remains a fiction.

Senator HUDDLESTON. Thank you.

Senator HATHAWAY. Senator Hart?

Senator HART. Congressman, you said a minute ago you did not want to get into line drawing. Unfortunately, that is the business we are all in.

Mr. HARRINGTON. I understand that.

Senator HART. One might agree with everything you have said and still not be left with a course to pursue. I would be interested in what, if you were a member of this committee or if you had a committee like this on your side, you would do about disclosure of budgetary information specifically.

Mr. HARRINGTON. I would vote to disclose the budget.

Senator HART. How much of it? All of it?

Mr. HARRINGTON. All of it.

Senator HART. Line by line?

Mr. HARRINGTON. Line by line, I think, would await some knowledge that you may have, Senator, that I don't, of exactly what the line by lines contain, but in general, yes, I would certainly go in the direction of disclosure with a very severe burden of proof on the side of the Agency to justify the continued secrecy, not just a reaffirmation of national security questions posed by the failure to keep it secret. I think it would be a wonderful deterrent for mischief.

Senator HART. Well, there are other ways to deter mischief. That is not the only way.

Mr. HARRINGTON. I agree. I haven't seen many of them, though, quite frankly, explored by the Congress, in this area, at least.

Senator HART. We have been exploring them, and I think with some success, but again, it is the old business about you cannot exploit your successes.

Senator HATHAWAY. Michael, let me ask you one more question. With 50 Members of both the House and the Senate now having access to this information, don't you think that is enough of a deterrent to abuses by the intelligence community? And with the advent of a House committee that is comparable to this, with rotating membership, so that the chances are minimized of a close relationship over the years being established, don't you think that we have enough of a safeguard without revealing a lot of information to the public?

Mr. HARRINGTON. If that is actually happening, I think that that is progress. I would just suggest again that I can tell you in the instance of my committee, the International Relations Committee, to the degree that secondhand information is of no value at all in the appropriations process, the subcommittee charged with that responsibility, it is not happening. There is no transcript. There is no record. There is no notification of other members on the major committee of meetings. There has been basically compliance abstractly but not compliance specifically, and we have held that out as improvement.

I cannot comment on how actual the sharing is here, and I wouldn't presume to do so, but let me tell you it is a fiction in the House.

Senator HATHAWAY. Thank you. Any further questions?

Senator MATHIAS. Mr. Chairman, just an observation. I would agree with Senator Hart that we have made progress. In the debate on this in the Senate, I recall Senator Hollings saying that, under the old practice one or two Members of the Senate got the information and squatted on it; that was in fact the case. I do not find many squatters around today. I think it is a much better and improved situation now.

Senator HATHAWAY. Thank you.

Any other questions? Senator Chafee?

Senator CHAFEE. I just would like to ask a couple of questions. I get the thrust from your statement that because under the guise of secrecy many evils have been wrought in the past half a decade or a decade, the tilt must be all toward disclosure and work backward from there.

I have just been reading "Bodyguard of Lies"—perhaps you have read the same—the description of the secret intelligence activities of the Allies in World War II. Suppose we had an ULTRA. Would that be worthwhile to be kept secret? How would you feel about that?

Mr. HARRINGTON. I think it would depend on the overall circumstances at the time, for any of the systems that we might in general take as examples. My concern really does not run to an appreciation of what yourself and Senator Hart have. There has been a theme running through the questions of what you do to try to deal with this obvious problem of attempting to push that back some. It is really prompted by my feeling that I think that there has to be a change in presumptions which I don't yet feel has shifted on the part of this Government that really, basically would commit it to openness and

then place a very heavy burden going the other way to justify and to have it the subject of knowledge, debate, public awareness to the degree that that was possible, giving the timing and given the nature of the concern of why we were opting for secrecy.

Take an example, and it isn't yours, but it perhaps makes my point. As recently as 1976, we are attempting to influence events preceding the elections in Italy, to preserve a reasonably corrupt Christian Democratic Party, by using the Agency, by using other outside conduits to funnel money into it.

I think that sort of thing, in terms of that event, that kind of activity, ought to be the subject of broad public knowledge and public debate. We may disagree, but my point is, I think each of these would have to be dealt with situationally, given the time, given the event, given the general sense of concern.

Senator CHAFEE. Dealt with by whom?

Mr. HARRINGTON. Dealt with by us and the Congress.

Senator CHAFEE. Who is us? We have got, as Senator Hathaway mentioned, 50 people who review the budget. I didn't realize that.

Mr. HARRINGTON. I didn't realize there were that many.

Senator CHAFEE. But there are 50 people apparently. Is that enough, or should it be more?

Mr. HARRINGTON. I think it should be the entire Congress. This self-imposed distrust has always puzzled me.

Senator CHAFEE. So, if we dealt with that problem with 536 people, then would they all keep it quiet until the determination was made?

Mr. HARRINGTON. I think if it deserved to be kept quiet, Senator, you would be surprised at how well kept quiet it would be.

Senator CHAFEE. I would be dumbfounded if it were kept quiet. Thank you very much. It is great to see you again.

Senator HATHAWAY. Any further questions by the committee?

Thank you very much, Michael. Excellent statement.

The Senate is having a vote now. I suggest that we take a 5- or 10-minute recess before hearing Ambassador Helms. He is waiting to testify.

[A brief recess was taken.]

Senator HATHAWAY. The next witness is Ambassador Richard Helms, who was Director of Central Intelligence from 1966 to 1973.

Mr. Ambassador, it is a pleasure to have you here before us.

I understand you do not have a written statement.

Mr. HELMS. That is correct.

Senator HATHAWAY. But that you would like to say a few words.

TESTIMONY OF RICHARD HELMS, FORMER DIRECTOR OF CENTRAL INTELLIGENCE

Mr. HELMS. Perhaps it would make the hearing easier if I were just to make a brief comment about the subject which I understand you have before you, which is the decision whether or not to make the aggregate budget of the intelligence community public.

I believe that I was asked some questions on this subject in January 1976, when I appeared before the Senate Select Committee which was sitting at that time. I have not read the transcript of what I said on that occasion since, so my recollection may not be too clear as to what indeed I did say.

It was my impression that I did not think this would give too many problems if it were decided to make public the aggregate budget of the intelligence community.

In the last few days since I was invited to appear before your subcommittee, I did a little work on this subject and reviewed some previous material. I think that where I come down now, although it is a narrow question and I don't feel that in saying what I am about to say that the world is going to fall apart if the subcommittee went against my judgment, I would lean on the side of not making the aggregate budget public.

I recognize that the two principal arguments about budgets come under the headings, one the "bump" theory, and the "camel under the tent" theory, two. I would assume that both had some validity, but the reason that I come down finally where I do is that it does not appear to me that if one makes the aggregate figure public, that that is going to be the end of the matter.

I recognize that the Congress would have a continuing control over this problem, that it might be able to hold the line at that point. I would hope that that were the case. But I was reviewing the final report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, which was chaired by Senator Church, and I came across the last paragraph on page 384 which interested me very much and which had a good deal to do with my decision.

It says, if I may read it, Mr. Chairman—

The committee finds that publication of the aggregate figure for national intelligence would begin to satisfy the constitutional requirement and would not damage the national security. While substantial questions remain about the relationship between the constitutional requirement and the national security, the committee recommends the annual publication of the aggregate figure. The committee also recommends that any successor committees study the effects of publishing more detailed information on the budgets of the intelligence agencies.

It is that last sentence to which I make particular reference, because even before the ink is dry on this report, the idea is to publish the aggregate figure, then get on with the business of getting further and further into revelations. Since the committee obviously was very thoughtful about what it said in this recommendation, I would assume that there was a considerable sentiment for getting on with the job of more openness and more budgetary disclosure, and it is for this reason that I lean in favor of not disclosing the aggregate figure.

Senator HATHAWAY. Thank you very much, Mr. Ambassador.

I think that what you have said has been in basic agreement with what Mr. Colby has stated before you, and maybe some others.

It has been argued, though, that we should reveal this figure in order to help restore the credibility of the intelligence community in the eyes of the American people. What do you think of that argument?

Mr. HELMS. Mr. Chairman, I don't know quite how to answer that question because I am not sure that the credibility of the intelligence community has ever been equated in the public's mind with the amount of money that it spends. It may be, but I have never heard this asserted in any particular way.

I think the public expects intelligence to require a certain amount of money, and probably a good deal of money, and I had always thought that the credibility argument went to certain other things, such as the value of the product, was the country well served by its

intelligence community, did we know about our adversaries or even our friends the things we should know in order to make political and military policy?

So I hardly think that the publication of this figure will dull the efforts of those who don't think the product is worth it, and I honestly therefore answer your question in the negative, that I don't think it would help to restore the credibility of the intelligence community to any appreciable extent.

Senator HATHAWAY. When you were Director, were any studies made with respect to this question?

Mr. HELMS. Not that I recall, sir. I know that for years this argument has been going on about the publication of budget figures and what damage it would do to the intelligence effort, but I don't recall at any time considering this publication of an aggregate figure. This is a fairly new concept as far as I am concerned.

Senator HATHAWAY. Is your only objection that it will lead to more and more? I didn't quite get that from your testimony—or do you agree with the bump theory?

Mr. HELMS. No; in order to clarify my statement, the thing that tilted me on the side of nondisclosure as against disclosure, was the idea that more and more information would be required to explain this and that figure. But I do believe in the bump theory. I recognize that if you take the entire intelligence community figure, it is sufficiently large that you have to have a fairly significant new development to make the bump theory have any meaning.

But what we are in effect saying here is that life is going to continue indefinitely the way it has for the last 5 years, maybe, or the last 10 years, and I don't believe that. The world is never the same, and we may come to a time when there is difficulty in the world of a very serious nature, and where the bump theory may very definitely come into play. And the difficulty with these matters, Mr. Chairman, is, at least in my experience this is the difficulty, that what you give up you can't get back.

I don't think that any sensible person would be sitting in this chair today and say that if the world were at peace and there were no possibility of any conflict that these budgetary figures make all that much difference, but I don't think we can say that, and I think that for this reason, the opening of Pandora's box literally means the opening of the box. There is no way ever to close it again, short of a national emergency or a holocaust. And I just would prefer in these matters to be on the conservative side.

Senator HATHAWAY. Thank you very much, Mr. Ambassador.

Senator GARN?

Senator GARN. Mr. Helms, can you see anything really to be gained from disclosing?

I phrase the question this way because I have served on this committee since its beginning last June or May and we as a committee probably have—well, not probably, we do have more insight, more knowledge than any other Congress has ever had. We have had more information disclosed to us, more cooperation from the intelligence community including all the details of the budget. Never before in the history of the intelligence community has it been so open.

It seems to me we are representatives of the people. The oversight is so different than it has been in the past. We are developing charters

and guidelines. We have subcommittees on the rights of American citizens. I approve of this and I think it should have been done a long time ago. I am very pleased at the way the committee has handled itself. I think the chairman has done an excellent job, and it seems to me that this does and will take care of a lot of the problems that have occurred in the past few years.

So my own view is that just disclosing an aggregate figure may not have any real effect. The bump theory may work; it may be the camel's nose under the tent. Frankly, beyond that, with this committee, with the detailed oversight we now have and the way we are working, do you see anything to be gained from disclosing this figure? I don't think the average American citizen cares too much about these amounts, but do you see any value from disclosing it other than these fears we might have?

Mr. HELMS. Well, Senator, I don't frankly myself, but I have respect for the opinions of those constitutional lawyers and others who believe that there is a constitutional requirement involved here which is not being satisfied. I have seen that there has been a great deal of argumentation on this point. I am not a lawyer myself so I am not in a good position to debate these matters, but I respect the feelings of those who believe that there is a constitutional requirement, so that when I say that I don't think that it would be very helpful to publish this aggregate figure, I may not be properly taking into consideration what I believe to be the strong feelings of these gentlemen. But my own opinion, my personal opinion is that there is no advantage.

Senator GARN. Well, I am speaking not from a legal standpoint but from a practical standpoint. I suppose my opposition comes not so much from my belief that in disclosing the one figure it would do any great damage, but rather from trying to ascertain whether it would do any good. I come down on the side of what you just said, that where it is rather a grey area, not too clear, I would rather be on the side of caution and not take the risks of disclosing something that might be very injurious to the national security or to the intelligence community. And it may not be. I would just rather be on the side of caution, especially when the committee is functioning the way it has for nearly a year now. I think we can exercise the controls that we were elected to do without taking the chance of injuring the national security.

I have no other questions.

Senator HATHAWAY. Thank you.

Senator Hart?

Mr. HELMS. Senator Hart, good afternoon.

Senator HART. Ambassador Helms, good to see you.

Is the whole purpose here to prevent the Soviets from finding out what we are doing, and how we are doing it? And therefore, shouldn't we really be looking at ways to prevent that from happening? And I use the term with regard—in the context of discussions with Mr. Colby about stonewalling and if one adopts the theory that we are in a post-stonewall era, that just saying Pandora's box or slippery slope, or whatever, once you get in it you can't put the toothpaste back in the tube or any of those things, that that really doesn't meet not only the requirements that the public has placed on its intelligence community, but on its Congress as well, and that what we rather ought to be doing is trying to devise a way to find out what operations of the intelligence

community are legitimately secret and should be protected, and then figuring out ways to protect them instead of just saying one thing may lead to another, and so let's don't even do one thing.

I don't know how this would fit, say, in the case of a Glomar Explorer. A considerable amount of money was spent there. We didn't presumably want the Soviets to know that. To my knowledge it has never been officially acknowledged or endorsed by the intelligence community.

But I don't think that any of the proposals that presently rest before this committee would have disclosed that, and I don't know how even agency by agency annual budgetary sums would have permitted that kind of extrapolation unless you buy wholesale what is now—what up until the time of your testimony was known as the bump theory, but which is probably now going to be known as the Pandora's box theory.

Don't you think it would be more profitable if we sought ways of really trying to protect legitimate operations and not resist every effort of disclosure?

Mr. HELMS. Senator Hart, if you were to do what you suggest, I don't think that any sensible person could object to it. That is the whole problem. And if one can identify these areas and get agreement as to what the areas are, this would undoubtedly solve the problem.

You are absolutely correct. I don't like to be guilty of using these glib phrases, because I think that they create the wrong type of impression sometimes. In intelligence work, the whole problem of secrecy is to be able to effect that surprise on your adversary that you want to effect so that you have some chance of being successful in whatever the operation may be. The day of the ordinary spy is still with us, but that is by no means the only method of collection in this era. There are obviously others. Some of them are very sophisticated, some of them are expensive. But the more privacy one has in this area, the better chance one has of achieving one's aims, because what one is attempting to do is to get through the other fellow's armor someplace, find the chink, find something he hasn't thought of, find an area where he can't build a Potemkin village and trick your cameras and so forth.

If one were to follow your suggestions and find a means of protecting those sensitive things that we are talking about, I think this would undoubtedly satisfy the requirement, but I think you will find as you examine this problem more and more in depth that someplace you have to have a cushion into which to fit these things. Unfortunately, when you finally identify what it is that you want to protect, and which is really sensitive and it is legitimate that you should protect it, then you realize that some place must be found where you can hide it. If you don't have any place in which you can hide it, where the bump or the Pandora's box or whatever you want to call it doesn't appear immediately, this is what creates the difficulty in the end.

I recall once discussing with Senator Richard Russell who at that time was the chairman of the Oversight Committee, the question of building what turned out to be the Oxcart aircraft. He was quite upset over the fact that this initially was in the CIA budget because he said, "There isn't any way that a device as expensive as this can be put in that budget and remain secret for very long. I want it clearly understood that from now on anything that is over a certain number of hundred million dollars goes into the Defense budget."

So this is really the problem: Where do you find chunks of money large enough so that you can take those really secret things, put them in there, and not attract attention.

Senator HARR. He obviously had the right idea. The Defense budgets are large enough to hide about anything.

Well, I—this business about there is pressure, you know; if we release one figure, then somebody is going to want two figures, then they will want four figures, then they will want eight figures, once it was discovered that there was in fact a Glomar Explorer, then the first thing people want to know is how much it cost. So it would seem to me that if you want to hide that, the way you hide it is not to let people find out there is a Glomar Explorer. I suspect whether we release 1 figure or 8 figures or 10 figures, there are always going to be people around this town, people who are paid to ask questions, who are going to be trying to find out whether we are aiding some government or foreign leader, whether we have a covert operation here or there, and to be trying to find that out in terms of how much it cost, in terms of who was involved, in terms of who ordered it, and so on and so forth.

And so I really am not impressed tremendously by the argument that if you release one figure, then that this will lead to further inquiries. I think we are in an era of further inquiries, and my own judgment is that is fine.

Senator HATHAWAY, Senator Mathias.

Senator MATHIAS. Mr. Ambassador, you have been very modest about the level of your legal training and knowledge. But I think anyone who has spent a life in Government service and risen to the very top of it probably knows more than a great many lawyers about at least this area of the law.

But let me approach this, not from a strictly legal point of view, but from the point of view of the sense of security of the executive branch: whether it would make any difference whether information of this nature were to be disclosed by a committee, this committee or perhaps the Armed Services Committee or the Foreign Relations Committee, or whether it should be disclosed only by the vote of the entire Senate?

Have you ever contemplated that theological question?

Mr. HELMS. I have contemplated it, and I must say that I come down on the side of having the vote of the entire Senate.

Senate MATHIAS. Do you want to share any of your reasoning on that?

Mr. HELMS. I think, Senator Mathias, that these are genuinely important matters. I am very interested that you are having a hearing about them, as a matter of fact, because I think they are of that importance. Therefore, if the Congress is going to speak on a matter of importance, I think that the entire Senate or the entire House ought to speak to a matter rather than just the members of a committee, even though the members of the committee obviously know more details. But here you are having an open hearing. Others can have access to the transcripts if they want, and I genuinely feel that that is the way the people speak; when the whole Senate votes rather than just one of its committees or subcommittees.

Senator MATHIAS. You have advised us against any disclosure of budget figures. I assume that would apply to the full Senate as well as to this committee.

I am wondering if you could tell us what effect the disclosure would have, either a disclosure of a detailed budget or any part of it, on individuals or governments who cooperate with the United States. What effect would it have on their confidence in our capacity for confidentiality?

Mr. HELMS. I believe as far as friendly services are concerned, or the services of friendly countries which collaborate with us, I think it would concern them. On the other hand, I believe that in the end they would accept whatever decision was made in the same spirit that the intelligence community will accept the decision, because they realize that it would have been taken for good and sufficient reasons, whatever the outcome. They might not like it, but I think they would accept it. The same thing would bother them that would bother some of us, and that is that if you sit on the other side and you are interested in penetrating those figures, or figuring out what they represent, it is enormously helpful to have a very solid benchmark from which to start to calculate.

Many people in this world believe in conspiratorial theories. They believe that people do things in order to get an opposite effect. It is a well accepted doctrine that if such and such is done in the intelligence world, it obviously is designed to fool us; the figure must be something else, or must be a little bit higher or a little bit lower, or they must want us to go off in a new direction because these days they are doing something different and they want to hide it from us.

But a solid figure put out by the U.S. Government . . . I think even the most conspiratorial of the KGB hierarchy would come to the conclusion that that was a pretty accurate figure and that therefore they would begin their work with that figure and start to break down the rest of the budget as best they could.

And very frankly, Senator Mathias, with the existing information in the public domain, I don't think they would have too difficult a time.

Senator MATHIAS. You mentioned the fact that it would be accepted by friendly governments in the same spirit in which it would be accepted by our own personnel.

What effect do you think it would have on the morale of our own intelligence community?

Mr. HELMS. Well, I don't think that it would be greeted with favor. Whether or not it will have an adverse morale effect, I find that question a little hard to deal with, because the various agencies have different perceptions of this problem. I am not at all sure that I would like to generalize about it. I don't think it would be helpful to you and I am not sure I would be correct. And I really haven't been close to these matters now for more than 4 years. I feel really quite out of touch.

Senator MATHIAS. Do you believe that the publication of a single, overall figure would in the light of your experience as Director and having had considerable experience with the impact of public opinion in this whole area—do you think it would stimulate criticism of the size of the figure? That it would lead to public debates, probably that it was too large, but conceivably, in some climates, to debates that it was too small? Do you think it could lead to that kind of debate? I am not sure that that is a bad thing. I just pose the question.

Mr. HELMS. No, I am not sure it is a bad thing either, but I think it probably would. Somebody would generate a debate. There is hardly

anything that goes on in our country that doesn't generate some kind of argument one way or the other. I think this would be a legitimate one in certain respects, and there would be a good deal one could debate about it.

But I go back to what I said just a moment ago: Once you mark the figure on the wall, you have given the matter a different dimension.

Senator MATHIAS. Thank you very much.

Senator HATHAWAY. Senator Chafee.

Senator CHAFEE. I am sorry, Mr. Ambassador, I was a little late when you gave your statement.

Did you indicate, or was the question asked, if you had the Soviet KGB budget, whether or not you would find that helpful?

Mr. HELMS. Enormously. I tried very hard to get it year after year after year.

Senator CHAFEE. And you would have found it extremely helpful.

Mr. HELMS. If they had just printed one figure in Pravda, I would have found it enormously helpful.

Senator CHAFEE. Certainly, if it was a figure you could rely on like the figure emerging from the U.S. Senate, for example.

Fine. Thank you. That was my only question, Mr. Chairman.

Senator HATHAWAY. Senator Lugar?

Senator LUGAR. No questions.

Senator GARN. I would like to just follow up a line that Senator Mathias was talking about in relationship with friendly nations particularly. Since I have been on the committee there has been some concern from the intelligence gathering agencies of friendly nations about what we disclose. Would you think that this would add to that problem, disclosing the figure, that their cooperation with us might be hindered by their thinking, "Gee, if we tell the United States things we may read it in the New York Times or the Washington Post about our intelligence cooperation with the United States"?

Isn't there some danger there as well?

Mr. HELMS. Well, Senator Garn, there isn't any question about that, and I think that they would be reacting in a perfectly human way. I think you would react in exactly the same way. I think any intelligent person would. This deeply concerns them. They have got the lives of people to think about. They have got their own prestige and standing to think about, and when they put their hand in ours, they expect to be protected and fully protected. So the slightest indication that this is not going to be the case is damaging as it would be in any fiduciary relationship. It is like the relationship between a lawyer and his client. If the client gets the impression that his lawyer is leaking damaging stories to the newspaper, it would obviously dry up his trust.

So it is the same thing in these matters, which are also fiduciary. There aren't any treaties or written documents or anything that cover these things. They come from men's good will and from their desire to collaborate and to help, and in some cases, to pay the United States back for favors and services rendered, so that all of these human factors come into the equation immediately.

Senator GARN. Well, I would certainly agree, and also, when you talk about taking one figure, and a lot of people say you can't learn much by breaking that one figure down but I have been amazed at

what I have learned about breaking down figures in previous testimony. It has been said that if you knew what the heating bill at Langley was, you could get a pretty good idea of how many people work there, what is going on, and the size of the operation just from knowing what it costs for heating. And so I certainly agree with you that it would be very useful to have that kind of a figure.

Thank you, Mr. Chairman.

Senator HATHAWAY. Senator Wallop?

Senator WALLOP. I apologize for being late, but I would like to pursue a question that just goes along this same line.

As Director, did you from time to time make the decision that our cooperation with another country might not be as full as we would like it to be because we didn't trust their security apparatus?

Mr. HELMS. Oh, yes, sir. I would rather not go into this in public in too great detail, but we certainly had a scale of confidentiality, there is no question about that. What we would do with one, we wouldn't necessarily do with another. They were all tailored to what we conceived to be the security standards and the ability to maintain security of each individual service.

Senator WALLOP. So it would only follow that they might make the same judgment on us.

Mr. HELMS. Certainly.

Senator WALLOP. I was interested with Mr. Colby, we followed a line of questioning for a minute in which he suggested that it would not be too bad a thing to go back at some period in time, and we didn't really get very specific as to how far back that would be, and feel free to release a certain type of figure. I asked the question of him that if we did that, would there be a snowball effect eventually? If we decided we would go back 10 years and release a certain amount of figures, and then next year 10 years previous to that, and so on until we got in effect to the point of the threshold that we are to cross now, and if we had made public this aggregate figure from this day forward, sooner or later under that Secrecy Act we would get up to the time when we would have released all the information up to today's threshold.

It would seem thereafter a fairly sample extrapolation on the part of any foreign intelligence analyst to track U.S. intelligence to the present day.

Mr. HELMS. I would agree, Senator Wallop. You gentlemen who are on the oversight committee now must have had a look at what the economists of the Agency are able to learn from even commonplace figures. By the time they get through with them, they come out with an extraordinary amount of truth and fact. Experienced people working with figures of this kind wouldn't have any difficulty in doing what you suggest.

Senator WALLOP. Thank you very much.

Senator HATHAWAY. Do any of the members have any further questions of Ambassador Helms?

Senator CHAFFEE. I just have one other question.

In Admiral Turner's presentation this morning, he indicated that he had debated this matter within his own mind, and had felt that this was a worthwhile step in a restoration of public confidence and trust in the Agency. There were some of us who felt that various other

steps had been taken and should be taken, and that revealing a budget wouldn't necessarily give the public any reasons to have confidence or no confidence in an agency.

Do you have any comments you might make on that particular subject?

Mr. HELMS. Yes, Senator Chafee. Earlier this afternoon before you came in, I addressed this question by saying that I did not think it would help the credibility of the intelligence community or the Agency to publish the budget figure. I don't think that the American public would find that either reassuring or not reassuring. In other words, I think it would be the "dull thud department," if I may suggest it.

Senator CHAFEE. Senator Lugar suggested that giving the public a figure of x zillion would be in a vacuum. The public wouldn't know whether this is a big or little figure.

Mr. HELMS. Correct, and they have no basis whatever on which to judge.

Senator CHAFEE. Fine. Thank you, Mr. Chairman.

Thank you, Mr. Ambassador.

Senator HATHAWAY. Thank you very much, Mr. Ambassador. We appreciate your testimony and answers to the questions.

I have here a statement from Mr. George Bush, former Director of Central Intelligence, which without objection will be placed in the record at this point.

[The prepared statement of Mr. Bush follows:]

PREPARED STATEMENT BY GEORGE BUSH, FORMER DIRECTOR OF CENTRAL INTELLIGENCE

My view has been and continues to be that budget figures for CIA and for the Intelligence Community should not be made public. When Director of Central Intelligence, I testified to this before several committees of both the Senate and the House.

I see no reason to change my mind. On the last vote on this question, both Houses of Congress voted, by about two to one, not to disclose budget figures. I hope the results will be the same on the next vote.

There is a myth abroad in the United States. The myth, often perpetuated by inaccurate reporting, is that the Congress does not know what's in the CIA budget or Intelligence Community budget. As this Committee knows very well, there is no truth to that myth. Indeed, this Committee, in my view, has done a very thorough job in examining the budgets.

Every penny of the CIA budget and Intelligence Community budget is reported to Congress.

In something as sensitive as intelligence budgets, the American people must place confidence in their elected representatives; and, in the case of the Executive Branch, the people must place confidence in the President and his appointees, to see that executive control is being asserted over the intelligence budget. I think such control is being asserted.

Let me just cite some of the budget process so those interested in the budget question will understand that this is not a process without checks and disclosure.

Last year, after various agencies made up their intelligence budgets, the Committee on Foreign Intelligence had many meetings at which the agencies had to justify, in detail, their budget requests.

The Committee on Foreign Intelligence had to make certain priority setting decisions. In most cases, but not all, the decision involved budget cuts.

The Office of Management and Budget got fully into the act. It made a detailed review of the budget. There was no withholding from the Office of Management and Budget.

The President familiarized himself with the budget and indeed some items were appealed to the President.

The President's Foreign Intelligence Advisory Board has full access to the budget figures. The Board does not approve or disapprove budget requests but it has access to extensive budget detail.

Public opinion to the contrary, several committees of Congress, including, of course, this one, take a detailed look at intelligence budgets. Staff investigators come to CIA and other agencies and spend week after week going over information related to budget requests.

The argument against revealing our total figure relates to the so-called unravelling process. I have concluded that one figure, standing alone, is all but meaningless. If it's a Community figure, some in the public will think it's a CIA figure. This "meaningless" figure will inevitably lead to a demand on the part of some for more detail. The revelation of that detail, in my view, will set benchmarks from which meaningful conclusions can be drawn by opposition forces as subsequent years' numbers become available.

I believe that skilled observers on intelligence will be able to reach meaningful conclusions about our intelligence activities if budget figures are revealed from year to year.

I worry about the whitewashing away process that might take place.

I recognize the basic dilemma. We are an "open society," our people do have a "right to know," but this right to know must give way at times to the legitimate demands for non-disclosure in certain national security categories. I am convinced intelligence budgets must continue to be in this category.

The answer, it seems to me, lies in a vigorous congressional oversight. It lies, too, in assuring the American people that certain committees of Congress do have complete access to Intelligence Community budget figures.

The answer lies in continuing the restoration of confidence in the Intelligence Community and especially in CIA. It also lies, I might add, in this Committee's letting the American people know the kind of thorough oversight you are doing on their behalf. Other committees with oversight responsibilities should also help.

There will always be an honest difference of opinion on this question. Many members of the press and some members of Congress will continue to press for more and more disclosure of intelligence matters, be it budget figures or operational matters.

I hope this Committee will resist the urge to move towards accommodation by revealing budget figures. The demand will not cease.

The rebuilding of confidence that thorough oversight can help accomplish will lead to a much broader recognition of the view that a strong foreign intelligence capability is essential to the survival of the free world. Such a capability is impossible to maintain if sources and methods of intelligence are not protected.

Revelation of budget figures will do more to enlighten a skilled adversary than it will to educate the American people, particularly if I am correct in my fear that the release of one figure whets the demand for more and more figures.

Convince the people that several congressional committees, acting on behalf of the American people are dealing properly and thoroughly with sensitive intelligence matters; and then, in my view, the problems will be solved.

The people want us to have a strong foreign intelligence capability. They will, in my view, support the Congress if it couples its insistence on secrecy in some intelligence matters with its determination to represent the people through penetrating congressional oversight.

Senator HATHAWAY. I also have a statement from Senator Frank Church, chairman of our predecessor committee, which I would like also to have placed in the record at this point.

[The prepared statement of Senator Church follows:]

PREPARED STATEMENT FROM HON. FRANK CHURCH, U.S. SENATOR FROM THE STATE OF IDAHO

Mr. Chairman: I appreciate this opportunity to submit testimony on the question of public disclosure of funds authorized for the intelligence activities of the United States. I commend the Committee for holding open hearings on the subject and thank the Chairman for his invitation to testify.

Almost exactly 1 year ago today the Senate Select Committee, in a series of final reports, recommended that the overall budget for national intelligence

activities be made public annually. We concluded that such a disclosure could be made without endangering national security or revealing sensitive programs. In the course of our investigation of all U.S. intelligence agencies we carefully examined the possible impact of such disclosure on the sources and methods of intelligence gathering and found it to be minimal.

We also encouraged the oversight committee to look into the possibility that the total expenditures for each of the intelligence agencies might be made public.

The recommendation of the Committee is as follows:

77. The intelligence oversight committee(s) of Congress should authorize on an annual basis a "National Intelligence Budget," the total amount of which should be made public. The Committee recommends that the oversight committee consider whether it is necessary, given the constitutional requirement and the national security demands, to publish more detailed budgets.

In my view, effective oversight of the intelligence community, both by the Congress and the American people, requires a basic knowledge of how much the intelligence agencies are spending in comparison to other government departments. Currently total funding levels are kept secret for the Central Intelligence Agency, National Security Agency, and other intelligence agencies. The Department of Defense budget is inflated by these dollar amounts, thus concealing both the aggregate intelligence figure and the expenditures for each agency. The public and most of the Congress are not aware of which categories of the Defense budget—weapons, manpower, pensions, etc.—are inflated to hide the intelligence appropriation. Therefore, there is no assurance the funds in the open appropriation will be used for the purposes for which they were intended by Congress. Not only does this procedure prevent adequate oversight of the intelligence agencies and present a distorted picture of sections of the Defense budget, but it also raises important constitutional questions.

Our investigation concluded that this system of secrecy was inconsistent with Article I Section 9 clause 7 of the Constitution, which states:

No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

This clause stipulates that the Congress control the purse through appropriations made by law, and that the public be kept informed of the expenditure of such funds. This constitutional requirement is designed to allow the Congress and the public to take part in the determination of policy, to make judgments on national needs and priorities, and to weigh specific allocations among specific agencies. Publication of appropriations and expenditures allows citizens to decide whether too much money is being spent on welfare and too little on housing, whether defense consumes a disproportionate amount of the budget and whether more money should go for health care. As Congressman Leggett put it: "How can we 'oversee' in any fashion if we have no knowledge of the Agency's command on our resources? How can we set budgetary priorities in a meaningful fashion if we have no basis for comparing intelligence with unemployment, health, or other competing program areas?" Open budgets produce public debate essential to determining the nation's direction. This was intended by the framers of the Constitution, and it is ignored by those urging complete secrecy of the intelligence budget.

Those opposed to public disclosure of the intelligence budget contend that it will provide information on "sensitive sources and methods," that specific technologies might be divulged by unusual rises or dips in the budget over time, and, finally, that publication of any information on the budget will inevitably lead to demands for additional information.

During the course of our investigation, we heard from two former Directors of the CIA, James Schlesinger and Richard Helms, that publication of a gross national intelligence figure would result in minimal security concerns. They were worried that if the budgets were broken down into their various components that "sources and methods" might be revealed, but expressed no fear for national security should the aggregate budget be revealed. On the issue of technology, the military budget is made public in great detail, and technical secrets about weapons are not compromised. It would be most difficult, indeed, to deduce from a total figure, even over time, the type of reconnaissance device or collection system that was being developed. As Senator Symington put it, "There's nothing secret about the . . . cost of a nuclear aircraft carrier or the cost of the C-5A." But, "knowledge of the cost does not equal knowledge of how the weapons oper-

ate or how they will be utilized." Similarly, knowledge "of the overall cost of intelligence does not in any way entail the release of information about how the various intelligence groups function, or plan to function."

The concern that publication of the budget will result in calls for additional information is an unpersuasive argument. The question really is what should be made public and what should be kept secret—an issue that should be debated on its merits. It is up to the Congress, in consultation with the intelligence agencies, to discuss and decide where the line should be drawn.

Therefore, I strongly urge that the aggregate National Intelligence Budget be made public and that the oversight committee consider publishing the total budgets for each intelligence agency. A Special Senate Committee to Study Questions Related to Secret and Confidential Documents suggested in 1973 that each intelligence agency's budget be published. The Committee's recommendation was as follows:

III. At the request of Senator Cranston, the Committee discussed providing the Senate the overall sums requested for each separate intelligence agency. The release of such sums would provide members with the minimal information they should have about our intelligence operations. Such information would also end the practice of inflating certain budget figures so as to hide intelligence costs, and would ensure that all members will know the true cost of each budget item they must vote upon.

Accordingly, the Committee recommends that the Appropriations Committee itemize in the Defense Department Appropriations bill the total sums proposed to be appropriated for intelligence activities by each of the following agencies: Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, National Reconnaissance Office and any separate intelligence units within the Army, Navy, and Air Force. The Committee does not request that any line items be revealed. . . . [Questions Related to Secret and Confidential Documents, Report of the Special Committee to Study Questions Related to Secret and Confidential Government Documents, Sen. Rep. No. 93-466, 93rd Cong., 1st Sess. (Oct. 12, 1973), at 16]

I agree with these conclusions. The aggregate figure for the whole community and the individual totals for the various agencies would allow the Congress and the people to begin to make the hard tradeoffs between the different items in the federal budget. The advantage of disclosing the intelligence agencies' totals is that comparisons can then be made between the intelligence agencies and other federal bureaus. Expenditures can then be compared publicly and decisions reached on whether too much or too little is being spent for intelligence. A free society should engage in open debate of these issues.

I urge the Senate Intelligence Committee to publish a National Intelligence Budget and to make public the total expenditures for each of the intelligence agencies.

Senator HATHAWAY. Tomorrow morning we will have two panels of witnesses. The first panel, which will testify on the constitutional question, consists of Gerhard Caspar, Thomas Emerson, and Ralph Spritzer. Panel 2 is primarily a panel of representatives of special interest groups for and against disclosure. Those witnesses will be Ray Cline, Morton Halperin, John Shattuck, Robin Schwartzman, David Phillips, and John Warner.

The committee will recess until tomorrow morning at 10 o'clock. [Whereupon, at 4:11 p.m., the committee recessed, to reconvene at 10 a.m., Thursday, April 28, 1977.]

THURSDAY, APRIL 28, 1977

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The Select Committee met, pursuant to recess, at 10 a.m., in room S-407, the Capitol, Hon. William D. Hathaway presiding.

Present: Senators Hathaway (chairman of the Subcommittee on Budget Authorization), Bayh, Biden, Garn, Mathias, Lugar, and Wallop.

Also present: William G. Miller, Staff Director; and Audrey Hatry, Clerk of the Committee.

Senator HATHAWAY. This morning the Intelligence Committee continues its hearings on the question of whether any portions of the intelligence budget should be made public.

During yesterday's session we heard from past and present Directors of Central Intelligence. Their testimony dealt primarily with the subject of whether public disclosure would endanger our intelligence operations.

This morning we will hear from two panels of witnesses who will be addressing other issues which relate to this question.

The first panel will consist of three outstanding constitutional scholars who will give us the benefit of their advice as to what the Constitution requires. The second panel consists primarily of representatives of public interest organizations who will give us their counsel concerning what the public expects and wants.

I would like to introduce and welcome the members of the first panel at this time: Prof. Gerhard Casper, professor of law and political science at the University of Chicago; Prof. Thomas Emerson, professor of law at Yale University; and Prof. Ralph Spritzer, professor of law at the University of Pennsylvania.

Gentlemen, each of you has a long and very distinguished career in the legal and academic world. Two of you have had distinguished careers in government, and one of you actually participated in litigation on the very question before us. So, we welcome you here today. We appreciate your being willing to come here. We look forward to hearing your statement.

All of your statements will be placed in the record, and if you would like to summarize them, that will be fine.

We can start with Professor Casper.

[The prepared statement of Professor Casper follows:]

PREPARED STATEMENT OF GERHARD CASPER, MAX PAM PROFESSOR OF LAW AND
PROFESSOR OF POLITICAL SCIENCE, UNIVERSITY OF CHICAGO

Mr. Chairman, members of the committee, your letter of invitation stated that you are addressing the issue whether disclosure of intelligence budget "is in the public interest". As I lack expertise concerning this general question, I shall not

attempt to answer it—nor have you specifically asked me to do so. All I am prepared to do this morning is to give you my analysis of some constitutional and legal issues connected with disclosure of intelligence budgets.

First I turn to the constitutional question which is whether Article 1, Section 9 mandates disclosure. Most analysis of this section tends to focus on the Statement and Account Clause. It is my view that the Appropriations Clause is at least equally relevant and important.¹

The Appropriations Clause is formulated as a prohibition, though no particular addressee is mentioned. What purpose is served by the clause? Its wording has led to the belief that "it was intended as a restriction upon the disbursement authority of the Executive department . . ." ² While this is clearly one of the purposes served by the Appropriations Clause, this was not its main function when conceived. The Convention debates on the subject are sparse, yet relatively unambiguous. As originally drafted, the clause meant to assure the control of the "popular" House of Representatives over all money bills, tax bills as well as appropriations. It was especially provided that appropriation bills should originate in the House. Thus the clause was an important element in the early debate over representation as well as over the role of the "aristocratic" Senate and the small states in the new government. A special committee was appointed to report on these matters. The discussion, on July 6, 1787, of the committee report ³ led to a major comment by Benjamin Franklin concerning the appropriations policy. Indeed, as far as I can make out, this comment by a crucial member of the special committee is the only statement of any significance on the subject matter:

Doctr. Franklin did not mean to go into a justification of the Report; but as it had been asked what would be the use of restraining the 2d branch [of the legislature] from meddling with money bills, he could not but remark that it was always of importance that the people should know who had disposed of their money, & how it had been disposed of. It was a maxim that those who feel, can best judge. This end would, he thought, be best attained, if money affairs were to be confined to the immediate representatives of the people . . . ⁴

Franklin's remark suggests that the Appropriations Clause itself was intended to serve accountability. The subsequent elimination of the requirement that appropriations bills originate in the House does not change this assessment.⁵

Story, displaying his usual acumen, thus saw the object of the Appropriations Clause correctly as interposing a restraint by which the public treasure "should be applied, with unshrinking honesty, to such objects, as legitimately belong to the common defense, and the general welfare." ⁶ Story understood clearly that the Appropriations Clause and the Statement and Account Clause are but part and parcel of what I have called the accountability function: "Congress is made the guardian of this treasure; and to make their responsibility complete and perfect, a regular account of the receipts and expenditures is required to be published, that the people may know what money is expended, for what purpose, and by what authority." ⁷

The Statement and Account Clause was added in the closing hours of the Convention on September 14, 1787 (the Convention was adjourned on September 17). The crucial question as to its interpretation is how much discretion the

¹ Article 1, Section 9 reads in part:

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations Made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." The legal literature on the subject is not exactly extensive. In this Statement I cannot engage in a detailed analysis of what there is, though I have obviously been aided by existing discussions. See, in particular, L. Fisher, *Presidential Spending Power* 202-28 (1975); Note, *The CIA's Secret Funding and the Constitution*, 84 *The Yale Law Journal* 608 (1975); Note, *Cloak and Ledger: Is CIA Funding Constitutional?*, 2 *Hastings Constitutional Law Quarterly* 717 (1975); Note, *Fiscal Oversight of the Central Intelligence Agency: Can Accountability and Confidentiality Coexist?*, 7 *New York University Journal of International Law and Politics* 433 (1974).

² *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937).

³ The report can be found 1 *Farrand, Records* 526 (July 5).

⁴ 1 *Farrand, Records* 546. The words in brackets were added by me.

⁵ *Ibid.* (remarks by Wilson). The requirement was dropped on August 8, see 2 *Farrand, Records* 224.

⁶ 2 *Story, Commentaries on the Constitution* 201 (2d ed.) (1851).

⁷ *Ibid.* (italics added).

clause grants Congress as to the timing of accounting and the details of disclosure. I find the short discussion of these matters on the floor of the Convention and in the ratification conventions so ambiguous as not to assist materially in the interpretation of the clause beyond what one can deduce from the text itself and from its function in relation to the Appropriations Clause.⁶ Only as concerns the timing may we conclude from the debates that accounting need not necessarily be done annually, as a requirement to this effect was amended out of Mason's original motion. What one can deduce from the wording of the Clause is that publication of a statement is mandated, that such statement account for all receipts and expenditures and, finally, that the timing be such that the statement can actually perform its accounting function. The Clause does not by itself mandate a specificity of details except insofar as the accounting categories must reasonably relate to the purpose of the two clauses—to secure accountability of the legislature (and the executive branch).

What do these principles suggest as to the major question before you: whether there is a constitutional obligation to publish figures concerning intelligence expenditures? Further analysis may be aided by looking at possible accounting categories in terms of three different considerations: (1) the purpose of expenditures; (2) the magnitude of expenditures; (3) truthfulness.

In terms of accounting by governmental purposes it is obvious that some detailed breakdown has to occur because otherwise the people would not know for what purpose their money has been expended. But what do we mean by purpose? Is the category "for purposes of defense" too broad? Does the answer to this question depend on the second consideration, the magnitude of expenditures? If the accounting were in terms of "100 billion dollars for purposes of national security", I assume we would all agree that such statement would make neither the Congress nor the executive genuinely accountable. But what degree of detail is required? The question is essentially "how much is too much?" (or "how little is too much?").

When the Constitution is ambiguous, constitutional lawyers frequently turn to its interpretation by early Congresses, the First Congress in particular. The First Congress authorized \$40,000 annually to provide "the means of intercourse between the United States and foreign nations" and gave the President discretion not to account specifically for such expenditures as he thought it inadvisable to make public.⁷ This discretion was continued and the procedures formalized by the Second Congress.⁸ The Third Congress increased the appropriation for expenses "in relation to the intercourse between the United States and foreign nations" by 1 million dollars and made this very substantial amount subject to Presidential discretion to withhold details from the public eye, though an account of the expenditures was to be laid before the Congress.⁹

The rather startling increase in appropriations "for the expenses attending the intercourse of the United States with foreign nations", which included the authority to borrow the amount needed, was for ransoming American hostages held by Algiers, "purchasing peace" and paying off foreign officials and other individuals. In submitting a report of the Secretary of State on the subject to the Congress, President Washington, on December 16, 1793, requested confidentiality as "it would still be improper that some particulars of this communication should be made known." "Both justice and policy required", the President stated, "that the source of that information should remain secret, as a knowledge of the sums meant to have been given for peace and ransom might have a disadvantageous influence on future proceedings for the same objects."¹⁰

A treaty with Algiers was concluded in the fall of 1795 and submitted to the Senate in February of 1796. The Account of Receipts and Expenditures for the year ending September 30, 1796 made no reference to Algiers-related expenses.¹¹ On January 2, 1797 the House passed a resolution calling on the President to provide information about the Algiers affairs,¹² which was supplied in confidence on January 9, 1797, including a relatively detailed report by the Secretary of the

⁶ The debate is reported in 2 Farrand, Records 618-19. For an assessment of the legislative history see Yale Note, note 1 supra at 609.

⁷ 1 Stat. 128 (Act of July 1, 1790).

⁸ 1 Stat. 299 (Act of February 9, 1793); now 31 U.S.C. 107 (1970).

⁹ 1 Stat. 345 (Act of March 20, 1794).

¹⁰ 4 Annals of Congress 143. For further details see 16 The Papers of Alexander Hamilton 429 (1972); American State Papers, Foreign Relations, I, 258.

¹¹ 6 Annals of Congress 2782.

¹² *Id.* at 1767.

Treasury.¹⁵ A secret debate took place on January 17. On February 21, 1797 the House voted 53 to 36 to lift the injunction of secrecy with respect to the Treasury report and some other matters.¹⁶

What the episode suggests is that Congress was satisfied with appropriating a very substantial amount of money for a rather vaguely stated purpose and, perhaps, that there is more of a relationship than some of the commentators admit between the Appropriations Clause and the Statement and Account Clause, on the one hand, and the Journal Secrecy Clause in Article I Section 5 on the other.¹⁷

However, in order properly to evaluate the events it should be kept in mind that the Congress itself was generally informed. It must also be remembered that it took Congress some time to evolve the degree of appropriations specificity considered necessary to forestall unwarranted discretion, an endeavor helped along by the development of a party system.¹⁸ On the other hand, it should not be overlooked that the early statements of receipts and expenditures are mostly in terms of such very general categories as "diplomatic department", "military department", "trade with Indians" etc.¹⁹

In view of this early history²⁰ and in view of my general sense of the attitude of the Framers toward secrecy, I find it difficult to believe that the Statement and Account Clause mandates annual disclosures of intelligence expenditures if it is the considered judgment of the Congress that publication would harm the national security. Let me hasten to stress that difficult matters are difficult and before I read the headline "constitutional law expert states secrecy of intelligences budgets is warranted", I should like to be heard out.

The following points seem crucial to me. (1) I doubt there is a constitutional command. This, of course, does not mean that the Congress has no authority to legislate disclosure. This is a matter of judgment, a judgment which has to take into consideration the need of the voters for adequate information. In making that judgment, I do not believe the Congress can hide behind a constitutional syllogism, though the policy underlying Article I Section 9 is obviously pertinent. (2) This is not to say that what is apparently the present system of deceptive appropriations and accounting is constitutionally bearable. Here the third consideration mentioned earlier becomes relevant. Accounting to serve any purpose must be accurate. This requirement may be served by allocating funds to relatively nonspecific governmental functions; it cannot be served, however, by pretending to spend money for one purpose while in reality it is spent for a totally different purpose. The present system for hiding intelligence appropriations should be scrutinized very closely as to what it does in terms of poor accounting and bad constitutional practices. Obviously, this is all I can say on the subject as I am not privy to the precise categories used for making intelligence appropriations. (3) I said there was no requirement of annual disclosure. This does not mean that the accountability function of Article I Section 9 does not require disclosure of information about intelligence expenditures at some point before the subject becomes one of historical interest only. Whether this means two years after the fact, three years after the fact or five years after the fact cannot be determined with any precision and is a matter of judgment for those who have the relevant information.

Permit me briefly to address the other matter which has been put to me. As I understand the question, it is as follows. If Congress passes an authorization bill for intelligence expenditures which either includes or does not include a total amount, what is the *legal status of a confidential committee report detailing authorizations for line items?* In attempting to answer the question I shall make the assumption that a total figure is given in the bill. An authorization bill not authorizing a specific amount in its text strikes me as byzantine, but my analysis does not depend on making the assumption. In inquiring into the legal status I understand we mean legal status in the appropriations process. Given the Journal

¹⁵ *Id.* at 2238.

¹⁶ *Id.* at 2235. See also Account of Receipts and Expenditures for the year ending March 31, 1797, 9 Annals of Congress 3562.

¹⁷ "Each House shall keep a Journal of its Proceedings, and from time to time publish the same excepting such parts as may in their Judgment require Secrecy."

¹⁸ See Sofer, War, Foreign Affairs and Constitutional Power: The Origins 70, 170 (1976); White, The Federalists 326 (1948).

¹⁹ See, for instance, notes 13 and 16 *supra*.

²⁰ It is, of course, possible to argue that the early Congresses acted unconstitutionally. The Supreme Court, in 1803, had no difficulty finding a provision of the Judiciary Act of 1789 unconstitutional.

Secrecy Clause in Article 1, Section 5 I have come to the conclusion that *Congress can bind the appropriations process by including in the authorization a reference to the confidential report*. I do not think this amounts to delegating Congressional powers to a committee, since Congress would act upon a prior report. It is of course true that legislating in this manner creates a somewhat unusual zero-sum game where an either-or choice takes the place of the more ordinary opportunities for amending committee bills. Once enacted, such authorization would have the *same status as other authorization legislation, i.e., if the appropriations committees exceeded the authorization, the appropriations bill would apparently be subject to a point of order under Rule XVI (2)*. Though, as to this matter, I shall readily yield to experts on the Standing Rules of the Senate. I am not one of them.

Finally, in the interest of clarity it would seem that when enacting an annual authorization for intelligence expenditures, *Congress should repeal standing transfer authority such as is contained in 50 U.S.C. 403(f) (1970)*. While *Section 12 of Senate Resolution 400* seems to establish the Senate's clear intention of breaking with tradition, the Senate alone may not be able to establish the intent of Congress with respect to authorizations. "The cardinal rule is that *repeals by implication are not favored*."²¹ While irreconcilable conflicts between two statutes can ordinarily be resolved in favor of the more recent act, standing transfer authority and an annual authorization do not necessarily constitute an irreconcilable conflict, as recent disputes over transfer authority have well illustrated.²²

TESTIMONY OF GERHARD CASPER, MAX PAM PROFESSOR OF LAW AND PROFESSOR OF POLITICAL SCIENCE, THE UNIVERSITY OF CHICAGO

Mr. CASPER. Thank you, Mr. Chairman. It is a great privilege to have been asked to appear before this committee this morning. I do have a statement, and I think in the interest of the committee's time I will read a shortened version of it.

Mr. Chairman and members of the committee, your letter of invitation stated that you are addressing the issue of whether the disclosure of intelligence budgets is in the public interest. As I lack expertise concerning this general question, I shall not attempt to answer it, nor have you specifically asked me to do so.

All I am prepared to do this morning is to give you my analysis of some constitutional and legal issues connected with the disclosure of intelligence budgets.

Let me now skip the following page and go on to page 4, Mr. Chairman, with your permission.

The Statement and Account Clause was added in the closing hours of the Convention on September 14, 1787. The Convention was adjourned on September 17. The crucial question as to its interpretation is how much discretion the clause grants Congress as to the timing of accounting and the details of disclosure.

I find the short discussion of these matters on the floor of the Convention and in the ratification conventions so ambiguous as not to assist materially in the interpretation of the clause beyond what one can deduce from the text itself and from its function in relation to the Appropriations Clause.

Only as concerns the timing may we conclude from the debates that accounting need not necessarily be done annually as a requirement to this effect was amended out of Mason's original motion. What one

²¹ *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). Cf. Sutherland, *Statutes and Statutory Construction* 197-81 (1891).

²² See Fisher, note 1 *supra* at 89-122.

can deduce from the wording of the clause is that publication of a statement is mandated, that such statement account for all receipts and expenditures, and finally, that the timing be such that the statement can actually perform its accounting function.

The clause does not by itself mandate a specificity of details except insofar as the accounting categories must reasonably relate to the purpose of the two clauses, to secure accountability of the legislature and the executive branch.

What do these principles suggest as to the major question before you: Whether there is a constitutional obligation to publish figures concerning intelligence expenditures. Further analysis may be aided by looking at possible accounting categories in terms of three different considerations: (1) the purpose of expenditures; (2) the magnitude of expenditures; and (3) truthfulness.

In terms of accounting by governmental purpose, it is obvious that some detailed breakdown has to occur because otherwise the people would not know for what purpose their money was expended. But what do we mean by purpose? Is the category "for purposes of defense" too broad? Does the answer to this question depend on the second consideration, the magnitude of expenditures?

If the accounting were in terms of \$100 billion for purposes of national security, I assume we would all agree that such statement would make neither the Congress nor the Executive genuinely accountable, but what degree of detail is required? The question is essentially, "How much is too much, or, how little is too much?"

When the Constitution is ambiguous, constitutional lawyers frequently turn to its interpretation by early Congresses, the First Congress in particular. The First Congress authorized \$40,000 annually to provide "the means of intercourse between the United States and foreign nations," and gave the President discretion not to account specifically for such expenditures as he thought it inadvisable to make public.

This discretion was continued and the procedures formalized by the Second Congress. The Third Congress increased the appropriation for expenses "in relation to the intercourse between the United States and foreign nations" by \$1 million.

Let me say, Mr. Chairman, if this amount had been expended in 1 year it would have been approximately 14 percent of the total outlays of the Federal Government at that time.

The appropriation was increased by \$1 million, and the Congress made this very substantial amount subject to Presidential discretion to withhold details from the public eye, though an account of the expenditures was to be laid before the Congress.

The rather startling increase in appropriations "for the expenses attending the intercourse of the United States with foreign nations," which included the authority to borrow the amount needed, was for ransoming American hostages held by Algiers, "purchasing peace," and paying off foreign officials and other individuals.

In submitting a report of the Secretary of State on the subject to the Congress, President Washington, on December 16, 1793, requested confidentiality as "it would still be improper that some particulars of this communication should be made known. Both justice and policy

required," the President stated, "that the source of that information should remain secret, as a knowledge of the sums meant to have been given for peace and ransom might have a disadvantageous influence on future proceedings for the same objects."

A treaty with Algiers was concluded in the fall of 1795 and submitted to the Senate in February of 1796. The account of receipts and expenditures for the year ending September 30, 1796, made no reference to Algiers-related expenses. On January 2, 1797, the House passed a resolution calling on the President to provide information about the Algiers affairs, which was supplied in confidence on January 9, 1797, including a relatively detailed report by the Secretary of the Treasury. A secret debate took place on January 17. On February 21, 1797, the House voted 53 to 36 to lift the injunction of secrecy with respect to the Treasury report and some other matters.

What the episode suggests is that Congress was satisfied with appropriating a very substantial amount of money for a rather vaguely stated purpose and, perhaps, that there is more of a relationship than some of the commentators admit between the appropriations clause and the statement and account clause, on the one hand, and the journal secrecy clause in article I, section 5, on the other.

However, in order properly to evaluate the events it should be kept in mind that the Congress itself was generally informed. It must also be remembered that it took Congress some time to evolve the degree of appropriations specificity considered necessary to forestall unwarranted discretion, an endeavor helped along by the development of a party system.

On the other hand, it should not be overlooked that the early statements of receipts and expenditures which I have examined are mostly in terms of such very general categories as "diplomatic department," "military department," "trade with Indians," et cetera.

In view of this early history and in view of my general sense of the attitude of the framers toward secrecy, I find it difficult to believe that the statement and account clause mandates annual disclosures of intelligence expenditures if it is the considered judgment of the Congress that publication would harm the national security. Let me hasten to stress that difficult matters are difficult, and before I read the headline, "Constitutional Law Expert States Secrecy of Intelligence Budgets Is Warranted," I should like to be heard out.

The following points seem crucial to me.

One, I doubt there is a constitutional command. This, of course, does not mean that the Congress has no authority to legislate disclosure. This is a matter of judgment, a judgment which has to take into consideration the need of the voters for adequate information.

In making that judgment, I do not believe the Congress can hide behind a constitutional syllogism, though the policy underlying article I, section 9, is obviously pertinent.

Two, this is not to say that what is apparently the present system of deceptive appropriations and accounting is constitutionally bearable. Here the third consideration mentioned earlier becomes relevant. Accounting to serve any purpose must be accurate. This requirement may be served by allocating funds to relatively nonspecific governmental functions. It cannot be served, however, by pretending to spend money for one purpose while in reality it is spent for a totally different purpose.

The present system for hiding intelligence appropriations should be scrutinized very closely as to what it does in terms of poor accounting and bad constitutional practices. Obviously, this is all I can say on the subject, as I am not privy to the precise categories used for making intelligence appropriations.

Three, I said there was no requirement of annual disclosure. This does not mean that the accountability function of article I, section 9, does not require disclosure of information about intelligence expenditures at some point before the subject becomes one of historical interest only. Whether this means 2 years after the fact, 3 years after the fact, or 5 years after the fact cannot be determined with any precision and is a matter of judgment for those who have the relevant information.

Permit me briefly to address the other matter which has been put to me. As I understand the question, it is as follows. If Congress passes an authorization bill for intelligence expenditures which either includes or does not include a total amount, what is the legal status of a confidential committee report detailing authorizations for line items?

In attempting to answer the question I shall make the assumption that a total figure is given in the bill. An authorization bill not authorizing a specific amount in its text strikes me as byzantine, but my analysis does not depend on making the assumption.

In inquiring into the legal status I understand we mean legal status in the appropriations process. Given the journal secrecy clause in article I, section 5, I have come to the conclusion that Congress can bind the appropriations process by including in the authorization a reference to the confidential report. I do not think this amounts to delegating congressional powers to a committee, since Congress would act upon a prior report.

It is, of course, true that legislating in this manner creates a somewhat unusual zero-sum game where an either-or choice takes the place of the more ordinary opportunities for amending committee bills. Once enacted, such authorization would have the same status as other authorization legislation, that is, if the Appropriations Committees exceeded the authorization, the appropriations bill would apparently be subject to a point of order under rule XVI(2). Though, as to this matter, I shall readily yield to experts on the Standing Rules of the Senate. I am not one of them.

Finally, in the interest of clarity it would seem that when enacting an annual authorization for intelligence expenditures, Congress should repeal standing transfer authority such as is contained in 50 U.S.C. 403f.

While section 12 of Senate Resolution 400 seems to establish the Senate's clear intention of breaking with tradition, the Senate alone may not be able to establish the intent of Congress with respect to authorizations.

I quote from a Supreme Court decision: "The cardinal rule is that repeals by implication are not favored." While irreconcilable conflicts between two statutes can ordinarily be resolved in favor of the more recent act, standing transfer authority and an annual authorization do not necessarily constitute an irreconcilable conflict, as recent disputes over transfer authority have well established.

Thank you, Mr. Chairman.

Senator HATHAWAY. Thank you very much, Professor.
 Next, Professor Spritzer.
 [The prepared statement of Professor Spritzer follows:]

PREPARED STATEMENT OF RALPH S. SPRITZER, PROFESSOR OF LAW, UNIVERSITY OF
 PENNSYLVANIA LAW SCHOOL

The question before the Subcommittee is whether the electorate is entitled to know how much of the public money is being expended for intelligence activities—whether that information should be published. In principle, I would support an affirmative answer. I shall confine my remarks, however, to the proposition that the Constitution, as illuminated by the records of the Constitutional Convention, requires no less.¹

This body is, of course, familiar with the text of Article I, Section 9, Clause 7:

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

The clause speaks to expenditures of all public money; it makes no exception for particular categories. Moreover, the explicit requirement of publication cannot readily be squared with a practice of concealing under other headings the aggregate amounts provided for and expended by an agency such as the C.I.A.

History confirms this reading. The language of accountability was drafted by George Mason of Virginia who stated that "he did not conceive that the receipts and expenditures of the public money ought ever be concealed. The people, he affirmed, had a right to know the expenditures of their money." (3 Farrand, "The Records of the Federal Convention of 1787," p. 326 (Rev. Ed. 1966)). Mason's proposal called for an annual statement. That was modified by an amendment calling for publication "from time to time." The reasons for this change, adopted by the Convention, were explained by Madison. He reasoned that reports based on short periods

would not be so full and connected as would be necessary for a thorough comprehension of them and detection of any errors. But by giving them [the reporting officials] an opportunity of publishing them from time to time, as might be found easy and convenient, they would be more full and satisfactory to the public, and would be sufficiently frequent. *Id.*

Conceivably, it might be suggested that the language of Article I, Section 9, could be read as requiring only that the responsible executive officials report expenditures to Congress. That would be a very strained reading of the word "publish". There is, moreover, no support for such a reading in the debates of the Convention or in the ratification proceedings of the States.² I have already observed that Mason and Madison made specific reference to the interest of the public in being informed concerning expenditures of the public money. Let me also point out that the Framers knew how to distinguish between the act of making information available to the Congress and the concept of publication. Witness the language of Article II, Section 3, stating that the President "shall from time to time give to the Congress information of the State of the Union. . . ."

The Framers also knew how to make an exception from a requirement of publication when they deemed that course appropriate. Thus, Article I, Section 5, Clause 3 provides that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy. . . ." The contrast between that provision and the requirement in Section 9 of the very same Article of the Constitution that there shall be published from time to time an account of expenditures of *all* public money is surely revealing of the Framers' position. Quite simply, they were of the view that the electorate had an unqualified right to know how much was being appropriated and how much was being spent by the various agencies of government.

¹ The legal issue has never been decided in the courts. It was raised in *United States v. Richardson*, 418 U.S. 166 (1974) but was not resolved, a divided Supreme Court ruling that the plaintiff lacked standing.

² On the contrary, it was assumed during the ratification proceedings in the States that there would be public dissemination. Such discussion as there was turned on the question whether the requirement of publication "from time to time" was sufficiently rigorous. See material noted in "The C.I.A.'s Secret Funding and the Constitution," 84 Yale Law Journal 608, 611 (1975).

The reason for that insistence on disclosure is no mystery. A revolution had been fought largely because of popular resentment of a distant sovereign who taxed and spent without public accountability.

I shall not try to address the question, "How detailed should the disclosure be?" Wisely, the Constitution does not seek to prescribe that. Accordingly, I have no doubt that in sensitive areas, Congress and the Executive may exercise discretion with respect to the degree of detail. What I do urge, is that the Constitution must be read as demanding, at a minimum, disclosure of the aggregate amounts appropriated for and expended by the various intelligence agencies. Without that minimal disclosure there is no accountability, no mechanism by which the electorate can gain the basic information upon which the most elementary exercise of judgment depends.

TESTIMONY OF RALPH S. SPRITZER, PROFESSOR OF LAW, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL

Mr. SPRITZER. Mr. Chairman, I agree with Professor Casper that the Constitution certainly does not answer the question, in what degree of detail must there be publication of receipts and expenditures of public money, but I think the Constitution and likewise the history made at the Convention does provide important guidance, first, as to the proposition that there must be a measure of disclosure, and second, that it indicates, I think, quite clearly, that that does not mean merely disclosure to the Congress by the Executive of amounts that have been expended, but means disclosure to the public so that the electorate is informed and can make judgments.

I am not going to seek to read the entire statement that I have submitted to the committee, Mr. Chairman, but I would like to emphasize a few aspects of the constitutional history.

The clause itself, of course, speaks to the expenditures of all public money, unqualifiedly, and then states that such receipts and expenditures shall be published from time to time. I don't think the requirement of publication can be readily reconciled with the idea, though the idea has sometimes been suggested, that publish means merely that the Executive shall make known to the Congress, and as I attempt to spell out in more detail in the statement, I think the constitutional history supports the reading that it means disclosure to the public, the normal connotation, certainly, of the word, publish.

George Mason initiated the discussion of this constitutional provision at the Convention, and he stated, as reported by Farrand in his Records of the Federal Convention, that the people "had a right to know the expenditures of their money."

Now, it is true that the proposal put forward by Mason, which in its initial form called for annual disclosure, was then modified to read as it now reads, disclosure "from time to time." That proposal, the amendment, that is to say, by Madison, has an explanation in Farrand's Report of the Convention. Madison reasoned that reports based on very short periods, and I now quote from Madison's statement, "would not be so full and connected as would be necessary for a thorough comprehension of them and detection of any errors. But by giving them"—that is to say, the reporting officials—"an opportunity of publishing them from time to time, as might be found easy and convenient, they would be more full and satisfactory to the public"—again, the reference to the public—"and would be sufficiently frequent."

I think it is evident from that comment by Madison that it was not contemplated that the disclosure would be years after the event, when it was no longer of anything but historical interest, the point that Professor Casper raised a few moments ago, since Madison suggested merely that the requirement ought not to be so rigid that it might not be conveniently performed, but there was certainly no notion that material was to be suppressed in the interests of suppression.

I have suggested that the normal connotation of these words in article I, section 9, is publication to the public, and I would point out that there are other provisions of the Constitution which certainly support that reasoning.

Thus, in article II, section 3, stating that the President "shall from time to time give to the Congress information of the State of the Union," one sees language calling for the giving of information, but not of publication.

I also note in the statement I have submitted to the committee the language of article I, section 5, clause 3, providing that:

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy.

In contrast to that, the language calling for disclosure of all public money makes no exception for secrecy, which I think is a revealing contrast. After all, both of these provisions come from the very same article of the Constitution.

Now, I don't suggest that the constitutional provision speaks to the question of how much detail must be given by way of disclosure. It seems to me if the concept of public accountability means anything, it must mean at a minimum there shall be disclosure of aggregate amounts. It seems to me further, and in this I am going for a moment beyond the statement I have submitted, that the committee might well conclude and the Congress might well conclude—that this is certainly a matter, as I would view it, for considered judgment—that certainly categories of informations might be given in particular circumstances without jeopardizing national security, but I would say that while the Constitution certainly leaves room for some accommodation with respect to the degree of detail, that the principle of disclosure is manifest, and that there should therefore be, at a minimum, disclosure of aggregate amounts, and beyond that, such further disclosure by category as is consistent with considerations of national security.

Senator HATHAWAY. Thank you very much.

Professor Emerson?

TESTIMONY OF THOMAS I. EMERSON, LINES PROFESSOR EMERITUS OF LAW, YALE SCHOOL OF LAW

Mr. EMERSON. Mr. Chairman, I will discuss the CIA budget as a model, but what I say will apply to budgets of other intelligence agencies insofar as the same procedure is followed as in the case of the CIA.

My study of this question leads me to two conclusions. First, that the present system of providing funds for the CIA is unconstitutional, and second, that the Constitution requires publication of the CIA line budget, though not in such detail as would make legitimate activities of a military or quasi-military character impossible.

Now, first, as to the unconstitutionality of the present system, it seems to me that it violates the Constitution in three respects. First of all, it does not comply with the first part of the statement and accounts clause article I, section 9, clause 7. Money is drawn from the Treasury and used by the CIA, not "in consequence of appropriations."

The procedure of appropriating money for another agency and then allowing that agency to transfer it to the CIA does not seem to me to constitute an appropriation to the CIA within the meaning of article I, section 9, clause 7.

Second, the present system clearly violates the second part of the statement and accounts clause. There is no regular statement and account of expenditures of public money. Now, that is obvious on its face. There is no statement of account. I think it is clear that no exception for total secrecy can be implied from the statement and accounts clause.

You will note, as Professor Spritzer indicated, that in the same article of the Constitution that contains the statement and accounts clause, there is also another article with respect to the publication of the journal providing that the journal shall be published from time to time. Now, those are the exact words used in clause 7 of section 9, publication "from time to time," and they are used also with respect to publication of the journal, but the journal clause specifically adds, "excepting such Parts as may in their Judgment require Secrecy."

The statement and accounts clause contains no such exception. It would be inconceivable that the draftsmen of the Constitution in the very same article, only three or four sections apart, used an explicit exception for the journal, accompanying the same wording, "published from time to time," but meant it to be implied in the statement and accounts clause. It seems to me most unlikely.

I take it therefore that one cannot really argue that there is any exception, nor does the legislative history suggest that there would be any exception because of secrecy. The only evidence that I can find with respect to that is a statement by George Mason in the Virginia Ratification Convention. It was a statement that in effect was denied by James Madison, and there is no other indication that the reason for changing "annual publication" to "publication from time to time" was in the interest of secrecy.

As to the matters mentioned by Professor Casper, that an early Congress allowed secrecy or provided for secrecy in one or two respects at the beginning of the early days of the Constitution, I cannot see that that history overrides the clear statement of the Constitution.

As we all know, practice, no matter how long it may have gone on, does not justify ignoring the provisions of the Constitution. In those days, constitutional issues of this sort did not get to the Supreme Court, and that was never challenged, but there is no reason to think that if as much as 14 percent of the budget was concealed from the American people, that was consistent with the purpose of the statement and accounts clause.

The purpose of that clause was to inform American citizens as to the policy in terms of expenditures made by Congress, and that one deviation does not seem to me to amount to a historical precedent that overrides the express wording of the Constitution.

I think that by and large it is accepted among the three of us, and I think probably generally, that the only basis for exception is an exception for national security. Now, on that, I wish to say that it seems to me that the explicit mandate of the Constitution requiring a public accounting cannot be ignored or defeated by a claim based on national security.

I call the attention of the committee to the case of the *United States v. United States District Court*, 407 U.S. 297, decided in 1972. In that case, the Government made the claim that it could engage in wire-tapping and other electronic surveillance in domestic security cases without regard to the provisions of the fourth amendment, and also without regard to the provisions of the Crime Control Act of 1968. Its argument was that by reason of its interest in national security, it did not have to comply with the requirements of the fourth amendment. The issues thus were almost the same. A constitutional safeguard inserted into the Constitution for the protection of the citizen could be ignored, according to the Government's claim, in the interest of national security.

The Supreme Court ruled unanimously—Justice Rehnquist did not participate, but the eight Justices who did, ruled unanimously—that the interests of national security could not override an explicit constitutional provision, and that the fourth amendment must be complied with. The language which they used there seems to me to apply equally here. Justice Powell's majority opinion said:

We recognize, as we have before, the constitutional basis of the President's domestic security role, but we think it must be exercised in a manner compatible with the fourth amendment.

There is no doubt about the authority of the Government to protect national security, but that power must be exercised in accordance with the constitutional requirements, including the statement and accounts clause.

Claims of national security as a basis for ignoring constitutional limitations have also been rejected in a series of cases which I will simply mention to the committee: *The New York Times v. United States*, 403 U.S. 713, which is the *Pentagon Papers* case; *United States v. Nixon*, 418 U.S. 683, the *White House Tapes* case; *United States v. Robel*, 389 U.S. 258, the *Industrial Security Program* case; and *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579, the *Steel Seizure* case.

In all of those cases, claims of national security were argued as overriding constitutional limitations, and denied by the courts. Consequently the claim of reliance on national security is not a valid one as such.

Now, there is a third argument which I want to present briefly to the committee, and that is an argument based on the first amendment. The structure of our Constitution is that the people of the country are the sovereign. The Government is subject to their command. "We, the people, do ordain and establish this Constitution," says the Preamble. In the words of Dr. Micklejohn, the people are the sovereign, the masters, the Government is the servant. It would be contrary to that whole structure if the people, the masters, the sovereigns, were not given full information with respect to the activities of their servants and full information necessary to direct the activities of their servants.

That is confirmed by the first amendment. In that respect, the first amendment is not only a statement of limitation on the authority of the Government to interfere with freedom of speech, but also, as Dr. Micklejohn says, an affirmative power granted to the people in order that they may exercise their function as sovereigns.

The Supreme Court has recognized the constitutional right of the people to know, in a series of cases beginning with *Lamont v. The Postmaster General*, 381 U.S. 301, right down to *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 96 S. Ct. 1817, in 1976. The Court has recognized a right under the first amendment to receive information.

Now, that right to know, that constitutional right to know, seems to me particularly applicable for two reasons among others. First of all, this is a question of money, and control over the expenditure of money has historically been one of the main methods for control over the executive by the legislature, and for control over the whole Government by the people.

Second, we are dealing here with the importance in a democratic society of controlling the secret police, a very difficult and delicate question, and one in which every power that can possibly be utilized by the people of the country in order to carry out that function is necessary.

My conclusion, then, is that the Constitution requires that the CIA budget be published, and as Professor Spritzer had said, that means making it available not only to Members of Congress, but to the public. Now, the further issue then becomes, in what detail must be the CIA budget funds be published? I submit there are two limiting principles that are consistent with the constitutional interpretation that I have given up to now.

First of all, there is the practical requirement. The framers of the Constitution realized, as one of them said, that it would be impossible to publish every minute shilling that was spent by the Government. Consequently, the same practices which generally exist with respect to publication of other budgets, using categories and so forth would certainly be applicable in this situation.

The second principle, I suggest, is one which is equivalent to that announced by Justice Brennan in the *Pentagon Papers* case. The question there was the disclosure of information which the Government alleged injurious to national security, and whether or not the Government could enjoin the publication of that material. Justice Brennan took the position that prohibition of disclosure on the basis of national security was permissible only when there was "Governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea."

The principle involved there, as I understand it, is this, that military operations are an area of national life where democratic values do not prevail to the same extent as in the main sector, and, consequently, some limitations can be imposed at that point. But the exception here would be very narrow, because the principle of civilian control over the military and civilian control over intelligence activities is also a fundamental tenet of any democratic state. That principle would demand

that secrecy in the military and secrecy in the intelligence activities be a very narrow area, a very narrow area in which the civilian state relinquishes its power to the compelling needs of military operations. And that would limit military secrecy to such things as the design of weapons, tactical operations of military units in the field, contingency claims for defense against hostile powers, and the like. It would not include withholding information on strategic or policy decisions, such as the decision to bomb Cambodia.

I think similar principles can be applied here. Where the CIA or an intelligence agency is engaging in operations similar to those mentioned by Justice Brennan of a tactical military or quasi-military kind, withholding of information may be permissible. But certainly the argument that anything can be withheld which the Congress or which the Executive considers to be a danger to national security is not compatible with the constitutional requirements.

We maintain a democratic state and a democratic society, and such societies operate on a different basis from totalitarian societies or other societies. There are certain things we cannot do under our Constitution. The requirement that information as to what our intelligence agencies are doing, in terms of the budget figures, is essential to the performance of the function of the citizen as the sovereign power in this country.

Thank you.

Senator HATHAWAY. Thank you very much, Professor Emerson.

Let me ask one question of all of you. In the *Richardson* opinion, the Court said in a footnote that Congress could grant standing to taxpayers or citizens, limited, of course, to the "case and controversy" provisions of article III. So there is a way we could get this matter decided.

Let me ask you, do you think that would be the best way to proceed?

The second question is, how do we do it in order to comply with the "case and controversy," provisions? Professor Casper?

Mr. CASPER. Well, Mr. Chairman, I think that footnote raises some very difficult constitutional questions. The Supreme Court has generally been very lenient in terms of standing granted by the Congress, and has not taken a very close look at the case of controversy requirement in article III in that connection.

I have some doubts as far as the constitutionality of such legislation would be concerned, but let me hasten to say that I think anyway that is not the best way to resolve the issues. There are some constitutional questions, like those involving the separation of powers, and particularly the relationship between the Congress and the Executive, the Congress and the people, in which the Supreme Court is not particularly expert. Of course, there is a whole doctrine the Supreme Court has itself developed—the political question doctrine—which explicitly recognizes that there are certain matters which the Supreme Court should not primarily decide.

It seems to me very important that the Congress recognize that in these areas it has the primary responsibility for interpreting the Constitution. The Supreme Court is a last resort. If it is available, fine. If it is not available, that is not too bad. The Congress must make its initial determination in public hearings like this. It has the respon-

sibility for interpreting the Constitution. It has as much responsibility as anybody else, and I think a statement after full consideration of the issues, for instance, before your committee today, which emerges out of the Congress in terms of what its views are on the Constitution, is, as far as I am concerned, probably almost—well, I am beginning to hedge—as authoritative, almost as authoritative, as a 5-to-4 majority on the Supreme Court of the United States. [General laughter.]

Senator HATHAWAY. I do not understand when you say this question can be resolved by the Congress. You certainly wouldn't say that for all constitutional questions.

Mr. CASPER. No, most certainly not for all constitutional questions, but it seems to me when we are in an area where the Constitution is somewhat ambiguous, and where one can argue that there is a primary commitment of responsibility to the Congress and the executive branch, as I think there is, with respect to questions concerning national security and the general appropriations process, the general accounting process, these are matters primarily committed to the other two branches, not to the judiciary, and where we have that situation rather than a question of individual rights, I would argue the primary responsibility lies with the Congress.

Mr. EMERSON. Mr. Chairman, I would say that almost without doubt Congress could amend the Freedom of Information Act in such a way as to open up to court interpretation all these questions. That is, it could amend the Freedom of Information Act to authorize any citizen to obtain information, some document in writing, and use the standards of the statement and account clause as the basis for what the citizen could obtain, and then allow judicial review of that in the courts.

I don't think there is any doubt that the Court under those circumstances would review the issue in terms of the constitutional requirements.

I would also add, however, that I hope that the Congress would not pass the buck to the Court. It seems to me, although I think in the end the Court may get into the picture, but it does seem to me that the Members of Congress have an obligation under the Constitution to enforce it as they see it, and I would, therefore, hope that the Congress itself would make the initial decision or determination on this issue.

Senator HATHAWAY. But Professor, I think we all recognize there is some ambiguity with respect to the constitutional provision, so why wouldn't it be a good idea to have it submitted to the Court? We don't know for sure what should be published from time to time. We do not know how much should be published. I think you agree that we disagree as to what should be published.

Mr. EMERSON. Well, the fact that it is a difficult constitutional question doesn't mean that each Member of Congress doesn't have the obligation to determine it for himself or herself. I think there is that obligation, even though there is a subsequent review by the courts.

Senator HATHAWAY. But then it could vary from Congress to Congress.

Mr. EMERSON. It also varies from court to court.

Senator HATHAWAY. They have a longer tenure, though.
Professor Spritzer?

Mr. SPRITZER. Senator, I would say the ambiguity of concern is not an ambiguity as to the constitutional requirement of publication, but rather an ambiguity as to what is the meaning of account. That is an ambiguity with which accountants may wrestle. It may mean different things under one regulation of the Internal Revenue Service to render an accounting and another regulation, and it seems to me that there may be, and I would say that there was, some flexibility at the joints that Congress can take advantage of in dealing with practical problems of appropriating and of calling for accounts from the Executive.

It seems to me since the functions involved are legislative and executive functions, therefore, that the primary, the initial responsibility in determining what is required by way of a fair compliance with the constitutional demand, how much the Appropriations Committee shall disclose and what to pay, is one that should be addressed by the Congress.

That, as Professor Emerson suggests, does not preclude the possibility of Congress devising a mechanism by which there could be ultimate Court review, but it seems to me that the question is one which calls upon the Congress to make an initial judgment, that it is more than ripe for judgment, that the confrontation of that issue should not be delayed for a matter of perhaps a year or two by simply devising a means of getting a test case.

Senator BIDEN. Mr. Chairman, may I ask a point of information? I apologize for being late.

Senator HATHAWAY. Surely.

Senator BIDEN. All three of you, as I understand, agree that there is an obligation to disclose an aggregate figure? The only controversy is the degree of disclosure of the accounts? When you say accounts, do you mean how much is accounted for?

Mr. SPRITZER. No; I mean detail, breakdown.

Senator BIDEN. Detail, breakdown. So it is not a question in your mind, Professor, that there is a requirement to release the aggregate figure, but it is the congressional judgment to make how much beyond that, if at all, is—

Mr. SPRITZER. There is no question in my mind. I don't know if I speak for Professor Casper or not.

Mr. CASPER. No; Senator. I have been hedging. It seems to me that if there were considered congressional judgment that disclosure of the aggregate figure would not serve the national interest, and let me stress, if there were considered congressional judgment—this is not a matter to be dealt with routinely—then I am not certain that there is a constitutional obligation.

Let me perhaps take the opportunity to address some of the criticisms which I heard on my left. They were friendly, to be sure. It seems to me that the relationship between the statement and account clause and the journal secrecy clause is indeed a more profound one, and that the conflict is not quite as easy to resolve by reference to the text as Professor Emerson perhaps suggested.

It seems to me that there is a good reason why the journal clause has an express reference to such matters which it would not be in the

public interest to disclose, and that is, if you order the publication of the journal from time to time, you have indeed ordered publication of the entire journal, all of the proceedings of the Congress.

In order to make it very clear that there can be secrecy if the Congress so determines, the Constitution has to expressly provide that there be such an exception for cases of secrecy.

Now, with respect to the statement and accounts clause, I think it was clear from the very beginning that the statement and account did not necessarily cover every expenditure engaged in by the Federal Government, and therefore there was by no means the same need to provide for secrecy exception. Also, to be sure, the framers were generally very careful to formulate in a consistent manner. But this provision, which was introduced very late in the Constitutional Convention, did not receive very careful consideration, and therefore I would not put too much trust in how it is formulated by comparison with other provisions.

There is one other point, and that is the argument that national security cannot override the express language of the Constitution. I am not famous for advocating before the Congress that national security can override the express language of the Constitution. But is there an express requirement?

The point is, what is the requirement? I think that question has to be answered with a lot of congressional judgment going into it.

Mr. SPRTZER: If I may take a moment to express my sharp disagreement with Professor Casper on this point, I would like to do so.

I think one can say that there is ambiguity as to the meaning of the word "account." I can call on my daughter to tell me how much she spends each week at school, and accept an aggregate figure, or maybe I can call on her to give me a receipt which shows how much she paid for her sandwich and a drink each day of the week. Now, surely there is ambiguity there, and there is a difference in the detail in accounting that the Congress now requires or now puts forward in the budgets. There is less detail, I think, in the Defense Department budget than perhaps in an independent agency budget, but I certainly cannot subscribe to the suggestion that the constitutional provision is not explicit in one respect.

It does say, "expenditures of all public moneys shall be published from time to time," and all does not mean "some". So, at a minimum, I think the constitutional provision on any reading does require, at the least, to respond to Senator Biden's question, as I read it, and I don't see how anyone can read it otherwise, that the aggregate figures be made public.

Senator HATHAWAY: If that is true, wouldn't it be a matter of just categorizing the various expenses? If we take our focus off the intelligence budget, and we say, "Reveal the entire defense budget," intelligence is part of that and we would not have to reveal the intelligence part. We would be revealing a whole category, "defense." And we would just reveal the whole category of "education," the whole category of "health," and we would not have to break it down. It would be just a matter of manipulation of what you call the categories. We could just rename all the categories and in that way not reveal the intelligence budget.

Mr. SPRITZER. Well, I think the requirement of accountability, Senator, does mean that there should be a meaningful disclosure.

Senator HATHAWAY. Well, our categories could still be meaningful even though they change. We are not wedded to any particular categories.

Mr. SPRITZER. I would agree with that, but what I would think would not be consistent with the concept of accountability is to conceal the fact that money was being appropriated for intelligence by saying it was being appropriated for welfare payments.

Senator HATHAWAY. No, I don't mean that. I mean, intelligence is an integral part of the defense budget, and we reveal the entire defense budget, but the breakdown does not show "intelligence".

Mr. SPRITZER. Well, I don't know how that would apply in the case of the Central Intelligence Agency, which is certainly a separate agency, but I would go beyond that and say that where there is not a compelling need for refraining from giving some detail, that some detail should be given. After all, the purpose of this is to permit informed judgments by the electorate and by the other Members of this Congress.

Senator BIDEN. Before you leave that point, to follow up on Senator Hathaway's comment, you said, "Professor, it should be". Is it a constitutional imperative, or is it your subjective judgment that you think we should?

Mr. SPRITZER. I think it is a constitutional imperative that there be an accounting and that there be disclosure, but I don't think one can say that the Constitution itself prescribes the precise degree, and I think one could rationally distinguish in deciding what the degree of disclosure shall be on the basis of the topic that is involved, the subject matter.

Senator BIDEN. Isn't it true that the Central Intelligence Agency, is an integral part of our defense structure? I am a proponent of disclosure, and so I am good at making the other argument because I get presented with it. Is it any different to say that the CIA budget is within the Defense Department, we are going to give you no detail of it?

Mr. SPRITZER. I would not think it was adequate disclosure to give an aggregate figure for the Defense Department as a whole, when it appears that there is no serious obstacle to breaking that down into some further category.

Senator BIDEN. On public policy grounds or on constitutional grounds?

Mr. SPRITZER. On constitutional grounds, because it seems to me that the requirement of disclosure, the idea of accountability requires giving such information as will enable people to make informed judgments. Now, there are limiting features.

Where there is no reason to withhold information, then it seems to me that some greater detail is required.

Senator BIDEN. Failure to give detail, are we able to bind the executive branch? For example, if we appropriate moneys and we don't publish the detail of the moneys we appropriate, are we capable of binding the executive branch to expenditures of a specific nature without our giving a public disclosure of the detail of the expenditure?

For example, we've got a secret budget in effect we know we are going to be voting on. Now, we all know what it is, but the budget resolution which we are going to be voting on today is essentially a secret budget. It says in it, if you read the budget, the authorization legislation—am I using the correct term? I have to ask staff about that—the authorization document—does anybody have a copy of it?

MR. MAXWELL. We can't show it around.

Senator BIDEN. No, you're right. Even if we had a copy, even if we agreed that we were going to decide to disclose the aggregate figure today, you can look at that, and one of my concerns now is, we are going to be passing a budget that we ask the rest of the Congress to look at that is one paragraph or two paragraphs. It is one sheet of paper. It is not anything like the detail of what the specific expenditures are. Can we bind the executive branch by a secret authorization bill?

By the way, I am out of order, aren't I? I am sorry.

Senator HATHAWAY. Yes.

Senator BIDEN. Well, come back to me.

Senator HATHAWAY. Senator Wallop?

Senator WALLOP. Mr. Chairman, after listening to this, I can only say, my goodness, Lord help this country if the accountants join the lawyers in working out the ambiguities. I can't believe that is the proper way to go.

I would make one other comment. I really feel pretty strongly about it. There was a statement I think that you made, Professor Emerson. It just seems typical of this country that money alone is the guiding principle, as you say, in whether or not there is accountability. I find it difficult to accept that. I am not a lawyer, and I am grateful for a few things in my life, and that is one.

Let me ask any of the three of you, over the course of history, have not there been different interpretations of the Constitution which were relevant to the era in which the country found itself?

MR. CASPER. Well, Senator, most certainly. However, by itself that fact does not resolve our problems, because clearly every generation has to go back and contemplate anew what the constitutional commands are, and each generation is as qualified as is the previous generation to make that determination.

Now, it is frequently argued, of course, that the Constitution is infinitely adjustable to the needs of whatever period we are in. I am not a believer in that theory. I do not think that is true. The Constitution can be amended. The Constitution, where it is flexible, does obviously make it possible to adjust, but basically the Constitution has to be interpreted in terms of the original intent.

Now, mind you, the original intent is often very unclear. Justice Jackson once said in a very famous formulation that to determine what the framers intended was as difficult as the task Joseph faced when he was to interpret the dreams of Pharaoh. The original intent is often very enigmatic, but nevertheless we have to return to this original intent at all times.

I think we have just gone through a period where various attempts like the Budget and Impoundment Act, the Emergency Powers Act, the War Powers Resolutions, constitute such attempts at reinterpreting

the Constitution undertaken by the Congress. By the way, the Supreme Court is no better than the rest of us at interpreting—if you don't quote me, please—the Supreme Court is no better than the rest of us at interpreting the Constitution.

Senator WALLOP. But my point is, and I agree with you that you don't use that as an excuse for reaching your own particular heaven, but it seems to me that it was inconceivable during an era in which the Constitution was framed that the people could look at the types of world threats and intelligence capabilities that there are now, and Dr. Spritzer, you mentioned that in order to satisfy the Constitution you have to give a meaningful accountability. Well, if it is meaningful to the public, it has got to be meaningful to the enemy, and is there not then a consideration of national security that can enter into the judgment process?

Mr. SPRITZER. I mean meaningful in terms of descriptive category, calling intelligence activities intelligence activities, and not calling them public welfare payments.

Senator WALLOP. Well, we don't.

Mr. SPRITZER. Meaningful can mean different things, depending on what we are talking about. I don't mean that the CIA would have to put into its account of expenditures whether it has spent money on a particular covert operation in a particular country. That might be meaningful in another way. I am talking about accountability of money, of the category of activity, not the detail of activity that is involved.

Senator WALLOP. Well, I guess I find it difficult in my own mind to see that that is very satisfactory, to put a lump figure out there and say that you in some manner or other have satisfied the constitutional requirement.

I would like to ask you, Dr. Emerson, can you conceive of any secret you are talking about, the people, the sovereign, and the Government the servant—and I am in here on that basis, and I am willing to accept it—but can you conceive of any secret that the Government of the United States, the Congress or any other, can keep from the people in defense of freedom, when you come up to that line?

Mr. EMERSON. Well, Senator, in response first to your original question, I think it is much more important now than when the Constitution was adopted to enforce the statement and accounts provision. At the time of the adoption of the Constitution there was no CIA, there was no institution in our Government that could commit the American people in the way that the CIA can.

Senator WALLOP. Well, at the time of the Constitution, there was no KGB and there was no Russian threat of similar proportions, either.

Mr. EMERSON. That is correct, but in terms of the original intention that the citizens of the country should know what is going on, and have some part in the determination of basic policy questions, it seems to me developments have made it even more important than at the beginning. I did say there are some situations in which, assuming the CIA is carrying on legitimate activities, a temporary secrecy or perhaps a permanent secrecy would perhaps be justified. Those would be very narrow. They would be limited. It wouldn't make sense to say

that names of all of the agents or informers had to be published, or matters of that sort, or matters of immediate operations. But in general I would say enough has to be published so that the basic intention of the Constitution will be carried out, that enough has to be published so that the American people will know, or can understand, what is going on in the country. The budget is only one part of this, of course. The budget does not tell more than the amount of funds allocated to a certain operation.

Senator WALLOP. Let me just close with asking this question of the three of you then. Who is to make the interpretation? Are you saying that the judgment has to be very narrow. Who is to make the judgment as to the breadth of that interpretation, if not the servants of the people?

Mr. EMERSON. Well, of course, yes, you make the interpretation. The Supreme Court may come in at a later point, but you make the interpretation. You make it under an obligation to comply with the Constitution, the purpose of which was to inform the people of important developments that the Government was undertaking.

Senator WALLOP. Thank you.

Senator HATHAWAY. Senator Biden?

Senator BIDEN. I yield to Senator Bayh.

Senator BAYH. Professor Casper, I missed part of the discussion, but I seem to sense that you are not certain in your mind as the other two distinguished gentlemen, that you at least arrive at a position which you feel would not require as much exposure constitutionally, if any, as they do.

You mentioned that the Congress has to decide what the requirements are. What do you think they are? You have read the newspapers. Unfortunately, or fortunately, I guess, most of the things that are existing have been on the front pages of the newspapers. You can assess that. You have studied the constitutional question. You are a concerned citizen. What do you think they are?

Mr. CASPER. Well, Senator, I assume you are addressing me not as an expert because I really have no special expertise on that question. I was hedging on the major question because I think ambiguities are exactly that—ambiguities. I cannot with finality resolve them for you, and I was going as far as I could go as a constitutional expert.

Senator BAYH. May I just interrupt? Professor Spritzer does not feel there is ambiguity in the use of the word "all." You didn't have a chance to respond to that. "All" is rather definitive.

Mr. CASPER. Thank you, Senator. I am delighted you are giving me that chance, because it seems to me that "all" means all expenditures and receipts; but "all" can here refer very easily to the total which has to be accounted for in one way or another, and I think that Professor Spritzer and I do not have that much disagreement, in that he and I both take it that there is fundamental constitutional discretion as far as accounting categories are concerned.

Now, if I may return to a point Senator Wallop made earlier, in the early statements of accounts and expenditures published by the Treasury in the 18th century, the expenditures were for categories as vague as the War Department, "\$1.2 million for the War Department." That was the accounting which took place in that early period, and \$1 million was a very considerable amount of money.

Now, it is quite clear to me, if I may repeat, that the Congress and the executive branch may not cheat on the public. They may not use one category and then really in secret transfer the amounts of moneys involved there to another agency, such as the CIA. On the other hand, in the President's budget, Senator Bayh, there appears a breakdown of expenditures by functional categories; for instance there is a category for intelligence and communications, \$9 billion, I think, in 1974—I don't quite remember.

Now, I do not know whether that includes all of the intelligence expenditures. Obviously, it must include some, but I cannot say with certainty that the Constitution demands a more explicit accounting than \$9 billion for intelligence and communications.

Now I will leave my role as an expert and be more directly responsive to your question, but I want you to understand that I am just speaking in a very ordinary way here. It is a matter of judgment which involves the importance of the intelligence category for public policy in general. Given the high degree of controversiality surrounding the intelligence budgets, this is a matter where indeed the public may need some accounting.

It certainly, I think, is a matter which in part depends on the amount of money involved. As I said in my statement, if the Congress accounted in terms of \$100 billion for defense, for national defense or national security, that is no accounting. In part, that is a function of the vagueness of the category, national defense.

In part, however, that would be a function of the huge amount of money involved. Once you account by \$100 billion, you are not accounting any more.

Now, I am not privy to what is involved in intelligence budgets. Let us assume the figure was around \$7.5 billion. Is this a large figure or not? It is in some ways a very large figure, but as I this morning walked up to the Capitol Building, Senator Bayh, I passed by that Reflecting Pool, which you have had for a few years now, and a sign put up by the Department of the Interior told me that the cost for that Reflecting Pool had been \$2 million, you know, this little puddle of water that you have there.

Well, I do not know whether \$2 million or, indeed, \$7.5 billion is a very large amount. It seems to me that once we come to something approaching 10 percent of the entire defense budget, it should probably be accounted for.

Let us assume this leads us to the judgment there should be disclosure of the aggregate figure. Now, Senator, frankly, since you are not addressing me as an expert, I don't know what the significance of the figure is. If you tell me that the United States spends \$8 billion a year for intelligence, I am a pretty well informed person generally, and I wouldn't know what to do with that figure. In that \$8 billion figure there is a lot of expenditure for hardware, satellites, and so on. As we have been told in the disclosures in Newsweek and other newspapers, the CIA budget amounts to something like \$750 million. That is very small, a very small amount in relation to the other.

Whether you are doing your job in supervising the intelligence expenditures and making sure there is no waste, I will not be able to determine by being told that the expenditure overall is \$9 billion. I

think it is important to disclose the \$9 billion, but really not for the purpose of informing the public, but for the purpose of more rationally controlling the appropriations process, which is a different question.

For those purposes, I think it is quite important; but I am by no means opposed to disclosure. I would like as much information about anything as can be given without endangering national security. I am no judge of what endangers national security. I am no expert on that, but once you have decided to disclose the figure of \$9 billion or \$7.5 billion, you still have not told me very much.

I would know quite a bit if you were willing to go to line items, but nobody is willing to go to line items, and really nobody has made an argument here this morning that there is a constitutional obligation to disclose line items.

Professor Emerson came closest to it by his reference to the language in the *New York Times* case, but I think very few other people would take that position.

Senator BAYH. Let me ask a followup on that. I suppose this could be directed at Professor Spritzer and Professor Emerson as well. We have a situation where they assume more strongly than you that there should be publication, so I am asking them to explain how much, and ask you if this would be in the category that you would say, yes, to disclose.

We have a situation where in the defense budget we are squirreling away or secreting away funds that are used for intelligence purposes which on the one hand denies the public the right to know what is being spent for intelligence, but on the other hand it gives them a misconception of how much is being spent on procurement, how much is being spent on operation and maintenance, how much is being spent on personnel.

This is further complicated by the fact that although the Secretary of State does have a particular aspect of his budget which on top of the table is described as secret. There are other parts of the intelligence-gathering mechanism of this country that are used by the Secretary of State for foreign policy and really should rightly be part of his budget beyond that which is specified in the secret category. The President uses this intelligence for a wide variety of areas. Drug enforcement is one thing that comes to mind where intelligence gathering agencies are involved. Other examples are energy policy, trade policy, how to handle dumping questions.

It is used both commercially and in the Government. How do we sort this out so it does have meaning? How much detail would you gentlemen require? Would you say that each of these agencies of the Federal Government that uses intelligence facilities should have a separate component there where you don't have the line item, Professor Emerson, unless you want to go that far? Or would you just leave it in one lump?

Mr. EMERSON. My answer to that would be, and I think we all agree, all three of us agree, that the present system by which the appropriations are made through another appropriation does not satisfy the Constitution. I think we are all agreed on that.

On the question of detail, Senator, I tried to enunciate two principles. I am not sure whether you were here at that time. One is, of

course, the practical one that the combined statement of the Treasury Department cannot publish everything down to the last cent, and therefore you have to use common sense with respect to that. But that, I think, is a totally different question, a totally different question, from the one that confronts this committee.

Otherwise, with respect to the amount of detail, my position is that it has to be a line budget, with the exception that in those situations where, in effect military or quasi-military tactical operations are involved, the amount need not be produced. Beyond that the interests of national security are not sufficient to overcome the express requirement of the Constitution. We have a constitutional structure in which the Government certainly is required to protect the national security, but it can do that only in certain ways, and one way we cannot do it is by concealing expenditures for intelligence activities.

Senator BAYH. May I just deal with two or three hypothetical examples to get further enunciation of your second point? I think we face the first problem in every other budget procedure, do we not, in the Government?

From the standpoint of your second point, let us just take a few hypotheticals. The Secretary of Commerce uses intelligence data to know how to deal with unfair competition from other nations that are competing with our firms by dumping. Let us assume that the Drug Enforcement Administration uses intelligence data to come to grips with heroin and cocaine and some of the other drug problems. Let us assume that a new Secretary of Energy uses intelligence data to determine what the real reserves are in this country, or to find out whether certain embargo policies or potential embargo policies will impact on this country, and how to defend ourselves against that.

Now, those are all three out of the technical definition of defense. They have an impact, I suppose, some of them, on our national security. How would you list those?

Mr. Emerson. I think all of those facts should be available either in the Appropriation Act as passed or in the combined statement. It does not make too much difference how the Government makes the material available, but I think all of those are of great significance to the American people. The American people want to know how many people are looking over their shoulders and how much money is being spent for various, and in many cases certainly worthwhile, projects by way of simply collecting information. All that is very important at this time in our national life.

We have seen from Watergate what can happen in those situations where the Government simply ignores constitutional requirements or collects information and puts it into computers. That whole problem is one of the major questions that is confronting the American people today. If we are to preserve an adequate degree of privacy in the face of an enormously expanding governmental function, we must know how much money is being spent to look after our affairs, to be put into computers and taken out on the pressing of a button.

That is a major question. I would say all of that information is very important.

Senator BAYH. Professor Spritzer, how do you come down on that?

Mr. SPRITZER. Unless, Senator, one had a uniform system of accounts for Federal appropriations and expenditures, and I am not suggesting we should have, it seems to me that all kinds of practical judgments are going to have to be made as to the detail, as to the degree of disclosure, and that is not only true of intelligence activities, but of all of the hudgets with which Congress' committees deal.

I think those practical judgments have to be made by Congress, and I think that the concept of accountability is not so rigid, and certainly it is not self-defining and the Constitution is not so rigid that Congress cannot exercise those practical judgments. I think the committees of the Congress are much more informed and better able to address those questions, those practical questions, than we three sitting here.

What I would say as a guiding principle, however, is that the idea of accountability indicates to me that there ought to be a presumption in favor of disclosure. I also think it plain that nothing ought to be hidden or mislabeled. The question resolves itself to the matter of the degree of the disclosure.

Now, Professor Casper has suggested earlier that if considerable detail is not given with respect to disclosure of moneys spent for intelligence activities, that it may be difficult to appraise the information. Well, that is true, but if it comes to a question of whether the public ought to know whether the CIA, let us say, is spending \$1 million or \$750 million a year, I don't think we ought to have to depend on newspapermen's speculation as to what the figure is. I think there is an obligation at a minimum to provide what information can be provided without hazard, and that would include at a minimum aggregate figures and perhaps broader categories breaking down those figures as well.

I don't know that I feel that I have any qualification to be more specific than that.

Mr. CASPER. Senator, can I respond to your hypotheticals? It seems to me that the answer to your question is, "disclosure has to be made." It has to be shown that the Commerce Department or the DEA spends so many million dollars for intelligence purposes. There is nothing sacred about invoking the term "intelligence."

The point is, disclosure may not be necessary in detail if it is the considered judgment of the Congress that it would endanger the national security. I cannot believe that these intelligence expenditures, the knowledge of those amounts by the general public would endanger the national security. Commercial intelligence, for instance, for the purposes you describe, to find out about dumping activities of other countries, I cannot believe that this information should be kept from the public or that that publication would endanger the national security. So on that, I have absolutely no reservation at all.

Senator BAYH. Thank you.

Senator HATHAWAY. Senator Garn?

Senator GARN. Gentlemen, I am sorry I came in lato, but this is a hazard of the Senate. We have been in Armed Services markups.

I am rather concerned about some statements I have heard in just the few minutes I have been here. Mr. Emerson, you said that the American people are tremendously interested in all of this information.

They need to know, they want to know. Do you really believe that they are really interested in this particular figure? Because I would be willing to bet you if they understood the whole thing and the possible implications of this, I can't believe the Constitution requires us to self-destruct, to give so much information.

I would be willing to bet that if you wanted to conduct a poll among the American people, I would bet the choice would be, "Hey, keep it secret, we don't want to know, if it is going to endanger," because the American public, in my opinion, is not that interested, particularly the average citizen. Walk out on the street. Ask them if they care about the CIA budget, particularly when you tell them it may—it may—endanger national security to disclose it. But I think there are some people who are very interested in having it who can determine a great deal from it.

Mr. EMERSON. Well, Senator, I think the answer to the poll would depend on how the question was put to them. If you simply said in the poll, "Do you favor the disclosure of information that would damage national security." I suppose everybody would say no, or a large percentage would say no. But if the full implications of what is involved here were made clear to the American people, I have no doubt that they would say, "We do not want our intelligence agencies to be given a totally unknown figure to do anything they want to do, and to get this country in such situations as we have been involved in, from Guatemala to Angola, without having something to say about it." I don't think there is a person in this country who would not say, "I want to have my say before we get involved in another Vietnam, or before we get involved in Angola, and so forth." This is only one part of that problem, of course, with respect to the budget. It goes beyond this, but on that I have very little doubt.

Senator GARN. Well, I disagree with you completely. As I said yesterday, we have a committee now which has more detailed information than has ever been known. We don't know just line items. We know all of it now. It has all been disclosed to this committee as an oversight committee, elected representatives of the people, and I simply disagree with you there.

Mr. EMERSON. Senator, that was not what the statement and account clause says. It does not say that the accounting should be made to the Congress. It says, made public, to the people.

Senator GARN. Well, I am not convinced it says that, and I am fortunate enough not to have a legal education so that I can look at the forest sometimes rather than the trees.

We also talked about hiding the money in the defense budget. Is it not conceivable that intelligence has something to do with defense, and that maybe it is appropriate that some of it be in defense? Because I would submit to all three of you that without an intelligence community, the defense budget would have to be a great deal larger.

I just came from a meeting about a shipbuilding program. If we didn't have some information about what the Soviets and others are doing with their military expenditures, I'll guarantee you, we would have a lot bigger defense budget and appropriations and procurement of military equipment, because we would be operating blindly. So, isn't intelligence to that extent a good part of a defense budget?

Mr. EMERSON. Yes; certainly. There is no doubt about that. The only question is whether it is kept a secret or disclosed, the amount. All we are talking about now is the amount of funds. Of course, it is an integral part of our defense program. There is no doubt about that.

Senator GARN. You made some other comments about tying this in with Watergate and all sorts of things. The FBI budget is disclosed, is it not?

Mr. EMERSON. Yes.

Senator GARN. We are not talking about domestic security—and in domestic intelligence Senator Bayh and I are chairman and vice chairman of the Rights of American Citizens at work on wiretap bills—and I think there is a very different distinction, and I do not want the implication left that the CIA is involved in surveilling American citizens any more. This committee certainly does not want that to happen. We are talking about disclosure of foreign intelligence figures here, not domestic, and I don't want that implication left from what you have said. We are not, because the FBI's budget is disclosed, and that is their responsibility.

Mr. EMERSON. I don't think that the FBI would agree that it has nothing to do with national security.

Senator GARN. I am separating domestic and foreign intelligence. There is a considerable difference between the two.

Mr. EMERSON. Yes; I think there is a difference between them, and my arguments are even more applicable to domestic security than to foreign security problems. The fact that the FBI can do this indicates that the danger to national security is not that great.

So far as foreign security is concerned, I call your attention to the fact that the safeguards in the Constitution are fully as applicable with respect to the exercise of governmental powers in the foreign field as they are in the domestic field. The Supreme Court, in *Reid v. Covert* and in other cases, has held that the constitutional protections to the individual in the Constitution cannot be ignored or defeated on the basis of foreign security powers. Therefore, the same constitutional argument applies.

I would also say that the interest of the American people in knowing what our foreign policy is and what we are doing abroad is as great as it is elsewhere because it involves matters of life and death and war and so on. There are some situations, as I said, as in the case of the military, as in the case of counterespionage, where it does not infringe upon the democratic system to conceal information. But those, as I say, would be very narrow and would not involve the amount of funds that were being expended in covert operations, for instance.

Senator GARN. Well, that is a question I wanted to ask you. Do you assume there is some basis for keeping military secrets? We certainly have kept them in World War II and others, and no one challenged the constitutionality of endangering the country by disclosing that information. Now, are you telling me that you think that intelligence is totally different in the foreign area?

I am not talking about the commercial intelligence that Senator Bayh was talking about. Where in the Constitution does it separate that? Where do you legal beagles come up with these wonderful separations?

Mr. EMERSON. Well, Senator, the statement and account clause is absolute. It says, all money. It doesn't say anything about secrecy. It is absolute on its face, and if you want a literal interpretation, it would mean every penny.

I said that, just as in the case of military operations, there is a certain element of military activity which you cannot fit into a democratic system, and I think the same applies to foreign espionage, and so on. There are certain limited exceptions for quasi-military operations. Those are very narrow in the military field, design of weapons, tactical military operations in the field, and so forth.

I think that is the place at which you draw the line. That is a principled position. The principle is that the democratic system allows that limitation on the disclosure requirement, because you simply cannot operate an army in a military conflict without keeping some secrets. That is the principle which should govern the committee, not that everything can be concealed which affects national security.

There are many ways in which to protect national security, and I think we have done a pretty good job. I would certainly discount about 90 percent of what the heads of the police institutions say when they feel that national security is being jeopardized, as in the *Pentagon Papers* case. There the Government came in and swore in pleadings and affidavits that the Pentagon papers would cause immediate, irretrievable and irreparable damage to the national security. It just turned out not to be true.

I think that in estimating national security we are very much inclined not to go behind these statements, these broad statements that are made to us by the heads of the agencies that are concerned with that. But that is a somewhat different question, because the principle is not national security. The principle is what conforms to the democratic process.

Senator GARN. Well, I find it very difficult to come to grips with where you draw the line. How can you almost totally exclude disclosing intelligence amounts at one time but not at others? Even though you say that technically the Constitution refers to all money, you can find some place for secrecy in the military area, but it is difficult for you to do so in the intelligence area.

Mr. EMERSON. No, I didn't say that, Senator. I was just drawing an analogy with the military. The principle I would use is very similar to the one that Justice Brennan used with respect to the military in the *Pentagon Papers* case. I don't distinguish between those two.

Senator GARN. Mr. Spritzer, you mentioned the constitutional requirement for disclosure so the public can evaluate more soundly. In all the management I have been involved in in my lifetime, I don't see how the aggregate figure can be of any help whatsoever, in regard to your statement that it would help them evaluate without knowing the quality of the product gained for the expenditure of their money.

Now, I can look at HUD and I can see where the money is being spent, and I can see the miserable product that HUD creates in a lot of cases, and I can evaluate whether HUD is performing or not. But, it would seem to me that you have only got half of it here; therefore, it becomes rather academic, because I don't think any one of the three of you would argue that we should disclose all of the intelligence product

gathered so the American people could put that together with the budget and make a sound evaluation.

Mr. SPRITZER. Senator, I don't believe you can go from the premise that it may be impracticable in some cases to give all the information to go to the conclusion that you ought to give none. I think the presumption is in favor of disclosure. I think the Constitution requires at least the disclosure in every instance of aggregate figures.

Now, I agree with you completely that in order to make a real appraisal as to whether the CIA is doing a great job or a poor job, you have to know a great deal in detail. I am not suggesting that the Congress can disclose that or should. I am suggesting that the presumption has to be that you disclose as much detail as you can without harm.

The presumption is in favor of disclosure, and the burden of not disclosing is on those who oppose, it seems to me, and it seems to me that one does not have to be a lawyer to get that out of the language that expenditures of all public money shall be published. That is pretty clear language.

Senator GARN. They are. We are just not saying that they are not an agency. I find it difficult as a nonattorney to believe that the founding fathers of the Constitution were going to know that we had HUD, HEW, CIA, and all these agencies. I am sure they would have been horrified if they had known, but the point is that in the total budget of the United States, all moneys are disclosed.

And so on your argument, we had better break down every single penny of everything that is spent and see if we can get the American people to——

Mr. SPRITZER. No, no.

Senator GARN. Well, that is what you are telling me.

Mr. SPRITZER. No.

Senator GARN. Well, why are you singling out the CIA, the intelligence community, that that should be disclosed?

Mr. SPRITZER. I singled out the CIA——

Senator GARN [continuing]. Answered in the total budget figures that are disclosed?

Mr. SPRITZER. No, that is not any kind of an account, to say that the U.S. Government spends \$100 billion a year doesn't give the electorate any information as to what it is going for.

Now, you don't have to go from nothing to everything.

Senator GARN. You have a very complete budget book. Have you ever read it?

Mr. SPRITZER. I have read parts of it.

Senator GARN. Did you ever have a great desire to know all of that?

Mr. SPRITZER. I have been before appropriations committees, Senator, and I have read parts of it. What I am saying is that an aggregate figure doesn't give as much information as a broken down figure. I am saying that you can make many different judgments as to how detailed an account should be given. Accountants will make different judgments as to how they will draw up accounts. Accountants will differ as to what a company's balance sheet or statement to regulatory agencies should contain. Congress can't avoid those judgments either.

But I think there is a presumption that there ought to be disclosed such information as is available and can be disclosed without demonstrable harm.

Senator GARN. OK, there is where we get down—yesterday I said that frankly I am not sure that the aggregate sum would be particularly damaging, but I will take a presumption on the side of caution for the security of this country, and that is my point, Mr. Emerson, about the American people, and I think they would, too. I don't think any of you are intelligence experts, and neither am I. Mr. Casper, you said you were not, you didn't know. You didn't think, you couldn't imagine that this would harm. But you have got some intelligence experts who are not the career-type police officers, who have been career Government and they have served for 2 or 3 years as head of the CIA, who would love to know what the KGB's aggregate budget was. They will tell you that if you know the heating bill at Langley they can figure out pretty accurately how many people work out there.

I have been absolutely staggered by the capabilities of these experts, and I am not talking about police types. I am talking about Ph. D.'s who sit in their offices and analyze the information collected. They are not 007's. They are not out killing people and involved in all these wonderful worlds of secrets. They are very highly trained, highly skilled people, and their deductive powers are rather startling to me when I see what they can determine, and so I happen to go on the side of caution. I don't know much more about it than you do, Mr. Casper, but I would suggest that before you make statements that you absolutely cannot believe that anything could be gleaned of any harm to the United States, you might spend a little time finding out how these Ph. D.'s can determine such things.

I am not saying they are all right, either, but at least for my vote, I am going to vote against disclosing, even if I am a little bit wrong, because I don't want to endanger the security of the United States for a figure that is meaningless to most of the people of the United States, and only of interest to some groups and some who would be against this country.

Senator HATHAWAY. Senator Biden?

Senator BIDEN. Thank you, Mr. Chairman.

I feel compelled at the outset to admit that both Thomas Jefferson and I were lawyers, are lawyers.

Senator GARN. Joe, you and I have had this argument for so long.

Senator BIDEN. Well, the only reason I mention it, Jake, is that your colleague from Wyoming was also bragging about not being a lawyer.

Mr. CASPER. Senator, I am worried about the future of American law schools if this attitude gets generally shared in the country. I was glad to see that the Senator has more respect for Ph. D.'s.

Senator GARN. Not much. [General laughter.]

Senator WALLOP. Joe, I only said I was grateful that I wasn't a lawyer. I didn't say I was grateful that there weren't lawyers.

Senator BIDEN. You sound like a lawyer. [General laughter.]

Senator MATHIAS. Mr. Chairman, as one lawyer to another, would you yield?

I have to leave and I just have one other question.

Senator HATHAWAY. Well, we all have to leave in a minute.

Senator BIDEN. Well, I can ask my question for the record. I have got to leave for hearings on the Zimbabwe relief fund, and I will ask my questions for the record, Mr. Chairman.

Senator HATHAWAY. You certainly can.

Senator BIDEN. If that is OK. I have to go, too, and there is no question. I can put it in. I have already interrupted once.

Senator MATHIAS. Well, the question I wanted to raise was just this: Do you think this committee has the authority to disclose any figure, whether it is an aggregate or a single figure, or in detail? Or do you think that that is the responsibility of the full Senate?

Mr. CASPER. Senator Mathias, my answer would be that you must resort to the full Senate. I do not think that the committee can exercise delegated authority. That is, it is the responsibility of the Senate to decide whether and what kind of accounting is to take place. It is a constitutional responsibility, indeed of the Congress as a whole, and I do not think that authority and responsibility can be delegated to a single committee of the Congress.

Senator MATHIAS. Gentlemen, do you have any comment?

Mr. EMERSON. I am inclined to agree. I think there seems to be a serious constitutional question that should be answered by the whole Congress. Of course there is a good deal that will be presumed to be delegated to this committee to do. Within that framework, I am sure they can operate, but I am sure anything which they feel is of major constitutional importance would be a question for the whole Congress.

Mr. SPRITZER. I agree with what Professor Emerson said.

Senator MATHIAS. That was my feeling last year when I made a motion that this question of disclosure be referred to the full Senate. Then because of the creation of this committee, that question was never addressed by the full Senate. So it is still in the hypothetical state. But when I made that motion last year, the incumbent administration was much opposed to any figure at all. Now we have an administration that says it does not oppose the publication of a single, aggregate figure.

Does that alter this particular question in any way?

Mr. CASPER. In terms of the overall position I have tried to develop here this morning, Senator Mathias, I think the position taken by the administration is obviously of importance to the deliberation of the Congress, obviously enters the congressional judgment, but by itself is not dispositive of this matter. The responsibility for appropriations for the detail of an appropriation, and indeed, as I tried to argue at length in the earlier part of my statement, the basic responsibility for statements and accounts is primarily a congressional responsibility, and indeed, the major function of the statement of accounts clause, contrary to what many people believe, is not, I think, to make the executive responsible but to make the Congress accountable.

So I think the administration's position is of great importance, obviously, because they have a lot of expertise on these matters, but it is not dispositive.

Mr. EMERSON. I would say, Senator, that in the absence of legislation, each branch of the Government has the obligation to comply with the Constitution as it sees it, and therefore the executive could make the figures public if it wanted to. A more difficult question would arise if the legislature laid down some guidelines, and the executive then

thought that those guidelines were not in compliance with the Constitution. Then you would have some sort of a confrontation. But I take it that position has not been reached.

Senator MATHIAS. Of course, there is a related question as to whether, when the administration withdraws any objection to publication, that isn't in effect a declassification?

Mr. EMERSON. Well, the way they phrased it, they withdrew objections to publication. I think it sounds as though they meant that it was up to the Congress to take the action.

Senator MATHIAS. They were saying you go first.

Mr. EMERSON. Right.

Senator MATHIAS. This may exceed the bounds of my original mandate to ask one question.

What would happen let's say, in a case in which there was no question of illegal political contributions or personal speculation or anything of that sort, to a major oil company which for 25 years surrendered phony books or phony accounts to its stockholders or to the SEC?

Mr. SPRITZER. It would take some time, I think, to catalog all of the statutes that that company had violated, State and Federal.

Senator MATHIAS. What would happen would be too horrible to imagine.

Mr. SPRITZER. Amen.

Senator MATHIAS. Except for the lawyers, let me say that. [General laughter.]

Senator GARN. They would make a fortune.

Senator MATHIAS. They would prove the old adage that it is an ill wind that blows no good to someone.

Senator GARN. I would like to ask just one more question before the 5-minute bell rings.

There is one thing that all you gentlemen agree on and I agree with, that no more information should be disclosed if it would endanger national security. Isn't that what all three of you have said? I think just since I have been here I have heard you say that there is a point, and what I was disagreeing with you on is where that point comes. Is that a fair statement?

Mr. EMERSON. No, Senator, I didn't take that position. I had another principle.

Senator GARN. Well, at least two of you did, then, I thought I heard you say it two or three times, that you didn't want to endanger national security. So then my question is—that seems to be a nebulous area of where that point is. If this committee decides to recommend to the Senate that an aggregate figure does endanger the security, on that basis we decided not to publish it, let it out. Where are we constitutionally then? What kind of guidance do you give us on that, because whose determination is correct with how far we go before it endangers national security?

Mr. SPRITZER. I think the Constitution obliges at a minimum, giving the aggregate figure in all circumstances.

Senator GARN. Even if it endangers the national security?

Mr. SPRITZER. Even if you, Senator, were to judge that is the case. I think this language is explicit. I think the room for interpretation

is as to the details, the degree of disclosure. In no view, it seems to me, can there be any justification, whether you believe in a construction of the Constitution that is strict or liberal, for not giving the aggregate figure.

Senator GARN. Well, I would find it difficult to believe, with my non-legal background, that the founding fathers intended that we should disclose information that would harm or injure the security of this country or endanger the Constitution itself.

Now, I am carrying that too far, I realize, to make a point, but nevertheless, I find it hard to believe that that was the intent of the writers, that we should disclose information that would endanger the security of the United States.

Mr. SPRITZER. There were secrets in those days, Senator, and the men who proposed this provision said that in no event should there ever be concealed the amounts of money being appropriated and expended. That was pretty categorical.

Senator GARN. Well, I doubt if they knew about ICBM's and a few things like that.

Senator HATHAWAY. Gentlemen, let me ask you one last question because we are running over our time.

The constitutional mandate says that a regular statement and account of the receipts and expenditures of all public money shall be made public from time to time.

Now, do you construe that as a mandate to the executive, because as you know, we have an authorization process and then appropriation, and then the actual expenditure. We could authorize \$100 billion and then only \$90 billion might be appropriated, and then maybe only \$80 billion might actually be spent. The language in section 9, clause 7, seems to be a mandate on the executive to reveal what it spent last year and what it took in, and no mandate really upon the Congress to reveal what is appropriated or what it authorized.

And the second question is, if the mandate is to the executive, should the Congress make sure the executive does this, or is this something that is in the discretion of the executive?

Mr. SPRITZER. I have read the provision as imposing obligations on both the Congress and the Executive. Speaking first to the Executive, I think there the language is pretty direct, that there be a regular statement of accounts, a statement and account of receipts and expenditures. Well, the expenditures, it seems to me, the receipts and expenditures you would have to get information from the Secretary of the Treasury, and that was provided by the First Congress. There was legislation requiring a report from the Secretary of the Treasury.

So far as the Congress is concerned, we have the language, appropriations made by law. Now, I think one can read into the idea of "made by law" that Congress shall identify what the money is being appropriated for, and certainly if one is to read the two parts of this provision together, it wouldn't make sense that the executive is required to identify with whatever particularity might be required what it is being spent for, but that Congress shouldn't identify what it is appropriating for.

So it seems to me that the two concepts are related, and that the clause contemplates disclosures, both by the appropriating body and by the spending body.

But that doesn't answer the question how detailed an accounting is to be rendered.

Mr. CASPER. Senator, I am not certain I heard all of your question because of my private exchange with Senator Wallop, but as far as I understood your question, let me try to answer.

It seems to me that indeed the appropriations clause and the statement and account clause are closely related; the statement and account clause is there to enforce the appropriations clause. It, of course, imposes an obligation on both the Congress and the executive branch, but it is the Congress which controls what details shall be made public and what details of accounting shall take place.

Now, obviously in theory, at least, one can think of a statute enacted by the Congress which is so vague as not to be accounting, and the Congress would violate the Constitution. And that was part of the question before us this morning. But basically the Congress controls things. The early incident which I discovered in some detail here this morning relating to the treaty with Algiers, I think rather nicely exemplifies what is a proper procedure. The Congress appropriated money for a very vague purpose, and there might be some question, but indeed your present appropriation bills are often very vague indeed in terms of the purposes. The actual laws, the legal language is extremely vague for many appropriations acts.

Now, there the Congress appropriated money for a vague purpose, but said the President lay a report before the Congress on how the money was spent. When the President didn't do it, the House called him to task and the President immediately obliged. Initially, the President responded by imposing an injunction of secrecy. The House took it on that basis. Eventually the House voted to lift the injunction of secrecy because it thought that the Treasury's report on Algiers expenditures should be made available to the public at large.

But what is clear here is that throughout the entire process the Congress controlled basically every step of the way and that would be my reading here in response to your question.

Senator HATHAWAY. Professor Emerson, do you have any comment?

Mr. EMERSON. I agree that it is a joint responsibility and that each branch has to comply with that obligation within its own sphere. Obviously only the executive can release a statement of expenditures. Congress doesn't know what they are. Also I would agree that the Congress has very considerable leeway in terms of requiring what the executive shall release. But I reserve the question as to what would happen if the executive came to the conclusion that the legislation of Congress was unconstitutional.

Senator HATHAWAY. I want to thank all three of you very much. This has been very enlightening and we appreciate your testimony and your answers to questions.

Thank you.

Next we have a panel of witnesses, Mr. Ray Cline, who is the executive director of the Georgetown Center for Strategic and International Studies. Mr. Cline served as Deputy Director of Central Intelligence from 1962 to 1966, and he was Director of the Bureau of Intelligence at the State Department from 1969 to 1973.

Mr. Morton Halperin, who is the director for the Center for National Security Studies. Mr. Halperin has previously served with the Gov-

ernment as Deputy Assistant Secretary of Defense, and as an assistant for planning on the National Security Council.

Mr. David Phillips, founder of the Association of Former Intelligence Officers. Mr. Phillips served in the CIA for 25 years.

Mr. John Shattuck, director of the Washington Office of the American Civil Liberties Union.

Ms. Robin Schwartzman, whose career has included experience in foreign affairs and specialized research on the question of intelligence budgeting practices.

Mr. John Warner, who for a number of years, served as the CIA's legislative counsel and later as the Agency's General Counsel.

And General Daniel Graham, former head of the Defense Intelligence Agency.

I want to welcome all of you here today. All of your statements will be placed in the record, and I would appreciate it if you could summarize your statements.

We have an executive session scheduled for 2 o'clock this afternoon, and we would like to have a little time prior to that.

Why don't we just start on my left, General, and ask you if you would like to make a few comments, and then we will just go across the table. Later we will ask you some questions. I am sure some of the other members will be back after the vote is over, but let's get started anyway.

TESTIMONY OF GEN. DANIEL GRAHAM, FORMER DIRECTOR OF THE DEFENSE INTELLIGENCE AGENCY

General GRAHAM. Yes, sir. I have no prepared statement, but I would like to address this as a military man who served both in CIA and DIA, that is the matter of exposing a figure, a total figure.

When I was Director of DIA, there were some aspects of the disclosure of the total intelligence figure that would have been very useful to me particularly if it was further broken down and we said that X agency got 20 percent of it, another agency got 33, poor old DIA got 10 percent. Now, that would have helped me with some of your colleagues up here on the Hill, not to mention some with some journalists and whatnot who had things pretty well fouled up and considered DIA to be something of a military CIA.

But the problem with releasing even a total figure is that it doesn't stop there. I have seen a total figure in the papers of \$6.2 billion, and since I have no access right now to the internals of that figure, I think I can say something about it. The papers, some of them, have printed that as the CIA budget, \$6.2 billion. When the CIA is approached about that they are going to have to say, "oh, well, we are just a small portion of that. There is a lot of that money somewhere else."

Then, whoever is really interested in intelligence matters then wants to find out, "OK, what portion of that is CIA?" I think that is the big problem with releasing a total figure is that it begins to break down, that it is the nose of the camel in the tent. I think it is very misleading to give a total figure because I know from past experience that within that \$6.2 billion figure there is a lot of tactical intelligence, not all of it, but some of it. And it brings up the problem of what is a total intelligence figure anyway?

Much of the attention around Washington is always on that intelligence which supports the President or Mr. Kissinger or whoever happens to be running foreign affairs, and very little attention is given to the fact that intelligence is a function that is distributed throughout the military, from top to bottom, and can no more be consolidated in one budget than can, say, personnel matters be consolidated.

Intelligence is a function of every unit in the Armed Forces. Now, whatever intelligence budget you get will not have, for instance, the reconnaissance platoon of an infantry battalion. It will not have the S-2 section of an infantry regiment, and those are intelligence functions, and they are in fact intelligence expenditures.

So you can't really give a figure that means anything to even knowledgeable people about intelligence in this aggregate figure and do anything more than confuse them, and once you have got them confused, they are going to want to have more detail about it. So I think it is not a wise idea, even to disclose an aggregate figure for intelligence.

Thank you.

Senator HATHAWAY. Thank you very much.

I presume the rest of you all agree.

[General laughter.]

Senator HATHAWAY. Ms. Schwartzman.

[The prepared statement of Ms. Robin Berman Schwartzman follows:]

PREPARED STATEMENT OF ROBIN BERMAN SCHWARTZMAN, ATTORNEY

Mr. Chairman, I feel very privileged to be invited to testify here today on questions relating to budget authorizations for the intelligence community. I should point out, of course, that I speak on my own behalf and not for Fried, Frank, Harris, Shriver & Jacobson, the law firm with which I am associated.

I have expressed my views on some of the topics before this Committee in an article which I believe you may have seen.¹ Therefore, my remarks today will be confined to those few points about intelligence community fundings which seem to me particularly to merit your attention at this time.

The Central Intelligence Agency is funded through administrative transfers rather than through regular appropriations. As a result of this transfer method of funding, the budget of the Agency does not show up as an appropriation or in the Treasury Department's annual accounting. Instead, it is concealed in the appropriations of other agencies. In fact, the word "concealed" may be something of a misnomer, because over the years there have been fairly numerous leaks about both the amount and the location of Agency funds in the executive budget,² and one gathers that these have not been entirely inaccurate.

The first point I would like to make this morning is that I believe the transfer funding system violates the Constitution. Article I, Section 7, Clause 9 of the Constitution contains two provisions: one that money may be drawn from the Treasury only pursuant to an appropriation by Congress, and a second that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

I am not here to argue whether the appropriation requirement is met by the present formality whereby Congress votes on appropriations without knowing the location or amount of funds earmarked for the CIA. I do submit here that the public accounting of CIA expenditures definitely falls short of what the Constitution requires. For the most recent fiscal year, the Treasury Department's published accounting contained no listing at all for the CIA, while the federal budget for fiscal year 1977 listed, under the heading "Central Intelligence

¹ Note, Fiscal Oversight of the Central Intelligence Agency: Can Accountability and Confidentiality Coexist? 7 N.Y.U. J. Int'l L. & Pol. 493-544 (1974).

² See, e.g., *New York Times*, Nov. 11, 1975, p. 40; *New York Times*, April 1, 1977, p. A1.

Agency," only a \$28.3 million payment to the CIA Retirement and Disability Fund.³

This is not a frivolous point, and it is a problem which this Committee is in a unique position to remedy. A country whose foreign policy stance is so reliant on moral considerations as ours is must suffer some lack of credibility as a result of such an open and long-standing violation of its own Constitution. And Congressional action is particularly urgent here because it appears increasingly probable that this question may never be judicially resolved.

A few years ago the Supreme Court held in *United States v. Richardson*⁴ that an ordinary taxpayer and citizen lacked the requisite standing to gain a court hearing on the question of whether the CIA budget must be published. The case was thrown out of court not because it lacked merit, but rather because the plaintiff, as a citizen-taxpayer, was not entitled to bring the case. Only last February, in *Harrington v. Bush*,⁵ the D.C. Circuit Court of Appeals held that a Congressman likewise lacked standing to test the constitutionality of the CIA funding mechanism.

In the absence of any Supreme Court interpretation, I believe that we can only take the Constitution to mean what it says so plainly: that public funds must be publicly accounted for. This interpretation is all the more compelled by reference to another provision in Article I of the Constitution. Article I, Section 5, Clause 3 states: "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting Parts as may in their Judgment require Secrecy. . . ." That shows that when the framers of the Constitution thought secrecy was appropriate, they provided for it. They did not provide for secrecy when it came to accounting for public funds.

Certainly it would be possible to bog down in legal argument if we attempt to determine, without the aid of the courts, the exact degree of detail in which intelligence budgets must be disclosed to meet the constitutional requirement. But that should not divert us from the first, basic point that no disclosure, as is the case at present, clearly violates the constitutional mandate, while some disclosure—perhaps even a one-line item for the entire intelligence community or a one-line gross budget for each agency—would at least represent an attempt to meet the minimal constitutional standard.

Because of the difficulty in obtaining a judicial decision on this issue, it is vital that Congress take action to right the constitutional wrong, rather than permitting it to remain without a remedy because of what is essentially a legal technicality. I repeat that it is up to Congress to provide a remedy, because this is an issue on which it may be impossible to obtain a judicial decision notwithstanding the fact that the Constitution is being violated.

Another important benefit would issue from the publication of the gross figures attributable to the intelligence community. These sums would then no longer have to be hidden in other agencies' budgets. The present practice of accounting for intelligence funds under other headings makes the entire Treasury Department accounting suspect and some certain unknown portions of it outright fabrications.

I think it is important to add that considerations of national security, which have been raised in defense of the present system, may not suspend constitutional requirements except, perhaps, under the most rare and unusual circumstances. As authority for that proposition, one might refer to the "Pentagon Papers" case,⁶ where the Supreme Court refused to abandon the constitutional guarantee against prior censorship even in the face of an alleged risk to the national security. Another such example is *Gravel v. United States*,⁷ where the Supreme Court found itself precluded by the Speech or Debate Clause of the Constitution from looking into the case of a Senator who had read classified documents into the public record.

³ U.S. Department of The Treasury, Combined Statement of Receipts, Expenditures and Balances of the United States Government for the Fiscal Year Ended June 30, 1976 and the Transition Quarter Ended September 30, 1976; Executive Office of the President, Office of Management and Budget, The Budget of the United States Government Fiscal Year 1977, p. 281; ———, Appendix to The Budget of the United States Government Fiscal Year 1977, p. 807.

⁴ 418 U.S. 166 (1974).

⁵ No. 75-1862 (D.C. Cir. Slip Op., decided February 18, 1977).

⁶ *New York Times Co. v. United States*, 403 U.S. 713 (1971).

⁷ 408 U.S. 606, 615-6 (1972).

My basic point here is that I believe the Constitution requires the publication of intelligence budgets, and that I further believe that it is up to this Committee to assure that the constitutional requirement is met. At the same time, I think it should be pointed out that such disclosure has not been shown to compromise the national security in any event.

Although successive Directors of Central Intelligence have frequently expressed the conclusion that release of gross intelligence budget figures would, over the years, have a negative effect on the national security,⁵ none has ever, that I am aware, demonstrated that this is, in fact, a valid theory. Their position, as I understand it, is first, that publication of the gross figures would stimulate requests for additional detail, and second, that a series of such figures would show a trend over the years which might in itself be revealing. On their face, these are weak theories because of the remoteness of the connection between a gross budget figure and the substance of any particular program, let alone the identity of a foreign agent. Numerous past leaks about the intelligence budget have certainly provided ample opportunity for evaluations of any harm they may have done, but such analyses have not been forthcoming. Moreover—and I believe this is critical—where the course the DCI's favor appears to violate the Constitution, a very heavy burden is on them to show that the national security would be compromised by anything less than complete secrecy about intelligence funding. Those who would comply with the Constitution should not be given the burden of disproving the unsupported theory that the DCI's have advanced.

To sum up this point, I believe that by disclosing intelligence agency budgets in gross form if not in greater detail, this Committee could assure that constitutional requirements were met, and the other benefits of disclosure secured, without causing more than vaguely speculative risk to our national security. Indeed, it seems to me that in the long run the essential values and freedoms we seek to protect may be much more endangered by maintaining secrecy in violation of the Constitution than they possibly could be by the disclosure of gross intelligence-agency budgets.

If you decide on public disclosure of intelligence budgets, there will then be the question of the degree of detail in which the information is to be made available. On this issue, I believe the Constitution clearly mandates disclosure at least of a one-line figure. On the other hand, I am equally sure that it does not prohibit appropriations and accountings of specified sums "for confidential purposes" upon the certificate of an agency head, assuming proper circumstances and proper safeguards. The area for legislative judgment as to the appropriate extent of disclosure lies between these two poles.

I'd like now to turn briefly to specific points which I believe must be included in any legislation originating in this Committee, if Congress is to regain effective control over CIA spending.

First, the Central Intelligence Agency Act of 1949, in providing for funding the CIA through transfers, states that sums may be transferred to the CIA from other government agencies and may then be expended "without regard to limitations of appropriations from which transferred."⁶ To avoid any possibility that this provision will be used to override the will of Congress, future authorizations of CIA funds should specify that no additional amounts may be transferred to the CIA on the authority of the 1949 Act. If the Agency retains even a theoretical authority to obtain funds through secret 1949 Act transfers, the new Congressional appropriation scheme will be rendered suspect, and Congress and the public will be left, if anything, in a worse position than we are in now, when at least we know what we do not know.

The same thing will be true if the CIA is permitted to retain any profits from its foreign proprietary operations without a proportionate reduction in its budget authorization. The CIA must be required to account to this Committee for all funds earned by CIA proprietaries.

Finally, a point about the General Accounting Office that I believe is vital. As a practical matter, control over intelligence community spending can only be

⁵ See, e.g., Memorandum submitted by George Bush to the Senate Committee on Rules and Administration. Hearings on S. Res. 400, 94th Cong., 2d Sess., p. 76; written statement submitted by William E. Colby at Hearings on the Nomination of William E. Colby to be Director of Central Intelligence, Senate Committee on Armed Services, 93d Cong., 1st Sess., p. 181.

⁶ 50 U.S.C. § 403f and § 403j.

effective if it includes the power to make independent audits. Congress has this capability in the GAO, which for several years has been performing regular audits of sensitive bodies such as the Energy Research and Development Administration. However, for many years, the GAO has not been given access sufficient to audit the CIA and most other intelligence agencies. This has been true despite, so far as I know, not one serious allegation by the intelligence community of any leak of confidential information by the GAO. Moreover, the competence of the GAO is well known and widely admired.

GAO representatives have made it clear that additional legislative authority is required if the GAO is to audit the CIA and certain other intelligence agencies. Such legislation might take any of a number of forms. One possibility is to enlarge the GAO's audit authority with respect to funds which may be expended solely on the certificate of a department head. Alternatively, the GAO could be given explicit legislative authority to audit the intelligence agencies, and the agencies could be required to give the GAO access to the information it needs. Finally, the GAO should probably be granted the subpoena power which it presently lacks.¹⁰ Unless it legislates some such additional authority for the GAO, Congress will have no way of determining whether the CIA and other intelligence agencies are honoring the laws that govern their expenditures and their activities. Without this necessary check, Congressional control in this area may be an illusion.

I wish to close my remarks by respectfully urging that you include in any authorization legislation you propose a requirement that the intelligence agencies give full access to the General Accounting Office as a condition of receiving their funds. I have no doubt that appropriate measures can be worked out to preserve necessary security, as, indeed, they have been when GAO has audited other highly sensitive agencies.

Mr. Chairman, that completes my prepared remarks.

TESTIMONY OF ROBIN BERMAN SCHWARTZMAN, ATTORNEY

Ms. SCHWARTZMAN. I feel very privileged to be here today. I should point out that I speak on my own behalf and not on behalf of the law firm with which I am associated.

I submitted a written statement, so now I would like to make a somewhat shorter statement.

The first point I would like to make is that I believe the transfer funding system violates the Constitution. I know this has been discussed at length this morning, and I would only like to make some additional observations.

These relate to the proposition that the public accounting of CIA expenditures in particular fall short of what the Constitution requires. It is not a frivolous point, and I believe it is a problem which this committee is in a unique position to remedy.

A country whose foreign policy stance is so reliant on moral considerations as ours is, has to suffer some lack of credibility as a result of this open and longstanding violation of its own Constitution. And Congressional action here is particularly urgent because it appears increasingly probable either that the question will never be judicially resolved, or that at least it will not be resolved in the foreseeable future.

I think it is important to note that the *Richardson* case was thrown out of court not because of a lack of merit, but because the plaintiff, as a citizen taxpayer, was not entitled to bring it.

¹⁰ Elmer B. Staats, Comptroller General of the United States, discussed these "legislative changes needed to facilitate meaningful GAO audit of intelligence activities" in a letter to Rep. Otis G. Pike, Chairman of the House Select Committee on Intelligence, reproduced at Procedures, Hearings Before the House of Representatives Select Committee on Intelligence, pp. 519-527 of U.S. Intelligence Agencies and Activities, Intelligence Costs and Fiscal Management, 94th Cong., 1st sess., pp. 521-22, and in testimony *id.* at pp. 15-46.

Then last February, in *Harrington v. Bush*, the District of Columbia Circuit held that a Congressman likewise lacked standing to test the constitutionality of the CIA funding mechanism.

In the absence of any Supreme Court interpretation, I believe that we can only take the Constitution to mean what it says so plainly: That public funds must be publicly accounted for. This interpretation is all the more compelled by reference to the Journal clause of the Constitution which was discussed this morning: The explicit reference to secrecy in that clause with respect to publication of the Congressional Journal shows that when the framers of the Constitution thought secrecy was appropriate, they provided for it. They did not provide for secrecy when it came to accounting for public funds.

Certainly we could all bog down in legal argument if we attempt to determine, without the aid of the courts, the exact degree of detail in which intelligence budgets must be disclosed to meet the constitutional requirement. But that should not divert us from the first, basic point, that no disclosure, as is the case at present, clearly violates the constitutional mandate, while some disclosure, perhaps even a one-line item for the intelligence community as a whole or a one-line gross budget for each agency, would at least represent an attempt to meet the minimal constitutional standard.

In view of the difficulties I have mentioned in getting a judicial solution, it is vital that Congress take action to right this constitutional wrong rather than permitting it to remain without a remedy because of what is essentially a legal technicality.

Another important benefit would issue from the publication of gross figures attributable to the intelligence community. These sums would then no longer have to be hidden in other agencies' budgets. The present practice of accounting for intelligence funds under other headings makes the entire Treasury Department accounting suspect, and some certain unknown portions of it outright fabrications.

I think it is very important to add that considerations of national security, which have been raised in defense of the present system, may not suspend constitutional requirements except perhaps under the most rare and unusual circumstances. As authority for that proposition, the *Pentagon Papers* case has already been discussed, where the Supreme Court refused to abandon the constitutional guarantees against prior censorship even in the case of an alleged risk to the national security.

Another example is *Gravel v. United States*, where the Supreme Court found itself precluded by the Speech or Debate clause of the Constitution from looking into the case of a Senator who read classified documents into the public record.

My basic point here is that I believe the Constitution requires the publication of intelligence budgets, at least in the aggregate, and that I further believe that it is up to this committee to assure that the constitutional requirement is met.

At the same time, I think it should be pointed out that such disclosure has not been shown to compromise the national security in any event. Opponents of disclosure have expressed the conclusion that release of gross intelligence budget figures would over the years have a negative effect on the national security, but none has ever, that I am aware, demonstrated that this is in fact a valid theory.

The remoteness of the connection between a gross budget figure and the substance of any particular program, let alone the identity of a foreign agent, makes this theory suspect. Numerous past leaks about the intelligence budget have certainly provided ample opportunity for evaluations of any harm they may have done, but such analyses have not been forthcoming. Moreover, and I believe this is critical, where the course the opponents of disclosure favor appears to violate the Constitution, a very heavy burden is on them to show that the national security would be compromised by anything less than complete secrecy about intelligence funding. Those who would comply with the Constitution by publishing budget figures should not be given the burden of disproving this unsupported theory.

To sum up this point, I believe that by disclosing intelligence agency budgets in gross form if not in greater detail, this committee could assure that constitutional requirements were met, and the other benefits of disclosure secured, without causing more than vaguely speculative risk to our national security. Indeed, to hark back to a point made a while ago, it seems to me that in the long run the essential values and freedoms we seek to protect may be much more endangered by maintaining secrecy in violation of the Constitution than they possibly could be by the disclosure of gross intelligence agency budgets.

I'd like to now turn briefly to specific points which I believe must be included in any legislation originating in this committee, if Congress is to regain effective control over CIA spending.

First, as you know, the Central Intelligence Agency Act of 1949, in providing for funding the CIA through transfers, states that sums may be transferred to the CIA from other Government agencies and may then be expended "without regard to limitations of appropriations from which transferred." To avoid any possibility that this provision will be used in the future to override the will of Congress, future authorizations of CIA funds should specify that no additional amounts may be transferred to the CIA on the authority of the 1949 act. If the Agency retains even a theoretical authority to obtain funds through secret 1949 act transfers, the new congressional appropriation scheme will be rendered suspect, and Congress and the public will be left, if anything, in a worse position than we are in now, when at least we know what we do not know.

The same thing will be true if the CIA is permitted to retain any profits from its foreign proprietary operations without a proportionate reduction in its budget authorization. The CIA must be required to account to this committee for all funds earned by CIA proprietaries.

Finally, a point about the General Accounting Office that I believe is vital. As a practical matter, control over intelligence community spending can only be effective if it includes the power to make independent audits. Congress has this capability in the GAO, which for several years has been performing regular audits of sensitive bodies such as the Energy Research and Development Administration. However, for many years, the GAO has not been given access sufficient to audit the CIA and most other intelligence agencies. This has been true despite, so far as I know, not one serious allegation by the intelligence community of any leak of confidential information by the GAO. Moreover, the competence of the GAO is well known and widely admired.

GAO representatives have made it clear that additional legislative authority is required if the GAO is to audit the CIA and certain other intelligence agencies. Such legislation might take any number of forms. One possibility is to enlarge the GAO's audit authority with respect to funds which may be expended solely on the certificate of a department head. Alternatively, the GAO could be given explicit legislative authority to audit the intelligence agencies, and the agencies could be required to give the GAO access to the information it needs. Finally, the GAO should probably be granted the subpoena power which it presently lacks. Unless it legislates some such additional authority for the GAO, Congress will have no way of determining whether the CIA and other intelligence agencies are honoring the laws that govern their expenditures and their activities. Without this necessary check, congressional control in this area may be an illusion.

I wish to close my remarks by respectfully urging that you include in any authorization legislation you propose a requirement that the intelligence agencies give full access to the General Accounting Office as a condition of receiving their funds. I have no doubt that appropriate measures can be worked out to preserve necessary security, as, indeed, they have been when GAO has audited other highly sensitive agencies.

Thank you.

Senator HATHAWAY. Thank you, Ms. Schwartzman.

Mr. CLINE. Mr. Chairman, I am Ray Cline and I have to catch an airplane at 1 o'clock. Could I stand on the statement, or would you like for me to make a 2-minute statement?

Senator HATHAWAY. Why don't you make a summary statement?

[The prepared statement of Mr. Ray Cline follows:]

PREPARED STATEMENT OF RAY S. CLINE, EXECUTIVE DIRECTOR, GEORGETOWN CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES AND FORMER DEPUTY DIRECTOR OF CENTRAL INTELLIGENCE

The fundamental principle of successful intelligence operations, I believe, is never to waste effort in keeping anything secret that you can live with while doing it openly. This principle simplifies the dreadfully complex life of secret intelligence. Consequently, in my view it is better for the intelligence agencies to reconcile themselves to public disclosure of the intelligence budget than to struggle any longer to keep it more or less secret. The main reason is that considerable benefit derives from the public support that will be won in an open society if Congress knows and publishes, as the Constitution seems to require, the gross sum of expenditures on intelligence activities by the intelligence agencies of the U.S. Government.

For these reasons I conclude that the authorization bill for the total program budget of the entire U.S. intelligence community ought to include a dollar total and the budget of the Defense Department or the Executive Office of the President ought to include a line item for "intelligence collection, processing, analysis, reporting and the management of intelligence resources."

This total, if restricted to activities and resources primarily dedicated to national intelligence activities, as distinct from tactical military training and readiness operations, will be smaller than most citizens think—something less than one-half of one percent of our Gross National Product (GNP). Knowledge of this expenditure total will give only marginal additional advantages to foreign intelligence services since our society is already so open to their inquiries that I am quite confident they—especially the KGB of the U.S.S.R.—already have a fairly accurate picture of the gross magnitude of our intelligence effort. If increased confidence in CIA and the other intelligence agencies results in the United States from disclosure of the total dollar cost of the intelligence program,

then the harm done by firming up Soviet and other foreign estimates of this figure will be minimal. The key test will be whether the Congress, having decided to make this total cost public, will be able to resist the inevitable pressures from hostile and curious critics of government to proceed to provide breakdowns of individual agency and functional program costs. Such detailed breakdowns of costs would enable the KGB to zero in on actual intelligence operations which they would—as a result of this precise knowledge—be better able to identify, frustrate or penetrate. These are the dangers of budget disclosure—deriving from detailed expenditure breakdowns and not from disclosure of a gross total through Congressional action on normal authorization and appropriation bills for the intelligence community.

This view is not recently arrived at but is the result of careful reflection on the pros and cons as a result of 31 years of experience in intelligence-related jobs in the U.S. Government. My conclusions on this problem were set forth last year in my book on CIA, "Secrets, Spies and Scholars," p. 259, as follows:

"One perennial question that arises is whether Congress ought to publish the intelligence budget as such or whether it should continue to be hidden in the huge Defense Department budget because this information is too revealing and too useful for foreign governments. There is a provision of the Constitution requiring that 'a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.' Critics find the hidden CIA funds in violation of this requirement. In my view, a very broad program budget giving only the total of national intelligence expenditures could be published annually without giving more than marginal advantage to foreign intelligence agencies. Our society is so open that any sophisticated espionage organization can easily determine the general dimensions of the U.S. national intelligence program. While I wish we did not have to give the exact figures each year so that strategic planners in Moscow and Peking would know whether we were expanding or contracting our intelligence efforts, the marginal value of this information over and above what Soviet and other spies can now get is so small that it is less important than the gain in Congressional and public confidence in the accountability of our intelligence system that probably would come from publication of total budget costs. In the public media these are usually grossly exaggerated. If the Congress and the President can agree to go no further in breaking down into detail the total budget figures and the general description of intelligence functions, the net gain would justify public release of this information and tend to legitimate and regularize the work of Congressional oversight."

**TESTIMONY OF RAY CLINE, EXECUTIVE DIRECTOR, GEORGETOWN
CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, AND
FORMER DEPUTY DIRECTOR OF CENTRAL INTELLIGENCE
AGENCY**

MR. CLINE. All right. I am sorry to interrupt but I have given a short prepared statement to the committee staff.

I simply want to say after listening to Ms. Schwartzman and the legal experts this morning, I don't believe that the Constitution is going to answer your difficult question as to how much detail to disclose about the intelligence budget, and I would like to simply make a proposition based on the experience of worrying about these things in the intelligence community. It runs along the following lines.

The fundamental principle I would follow is that it is not worth wasting effort to keep something secret if you can live with it when it becomes open. I think most of us here feel that the total—most of the experts you have consulted feel that the total aggregate sum of the intelligence community budget is something that could be revealed without doing any very serious damage.

Therefore I would like to urge this committee to accept the proposition that some public support might be won and some public criticism

might be cast aside if that aggregate sum were given. The key test then would be whether this committee and the Congress, having decided to make that total cost figure public, has the capability to resist the inevitable pressures from hostile and curious critics to proceed to further breakdowns. If you can feel confident in your minds that you have that capability, then I think the net gain on balance from the point of view of an old intelligence officer is go with the total figure but nothing else.

Thank you very much, sir.

Senator HATHAWAY. Thank you.

I for one don't have that confidence. While there are 50 Members of both parties who know it now, there are probably 150 staff people in addition to that.

Mr. CLINE. It may be a lost cause anyway.

Senator HATHAWAY. It may be that all you need to do is just open the door and reveal one figure, and then you would be questioned over and over again by various reporters. For instance, the New York Times published a figure a little while ago and then many of us were called about various figures and they said, "Well, this figure's out, does it mean this, does it mean that?" and so forth, and I am sure the same thing would happen.

Mr. CLINE. Well, if that is your conviction, then obviously any statements would be rather worthless because people will press for more detail and get it, but if you could hold the line and it would dissuade criticism, the total figure.—

Senator HATHAWAY. But don't you think the fact that 50 Members now know it is enough? You have this committee, and you will also, quite probably have a committee established in the House in the future with a rotating membership. Isn't that a good enough assurance to the general public that the money is being spent wisely?

Mr. CLINE. It certainly is a good enough assurance for me. I am afraid also that it is probably an assurance that more details will come out, whether or not you publish this figure. So in a sense that makes the question of the general figure moot.

Senator HATHAWAY. Thank you.

Mr. CLINE. Thank you, Mr. Chairman. I am awfully sorry to ask for a special hearing.

Senator HATHAWAY. That's all right.

Mr. Phillips?

[The prepared statement of Mr. David Phillips follows:]

PREPARED STATEMENT OF DAVID ATLEE PHILLIPS, PRESIDENT OF THE ASSOCIATION
OF FORMER INTELLIGENCE OFFICERS

Mr. Chairman, I am pleased to be here representing the Association of Former Intelligence Officers in response to the invitation in your letter of April 6, 1977. We believe, as you do, that the question of whether there should be disclosure of any of the funds authorized for the intelligence activities of the government is a most serious one deserving very careful consideration by the Congress.

Let me explain, that our Association, which I represent today rather than speaking as an individual, is composed of 1,700 men and women from government who in the past have had principal duties in the field of intelligence. They come from all civilian and military services. Our membership is not open to anyone presently active in an intelligence assignment.

With me today is John S. Warner, a member of our Board of Governors and Legal Advisor to the Association; I will ask him to respond to any questions concerning the legal or constitutional aspects of this issue.

Many of us have studied the issue. We have read the Final Report of the Senate Select Committee, the floor debates in the Senate on June 4, 1974, and in the House on October 1, 1975, and various court decisions including *U.S. v. Richardson* in the Supreme Court and the recent opinion of the U.S. Court of Appeals for the District of Columbia in *Michael J. Harrington v. George Bush, as Director of the Central Intelligence Agency, et al.* We recognize that there are many pros and cons on this issue. Nevertheless, in surveys of our membership—in early 1976 and in recent weeks—the Association comes down firmly on the side of not disclosing even a total figure for all intelligence activities. We are not all agreed on this, but that is clearly the viewpoint of the majority of our members.

First, and perhaps most importantly, we do not believe our government should make easier the task of our adversaries. Disclosure would substantially help them. If the Soviets were to publish a total intelligence figure (which we could believe) this certainly would be of substantial aid to the U.S. government. Aside from erasing uncertainty, it would save significant analytical dollars. It has been said that the Soviets already know our total figure—but this is not necessarily true. There is a difference between media conjecture and assertions by some former intelligence officers and official figures published formally by either the Executive Branch or the Congress.

Secondly, it has been argued that each member of Congress has a right to know such a figure and disclosure would permit a more informed vote. This argument does not stand up when, as I understand it, any member can or may be informed of these figures on a classified basis.

Thirdly, I am concerned about what would probably be the beginning of an erosion process. A total figure will bring calls for a breakdown, initially as to allocations to components and then as to major projects or activities. Step by step, piece by piece, this would carry us to a point where truly serious harm to our intelligence activities would be the result.

Finally, there is the argument of the people's right to know. Within our system of government there has always been a balancing of this right against the needs of diplomatic negotiations, national defense, intelligence and other areas. There is ample precedent for secrecy, going back to debates in the Constitutional Conventions and the use of a secret fund during the administrations of Washington and Madison, and even a secret appropriations act in 1811. Certainly, appropriations for the Manhattan Project were secret. Since the establishment of CIA in 1947, Congress by legislation, and all administrations, have consistently supported the need for secrecy concerning intelligence budgets. This issue was squarely before the Senate on June 4, 1974 with three hours allotted for debate. The recorded vote to retain secrecy was 55 to 33. Similarly, there was extensive floor debate in the House on October 1, 1975 resulting in a recorded vote to sustain secrecy of 267 to 147. Rather than repeat the arguments made I refer you to those debates.

Mr. Chairman, I recognize that times do change and that is precisely why this issue is being considered today. But my colleagues and I believe the need for good intelligence continues. I urge you to avoid any steps which might lead to the atrophy of American intelligence. In some respects, the arguments for disclosure intimate that the Committee structure established by the Congress in the past has not been adequate to deal with intelligence. But today there is a new Committee structure. Should you not see how it works before taking steps that might be irreversible? In any event, it is you and the other members of Congress who will be weighing the considerations for and against disclosure. I hope the views of former intelligence professionals will be useful to your deliberative process.

TESTIMONY OF DAVID PHILLIPS, ASSOCIATION OF FORMER INTELLIGENCE OFFICERS

Mr. PHILLIPS. Mr. Chairman, in the interest of time, I am going to skip over parts of my printed statement for the record, but then I am going to make some informal remarks.

I am pleased to be here representing the Association of Former Intelligence Officers in response to the invitation in your letter. We be-

lieve, as you do, that this is a very important and serious question for Congress.

Let me explain that our association—which I represent today, rather than speaking as an individual—is composed of 1,700 men and women from Government who in the past have had principal duties in the field of intelligence. They come from all civilian and military services. Our membership is not open to anyone presently active on an intelligence assignment.

Today with me is Mr. John S. Warner, a member of our Board of Governors and legal adviser to the Association, and he will be in a position to respond to any questions concerning legal or constitutional aspects of this issue.

We have recently had a poll of our membership, which follows a similar poll taken 1 year ago, and there seems to be no question—perhaps it is predictable—that former intelligence officers come down firmly on the side of not disclosing even a total figure for all intelligence activities. All of the responses to our poll of last year and of this year certainly are not predictable. For instance, last year in reporting to Senator Ribicoff's Government Operations Committee, I was surprised to find that a majority of former intelligence officers favored the idea of the Congress being advised in advance of covert action. And in this case we certainly have a majority. We do not all agree on it, but it is a majority.

First, and perhaps most importantly, we do not believe our Government should make easier the task of our adversaries. Disclosure would substantially help them. If the Soviets were to publish a total intelligence figure—which we could believe—this certainly would be of substantial aid to the U.S. Government. Aside from erasing uncertainty, it would save significant analytical dollars. It has been said that the Soviets already know our total figure. But this is not necessarily true. There is a difference between media conjecture and assertions by some former intelligence officers, and official figures by either the executive branch or the Congress.

Second, it has been argued that each Member of Congress has a right to know such a figure, and disclosure would permit a more informed vote. This argument does not stand up when, as I understand it, any Member can or may be informed of these figures on a classified basis.

Third, I am concerned about what would probably be the beginning of an erosion process. A total figure will bring calls for a breakdown, initially as to allocations to components, and then as to major projects or activities. Step by step, piece by piece, this would carry us to a point where truly serious harm to our intelligence activities would be the result.

Mr. Chairman, I recognize that times do change, and that is precisely why this issue is being considered today, but my colleagues and I believe that the need for good intelligence continues. I urge you to avoid these steps which might lead to the atrophy of American intelligence.

In some respects, the arguments for disclosure intimate that the committee structure established by the Congress in the past has not been adequate to deal with intelligence. But today there is a new committee structure. Should you not see how it works before taking steps that might be irreversible?

In any event, it is you and the other Members of Congress who will be weighing the considerations for and against disclosure.

Mr. Chairman, to speak more informally, and to try and get across perhaps some of the flavor of the way former intelligence people think about this issue, I must really discuss it in the sense of openness in American intelligence.

During the last couple of days—I was here yesterday—we have heard a lot about the citizens' right to know, citizens' pressure, one of the reasons that the budget should be disclosed. Another reason is that if we were to publish a total budget it would give the intelligence community a certain credibility and confidence which they certainly don't enjoy now. My point is, is that true? This morning there was a discussion about a recent poll. There was a poll in the Indianapolis News taken just after the first of the year. This is done annually. And the poll was in two sections. The first section asked the reporters and editors of the Indianapolis News to name the 10 most important news stories of 1976. The editors and publishers chose the Presidential elections No. 1, and the CIA-FBI scandals as No. 2.

And then the readers of the paper were polled. They, too, chose the Presidential election as the No. 1 news story of the year—but did not mention the CIA-FBI scandals in the remaining nine answers that they gave.

I believe this is relevant in the sense that the people from Indianapolis certainly expect Senator Bayh to be part of this congressional committee which sees that the intelligence community is not taking on adventures that it should not, but I believe that they will be satisfied with that and publishing a budget figure won't help them.

I think what it boils down to is the answer to a question which was asked here yesterday, a very good question by one of the Senators, who asked Mr. Colby: Why can't we carve out certain areas of intelligence operations, identify them—and he did, about six different aspects—why can't we carve these out and then just talk about the rest? The way that we feel as former intelligence officers I think may be explained by a story that I heard a short time ago about a little Mexican boy who achieved some renown because he could sculpt such marvelous donkeys out of stone. He was only 11 years old and someone asked him: How is it that you are able to do this? He said, well, it's easy. I get a big rock and a hammer and chisel, and I keep chip, chipping away all the parts that don't look like a donkey.

We are concerned about the chipping away that has been going on for 2 years in the intelligence committee. Soon we are going to end up with something which could be recognized, at least by experts, as sources and methods.

Actually, we who were in intelligence have felt that American intelligence has been uniquely open for a number of years. There are frequent remarks because we now have signs which point the way to the CIA building. The fact is that those signs went up when the building was erected in the early sixties, and at the request of American Presidents, were taken down. Finally James Schlesinger said, "Yes, we want the signs again." That was a long time ago. Long before the current controversy concerning intelligence. It was a part

of my duty at CIA to take time off to talk to visiting college groups, high school students, businessmen, that sort of thing.

Then we had the situation of the Swedish professor who wrote to 10 intelligence services around the world and asked for information about each service. He received an answer from one: the CIA. Nine of them said "No." As a matter of fact, the diplomatic representative of one country told him he was totally demented to ask such a question. We in CIA were a little concerned because the CIA sent him a package which weighed 2½ pounds.

Then came the deluge in 1975 and 1976. There were times when we felt that the openness and the amount of detail in the scrutiny was almost intolerable during the investigations of the Church committee. We saw that William Colby found himself in a situation where he was describing the characteristics of a particular lock in a particular vault in the CIA—and he was doing this on national television.

During that period of early 1975, before I left the CIA, one day I was leaving the building with a colleague who was about to go overseas to an area where the protection of his identity was essential for his effectiveness and perhaps to his survival. As we were leaving the front entrance of the building there was a sign placed there. My colleague saw it and he blanched and sought other transport. Because we were about to board the shuttle bus which takes CIA employees around town, and the sign read: "A national television network will be televising the shuttle bus and its passengers today."

Now, my point in all of this is simply to say that as a threshold decision in the business of being open in American intelligence, I hope the committee will realize the proportions of budget disclosure. It will affect our intelligence capabilities. And I am thinking now particularly of those human sources so important to us in fields of science, nuclear development, research, and development, the kind of people who, reading in the papers that one more step has been taken to open up American intelligence, will say thanks but no thanks when asked to cooperate.

I am in a unique position because on almost a daily basis there are former members of intelligence services joining our organization. They have come out of the meatgrinder for the last couple of years. American intelligence, I think will survive, but it is battered.

This committee is dedicated to controlling American intelligence and seeing that it doesn't commit the abuses that it has in the past. We certainly know you are trying to protect American intelligence. We certainly need you and need you badly.

The record of this committee and the Church committee before it has been a very good one—responsible recommendations and no leaks—and we appreciate that. But we do hope that we won't have another contribution to the chip, chip, chipping away. Indeed, the disclosure of even a total figure would be a whack at carving out that figure that foreign experts could recognize as sources and methods.

Thank you, Mr. Chairman.

Senator HATHAWAY. Thank you.

Mr. Shattuck.

[The prepared statement of Mr. John Shattuck follows:]

PREPARED STATEMENT OF JOHN H. F. SHATTUCK, DIRECTOR, AMERICAN CIVIL
LIBERTIES UNION, WASHINGTON OFFICE

My name is John Shattuck. I am an attorney and the Director of the American Civil Liberties Union, Washington Office. The ACLU is a nationwide, non-partisan organization of more than 275,000 members, devoted entirely to protecting and advancing the Bill of Rights. The organization has long defended the public's right to know what its government and elected officials are doing, and in recent years it has frequently participated in efforts in the courts and in Congress to curtail government secrecy.

LITIGATION CHALLENGING INTELLIGENCE BUDGET SECRECY

The ACLU's particular interest in the issue at hand—the secrecy of intelligence budgets—is reflected in two important lawsuits which, for different reasons, failed to resolve the question now before this Subcommittee. I was counsel in both of these suits.

In 1973 the ACLU represented William Richardson, a private citizen who had sued the CIA and the Department of the Treasury to compel those agencies to provide the public with a "regular Statement and Account of the Receipts and Expenditures of all public money" by the CIA, as required by Article I, Section 9, Clause 7 of the Constitution. The Supreme Court resolved this litigation by holding, 6-3, that Mr. Richardson lacked standing in his capacity as a citizen-taxpayer to bring suit. In reaching its decision, however, the Court indicated that "it is clear that Congress has plenary power to exact any reporting and accounting it considers in the public interest," doubting only "whether the Framers of the Constitution ever imagined that general directives to the Congress or the Executive would be subject to enforcement by an individual citizen." *United States v. Richardson*, 418 U.S. 166, 179 (1974) [emphasis supplied].

Two years after the decision in *Richardson*, the ACLU filed suit on behalf of Morton Halperin, who had unsuccessfully sought under the Freedom of Information Act to obtain the total figure for expenditures by the CIA in Fiscal Year 1974 and the total CIA budget authority for Fiscal Year 1976. In the Halperin case, we argued that these two figures were neither properly classified nor specifically exempt from disclosure by statute, and thus subject to mandatory release under the FOIA, quite apart from the Constitutional requirements of Article I, Section 9, Clause 7. The District Court rejected this claim on the ground, *inter alia*, that it was bound under the FOIA to limit its review to the narrow question of whether the required procedures had been used in classifying the figures. The Court did not—and claimed that it could not—take into account any larger question of the public's interest in disclosure of the CIA budget. *Halperin v. Colby*, Civil Action No. 75-676, — F. Supp. — (D.D.C. 1976).

There are two conclusions to be drawn from this litigation. First, it appears unlikely that the courts will resolve the merits of any dispute about how much budgetary secrecy is compatible with the Constitution. An individual litigant seeking to enforce the Statement and Account Clause will find it impossible to satisfy the standing requirements enunciated in *Richardson* and other recent Supreme Court decisions. On the other hand, the Freedom of Information Act, unless amended, is unlikely to be construed by any court to permit a searching probe and evaluation of the claim of budget secrecy made by the CIA or any other intelligence agency.

A second conclusion to be drawn from the litigation is that, apart from procedural and jurisdictional problems, there appears to be judicial agreement that the Statement and Account Clause does require at least partial disclosure of the budgets of all federal agencies, including the CIA. Both the Court of Appeals and the Supreme Court in *Richardson* interpreted the Clause to mandate disclosure—assuming Congressional enforcement—and disagreed only about the extent or degree to which secrecy would be permitted. Chief Justice Burger in his majority opinion in *Richardson*, 418 U.S. at 178 n.11, concluded that while the available evidence is not "conclusive . . . , historical analysis of [the Clause] suggests that it was intended to permit some degree of secrecy in government operations." Justice Douglas in dissent cited the debate on adoption of the Clause and maintained that it would be "astounding" to say that "Congress has the

power to read the clause out of the Constitution when it comes to one or two or three agencies" [418 U.S. at 200-01]. Although the majority and dissent are far apart on the standing issue, their differences on the merits are relatively insubstantial. Burger argued for "some degree" of secrecy, but did not make a case for exempting an entire agency; Douglas recognized that Congress has some "discretion" on accounting, but certainly not a discretion to ignore the Constitutional mandate.

The history and meaning of the Statement and Account Clause has been extensively explored in several recent studies¹ and requires only a brief summary here. The debates preceding adoption of the Clause contain no evidence that the framers intended any generalized exception to disclosure to exist. George Mason, who proposed the Clause, "could not conceive that the receipts and expenditures of public money ought ever to be concealed." 3 *Elliot's Debates on the Federal Constitution* 459. Madison, who proposed amending the Clause to require publication to be "from time to time" rather than "annually," argued that publication at a convenient rather than a fixed time would provide "more full and satisfactory" disclosure. 3 Farrand, "The Records of the Federal Constitution of 1787," 326. There was no recorded disagreement at the debates with Mason's assertion that the public has a "right to know" how all public money is being spent. The only issue was how to make budget information available in such a manner as to promote, in Mason's words, its "thorough comprehension" by the public. As adopted, therefore, the Statement and Account Clause appears to be clear, concise and general in its mandate.

What about the practice of budget secrecy in the two centuries since the Clause was adopted? Although there have been instances in which certain types of expenditures have not been publicly accounted for, there is not a single example apart from the CIA and National Security Agency in which the entire agency has been financed in total secrecy. Typical of secret funding practices was Congress' secret appropriation of funds for the occupation of Florida during the War of 1812, or the secret funding of the Manhattan Project during World War II. More recently, the Atomic Energy Commission (now the Energy Research and Development Agency) has been funded in part in secret, with certain of its projects appearing in the overall agency budget as "objects of a confidential nature." In each of those instances, the secret spending figure was included in the relevant agency total, and the need for secrecy was tied to a particular operation and for a particular period of time. In short, there was no example of a wholesale exemption from the Statement and Account Clause until the CIA began to assert such an exception after its creation in 1947.

THE "CONFIDENTIAL PURPOSES" APPROACH TOWARD DISCLOSURE

While there are no other instances of blanket secrecy apart from the CIA, and NSA, a variety of agencies whose activities are at least as sensitive as the activities of those two agencies have long followed a "confidential purposes" approach toward budget disclosure. Since 1793 Congress has appropriated funds directly to sensitive agencies and has publicly specified the percentage of such funds which are to be used "for confidential purposes" without detailed accounting. For example, the FBI, Department of State, Atomic Energy Commission (now ERDA), Defense Intelligence Agency and Nuclear Regulatory Commission are all funded to varying degrees in this manner. Nevertheless, even where intelligence activities are treated as a confidential purpose, the total amounts spent for such activities by each separately funded agency is publicly disclosed. For example, the Appendix to the Budget of the United States Government for Fiscal Year 1976 includes budget estimates for Army Personnel intelligence and communications activities (Budget Appendix at 268), Navy intelligence operation and communications activities (Budget Appendix at 268), and Defense Nuclear Agency intelligence and communications activities (Budget Appendix at 281).

The annual publication of this kind of intelligence spending seriously undermines the CIA's contentions that its entire budget must be protected from disclosure. As the Church Committee concluded in the chapter in its final report

¹ See especially Note, "The CIA's Secret Funding and the Constitution," 84 Yale Law Journal, 608 (1975); "Cloak and Ledger: Is the CIA Funding Constitutional?" 2 Hastings Constitutional Law Quarterly, 717 (1975); Note, "Fiscal Oversight of the Central Intelligence Agency: Can Accountability of the Confidentiality Coexist?" 7 New York University Journal Int. L. & Pol., 493 (Winter 1974).

on intelligence budget secrecy, "the claims about damage to the national security resulting from publication of the aggregate figure for each intelligence agency must be viewed in the light of far more detailed, and continuing exposure of the budgets of other agencies vital to the national security." "Foreign and Military Intelligence." (Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate, 94th Cong., 2d Sess. (April 26, 1976), Bk I, at 381.)

A "confidential purposes" approach to budget secrecy would tie the degree of permissible secrecy directly to the statutory authority of the agency in question. Obviously, one of the principal purposes of budget disclosure is to permit Congress and the public to scrutinize intelligence expenditures closely enough so that intelligence agencies are deterred from conducting activities prohibited by statute or the Constitution. The American Civil Liberties Union supports legislation pending in the House of Representatives to restrict domestic intelligence activities to the investigation of crime and foreign intelligence activities to the collection of information from mechanical and overt sources. This legislation (H.R. 6051) provides for detailed intelligence budget disclosure as an important element of its enforcement scheme. Although the bill would drastically curtail the amount of secrecy permitted in intelligence activities, it recognizes certain categories of permissible secrecy for military and technical information. These categories could properly be considered to be for "confidential purposes" and the budgetary details of such expenditures could be exempted from disclosure under the Statement and Account Clause. Obviously, the same analytical approach toward disclosure of detailed budget information could be adopted in any legislation restricting and defining the jurisdictions of intelligence agencies. In the context of this hearing it is the "confidential purposes" approach toward disclosure that matters, not any particular legislative scheme to reform the intelligence agencies.

THE ARGUMENT FOR BLANKET SECRECY

What, then, is the argument of the CIA and other intelligence agencies to support their claims for blanket secrecy and exemption from the Statement and Account Clause? A detailed exposition of this argument can be found in the deposition of former CIA Director William Colby conducted in *Halperin v. Colby*, *supra*, a copy of which I have submitted for the record. Close analysis of Colby's contentions demonstrates that they cannot override the Statement and Account Clause, even if they were sufficient to overcome the FOIA claim in *Halperin*.

Throughout his deposition Mr. Colby repeated the claim that disclosure of the CIA budget and expenditure figures would provide an accurate "benchmark" which would permit hostile governments to "refine" their estimates of CIA operations. The argument runs as follows:

"You have to realize that there have been a number of figures published by the CIA on its activities. Now taking an official [total CIA budget or expenditure] figure which would be accurate, that allows you to do a great deal of analysis as to the degree of activity. . . .

"You have statements issued about the size of our personnel; you have statements issued about the kinds of operations we run. Some of these aren't official; some of them are leaks.

"Some of them refer to certain types of operations, but then if you then have a bench point, a benchmark against which you can consider these, then your analysis can be very much helped in terms of breaking down the details of our operations." [Colby Tr. at 9-10].

Colby used his "benchmark analysis" to respond to a variety of questions designed to elicit specific factual information about his claim that disclosure of the requested figures would damage the national security. Thus, he responded with the "benchmark analysis" argument in answering questions about how release of the budget figures would reveal any "objects of a confidential, extraordinary or emergency nature" [Colby Tr. at 11-12]; requests for real examples or hypotheticals of damaging information that could be derived from disclosure of the budget figures; [Colby Tr. at 22-23]; questions about what action might be taken by a foreign intelligence service that would be likely to damage the national security as a result of release of the requested figures [Colby Tr. at 26-28]; questions about how release of the total figures would reveal the identity of a particular intelligence program. [Colby Tr. at 47-48]; and questions about what event would be likely to occur

that could be expected to cause damage to the national security if the requested figures were revealed [Colby Tr. at 50-51].

Following this reasoning most of the information released by the government every day could provide a useful "benchmark" for a foreign analyst, enabling him to "refine" some estimate of some aspect of U.S. Intelligence. Mr. Colby himself admitted that "intelligence today is more and more the study of open material" [Colby Tr. at 14 and 49]; and he made reference to the State of the Union message and copies of Congressional appropriations as examples of other "benchmarks" which could be useful to foreign intelligence agencies in the analytical process he had been describing. [Colby Tr. at 59].

According to the "benchmark analysis" argument, a foreign intelligence agency would attempt to pinpoint all the CIA programs, add up their cost, and compare that cost to the budget and expenditure "benchmark" figures. If that cost figure comes to less than the benchmark, the foreign agency would search very hard to find the programs it knows that it has not identified. Once these programs are found, the foreign agency would take steps to thwart their implementation.

Because of the flexibility of the CIA budget, however, a foreign analyst would have difficulty knowing what programs are included in a CIA "confidential purpose" budget or expenditure figures. Even if the analyst did know these programs, it would still be difficult to estimate their size accurately. Assuming, however, that the analyst was successful in getting this far in the process, he would still have to discover the "missing" CIA programs. And even if he identified the other CIA activities, this does not mean the foreign agency could successfully neutralize them.

A foreign analyst would encounter large hurdles at each step of the way in completing the benchmark analysis described by Colby. Furthermore, no one, including the CIA Director, would deny that there is a substantial difference between a foreign analyst "refining" an intelligence estimate and a reasonable expectation of damage to the national security. Mr. Colby himself stated that he did not believe everything useful to a foreign analyst could reasonably be expected to cause damage to the national security. Yet nowhere in his deposition did Colby explain why release of intelligence budget and expenditure total would threaten national security, while the availability of "sensitive" information from public sources would not.

The implications of the blanket secrecy argument are staggering. Are the CIA and other intelligence agencies so dependent on their protective shields of secrecy that they require total insulation from the very public they purport to serve? The Statement and Account Clause is one of the few public accountability provisions in the Constitution, apart from the requirement of popular elections. Is it to be overridden on the mere assertion that intelligence expenditures cannot be publicly accounted for? Is the public also to be deceived by the lying and manipulation which have become institutionalized under the CIA's cloak of secrecy? If not, Congress must reject the argument for budget secrecy.

The constitutional requirement of a full accounting must carry the day. This requirement is based not only on the Statement and Account Clause, but on the public's First Amendment interest in maintaining an "uninhibited, robust and wide-open debate" on public issues. *New York Times v. Sullivan*, 376 U.S. 254, 260 (1964). As one commentator has noted, without a regular Statement and Account for intelligence expenditures "neither Congress nor the public can determine whether the expenditures comply with the CIA's enabling laws, or with the Constitution, and whether they have been made without waste or corruption. Neither Congress nor the public can weigh CIA spending against that of other agencies; the CIA's internal ordering of priorities cannot be analyzed." Note, "The CIA's Secret Funding and the Constitution," 84 *Yale L.J.* 606, 619-20 (1975). Since these important, constitutionally protected purposes are frustrated by the secrecy of intelligence funding, it is necessary to turn to the least drastic means of maintaining the confidentiality of certain programs. Under this approach the separate budgets of each intelligence agency should be disclosed in detail, with the exception of those line items certified to relate to statutorily authorized "confidential purposes."

Thank you for the opportunity to appear before the Subcommittee.

**TESTIMONY OF JOHN SHATTUCK, DIRECTOR, AMERICAN CIVIL
LIBERTIES UNION, WASHINGTON OFFICE**

Mr. SHATTUCK. Thank you, Mr. Chairman.

I would like to touch on several of the points in my prepared statement which I believe have not been fully developed by other witnesses, or have been developed in another direction from mine.

First let me say that the American Civil Liberties Union considers the issue of intelligence budget disclosure to be of paramount importance in the larger effort to insure, as Mr. Phillips himself has suggested, that intelligence activities are consistent with the Constitution and our democratic form of government.

I differ with Mr. Phillips in the sense that I believe that in many ways, this issue, whether or not and how much the budget of the intelligence agencies should be disclosed, is a test of the will of this committee and of the Congress to conduct vigorous oversight of the intelligence community. It is probably the first such test, and we think the committee is fully prepared to meet it on the facts which support disclosure in a manner which I will set forth in some further detail.

The intelligence abuses which have been brought to light by the Church committee came about in part because the agencies had little built-in accountability to Congress or the public.

This lack of accountability—and I think that is the key term that is at issue throughout these hearings—is nowhere better symbolized than by the secrecy of the intelligence budgets. The first point to be made about this secrecy is that it is flatly inconsistent with the constitutional mandate, in the statement and account clause. However one may dispute the history of that clause and the manner in which it has or has not been applied, the clause itself is flatly inconsistent with the blanket secrecy of the intelligence budgets.

The clause is one of the few provisions in the Constitution, apart from the right of the people to elect their government in popular elections, which makes the government accountable to the people. The clause and the first amendment, which I think reflects some of the same interests, serve the general purpose of accountability with respect to public officials. I think the committee has been searching for the interest which the public has in the disclosure of the information in the intelligence budgets, and I would identify it in a way that I don't think has been adequately brought out yet this morning or yesterday, as a right to make judgments, relative judgments about the spending priorities that the public ultimately wants for its money. What is it that the public wants to have its money spent on? How much money should be spent on education? How much on defense, how much on intelligence?

There is no way for the public to make that judgment right now, and even the aggregate budget for the entire community, which we submit is not a sufficient amount to disclose, but even that aggregate amount would permit the public to begin to make those kinds of relative judgments which it has a right to make under the statement and account clause, and under the first amendment.

Now, these judgments and these rights of the public should not be overridden except by a showing of grave and overwhelming national danger. Some views that have been expressed here by some members of the committee have suggested that the opposite should be true—that in fact, if there is any doubt, the Constitution itself should be suspended—but I respectfully submit to the committee that this is the kind of argument that got us into so much difficulty in the Watergate

and the impeachment period, and I am sure that the committee will disregard it.

The resolution that created this committee, Senate Resolution 400, contains an indication of the kind of gravity that would be necessary to override the statement and account clause or any other constitutional provision with respect to secrecy, and that can be found in the certification clause in section 8b(2) where "the threat to the national interests of the United States posed by disclosure is of such gravity that it outweighs any public interest in disclosure," and that certification would have to be made by the President and upheld by the Senate in order to prevent the disclosure of information, including, presumably, budget information.

Now, the second point I want to make, apart from the interest which I have identified that the public has in getting this budget information, relates to the contrast between the budget secrecy practices of the intelligence agencies on the one hand, and other sensitive defense and national security agencies on the other hand. With respect to these other agencies a great deal of budget information is available.

Although there have been instances in our history in which certain types of expenditures have not been publicly accounted for, there is not a single example that I am aware of—and I would like to be corrected if I am wrong—apart from the CIA and the National Security Agency, in which an entire agency has been financed in total secrecy, so that even the aggregate budget items for those agencies cannot be ascertained by the public.

While there are no other instances of blanket secrecy since the beginning of this country, a variety of agencies whose activities are at least as sensitive as the activities of those two agencies, have long followed a "confidential purposes" approach toward budget disclosure, and it is that approach that the American Civil Liberties Union would urge upon the committee for intelligence budget disclosure.

Since 1793, Congress has appropriated funds directly to sensitive agencies, and it has publicly specified the percentage of such funds which are to be used "for confidential purposes," without a detailed accounting. For example, the FBI, the Department of State, the Atomic Energy Commission, and, more to the point, the Defense Intelligence Agency from time to time, and the Nuclear Regulatory Commission are all funded to varying degrees in this manner. Nevertheless, even where intelligence activities by these agencies are treated as a confidential purpose, the total amounts spent for such activities by each separately funded agency are publicly disclosed. For example, the Appendix to the Budget of the U.S. Government for Fiscal Year 1976 includes budget estimates for Army personnel intelligence and communications activities, Navy intelligence operation and communications activities, and Defense Nuclear Agency intelligence and communications activities.

I think the annual publication of this kind of detailed intelligence spending seriously undermines the CIA's contention that its entire budget must be protected from disclosure.

And let me, without going through the rest of my prepared statement, give you some indication of why we think the confidential purposes approach is appropriate for this committee to adopt in ascertain-

ing the degree of information to be published from the intelligence budgets.

A confidential purposes approach to budget secrecy would tie the degree of permissible secrecy directly to the statutory authority of the agency in question. Obviously, one of the principal purposes of budget disclosure is to permit Congress and the public to scrutinize intelligence expenditures closely enough so that intelligence agencies are deterred from conducting activities prohibited by statute or the Constitution.

Now, the American Civil Liberties Union supports legislation that would restrict by statute and apply a charter to the various intelligence agencies in question. The legislation that we support has categories of permissible secrecy that are not unlike some of the categories that Professor Emerson was referring to this morning, but I don't want to get into a discussion of the details of any of the categories of secrecy so much as to commend to the committee the statutory approach toward budget disclosure which I think would be flowing directly from the charter restrictions that would be imposed on the agencies.

The same analytical approach that is taken in H.R. 6051, the charter legislation pending in the House that we support, could be adopted with respect to restrictions and definitions of agency jurisdictions in any legislation that might be developed to control the intelligence agencies.

The point is that this confidential purposes approach would lead to a line by line disclosure of intelligence spending, consistent with the statutory function of the agency in question. It would go beyond the aggregate intelligence community disclosure, and would also go beyond the disclosure of lump sums for individual agencies.

For the time being, and until these statutory restrictions are enacted, there is no question that the aggregate figures for each agency could and must, consistent with the statement and account clause and the accountability of the agencies, be disclosed.

I think I will reserve for any questions you might have the balance of my statement with respect to the arguments of injury that have been made against disclosure during the course of the last 2 days.

Thank you, Mr. Chairman.

Senator HATHAWAY. Thank you very much, Mr. Shattuck.

Mr. Halperin.

Mr. HALPERIN.

[The prepared statement of Morton Halperin follows:]

PREPARED STATEMENT OF MORTON H. HALPERIN, DIRECTOR, PROJECT ON NATIONAL SECURITY AND CIVIL LIBERTIES, CENTER FOR NATIONAL SECURITY STUDIES

Mr. Chairman: I appreciate this opportunity to present my views on whether the budget of the CIA and other intelligence agencies should be made public. Much of what I would want to say on this subject is included in an affidavit I prepared as part of a lawsuit brought by the American Civil Liberties Union under the Freedom of Information Act in an effort to obtain release of the CIA budget figure. The committee has that affidavit and I assume it will be included in the record of these hearings along with other papers from that case (*Halperin v. CIA*, Civil Action No. 75-0676). If not, I would ask that you do so.

Today, I would simply like to comment briefly on two points: First, the standard that the committee should use in deciding what should be made public and second, the real reasons, as I understand them, for resistance to making the budget figures public.

As this committee is well aware, the Congress has not established any standards to be used by the executive branch in determining what information should be kept secret in the interest of national defense or foreign policy. Until recently, Congress left the President free to decide on procedures and criteria for classification. In amending the Freedom of Information Act in 1974, Congress simply required that the executive branch observe the procedures of the Executive order on classification. That Order, 11652, in its preamble makes reference to the public's right to know but in its operational sections sets criteria for secrecy which relate only to injury to national security from disclosure. Thus, the definition of "confidential" is whether release "could reasonably be expected to cause damage to the national security." There is no requirement that the estimated damage be weighed against the importance of the information for public debate.

I would urge this committee to adopt a different standard in deciding what information it will make public. Over the longer run I would hope that the Congress would legislate a classification system which properly balances the public's right to know against the legitimate requirements of national security.

In the meantime the Congress is, of course, in no way limited by the standards of the Executive order. In deciding whether to release the budget figures the committee should, in my view, explicitly adopt its own standard. Such a standard need not be developed anew. Rather, it can be found in the resolution of the 94th Congress establishing this committee, Senate Resolution 400, in providing that the President can ask this committee to reconsider a decision to release information. In order to do so the President must certify that:

"The threat to the national interest of the United States posed by such disclosure is of such gravity that it outweighs any public interest in the disclosure." Senate Resolution 400, sec. 8(b) (2), 94th Cong., 2d sess.

I would urge the committee to apply this standard in its own deliberations. If it does so, it will have no difficulty reaching the judgment that the budget figures should be made public.

Permit me now to turn briefly to the major arguments against disclosure. Although arguments are made about the adverse consequences of releasing even the single figure, William Colby, with commendable honesty, has admitted that his major concern is that if a single figure is released, there will be pressure to release additional numbers. He eltes with horror the detail of the atomic energy budget now made public. The committee may wish to inquire into the question of whether any injury has resulted from the release of those additional figures.

James Schlesinger, with equal candor, has suggested that releasing the CIA budget figure would lead to pressure to reduce spending on intelligence matters.

I think Messrs. Colby and Schlesinger are both correct, but I draw the opposite conclusion from these predictions. Releasing a single figure will generate pressure to release more, but so it should. As much of the intelligence budget as possible should be released. I would exclude only those details where the threat from disclosure is of "such gravity that it outweighs any public interest in disclosure." Obviously, the lack of public interest in some details should be weighed along with the estimated harm.

If Mr. Schlesinger is right, then that is as it should be. Surely it is unacceptable to keep budget figures secret in order to keep public pressures from influencing how the Federal Government spends our tax dollars.

Let me conclude, if I may, with a procedural suggestion. I would propose that the committee, this year, simply make the total budget figure for each intelligence agency and the overall total public. It should at the same time instruct the intelligence agencies to proceed in the future as other national security agencies do, submitting as much of the budget and its justification as possible in public and the remainder in secret.

Mr. Chairman, I am grateful for the committee's invitation to participate in these hearings and I am, of course, available to answer the committee's questions.

TESTIMONY OF MORTON HALPERIN, DIRECTOR, PROJECT ON NATIONAL SECURITY AND CIVIL LIBERTIES, CENTER FOR NATIONAL SECURITY STUDIES

Mr. HALPERIN. Mr. Chairman, I am painfully aware that your lunch hour is getting shorter—

Senator HATHAWAY. Don't worry about it. Go ahead.

Mr. HALPERIN. Let me first try to deal with the question of whether release of one figure will require you to release additional figures. I think it will, and I think it is misleading if anybody goes ahead and says we are going to release one number and that is all we are going to do. I also think one has to recognize that releasing the one number is not going to get you—is not going to get anybody very far. I mean, we will learn that it is \$8.2 billion or \$8.6 billion or \$9 billion. If it is \$40 billion, obviously, that would make a substantial difference, but I assumed that based on this discussion, that the number is not very different than what everybody thinks it is.

But in my view, the committee should release much more. That is, the intelligence agencies should not be treated any different than the Defense Department, ERDA, or any of the other sensitive parts of the U.S. Government. The standard should be that all information should be made public except that information that is properly kept secret under some standard.

And the standard I would urge upon you is the standard that is in the bill creating this committee. That is, if the committee wants to release information, the President can ask you to reconsider that decision only if he certifies that the threat to the national interest of the United States posed by such disclosure is of such gravity that it outweighs the public interest in disclosure.

Now, that seems to me the standard that the committee ought to use itself, and that the committee ought to go through the entire intelligence agency budget asking itself about each of the major figures, whether or not the disclosure of that figure fits that criteria. And my guess is that if you do that, you will discover that in fact substantial parts of the budget can in fact be made public.

Now, I think with all respect to the Congress, it is not a sufficient answer to say that 60 Members of the Congress are now looking at these figures. I think under our system of Government the assumption is that the public is entitled to have all the information, and whether it is just a few people in Indiana who are interested in it, or a lot of people in Indiana, they are entitled to have that information which the Government can make public, taking into account both the public's right to know and the injury to national security which might or might not occur.

The fact that the budget is now at last getting serious scrutiny is in my view not an answer to the notion that nevertheless, those parts which can be made public under the criteria for secrecy that we adopt should be made public.

I think this year you should go one step further than Admiral Turner is prepared to go, and that is to release the figures for each of the aggregate components. As you are aware, a committee that looked at this problem in 1973, before we had these revelations, before there was any question of doing this in order to enhance the credibility and restore public confidence in the intelligence agencies, because 1973 was by these terms a long time ago, that committee recommended precisely that the budget for each of the intelligence agencies be made public.

Now, Mr. Shattuck, in his list of agencies which have secret budgets, left out an agency whose existence as well as budget is in general not

made public, but since it is included in this list, let me read from the report of this committee, since I have discovered that mentioning the name of this organization without reading this quote produces lightning and other dangers.

[General laughter.]

Mr. HALPERIN. The list from this report is the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, the National Reconnaissance Office and any separate intelligence units within the Army, Navy, and Air Force, and I assume one would add to that the ERDA intelligence operation, the Bureau of INR in the State Department and possibly the FBI.

Now, Admiral Carter, when asked—Admiral Turner, excuse me.

[General laughter.]

Mr. HALPERIN. When asked what would happen—

[General laughter.]

Mr. HALPERIN. I think he may accept the promotion. But when asked what harm would occur if he released each of those figures, said he could not discuss that in public, and I think that is unfortunate that he feels he cannot say anything about it.

Let me just say a little bit about it from what I understand about these numbers. Let's take, for example, if there was an increase in the CIA budget. That would not tell you, necessarily whether there was an increase for research, an increase in spying, or whether the CIA was in fact engaged in an R. & D. program for technological development. Those are all things that the CIA does, and simply saying that the CIA budget has gone up or gone down would not tell you whether we were spending more money on covert operations, covert intelligence collection, analysis, central direction and control of the intelligence community, or R. & D. for a new technological development which the CIA was funding because other people were not interested in it.

Now, I think we should be entitled to that information, and I think much of that could be revealed without revealing secrets, but what I am saying now is that simply an indication that the CIA budget had gone up or gone down would not tell you anything except that one or more of those components had either gone up or gone down.

Take the National Security Agency. It is no longer secret that the National Security Agency makes and seeks to break codes, and that it also spends a great deal of money monitoring other kinds of communications and analyzing them to draw conclusions from them without breaking codes. Again, an increase or a decrease in that would not tell you whether there was a big new R. & D. development program, whether there was money being spent to replace bases that we had lost around the world, whether we had broken the Russian code and, therefore, were spending a lot of money declassifying all the old cables, or whether we had not broken the Russian code but had given up on it or were trying to spend new money to break it.

The same is true with the National Reconnaissance Office, if I can again quote that phrase from this text. If more money were spent on that, it would not tell you whether we were having trouble refining our photography or doing so well that we were taking lots more pictures and so on.

So that it seems——

Senator HATHAWAY. Let me interrupt you there. It might not show you or me, but it might show Russian analysts.

Mr. HALPERN. Well, not simply the release of that figure. I mean, the Russian analysts—

Senator HATHAWAY. How can you tell that if you don't know what they know already?

Mr. HALPERN. Well, I think the point is they already know a great deal, some of which we have released publicly because we talk about these subjects, some of which of course they can tell by the facts. I mean, they see the satellites. They know how many satellites are crossing the Soviet Union. One gathers from the press that they have been looking very closely at them.

In terms of the question of countermeasures, which is the ultimate argument, we have a treaty with the Russians on the banning of the ABM systems which specifically prohibits them from shooting down these satellites. So even if they concluded that there were more satellites or they were more dangerous, it is not clear to me what countermeasures they could take. They are not only precluded, as I understand it, from shooting down, but even from taking measures which would interfere more than they have in the past with the ability of those satellites to observe at least our strategic systems.

Similarly, it is no secret to the Russians that we try to break their codes. President Nixon revealed on national television that we read their radar reading our radar, and that therefore they know that we track these things.

Now, I think one cannot say that the release of any additional figure could not give them some value, just as the Russians could get some value parking out on the George Washington Parkway watching the license plates of the cars that leave the CIA headquarters, which as far as I can tell, they are free to do. In an open society there are many things that we reveal which, put together with other things, might be of some value.

I think the test has to be whether that value outweighs the public's right to have the information in order to have public debate, and that is very hard to do for any particular piece of information. What I am saying is I think that the risk from simply revealing aggregate numbers, at least, I am persuaded is likely to make such a very marginal contribution to what they can find out from other sources that it is a step that we ought to take.

Thank you.

Senator HATHAWAY. Let me interrupt right here and go vote and then come right back.

[A brief recess was taken.]

Senator HATHAWAY. All right, go ahead, Morton.

Mr. HALPERN. I think I am done, Mr. Chairman.

Senator HATHAWAY. All right, Mr. Warner?

[The prepared statement of John Warner follows:]

PREPARED STATEMENT OF JOHN S. WARNER, LEGAL ADVISER TO AFIO

Mr. Chairman, we, of the Association of Former Intelligence Officers, Inc., appreciate the invitation extended to us in your letter of April 6, 1977 to present our views on the question of disclosure on any funds authorized for intelligence

activities. My very brief statement will be limited to the legal or constitutional aspects of this question.

I shall not repeat in detail the legal arguments made to you or otherwise available to you. The essential question is whether the Congress has acted within the bounds of the appropriation and expenditure language of Article I, section 9, clause 7 of the Constitution.

The facts are:

(1) That the framers of the Constitution were made aware of the need for some degree of secrecy in approval of funds and in connection with their expenditures;

(2) That for two centuries the Congress and various Presidents approved laws which authorized secret funds and secret reports of expenditure;

(3) That in the National Security Act of 1947 and in the Central Intelligence Act of 1949 specific statutory provisions were included to implement this concept of non-disclosure in the intelligence area;

(4) That the Senate in 1974 and the House in 1975, by floor debate and recorded vote, squarely faced the issue and rejected disclosure.

It is difficult for me to assume that these Congresses and Presidents, with their legal and advisors, have acted in an unconstitutional fashion for the two centuries of our history.

No court, to my knowledge, has ruled that non-disclosure is unconstitutional. It is true that no court has addressed itself to the issue on its merits. In the *Richardson* case in the Supreme Court in 1974 and in the *Harrington* case in the U.S. Court of Appeals for the District of Columbia Circuit in 1977, there is ample dicta that "Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest" or that there is a specific constitutional base to the rules that Congress provides for its own proceedings. In the *Harrington* case, wherein your witness of yesterday was the plaintiff and appellant, the Court observed that he was asking judicial intervention on his behalf as a member of Congress to change the rules adopted by the entire body of the House. That Court concluded that Mr. Harrington was asking the Court to usurp the legislative function to grant him relief which his colleagues had refused him.

There is no genuine legal or constitutional issue here—the issue cannot be resolved by the lawyers and the Judiciary probably won't interfere. Non-disclosure or disclosure is clearly consistent with the Constitution—the real issue is a political one and to be decided by the Congress. You must consider the merits of changing the existing procedures as you do on any other question and then vote your beliefs.

TESTIMONY OF JOHN WARNER, LEGAL ADVISER TO AFIO

Mr. WARNER. Mr. Chairman, I shall be very brief. I will limit myself to the legal and constitutional issue, hopefully not get off those other subjects, as something to advocate disclosure or nondisclosure. But I think there were a couple of points I think were not made.

First of all, fundamentally I believe that the constitutional issue raised in this connection is a red herring. Factually, we have had a system of nondisclosure of funds for a lot of years. Certainly the Congress, in the 1947 act and the National Security Act setting up the CIA and the 1949 act, implemented this practice and procedure of nondisclosure of secret funds. So a lot of Congresses and a lot of Presidents have come on board, and I hesitate to assume that they have all acted unconstitutionally.

Furthermore, in September of 1974 and later in 1975, both the Senate and the House squarely faced the issue of nondisclosure and by lopsided votes rejected disclosure.

In the two court cases mentioned, the *Richardson* case and the *Harrington* case, while they both turn on the issue of standing, nevertheless there was ample dicta in both cases on the subject, Richardson

pointing out that the Congress had plenary power to establish procedures to fulfill their obligations under the statement and accounts clause; also in the *Harrington* case particularly the court observed that Mr. Harrington was asking judicial intervention on his behalf as a Member of Congress to change the rules adopted by the entire body of that House, and the court concluded that Harrington was asking the court to usurp the legislative function, to grant him relief which his colleagues had refused him.

As many lawyers as you will get in this room you will get differing opinions on the constitutional issue. I say that listening to lawyers' views on this is not going to resolve the problem, nor will the judiciary probably interfere in any way.

So in my opinion, frankly, nondisclosure or disclosure is clearly consistent with the Constitution based on what we have seen and heard.

The real issue is a political one and to be decided by the Congress, and I think you and the others must consider the merits of the question of changing the existing procedures which the Congress has established, and consider the matter as you do any other question, and then vote your belief. The constitutional issue is not a real issue here.

Senator HATHAWAY. Let me ask this of everybody, or anybody who wants to comment on it. The interpretation of the Constitution is subject to considerable debate, so that perhaps we should try to confer "standing" so that this matter can be decided.

Mr. WARNER. I have grave difficulty with that as expressed by some of the lawyers earlier. This is a matter in which the Congress as well as the Supreme Court share responsibilities, not total sharing, and the Congress has established the procedures under which there are questions raised, and it is up to the Congress to resolve it one way or the other.

Senator HATHAWAY. Any others?

General GRAHAM. Senator, I would like to make one point here that has occurred to me and that I am uniquely, I think, among the very few who could address this point. It pertains to the notion that somehow the public or the body politic in general is going to be more informed by releasing these intelligence numbers.

I will tell you that they will not, and that even their own representatives in Congress are going to be less well informed. Now, I know this because I was Bill Colby's man and Schlesinger's man, to direct the efforts of pulling up a budget together which was called the national intelligence budget. You really had to twist the Navy's arm to say, "let's put in there the reconnaissance aircraft off of the 6th Fleet," and they had exactly the kind of worry that—and I would join them now in that worry, that well, that is just going to cause problems.

Now, what is going to happen if the whole figure becomes public?

It is certainly going to drop because all of those military reconnaissance capabilities are going to fall out of the national intelligence budget. Furthermore, if I were Secretary of Defense, I would immediately do away with DIA because it is a Defense creation, and turn all of those resources back to the services and let you try to find them.

So you are going to get less information if you go through the route these gentlemen are talking about than you would get more.

Senator HATHAWAY. Well, Ms. Schwartzman, do you have any comments on the question I asked about whether we should confer

"standing" in some way, which was suggested in the *Richardson* case?

Ms. SCHWARTZMAN. Well, *Richardson* held that there was no standing at the moment.

Senator HATHAWAY. But the Congress could confer standing in some way.

Ms. SCHWARTZMAN. I don't believe that the only answer in any case. The solution needs to come sooner than that, I think, and it seems to me that the Constitution is sufficiently explicit on this point that to a large extent disclosure is a legislative matter. Even without a Supreme Court decision, the way the statement and account clause reads, the presumption has to be in favor of disclosure.

Senator HATHAWAY. Well, I think we are capable of determining a lot of things that sometimes can go to the Supreme Court. We didn't seat Adam Powell. We determined that, and when we went to the Supreme Court we found out we were wrong. So why shouldn't this matter go to the Supreme Court, whether we are right or wrong?

Ms. SCHWARTZMAN. I see no reason that it shouldn't. I only hope that you won't feel that that solves the problem.

Senator HATHAWAY. It seems to me it is a pretty good solution because we have so many different opinions as to just what the interpretation of this clause is, as well as of other clauses that bear upon it. So maybe we ought to get a Supreme Court decision on it.

Ms. SCHWARTZMAN. I have the feeling that meanwhile, though, you feel well, we will keep the status quo, and I am not sure in any case that the Supreme Court will be willing to determine the extent of disclosure that is required.

Senator HATHAWAY. Right. But another year or so won't make any difference, will it? We have gone several years without disclosing it.

Ms. SCHWARTZMAN. It may be longer than that. I will yield to another witness.

Senator HATHAWAY. John, do you have anything?

Mr. SHATTUCK. Yes, Mr. Chairman, I do have a comment on that. I think that the Supreme Court really has implicitly already decided this question. By implicitly I mean that although the *Richardson* case went off on standing, there was very considerable agreement, in fact, I would say unanimity, among the various opinions that the statement and accounts clause does require some degree of disclosure, and the only areas of disagreement were with respect to details, as I think there would be if this were thrown back to the Court by a standing bill enacted by Congress.

I think the degree of detail to be disclosed probably is a political question and is the question that needs to be addressed and decided by Congress.

But I think the Court has indicated that the statement and account clause is just exactly what it says. It requires disclosure, and the amount of detail of the disclosure is something the Court is just not going to be wrestling with, even if you confer standing upon it. It is going to be difficult for the Court to make this kind of judgment.

Senator HATHAWAY. The statements and accounts clause, though, is directed toward the executive. So shouldn't we just leave that to the discretion of the executive, or do you think there is a congressional mandate to tell the executive to disclose what was spent last year?

MR. SHATTUCK. I think that is what the Court would call a political question, and in that sense, the amount of detail to be disclosed is to be decided by the Congress and the President. You can look at it as a political question similar to the one that was presented in the *Truman Steel Seizure* case, for example. I mean, if the Congress wanted to require a certain degree of disclosure, then I think the congressional judgment requiring such disclosure would be constitutional.

SENATOR HATHAWAY. It is not really a mandate on the Congress, though, is it? Can't you read the clause as just a mandate to the executive to reveal or publish a statement and account of the receipts and expenditures?

MR. SHATTUCK. But I think the political question doctrine is that the two other branches of Government are going to have to work it out between them. I understand what you are saying, and that is, "can we leave it entirely up to the executive to make that determination?" I would say the Congress could choose to do so, but I think Congress could also choose to legislate, and that is what I think it should do.

MR. HALPERIN. Mr. Chairman, as a nonlawyer, can I jump in?

SENATOR HATHAWAY. Sure.

MR. HALPERIN. It seems to me the problem with leaving it to the Court is the most I think the Court would do would be to say that some number has to be made public. As the former director of the DIA has already begun to explain to you, the Government can produce the most meaningless number possible if it is under an injunction to produce a number that it doesn't want to release. As you are well aware, what you call intelligence and what you don't call intelligence at the fringes is arbitrary, and a lot of R. & D. could be allocated in various ways so that if you were under a constitutional mandate to release a number—but the Congress and the executive branch did not want to—they could release a number which was clearly useless to anybody.

The constitutional clause, in my view, should be looked upon as an injunction to the Congress as well as the President. In addition to the general requirement of our constitutional system to make public what can be made public, there is a special obligation on all the branches to make public information relating to expenditures because that went, as the founders saw it, to the heart of the accountability of the Government and of the Congress and the President to the electorate, that they would know how their money was being spent. It seems to me that one should look upon this really as the spirit of that constitutional clause mandating that this committee make public as much of the information about the expenditures as you can. Whether you structure it so that the Supreme Court can tell you that you have to make something public or not seems to me not to be terribly valuable information to give you because it seems to me that is already clear, that something should be made public. The question is what, and the spirit in which you are going to approach the task.

SENATOR HATHAWAY. Well, do you think the expenditures are enough or do you think we have to reveal the authorization and appropriations as well?

MR. HALPERIN. I think you have to reveal all such information where balancing the public's right to know against the harm you conclude that it can be safely revealed. I don't think that there is some set

of numbers that must be revealed and another set of numbers that do not. I think it is that spirit that says we are going to balance here the public's right to know against the harm, and not simply take the view that has been expressed that if any intelligence officer is concerned that some harm might occur, we don't release the number.

Senator HATHAWAY. I didn't mean that with respect to a breakdown. But it seems to me that reading the constitutional provision, the emphasis is on how much is actually spent. As you know, we could authorize 10 times as much.

Mr. HALPERIN. I think the spirit of that is on the actual expenditure.

Senator HATHAWAY. The actual expenditure, so it would not require any disclosure at all on how much was authorized or how much was appropriated.

Mr. HALPERIN. Except the appropriations clause which is also in there, I think, does.

Senator HATHAWAY. Well, that is just a safeguard to make sure they don't spend any more money than they were appropriated. But that could be done with a very large figure, I presume.

Mr. HALPERIN. Yes.

Senator HATHAWAY. Well, I certainly appreciate your testimony. You leave us with a very tough problem, but you and the others who have testified have given us a considerable amount of guidance, and unless you have any further comments you would like to make, we will close the hearing at this time.

Thank you very much.

[Whereupon, at 1:08 p.m. the committee recessed.]

APPENDIX I

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FISCAL OVERSIGHT OF THE CENTRAL INTELLIGENCE AGENCY: CAN ACCOUNTABILITY AND CONFIDENTIALITY COEXIST?

I. INTRODUCTION

Recent revelations about Central Intelligence Agency [hereinafter "CIA" or "Agency"] activities in the U.S. and abroad have renewed public interest in the basic dilemma inherent in the position of a secret agency in a free society. On the one hand, there is a valid need for intelligence activities in today's international climate, and intelligence, by definition, must often be gathered clandestinely. On the other hand, our Constitutional system is based on checks and balances among the three branches of government. The traditional legislative check on executive agencies is provided through the funding process, by reviews of appropriation requests and agency expenditures. With respect to the CIA, such funding review is particularly important since secrecy may preclude review of the substance of specific ongoing projects.

Budgeting is Congress' definitive, practical expression of policy decisions—except in the case of intelligence agencies such as the CIA. The CIA budget, which has been estimated at between \$750 million and \$1 billion,¹ reflects only minimal congressional policy input. Ironically, however, it is precisely the intelligence area in which the consequences of poor judgment are potentially most serious: in an

1. The \$750 million estimate was made by Sen. William Proxmire, 119 Cong. Rec. 6868 (daily ed. April 10, 1973). The same figure appears elsewhere, e.g. Miller, Book Review, N.Y. Times, April 18, 1974, § 7 (Book Review), at 6. The \$1 billion figure appears in Walden, *Restraining the CIA, in Surveillance and Espionage in a Free Society: A Report by the Planning Group on Intelligence and National Security to the Policy Council of the Democratic National Committee* 219 (R. Blum ed. 1972) [hereinafter "Blum"]. Although Walden did not give the source of his estimate, his billion-dollar figure is consistent with estimates based on a total U.S. intelligence budget of approximately \$6.2 billion. (Sen. Proxmire set the total at \$6.208 billion, 119 Cong. Rec. 6868 [daily ed. Apr. 10, 1973].) At the Hearing on H.R. 6167 and S. 1494 before the Senate Comm. on Armed Services, 93d Cong., 1st Sess. 16 (1973) [hereinafter "Hearing on S. 1494"], Sen. Stuart Symington stated that the CIA represents about 17% of the total intelligence dollar. (17% of \$6.2 billion equals \$1.084 billion.)

extreme case, the inopportune discovery or miscarriage of a covert CIA operation might threaten the nation's continued survival.

In addition, problems necessarily arise whenever large sums of money are not subject to regular congressional accounting. One such problem is duplication. For example, the U.S. intelligence community consists of several organizations: the CIA, the Defense Intelligence Agency, the National Security Agency, the Intelligence and Research Bureau of the State Department, the separate intelligence services of the Army, Navy and Air Force, the Federal Bureau of Investigation, the Atomic Energy Commission, the Treasury Department, and perhaps others.² Although there are executive bodies to coordinate the activities of these organizations, some duplication is inevitable. The redundancies are unlikely to be discovered and eliminated unless agency budgets are coordinated and their spending is closely monitored by Congress.³ Also, in order to assign priorities intelligently, not only must Congress be informed as to the amount of funds earmarked for intelligence, but it must also have some means to determine whether the intelligence agencies are spending the funds in accordance with Congress' intent. At present, the CIA funding process does not permit these requirements to be adequately fulfilled.

This Note will examine the CIA funding process and explore means to increase congressional control over CIA funding—and

2. The named organizations are represented on the U.S. Intelligence Board (USIB). Hughes, *The Power to Speak and the Power to Listen: Reflections on Bureaucratic Politics and a Recommendation on Information Flows*, in *Secrecy and Foreign Policy* 15 (T. Franck and E. Weisband eds. 1974). The White House announcement of the reconstitution of the USIB did not list the Army, Navy, and Air Force intelligence services as members. 7 Weekly Compilation of Presidential Documents 1482 (1971), reprinted in 117 Cong. Rec. 40,284 (1971) [hereinafter "White House Announcement"].

3. Sen. Symington has pointed out that such waste is not only a theoretical possibility but a reality:

We sent out some staff men, from Foreign Relations, good staff men. They turned up much information about intelligence that nobody had told us about, any committee. They said one of the greatest duplications they found anywhere with respect to unnecessary spending of the taxpayers' money was in the intelligence field.

Hearing on S. 1494, *supra* note 1, at 15.

We had staff men go in certain areas of the world and they found great duplication. They found the intelligence units of the CIA, the Department of Defense, the Army, the Navy, and the Air Force all directed to particular intelligence, tremendous duplication, therefore waste.

117 Cong. Rec. 42,926 (1971). It should be noted that Sen. Symington's criticisms applied only to duplication in intelligence *collection*. This is to be distinguished from duplication in *analysis*, which is often justified.

hence over Agency activities—without impairing the confidentiality necessary to some legitimate CIA functions. Specifically, it will first describe the CIA budgeting and appropriation process. It will then focus on the components of existing executive and legislative spending "oversight".⁴ Finally, after reviewing the constitutionality of the present appropriation system, this Note will consider proposals whereby Congress might play a larger role in establishing the CIA budget and overseeing Agency spending.

II. BUDGETING AND APPROPRIATION PROCEDURES

The Central Intelligence Agency Act of 1949 [hereinafter the "1949 Act"]⁵ established a unique procedure for funding the Agency. Instead of seeking regular appropriations from Congress, the CIA has money transferred to it secretly from the appropriations of other agencies.⁶ This is accomplished through an Office of Management and Budget [hereinafter "OMB"] administrative procedure in accordance with instructions from the chairmen of the House and Senate Appropriations Committees.⁷ The process begins with the formulation of the President's annual budget proposal to Congress.

A. Proposing the Budget to Congress: The Roles of Executive Agencies

The budget proposed to Congress by the President is the product of OMB, which receives requests from the executive agencies,

4. The word "oversight" connotes both monitoring and control, although the two functions are not always coextensive.

5. 50 U.S.C. §§ 403a-403j (1970).

6. Section 403f provides in part:

In the performance of its functions, the Central Intelligence Agency is authorized to—

(a) Transfer to and receive from other Government agencies such sums as may be approved by the Bureau of the Budget [now redesignated as the Office of Management and Budget, Reorganization Plan No. 2 of 1970, 5 U.S.C.A. App. II § 102a (1974 Supp)], for the performance of any functions or activities authorized under sections 403 and 405 of this title, and any other Government agency is authorized to transfer to or receive from the Agency such sums without regard to any provisions of law limiting or prohibiting transfers between appropriations. Sums transferred to the Agency in accordance with this paragraph may be expended for the purposes and under the authority of sections 403a-403j of this title without regard to limitations of appropriations from which transferred.

7. See text accompanying note 31 *infra*.

including the intelligence agencies, coordinates the requests, and then produces one consolidated budget. Theoretically, at least, the budget requests of the intelligence agencies are coordinated before their submission to OMB by the Intelligence Resources Advisory Committee [hereinafter "IRAC"], which was created by an executive order of the President⁸ to "advise the DCI [Director of Central Intelligence, the chief officer of the CIA] on the preparation of a consolidated intelligence program budget." The recommendations made by the DCI after consultation with IRAC are neither final nor binding. According to DCI William Colby:

The DCI does not have full responsibility for the budget of the entire intelligence community. His responsibility . . . is to recommend to the President through [OMB] the general level and composition of the budget and the appropriate distribution of resources among the different programs. He does not "control" the defense intelligence community. Through a variety of mechanisms and authorities, however, he can exercise leadership with respect to it in the manner directed by the President.⁹

Thus, whatever advisory role IRAC may play in the DCI's recommendation, it is clear that the principal substantive responsibility for coordinating the intelligence agency budgets rests with OMB.

According to OMB Director Roy Ash, OMB reviews CIA funding "in the same detail that it reviews the budget requests of any other executive branch agency."¹⁰ The OMB review comprises

8. White House Announcement, *supra* note 2. The DCI is Chairman of IRAC, whose members are senior representatives from the State Department, the Defense Department, OMB, and the CIA.

9. Hearings on the Nomination of William E. Colby to be Director of Central Intelligence before the Senate Comm. on Armed Services, United States Senate, 93d Cong., 1st Sess. 184 (1973) [hereinafter "Colby Hearings"]; see also *id.* at 11-12. Colby was the DCI-designate when this statement was made.

Compare the following Senate colloquy on the limited scope of the DCI's budgetary role:

Mr. SYMINGTON. We were briefed by the Director of the Central Intelligence Agency [DCI] twice, the full committee, last January; and then again this morning.

Mr. FULBRIGHT. Did he discuss how much was spent by the National Security Agency?

Mr. SYMINGTON. I asked but he did not know.

Mr. FULBRIGHT. He does not know?

Mr. SYMINGTON. He does not know about the others, only his own in any detail.

117 Cong. Rec. 42,927 (1971).

10. Letter from Roy L. Ash, Director, OMB, to Sen. William Proxmire, April 29, 1974 [hereinafter "Ash letter"], published in 120 Cong. Rec. 9306 (daily ed. June 4, 1974).

a detailed written justification by each agency for its budget request, written responses to detailed questions posed by OMB staff assigned to review individual agencies' requests, and oral hearings.¹¹ The CIA budget is reviewed within an OMB unit which considers and coordinates the budget requests of all foreign intelligence programs of the Government. OMB asserts that this approach reduces, while it may not entirely eliminate, redundancy in the funding of intelligence programs.¹² The budget thus formulated is forwarded by OMB to the President for submission to Congress.

B. The Role of Congressional Appropriations Intelligence Subcommittees

The amount and source of funds to be transferred to the CIA are neither discussed in nor announced to the full House and Senate Appropriations Committees. Rather, they are determined by the Appropriations Committee chairmen meeting in executive session with an appropriations intelligence subcommittee in each house. In addition to the chairman of the full committee, each subcommittee is composed of the ranking minority member of the full committee and senior members of the Appropriations Subcommittees on Defense.

The House Appropriations Intelligence "Special Group"¹³ spends approximately four days each year reviewing the budget requests of the CIA and other intelligence services.¹⁴ Meetings at which the CIA budget is considered are attended by members of the Special Group, representatives of the CIA, two Appropriations Committee professional staff members, and a House of Representa-

11. Letter from Joseph Laitin, Assistant to the Director for Public Affairs, OMB, to author, Oct. 3, 1974, on file in New York University Law Library [hereinafter "OMB Letter"].

12. *Id.*

13. Technically, this group is not a subcommittee. Each Appropriations Committee subcommittee is responsible for its own appropriations bill, e.g. defense, transportation, etc. Since there is no separate appropriation for the intelligence services, there is accordingly no intelligence subcommittee, but rather this "Special Group" which approves intelligence budgets for insertion into other appropriations. Telephone interview with Samuel Preston, Staff Assistant, House Appropriations Committee, Nov. 27, 1974 [hereinafter "Preston interview—Nov. 74"]. The names of the Special Group's members, which formerly were kept secret, 117 Cong. Rec. 29,672 (1971) (remarks of Rep. Harrington), were published in 1974, 120 Cong. Rec. 9609 (daily ed. June 4, 1974) (remarks of Sen. McClellan).

14. Preston interview—Nov. 74, *supra* note 13.

tives stenographer who makes a complete record of the meeting.¹⁵ This process is said to result in a review of the CIA budget which is as detailed as the subcommittee's review of the Defense Department budget.¹⁶

The Senate Appropriations Intelligence Subcommittee¹⁷ is also said to conduct extensive formal budget hearings at which staff members are present and memoranda are prepared for future reference by subcommittee members and staff.¹⁸ However, in June 1974 Senator Jolin Pastore (D., R.I.), a member of the subcommittee, conceded that no record of its proceedings is kept.¹⁹ Senator Pastore's statement is consistent with an earlier description of the subcommittee's *modus operandi* by Senator Allen Ellender (D., La.):

We five who sit on this committee hear the testimony of those applying for funds. The funds are justified to us. We ask many questions. None of this information is in writing, nor is it recorded, but it is simply given to us and we weigh it and then recommend appropriations as is seen fitting.²⁰

The public record contains indications which cast doubt on the intensity of the Senate subcommittee's CIA budget review. For example, Senator Ellender is reported to have said that he did not want to learn the details of the CIA budget for fear he might talk in his sleep²¹—a remark which, if true, indicates that a key figure in the intelligence budget review process preferred to remain less than fully informed as to the specifics of the CIA budget. This view is confirmed by a Senate colloquy which took place after it became public that the CIA had been secretly supporting a 36,000-man army in Laos:

15. For safekeeping, the record is stored at the CIA, which delivers it to the Capitol on request. *Id.*

16. Telephone interview with Samuel Preston, Staff Assistant, House Appropriations Committee, Aug. 30, 1974 [hereinafter "Preston interview—Aug. '74"].

17. The Senate Appropriations Intelligence Subcommittee was first included in the Appropriations Committee's published list of subcommittees in 1969. S. Horn, *Unused Power: The Work of the Senate Committee on Appropriations* 38, 40 (1970) [hereinafter "Horn"].

18. Telephone interview with a Senate Appropriations Committee staff member, Nov. 11, 1974 [hereinafter "Senate Appropriations staff interview"].

19. 120 Cong. Rec. 9606 (daily ed. June 4, 1974).

20. 117 Cong. Rec. 42,923 (1971). When he made this statement, Sen. Ellender was Chairman of the Appropriations Committee and its Intelligence Subcommittee.

21. 120 Cong. Rec. 9607 (daily ed. June 4, 1974) (remarks of Sen. Hughes); Colby Hearings, *supra* note 9, at 52.

Mr. FULBRIGHT . . . It has been stated that the CIA has 36,000 there. It is no secret. Would the Senator say that before the creation of the army in Laos they came before the committee and the committee knew of it and approved it?

Mr. ELLENDER. Probably so.

Mr. FULBRIGHT. Did the Senator approve it?

Mr. ELLENDER. It was not—I *did not know anything about it*. . . . I never asked, to begin with, whether or not there were any funds to carry on the war in this sum the CIA asked for. It never dawned on me to ask about it. I did see it publicized in the newspapers some time ago. . . .

Mr. CRANSTON I would like to ask the Senator if, since then, he has inquired and now knows whether that is being done?

Mr. ELLENDER. I have not inquired.

Mr. CRANSTON. You do not know, in fact?

Mr. ELLENDER. No.

Mr. CRANSTON. As you are one of the five men privy to this information, in fact you are the No. 1 man of the five men who would know, then who would know what happened to this money?

The fact is, not even the five men, and you are the chief one of the five men, know the facts in the situation.

Mr. ELLENDER. *Probably not.*²²

Senator Milton Young (R., N.D.), another member of the subcommittee, also admitted on the floor of the Senate that he had "read in the magazines and newspapers" about the CIA's army in Laos.²³ It has since been estimated that the CIA was spending more than \$300 million annually on the secret army in Laos at the time these statements were made.²⁴

Inasmuch as the subcommittee meets in executive session and

22. 117 Cong. Rec. 42,929-31 (1971) (emphasis added).

23. *Id.* at 42,930. A statement prepared by William Colby for the Senate Armed Services Committee's hearing on his nomination as CIA Director appears to conflict with the statements made by Sens. Ellender and Young. In response to a question posed by Sen. Hughes, DCI-designate Colby stated:

The appropriate committees of the Congress and a number of individual senators and congressmen were briefed on CIA's activities in Laos during the period covered. In addition, *CIA's programs were described to the Appropriations Committees in our annual budget hearings.*

Colby Hearings, *supra* note 9, at 180 (emphasis added).

24. 119 Cong. Rec. 15,362 (daily ed. Aug. 1, 1973) (remarks of Sen. Proxmire).

does not publish its proceedings, it is difficult to determine whether the Senate Appropriations Subcommittee's involvement in the budgeting process has changed since 1971. The fact that the subcommittee has met with increased frequency during recent years may indicate that it is now taking a more active role.²⁵

There are indications that the Armed Services Committees and their intelligence subcommittees may also have a part in the approval of the CIA budget. For example, in 1973 the Senate Armed Services Committee reportedly questioned DCI Colby and other members of the CIA staff in detail concerning the Agency budget.²⁶ In August 1974 DCI Colby stated to a House subcommittee: "We also fully brief the CIA oversight subcommittees of the Armed Services and Appropriations Committees on budget and operational matters."²⁷

C. The Role of Congress as a Whole

The proposed appropriations as approved by the Appropriations Committees—with the CIA funds hidden within other categories—are debated on the floors of both houses of Congress. Since the Appropriations Committees' proposals do not reveal in which appropriations the CIA budget has been concealed, it is impossible for members of Congress to know which of the figures under consideration have been inflated by funds actually destined for administrative transfer to the CIA. For this reason, Congress as a whole plays only a mechanical role in approving the CIA budget.

This budgeting process is not likely to change significantly as a result of the new budgeting system enacted during the 1974

25. During 1973 the subcommittee held 8 meetings with CIA representatives; and by September 1974, 5 meetings had been held. This is compared with 2 meetings in 1972 and 1 in 1971. Telephone interview with a Senate Appropriations Committee staff member, Aug. 30, 1974. Sen. John McClellan (D., Ark.) became chairman of the subcommittee (and of the full Appropriations Committee) following Sen. Ellender's death in 1972.

26. 119 Cong. Rec. 15,361 (daily ed. Aug. 1, 1973) (remarks of Sen. Symington); 120 Cong. Rec. 9610 (daily ed. June 4, 1974) (remarks of Sen. Stennis). See also Colby Hearings, *supra* note 9, at 16, where Sen. Symington stated that the Senate Armed Services Committee "would appreciate reviewing what [the CIA] give[s] to the appropriations committees of the Senate and the House," and DCI Colby agreed to "report fully" to the Committee.

27. Statement of William E. Colby before House Foreign Operations and Government Information Subcomm. Aug. 1, 1974, at 5 (mimeographed text obtained from CIA).

session.²⁸ The CIA budget can be as well hidden in other appropriations under the new system as it is under the present system. Therefore, until further legislation is passed, Congress' role with respect to the CIA budget will remain substantially as described above.

D. Ministerial Functions of OMB and the Treasury Department

Following congressional approval, the appropriations are forwarded to OMB together with instructions from the Appropriations Committee chairmen as to the amount and source of funds to be transferred to the CIA.²⁹ The budgeting process is complete when OMB in fact transfers³⁰ the funds. This step was recently described by Senator Proxmire (D., Wis.):

. . . The transfer of funds to CIA under Section 6 of the CIA Act [50 U.S.C. § 403f (1970)] is accomplished by the issuance of Treasury documents routinely used for the transfer of funds from one Government agency to another. The amount and timing of these transfers are approved by OMB.

The funds approved for transfer to CIA by OMB are limited to amounts notified to OMB by the chairmen of the Senate and House Appropriations Committees. The specific appropriations accounts from which the funds will be transferred are also determined by this process

In other words, only two men in the entire Congress of the United States control the process by which the CIA is funded.³¹

28. The new congressional budgeting system, which will become fully operative when Congress considers the budget for fiscal 1977, establishes new congressional machinery to examine the budget as a whole and to determine spending priorities within overall spending and revenue targets. It will replace the present approach whereby Congress considers each appropriation bill without regard to the total budget or total available revenues. See N.Y. Times, Mar. 23, 1974, at 1; Wall St. J., June 6, 1974, at 2.

29. The CIA Act of 1949 does not expressly mention this role of the chairmen of the Appropriations Committees. However, when the floor manager described the proposed bill to the House of Representatives he stated:

[W]e have provided the legal basis for the granting to the Agency authority for the spending of those unvouchered funds which the Appropriations Committee of the House will earmark. . . .

95 Cong. Rec. 1945 (1949) (remarks of Rep. Sasscer).

30. Transfers are used for many purposes in addition to concealing intelligence budgets. See generally Horn, *supra* note 17, at 192-95.

31. 120 Cong. Rec. 9602 (daily ed. June 4, 1974). See also Ash letter, *supra* note 10.

It has been reported that the transfers are made in the Intelligence Community Branch of the OMB³² and that they are known to only two or three high-ranking OMB employees.³³

The Treasury Department records the transfers in the *Combined Statement of Receipts, Expenditures and Balances of the United States Government* [hereinafter the "*Combined Statement*"].³⁴ The *Combined Statement* is published in compliance with 31 U.S.C. § 1029, which directs "the Secretary of the Treasury annually to lay before Congress . . . the expenditures by each separate head of appropriation" (emphasis added). Since all CIA funds are transferred from other appropriations, there is no "head of appropriation" for the CIA. Therefore, this method of accounting does not make it possible to identify the location or amount of Agency funds.³⁵ Thus, the *Combined Statement* does not, except in the most technical sense, reflect CIA expenditures.³⁶

III. OVERSIGHT OF CIA SPENDING

With the foregoing outline of the budgeting process as background, the nature and extent of oversight of CIA expenditures can be examined. Congress, with its constitutional power of the purse,³⁷ has ultimate control over CIA spending; to a limited extent, however, the executive branch also monitors the CIA's expenditure of funds appropriated for its use.

A. Executive Branch Oversight of CIA Spending

1. *National Security Council Groups.* Most intelligence oversight by the executive branch is concerned with substantive, as dis-

32. D. Wise, *The Politics of Lying* 114 (1973).

33. Blum, *supra* note 1, at xxvi.

34. Apparently OMB does not report to the Treasury Department the real purposes for which these funds are transferred. "The [Treasury] Department has [stated] that it does not receive any records which show receipts and expenditures of the Central Intelligence Agency." Supplemental Brief for the Appellees at 2, n.l. *Richardson v. United States*, 465 F.2d 844 (3d Cir. 1972).

35. When Congress has specifically appropriated funds for the CIA, the *Combined Statement* has reported the appropriations and the expenditures thereunder. See, e.g., Military Construction Act of 1955, ch. 368, § 401, 69 Stat. 324, authorizing the appropriation of \$55.5 million for acquisition of land and construction of a building for the CIA headquarters in Langley, Va. See also Supplemental Appropriation Act of 1957, ch. 748, subch. III, 70 Stat. 678.

36. See text accompanying notes 124-40 *infra* for a discussion of the constitutionality of this arrangement.

37. U.S. Const., art. I, § 8.

inct from budgetary matters. In 1971, President Nixon announced the establishment or reconstitution of four intelligence oversight bodies—the National Security Council Intelligence Committee [hereinafter the "Forty Committee"], the Net Assessment Group within the National Security Council Staff, the United States Intelligence Board, and IRAC—all as arms of the National Security Council reporting to the President through his Special Assistant for National Security Affairs.³⁸

Initially, the Forty Committee³⁹ was established to "give direction and guidance on national intelligence needs and provide for a continuing evaluation of intelligence products from the viewpoint of the intelligence user."⁴⁰ More recently, President Ford has indicated that its duties encompass the review of every covert activity undertaken by the Government.⁴¹ Since the activities of the Forty Committee are not made public,⁴² it is impossible to state with certainty that this group does not oversee the CIA budget. However, since the committee is not charged with budgetary oversight and does not include members who specialize in fiscal matters, this conclusion seems reasonable. The Net Assessment Group is "responsible for reviewing and evaluating all intelligence products and for

38. White House Announcement, *supra* note 2. The four groups consist largely of the same members. In the words of a former member of the groups: "at Kissinger meetings, at whatever group it is, they all have different names, but the same people sit there . . ." Transcript of tape-recorded conversation between Gen. Robert E. Cushman, Jr. (a former Deputy DCI) and E. Howard Hunt, July 22, 1971, published in *N.Y. Times*, Aug. 3, 1973, at 10, col. 6. The reference to "Kissinger" refers to Dr. Henry Kissinger in his role as the President's Special Assistant for National Security Affairs.

39. Members of the Forty Committee include the Special Assistant to the President for National Security Affairs, the Chairman of the Joint Chiefs of Staff, the Under Secretary of State for Political Affairs, the Deputy Secretary of Defense, and the DCI.

The Committee derives its name from National Security Council Intelligence Decision Memorandum No. 40, the classified directive which established it in its present form. See T. Szulc, *How Kissinger Runs our 'Other Government'*, New York, Sept. 30, 1974, at 59. Earlier embodiments of the Forty Committee were named "the 54/12 Group," "the Special Group," and the "303 Committee." See Sperling, *Central Intelligence and its Control: Curbing Secret Power in a Democratic Society*, quoted in 112 Cong. Rec. 15,758, 15,763 (1966) and Walden, *Restraining the CIA*, in Blum, *supra* note 1, at 232.

40. White House Announcement, *supra* note 2.

41. *N.Y. Times*, Sept. 17, 1974, at 22, col. 4.

42. For example, at the hearing on his nomination, DCI-designate Colby indicated that due to the "classified" nature of the information, questions about the membership and function of the Forty Committee should preferably be deferred until the hearing was in executive session. Finally, Colby conceded in open session that the Chairman was indeed Dr. Kissinger, then Assistant to the President for National Security Affairs. Colby Hearings, *supra* note 9, at 14.

producing net assessments,"⁴³ while the United States Intelligence Board likewise performs substantive intelligence functions which have no relation to budgetary oversight.⁴⁴

Only IRAC, the fourth group, was given a function related to intelligence budgeting. But this function, as discussed above,⁴⁵ is limited to advising the DCI in the coordination of the various intelligence agency budget requests; it does not extend to assuring that budgets, once approved, are adhered to. Therefore, it appears that none of the groups created by the 1971 Presidential reorganization was intended to, or in fact does, fulfill an oversight function with respect to spending by the intelligence agencies.

2. *The President's Foreign Intelligence Advisory Board.* The President's Foreign Intelligence Advisory Board [hereinafter "PFIAB"] was re-established by executive order in 1969 as an intelligence oversight body within the Office of the Executive.⁴⁶ It was given a broad mandate to advise the President concerning the conduct of foreign intelligence activities by Government agencies.⁴⁷ PFIAB consists of 11 private citizens⁴⁸ assisted by a

43. White House Announcement, *supra* note 2.

44. The United States Intelligence Board was established to advise and assist the DCI with respect to the production of national intelligence, the establishment of national intelligence requirements and priorities, the supervision of the dissemination and security of intelligence material, and the protection of intelligence sources and methods.

Id.

45. See text accompanying notes 8-9 *supra*; see also White House Announcement, *supra* note 2.

46. Exec. Order No. 11,460, 34 Fed. Reg. 5539 (1969) [hereinafter "Exec. Order No. 11,460"]. Since 1956, PFIAB has existed under varying names with somewhat changing missions pursuant to previous executive orders. For a review of its history, see Announcement of Executive Order Reconstituting the Board, in 5 Weekly Compilation of Presidential Documents 44 (1969).

47. According to Exec. Order No. 11,460, § 1, *supra* note 46, PFIAB's duties are to:

(1) advise the President concerning the objectives, conduct, management and coordination of the various activities making up the overall national intelligence effort;

(2) conduct a continuing review and assessment of foreign intelligence and related activities in which the Central Intelligence Agency and other Government departments and agencies are engaged;

(3) receive, consider and take appropriate action with respect to matters identified to the Board, by the [CIA] and other Government departments and agencies of the intelligence community, in which the support of the Board will further the effectiveness of the national intelligence effort; and

(4) report to the President concerning the Board's findings and

five-person staff. To assist PFIAB in carrying out its function, the executive order directs the intelligence agencies to "make available to the Board all information with respect to foreign intelligence and related matters which the Board may require."⁴⁹ This blanket grant of access to Agency data gives PFIAB at least the potential to conduct budgetary oversight. However, it concentrates mainly on substantive issues relating to the intelligence community, with fiscal matters playing only a tangential role in its deliberations.⁵⁰

In addition to the fact that PFIAB exists to advise the President, whose interests may not always coincide with those of Congress or the nation as a whole, there are a number of reasons why PFIAB cannot reasonably be expected to produce objective budgetary oversight. First, it lacks the manpower to oversee a billion-dollar budget, for its members work only part time on PFIAB matters⁵¹ and its small staff includes no accountants.⁵² Second, many of the members have held responsible positions in the intelligence community and may therefore share the contextual predispo-

appraisals, and make appropriate recommendations for actions to achieve increased effectiveness of the Government's foreign intelligence effort in meeting national intelligence needs.

48. As of Aug. 30, 1974, the members of the Board were: George W. Anderson (Chairman), Former Chief of Naval Operations; William O. Baker, Vice President, Research, Bell Telephone Laboratories, Inc.; Leo Cherne, Executive Director, Research Institute of America; John B. Connally, former Secretary of the Treasury; John S. Foster, Director of Defense Research and Engineering, Department of Defense; Robert W. Galvin, Chairman of the Board, Motorola, Inc.; Gordon Gray, former Special Assistant to the President for National Security Affairs; Edwin H. Land, President, Polaroid Corporation; Clare Booth Luce, former Congresswoman from Connecticut and former Ambassador to Italy; Nelson A. Rockefeller, former Governor of New York; and Dr. Edward Teller, Professor, University of California and Associate Director, Lawrence Radiation Laboratory. Colby Hearings, *supra* note 9, at 185; telephone interview with Wheaton Byers, PFIAB Executive Director, Aug. 30, 1974 [hereinafter "Byers interview"].

49. *Id.*

50. Interview with Leo Cherne, Member, PFIAB, New York City, Sept. 13, 1974 [hereinafter "Cherne interview"]. PFIAB's executive director has suggested that PFIAB is concerned with intelligence agency budgets only to the degree that it may feel they do not reflect the President's priorities. Byers interview, *supra* note 48.

51. The members meet formally for approximately two days every two or three months and work individually on PFIAB projects for varying amounts of time between meetings. *Id.*; Cherne interview, *supra* note 50.

52. In September 1974 the staff consisted of the executive director, a former foreign service officer; his assistant, an attorney; and three secretaries. Byers interview, *supra* note 48.

sitions of the agencies whose programs they review.⁵³ Another problem originates from the fact that the Board's advice to the President is given in strict confidence and hence is not subject to the check of publicity.⁵⁴ In sum, PFIAB is a policy adviser to the President. It does not in fact and does not purport to exercise an intelligence-budget oversight function.

3. *OMB as an Overseer of Spending.* OMB is not authorized to make independent audits of any government agency's expenditures⁵⁵ and does not attempt to perform such audits.⁵⁶ Nonetheless, in discharging its primary responsibility as the coordinator of agency budget requests, OMB also serves to a limited extent as an overseer of agency spending. Executive agencies, including the CIA, which submit budgets to OMB are required to report "as accurately as possible" fiscal data including "receipts, appropriations, transfers, outlays and balances for the past year."⁵⁷ The reports "must be on a firm accounting basis and consistent with law and regulations"⁵⁸ and are subject to the same review as any other part of the agencies' submissions.⁵⁹ Thus, to the extent that OMB requires the CIA to account for previously appropriated funds, it serves as a check on CIA spending.

53. Exec. Order No. 11,460, *supra* note 46, calls for the appointment of persons

qualified on the basis of knowledge and experience in matters relating to the national defense and security, or possessing other knowledge and abilities which may be expected to contribute to the effective performance of the Board's duties.

54. Sen. Clifford Case (R., N.J.) described the disadvantages of confidential advice in the context of a discussion on executive privilege:

[T]he Executive is going to get better advice from people who know that their opinions are going to be tested by exposure to public view than otherwise, and . . . the greatest problem of getting good advice from anybody, so far as the President is concerned, is the knowledge that his advisers want to please him, and . . . this is the greatest corrupter of true intelligence. . . . [I]f the people who surround the President know that they are not going to be subject later to an exposure of their views and their advice to the President, they are rather more likely not to give the best advice they can.

Hearings on S. 2224 Before the Senate Comm. on Foreign Relations, 92d Cong., 2d Sess., (1972) [hereinafter "Hearings on S. 2224"].

55. See United States Government Manual 80-81 (1973-74).

56. OMB Letter, *supra* note 11.

57. Executive Office of the President, Office of Management and Budget, Preparation and Submission of Budget Estimates, Circular No. A-11 § 11.6 (June 28, 1974).

58. *Id.*

59. See note 11 *supra* and accompanying text.

4. *Audits within the CIA.* The only other executive branch review of CIA expenditures occurs within the CIA itself. According to DCI Colby, the Agency's methods of accounting "conform to auditing procedures used throughout the Government."⁶⁰ The CIA has an audit staff which reports to the DCI through the Inspector General, who audits all Agency accounts. Most CIA accounts are reviewed internally on an annual basis, with some smaller accounts being audited at less frequent intervals and some larger accounts audited continuously by a resident auditor. In some situations, audits are performed by outside audit firms or the Defense Contract Audit Agency; in addition, a specialized staff audits many of the Agency's industrial contracts.⁶¹ It would appear from this description that in-house CIA budgetary oversight is thorough. However, as conscientious and competent as the Agency's in-house auditors may be, it is an administrative axiom that no organization can evaluate its own programs with complete objectivity.

Thus, all oversight of CIA spending performed within the executive branch—that by the CIA itself, OMB, and perhaps to a small extent PFIAB—is based on fiscal data supplied by the Agency. The task of performing an independent audit is left for the legislative branch.

B. Congressional Oversight of CIA Spending

Congress' method of overseeing CIA spending was developed in response to the special requirements of secrecy that accompany many of the activities—and consequently the expenditures—of the CIA and other intelligence services. When the congressional CIA oversight mechanism was established, it was thought that the need for secrecy rendered public hearings and other traditional methods of congressional oversight impracticable and that access to confidential information about the intelligence agencies and their activities should be denied to all but a few congressmen. Oversight of CIA spending and activities was therefore delegated to subcommittees which meet in executive session and report only the conclusions reached at their meetings, not the reasons underlying them, to Congress as a whole.⁶² These subcommittees are in uniquely

60. Letter from William E. Colby, DCI, to author, Nov. 9, 1974, on file in New York University Law Library [hereinafter "Colby Letter"].

61. Colby Hearings, *supra* note 9, at 182.

62. This exemption from a requirement to justify their conclusions to Congress as a whole is unique to the intelligence subcommittees. Other subcommittees also customarily meet in executive session. Senate Appropriations staff interview, *supra* note 18.

powerful positions both because they are not required to justify their conclusions to the full houses and because they are the only congressional bodies to which the CIA acknowledges its obligation to report.⁶³

Oversight of CIA activities and spending is primarily the responsibility of subcommittees of the Armed Services Committees in both houses, although the Appropriations Intelligence Subcommittees also perform some spending oversight. The Senate Armed Services Subcommittee on Central Intelligence and the House Armed Services Special Subcommittee on Intelligence are composed of senior members, including the chairmen, of the full committees. Both subcommittees have taken an increasingly active role in intelligence oversight since 1971, a year when the House subcommittee had been disbanded entirely and the Senate subcommittee, although technically in existence, did not meet.⁶⁴

The Senate Armed Services Subcommittee, chaired by Senator John Stennis (D., Miss.), appears to be the less active of the two subcommittees. By mid-September 1974, it had held only two formal meetings during the 93d Congress,⁶⁵ although it met informally on a number of other occasions.⁶⁶ The informal meetings reportedly did not always involve all subcommittee members and were sometimes, but not always, attended by one or two staff members and recorded in staff memoranda.⁶⁷ CIA spending was reportedly reviewed in great detail at some of these meetings.⁶⁸

The House Armed Services subcommittee has taken a relative-

63. According to DCI Colby.

[T]here is no specific resolution of either the House or the Senate that sets up those particular committees, but in the early 1950s those subcommittees of the Appropriations Committee and the Armed Services Committee of the House and of the Senate were established as our proper oversight and review committees. And the practice grew up, over these 25 years, that we would only speak to those and not to the others.

Center for National Security Studies, Conference on the Central Intelligence Agency and Cover Actions, Washington, D.C. Sept. 13, 1974 (mimeo'd proceedings) [hereinafter "National Security Studies Conference"].

64. For a description of the oversight committees through mid-1971, see CIA: Congress in Dark About Activities, Spending, 21 Cong. Q. 1840-43 (Aug. 28, 1971) and id. at 1728-29 (Aug. 14, 1971). See also 120 Cong. Rec. 5929 (daily ed. April 11, 1974).

65. 120 Cong. Rec. 17,005 (daily ed. Sept. 19, 1974) (remarks of Sen. Baker, attributing the information to Senate Armed Services Committee staff).

66. Telephone interview with W. Clark McFadden II, Counsel, Senate Armed Services Committee, Nov. 8, 1974.

67. Id. McFadden was unwilling to state the extent to which the subcommittee's responsibilities might be carried out by the chairman alone.

68. Id.

ly active role in CIA oversight since its reconstitution in 1971 under the chairmanship of Representative Lucien Nedzi (D., Mich.).⁶⁹ It met nine times in 1972, 24 times in 1973, and 17 times in 1974 through mid-November.⁷⁰ The subcommittee generally meets in executive session, usually with staff members and a stenographer present.⁷¹ That the meetings have not focused on spending oversight is indicated by the fact that a staff member who has worked for the intelligence subcommittee since 1972 has "not been privy to any detailed budget discussions."⁷²

The intelligence subcommittees of the House and Senate Appropriations Committees also perform some spending oversight. Staff members of the House "Special Group" are frequently in contact with the executive agencies they oversee; in addition, the Special Group informally monitors CIA spending both in the course of substantive briefings throughout the year concerning Agency programs and in its hearings on the Agency's appropriation requests.⁷³ The Senate Appropriations Intelligence Subcommittee reportedly also concerns itself with CIA spending both in its formal budget hearings and in its regular semi-monthly meetings.⁷⁴

C. *The 1949 Act and Congressional Control Over CIA Spending*

The 1949 Act appears to limit traditional legislative control over executive agencies by providing that the CIA may expend its funds "without regard to limitations of appropriations from which [the funds are] transferred"⁷⁵ and "notwithstanding any other provisions of law."⁷⁶ If in these provisions Congress completely—

69. The chairman of the full committee, Rep. Edward Hébert (D., La.), is a member of the subcommittee.

70. Letter from William H. Hogan, Jr., Counsel, House of Representatives Comm. on Armed Services, to author, Nov. 18, 1974, on file in New York University Law Library [hereinafter "Hogan Letter"]. Many, but not all, of these meetings were devoted to hearings on CIA involvement in Watergate and retirement provisions for CIA employees. See, e.g., the list of subcommittee publications in *Hearings Before and Special Reports Made By House Comm. on Armed Services on Subjects Affecting the Naval and Military Establishments 1973*, 93d Cong., 1st Sess. at 24-25.

71. Hogan Letter, *supra* note 70.

72. *Id.*

73. Preston interview—Nov. 74, *supra* note 13. Although the subcommittee's reviews of CIA appropriation requests do not include a systematic justification of past-year spending, Agency representatives are called upon to justify specific items, e.g. a request for an increase in funds for a certain purpose. *Id.*

74. Senate Appropriations staff interview, *supra* note 18.

75. 50 U.S.C. § 403 f (a) (1970).

76. *Id.*

even if not permanently⁷⁷—relinquished its power to control CIA spending, attempts to utilize the congressional “plenary power to exact any reporting and accounting it considers appropriate in the public interest”⁷⁸ may be an exercise in futility. On the other hand, such a situation may increase the importance of congressional oversight in order to determine when new legislation, including modification of the 1949 Act, may be needed and to allow Congress to attempt to influence the CIA through informal means. In either case, it is useful to define the scope of the 1949 Act with respect to congressional control of CIA spending.

A concrete context in which this issue might arise would be the approval of an appropriation including funds destined for the CIA which contains a limitation on the purposes for which the funds may be spent but which does not expressly state whether the CIA is to be bound by the limitation.⁷⁹ In such a case the 1949 Act may reasonably be held to override the subsequent enactment only if Congress (1) intended in passing the 1949 Act to exempt the CIA from all subsequently enacted funding limitations; and (2) does not intend to disturb the CIA exemption in the subsequently passed funding limitation.⁸⁰

The language of the 1949 Act suggests that Congress intended to exempt the CIA only from certain funding technicalities. Thus, for example, the subsection which exempts the CIA “from other provisions of law” arguably applies only to technical funding limitations such as those enumerated in that subsection, viz.,

prohibitions on the exchange of appropriated funds other than for silver, gold, U.S. notes and national bank notes, restrictions on using personnel of other government agencies, and limitations on the payment of rent and making of improvements to leased premises.⁸¹

77. Congress may, of course, reassert this power whenever it wishes by the passage of new legislation. See text accompanying notes 196-214 *infra*.

78. *United States v. Richardson*, 418 U.S. 166, 178, n. 11 (1974).

79. An example of such a limitation in an appropriation bill might state that “nothing in this appropriation shall be construed as authorizing the use of any such funds to provide military assistance to the Government of X.” Cf. Pub. L. No. 91-668, § 838 (a), 2d proviso, 84 Stat. 2020 (1971), a provision in the 1971 Department of Defense Appropriation which prohibited the use of funds in the appropriation for support of allied forces assisting the government of Cambodia or Laos. This limitation is discussed in Futterman, *Toward Legislative Control of the CIA*, 4 N.Y.U. J. Int’l L. & Pol. 431, 450 (1971) [hereinafter “Futterman”].

80. *Id.* at 448-54.

81. 50 U.S.C. § 403f (1970). This interpretation involves application of the *ejusdem generis* maxim of statutory construction.

Similarly, subsection 10 (a),⁸² which allows the Agency to expend funds "notwithstanding any other provisions of law," arguably was intended to apply only to the housekeeping functions listed therein such as "rental and news-reporting services" and "association and library dues." Subsection 10 (b),⁸³ authorizing the CIA to spend its funds "without regard to the provisions of law and regulations relating to the expenditure of Government funds," may have been intended only to exempt the CIA from normal accounting procedures. Such an interpretation is indicated by the remainder of the sentence: "... and for objects of a confidential, extraordinary or emergency nature, such expenditures to be *accounted* for solely on the certificate of the Director. . . ." (Emphasis added.)

Congress' intent regarding CIA spending autonomy is not clarified by the legislative history of the 1949 Act. The Committees on Armed Services of both houses held hearings on the bill in executive session and released only skeleton reports stating that much of the testimony was confidential and that the legislation was justified.⁸⁴ The House passed the bill without clarification;⁸⁵ the Senate likewise passed an amended version of the House bill with the knowledge that it was not being given a full explanation.⁸⁶ The funding provisions of the Act were not discussed in either House.

Proponents of CIA autonomy may argue that Congress' passage of the 1949 Act without knowledge of its full implications re-

82. 50 U.S.C. § 403j (a) (1970).

83. 50 U.S.C. § 403j (b) (1970).

84. S. Rep. No. 1302, 80th Cong., 2d Sess. (1948); H.R. Rep. No. 160, 81st Cong., 1st Sess. (1949); S. Rep. No. 106, 81st Cong., 1st Sess. (1949). The House report stated:

The report does not contain a full and detailed explanation of all the provisions of the proposed legislation in view of the fact that much of such information is of a highly confidential nature. However, the Committee on Armed Services received a complete explanation of all features of the proposed measure. The committee is satisfied that all sections of the proposed legislation are fully justified.

H.R. Rep. No. 160, 81st Cong., 1st Sess. 6 (1949).

85. When the House considered the committee report, some members objected to the committee's failure to inform the House of the full implications of the bill. Rep. Emanuel Celler (D., N.Y.) protested:

Certainly if the members of the Armed Services Committee can hear the detailed information to support this bill, why cannot our entire membership? Are they the Brahmins and we the untouchables? Secrecy is the answer. What is secret about the membership of an entire committee hearing the lurid reasons? In Washington three men can keep a secret if two men die. It is like the old lady who said, "I can keep a secret but the people I tell it to cannot."

95 Cong. Rec. 1945 (1948).

86. 95 Cong. Rec. 6947-56 (1949).

reflects an intent to abdicate effective control. However, a contrary argument holding that the burden of proof falls on those who assert such an extraordinary abdication of legislative power is at least equally persuasive. In this view, the absence of explicit legislative direction should be interpreted as reflecting a congressional intent *not* to grant extraordinary powers to the CIA. If any such explicit grant is contained in the undisclosed portion of the Armed Services Committees' hearings, the burden is on those who assert it to produce the unpublished materials. Even if such materials were found to exist, the question would still remain as to whether they reflect the true intent of Congress since Congress as a whole was ignorant of them when it passed the legislation.⁸⁷

Respect for the intent of post-1949 Congresses which have enacted appropriations limitations also dictates a restrictive construction of the 1949 Act's funding provisions. A total CIA exemption from funding limitations which do not expressly apply to it might frustrate the intent of subsequent Congresses enacting limitations on appropriations, for the executive could always evade the restrictions merely by transferring the funding and nominal control of the forbidden operation to the CIA. Therefore, when Congress passes a blanket restriction on an appropriation and is silent regarding its application to the CIA, the burden of persuasion should rest on those who would exempt the Agency rather than on those who would read the restriction literally. This view is particularly plausible since such restrictions are frequently added during rapid floor debate, when congressmen cannot be expected to have in mind all the other sections of the United States Code which might conceivably affect the matter at hand. Unless there is an express indication of congressional awareness of the 1949 Act's CIA exemption when a given funding restriction is passed, the axiom that Congress intends its legislation to be effective suggests that the 1949 Act should not be held to supersede a subsequently voted appropriation restriction.⁸⁸

87. The position described here is put forth in Futterman, *supra* note 79, at 452-53.

88. Cf. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1969), where the Supreme Court held that a statute prohibiting federal courts from granting injunctions against labor unions under any conditions [Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1932)] did not prevent a federal court from granting an injunction to enforce a provision of a more recent law [Labor Management Relations Act, 29 U.S.C. § 185 (1947)], despite the fact that the newer statute did not expressly supersede the older one and did not expressly authorize the granting of such an injunction. The Court stated:

The literal terms of . . . the Norris-LaGuardia Act must be accommo-

Thus there is at least a colorable argument that the 1949 Act was not intended to and does not preclude control of CIA spending by subsequent Congresses. Otherwise, the 1949 Act would so limit the parameters of Congress' discretion that congressional oversight of CIA spending would be reduced to form without substance.

IV. DEFICIENCIES IN THE PRESENT SYSTEM OF CONGRESSIONAL OVERSIGHT

There is little disagreement that intelligence oversight—including oversight of intelligence spending—cannot be performed as openly as oversight of other government functions. An appropriate standard for congressional oversight of the CIA is that it be as thorough and as open as possible, consistent with the confidentiality required by the national security. With that standard in mind, this section will examine some possible weak points in the current system.

A. Do the Subcommittees in Effect Shield the CIA from Congress?

The secrecy that attends subcommittee oversight of CIA expenditures raises issues regarding the utility of oversight groups whose members cannot reveal the bases for their judgments even to their congressional colleagues. Under such conditions the oversight committees, far from being an instrument of congressional control over the intelligence agencies, may in effect shield the intelligence community from effective congressional scrutiny.⁸⁹

So long as the oversight subcommittees continue to have jurisdiction over CIA activities, no other congressional bodies will be likely to monitor the Agency. Hence, by remaining ignorant of

dated to the subsequently enacted provisions of . . . the Labor Management Relations Act and [the latter Act's] purposes.

398 U.S. at 250.

89. For example, Sen. Proxmire, citing the repeated postponement of hearings on the CIA by the CIA subcommittees in both houses despite the referral of "several important bills" to them and despite DCI Colby's suggestion that changes be made in the CIA legislation, recently stated on the floor of the Senate:

It has reached the point where the only conclusion that can be drawn is that the committees are trying to protect the CIA from the legitimate calls for change from the rest of Congress.

120 Cong. Rec. 5929 (daily ed. April 11, 1974). Sen. Case has also cautioned that oversight committees having access to classified information may in effect be "used as a means of conning us rather than informing us, as a body." Hearings on S. 2224, *supra* note 54.

Agency activities, such as appears to have been the case regarding CIA involvement in Laos before 1971,⁹⁰ the subcommittees effectively cut off the access of the entire Congress to information, both fiscal and substantive, about these activities. The effect of any failure to oversee by the subcommittees is particularly severe in view of the fact that they are the only ones to whom the Agency recognizes an obligation to provide information.⁹¹ A concrete example of this problem occurred recently in connection with an investigation of possible CIA involvement in the Watergate break-in and cover-up by the Senate Select Committee on Presidential Campaign Activities [hereinafter the "Select Committee"]. Senator Howard Baker (R., Tenn.) reported that the Select Committee had been confronted by a "stonewall" [sic] when it received a letter from DCI Colby

stating that the Agency would make certain critical classified information "completely available to inspection by any member of the CIA Subcommittee of the Senate Armed Services Committee" but that he did not "think it appropriate to turn over to the Select Committee" any of this material.⁹²

Thus, a properly authorized congressional committee was unable to investigate as fully as it deemed proper matters involving the CIA. The committee's inability appeared to result from a combination of the oversight subcommittees' failure to act and the CIA's reluctance to supply certain information to any congressional body other than the oversight subcommittees.

Another aspect of the problem arises from the Armed Services Committees' practice of referring bills concerning the CIA to the Agency for comment, which as applied sometimes appears to have the effect of giving the CIA a measure of control over legislation concerning it. Although it is regular congressional procedure to re-

90. See text accompanying notes 22-23 *supra*.

91. DCI Colby recently stated:

I am prepared to go into the CIA . . . in detail before the proper committees . . . [or] before any other members who are brought into the matter by the proper committees. I am prepared to change our procedure if the Congress decides to set up the structure in another way. Until one of those happens, I respectfully must not get into a further discussion about the details of our activities

See note 63 *supra* and accompanying text.

92. 120 Cong. Rec. 17,004 (daily ed. Sept. 19, 1974). DCI Colby, while not denying Sen. Baker's assertions, states that the CIA "made available" to the Select Committee "26 witnesses, 700 documents, and 2,000 pages of testimony, much of it sensitive and of the type normally available only to the Agency's oversight committees." Colby letter, *supra* note 60.

fer proposed legislation to the agencies concerned for comment,⁹³ bills referred to the CIA by the House Armed Services Committee frequently remain at the Agency for so long as effectively to cut off their chance for consideration by Congress.⁹⁴ This practice, whatever its purpose, serves to prevent the passage of legislation concerning the Agency rather than to facilitate it.

B. Are the Subcommittees Representative of Congress as a Whole?

The membership of the oversight subcommittees does not represent the full spectrum of congressional views. The seniority system creates one facet of this problem. As the system presently works, the chairman of each committee assigns the other members to subcommittees. The chairman of the Armed Services and Appropriations Committees in both houses have consistently chosen only relatively senior members for service on the intelligence subcommittees.⁹⁵ Younger congressmen and those who tend to be more critical of the CIA are not represented on the oversight subcommittees.

The second aspect of the problem is inherent in the secrecy which attends subcommittee deliberations. Representatives and senators face elections every two or six years, and intelligence oversight does not gain votes at home. Indeed, it may well cost votes. Based on what a subcommittee member has learned in confidential briefings, he may be moved to a vote on the floor of the House or Senate which he cannot justify publicly and which may appear ill-considered in light of the information available to the public.⁹⁶

93. Hogan letter, *supra* note 70.

94. For example, among the bills awaiting CIA comment in August 1974 was one which had been referred to the Agency in May 1973 and two which had been referred in June 1973. Leg. Cal., H.R. Comm. on Armed Services, 93d Cong., No. 8 (Aug. 23, 1974). Consideration of six bills similar to those submitted for CIA recommendation was meanwhile being held in abeyance pending receipt of the Agency reports on the three submitted bills. *Id.* All these bills died in committee when the 93d Congress adjourned Dec. 20, 1974.

95. See text preceding notes 13 and 64 *supra*.

96. Sen. George Aiken (R., Vt.) has aptly described this predicament:

We all know that when the appropriations bill is pending the Russians in particular become extremely powerful. They are on the verge of producing weapons which could virtually exterminate us at one blow and we have to do something about that right away. Let's assume [the Defense Department] asks for a trillion dollars to continue [its] research . . . But assume that the members of the committee entitled to the information from the CIA learn that this information, so-called, which has been spread across the front pages of the press to justify the

Furthermore, since time and effort expended on intelligence oversight do not usually gain crucial home-town publicity, the congressmen who can best afford to participate in confidential oversight may be those senior members with "safe" seats.⁹⁷

Since secrecy requires intelligence oversight committees to report their conclusions to the entire Congress without the underlying justifications—thereby precluding the members from making an independent informed judgment⁹⁸—and since these conclusions are necessarily based on general policy judgments as well as on specific classified information, it is particularly unfortunate that the subcommittees do not comprise a philosophical cross-section of the full Congress.⁹⁹ This is a case in which national security, the political process, and the democratic ideal of fair representation are all at loggerheads.

C. Exclusion of the House Foreign Affairs and Senate Foreign Relations Committees from CIA Oversight

Another deficiency relates to the exclusion from the intelligence oversight process of congressional committees with jurisdiction over foreign affairs. The structural relationship between CIA

demand for a trillion dollars, isn't so; that the Russians are nowhere near that point in their development of destructive weapons and that, say \$500 billion would suffice to insure the security of the United States.

What do we do then? Do we go on the floor and take the position against all this publicity which has been spread in public before the committees and spread before the United States and the press? Then to carry out our duties we vote against that trillion dollars . . . and approve of only \$500 billion. How do we justify that position with our constituents back home? Assuming we want to be reelected, it puts us in a bad spot. Can we say we got this information from the CIA? How do we justify our position after all this publicity has been made on the other side of it?

You know self-preservation is a very strong instinct among Members of Congress.

Hearings on S. 2224, *supra* note 54, at 37-38.

97. But see text accompanying notes 145-46 *infra*.

98. Sen. Hughes has described Congress' position with regard to intelligence matters:

We are uninformed . . . We have not had the capacity or responsibility to know even when we were given information whether it was right or wrong, or what was happening.

120 Cong. Rec. 9607 (daily ed. June 4, 1974).

99. In the case of the Appropriations subcommittees the problem is most acute, since the CIA budget as approved by these subcommittees is concealed in other appropriations and is not even subject to the formality of a vote of the full House and the full Senate.

activities and U.S. foreign policy supports the inclusion of these committees. As demonstrated by the recently disclosed Chilean operation, CIA activities can have a profound effect on U.S. foreign policy. Congress recognizes this: When a covert operation goes awry, it looks to the Foreign Affairs and Foreign Relations Committees, not to the Armed Services or Appropriations Subcommittees, for an explanation.¹⁰⁰

Furthermore, the law restricting CIA operations (with very limited exceptions) to foreign countries¹⁰¹ suggests that the House Foreign Affairs and Senate Foreign Relations Committees ought to be included in intelligence oversight. Another reason for their inclusion is the fact that CIA operatives abroad are responsible to the ambassadors in their respective countries; the ambassadors, in turn, are part of the State Department, which is within the exclusive congressional jurisdiction of the Committees on Foreign Affairs and Foreign Relations.¹⁰² The Foreign Assistance Act of 1974¹⁰³ mandates the inclusion of the Foreign Affairs and Foreign Relations Committees in certain aspects of CIA oversight which have particular significance to the United States' international posture. However, an informal arrangement by which members of the Senate Foreign Relations Committee were accorded "observer" status at Senate Armed Services Intelligence Subcommittee meetings was discontinued in 1974.¹⁰⁴

D. Lack of Executive Cooperation

The effectiveness of congressional oversight of the CIA is reduced by the failure of the executive branch either to consult with the subcommittees on policy matters or to cooperate fully in congressional investigations.¹⁰⁵ The 1971 White House reorganization of the intelligence community¹⁰⁶ is perhaps the most striking example of executive failure to consult with the intelligence oversight

100. F. Wilcox, *Congress, the Executive, and Foreign Policy* 87 (1971). Hearings about the U-2 incident in 1960 and the Bay of Pigs episode in 1961, for example, were both held by the Senate Foreign Relations Committee. Moreover, when the Foreign Relations Committee sought an explanation of the CIA's role in these events, it bypassed the Armed Services Committee and went directly to the CIA. *Id.*

101. 50 U.S.C. § 403d (3) (1970).

102. 117 Cong. Rec. 42,925 (1971) (remarks of Sen. Symington).

103. Pub. L. No. 93-559 (Dec. 30, 1974). See Editor's Note *infra*.

104. Telephone interview with Senate staff member, Aug. 30, 1974 [hereinafter "Senate staff interview"].

105. See, e.g., text accompanying note 92 *supra*.

106. See text accompanying note 38 *supra*.

subcommittees. This action was taken without prior consultation with or even advance notice to the Senate Armed Services or Appropriations Committee.¹⁰⁷

The Executive's attitude toward Congress in this matter was described by Senator Stuart Symington (D., Mo.), a member of the Armed Services Intelligence Subcommittee who had protested the Executive's bypassing of Congress:

The Chairman of the newly formed White House Intelligence Committee, Dr. Kissinger, . . . said . . . that the change should have been discussed with the proper committees of Congress, that the organization details had been handled by Mr. George Shultz, and that he, Kissinger, would arrange for Mr. Shultz to come down and talk to me about it.

I . . . said I felt any such a briefing should be given to the committees, not to an individual Member. *That is the last I have heard of it.*¹⁰⁸

Congressional hearings to be held in 1975 on the CIA's alleged domestic activities and on its \$11-million intervention in Chile may disclose whether the executive branch has since begun consulting with the congressional oversight committees.¹⁰⁹

A particularly important instance of executive failure to cooperate with subcommittee investigations involves CIA's refusal to permit the General Accounting Office [hereinafter "GAO"], Congress' legal and accounting arm,¹¹⁰ to conduct a comprehensive CIA audit. Since 1961, when GAO concluded that "under existing security restrictions" it could not perform useful audits,¹¹¹ GAO has "not conducted any reviews at the CIA nor any reviews which focus

107. 117 Cong. Rec. 42,930 (1971) (remarks of Sen. Stennis). The record does not reveal whether the House oversight committees were consulted.

108. 117 Cong. Rec. 42,924 (1971) (emphasis added).

109. Sen. Symington stated that he had not been fully informed of the Chile operation. N.Y. Times, Sept. 17, 1974, at 11, col. 1. DCI Colby stated:

I can't say that every dollar that CIA spent in Chile was individually approved by a chairman, but I can say that the major efforts were known to the senior officials of the Congress as stated.

National Security Studies Conference, *supra* note 63.

110. The GAO was established by the Budget and Accounting Act of 1921, 31 U.S.C. § 41 (1970), as an independent, nonpolitical investigative arm of Congress. See also the Budget and Accounting Procedures Act of 1950, 31 U.S.C. §§ 65-67 (1970), and the Legislative Reorganization Act of 1970, 31 U.S.C. §§ 1154, 1171-76 (1970).

111. Letter of May 10, 1974 from R. F. Keller, Acting Comptroller General of the United States, to Hon. William Proxmire 9 [hereinafter "GAO Letter"].

specifically on CIA activities."¹¹² When CAO has contacted the CIA, directly or indirectly, in the context of broad reviews regarding other matters such as transfers of excess defense articles to foreign governments, it has experienced varying degrees of cooperation. In some cases the CIA has provided the information desired, but other attempts to obtain "information from the intelligence community must be characterized as border line, at best."¹¹³

Since GAO provides the mechanism through which Congress normally audits the executive agencies whose budgets it authorizes, the failure of the CIA to cooperate with GAO auditors and investigators presents an extremely serious problem. The intelligence subcommittee staffs do not have the capacity to audit a billion-dollar budget such as the CIA's, while CAO was established precisely to perform such audits for Congress.¹¹⁴ Thus, by not cooperating with GAO, the CIA effectively forecloses Congress from auditing its books.

E. Concealment of the CIA Appropriation from Congress

Perhaps the most critical shortcomings in congressional oversight of CIA funding are found in the appropriation system. Under the present scheme, only a few committee chairmen and subcommittee members know the amount of the CIA appropriation; the great majority of congressmen play no role in determining either the details of Agency spending or even the total amount of its budget.¹¹⁵ This arrangement not only deprives Congress of an opportunity to express its funding priorities with respect to CIA activities but also affirmatively deceives Congress with regard to the level of funding being approved for other programs whose appropriations may contain funds actually destined for the CIA.

Through the annual appropriation process, Congress allocates the Government's available financial resources. Since these resources are limited, Congress in effect must choose among the several items in the budget supermarket, spending more on the items it judges to be most vital, economizing on others, and eliminating some altogether.¹¹⁶ Since the CIA budget is unidentified, there is

112. *Id.* See note 151 *infra*.

113. *Id.* at 10-11.

114. See note 110 *supra*.

115. For a description of the appropriation process, see Section II *supra*.

116. Sen. McGovern first made the analogy of a supermarket of services. 117 Cong. Rec. 23,692 (1971).

no opportunity for the members to weigh it against other programs which might compete with it for federal funds. At the same time, the CIA budget affects Congress' budgeting process in a particularly unfortunate way, by inflating the appropriations in which the CIA's budget is hidden.¹¹⁷ Hence, Congress believes it is allocating a higher priority to the programs in whose appropriations CIA funds are concealed than is, in fact, the case.¹¹⁸

Even the chairmen of subcommittees concerned with non-intelligence matters sometimes are unaware that the appropriations for programs under their jurisdiction include funds earmarked for the CIA. For example, in 1971 Senator Edward Kennedy (D., Mass.), Chairman of the Senate Judiciary Committee's Subcommittee on Refugees and Escapees, made public receipts obtained from GAO which he said demonstrated that much of the money appropriated for refugee aid in Southeast Asia was in fact being spent to

117. Most but not all CIA funds are probably included in appropriations for the Department of Defense. Preston interview—Nov. '74, *supra* note 13. This is reflected in the fact that the appropriations intelligence subcommittees in both houses are largely composed of members of the Defense Department subcommittees. See text preceding note 13 *supra*. In 1971 Professor Futterman suggested that most CIA funds may be located in the \$5+ billion "Intelligence and Communications" item in the Defense Program and Budget. Futterman, *supra* note 79, at 441. It has also been suggested that funds destined for the CIA may be hidden in appropriations for the Food for Peace program [117 Cong. Rec. 40,737 (1971)], domestic agricultural programs [117 Cong. Rec. 23,692 (1971)], and refugees in Southeast Asia (see text accompanying notes 119-20 *infra*).

118. This problem was discussed in the Senate in 1971:

Mr. FULBRIGHT. [B]illions of dollars of intelligence funds are contained in this [Defense Department] appropriation. No one can tell where in this bill those funds are. When they read a line item and find that there is so much for aircraft, or for a carrier, those may or may not be the real amounts.

This practice gives rise to questions about every item in the appropriation

Mr. CRANSTON. Are there references in the appropriation bill to funds for intelligence uses?

Mr. SYMINGTON. No.

Mr. CRANSTON. How are they provided for: by padding other categories?

Mr. SYMINGTON. I am not sure I have enough knowledge to answer. Presumably yes

Mr. CRANSTON. When we run through the bill, we find that there is allocated money for pay and allowances, for individual clothing, for subsistence. . . . Is the way these items are handled, inflated, or bloated, in fact—some of them, at least—that will cover up what is in this bill for intelligence?

Mr. ELLENDER. Yes, the Senator is correct—some of it.

117 Cong. Rec. 42,927-31 (1971).

support CIA-directed paramilitary operations in Laos.¹¹⁹ Over a year later Senator Kennedy published reports which indicated that nearly half of the funds appropriated by the U.S. to aid victims of the war in southeast Asia were still being diverted to CIA projects, despite President Nixon's earlier assurances that the practice would be ended;¹²⁰ and the CIA was reported to be continuing to finance clandestine army operations through the Agency for International Development.¹²¹

It appears that subcommittee chairmen remain unaware of CIA funds in their appropriations. As recently as April 1974, Senator Proxmire asserted that "many subcommittee chairmen in Congress are not aware that they are approving appropriations for intelligence agencies under the slight-of-hand procedures in the [1949 Act]."¹²² To help remedy this situation, Senator Proxmire stated that he would ask the floor manager of every appropriation bill whether intelligence funds were hidden in his bill.¹²³

V. DOES THE CONSTITUTION MANDATE PUBLICATION OF THE CIA BUDGET?

The question of whether the CIA budget should be hidden from all but a few members of Congress is one of constitutional significance. Not only may the Constitution mandate the reporting of CIA expenditures to Congress as a whole, but it may even require publication of the CIA budget. Article I, Section 9, Clause 7 of the Constitution provides: "[A] regular statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." This, the Statement and Account Clause, has never been interpreted by the Supreme Court.¹²⁴ The "legislative history" of the Clause, while not totally unambiguous, is compatible with the view that the Framers of the Constitution intended that public account should be made of all funds expended by the federal

119. N.Y. Times, Feb. 7, 1971, at 16, col. 3.

120. N.Y. Times, March 19, 1972, at 1, col. 8.

121. Id. at 2, cols. 1-4.

122. 120 Cong. Rec. 5929 (daily ed. April 11, 1974).

123. 120 Cong. Rec. 888 (daily ed. Jan. 31, 1974).

124. Recently, in *United States v. Richardson*, 418 U.S. 166 (1974), a citizen invoked the Clause in support of his petition for a writ of mandamus to compel the Secretary of the Treasury to publish the CIA's receipts and expenditures and to enjoin any further publication of the Treasury Department's *Combined Statement* which did not reflect such figures. The Supreme Court held that Richardson lacked standing to bring the action and issued no opinion on the merits of his case.

government. At a minimum, the legislative history indicates an intent that Congress should be fully informed of all federal expenditures.

A. *Textual Analysis of the Statement and Account Clause*

The plain language of the Statement and Account Clause is unambiguous in its mandate that "a regular statement and Account . . . of all public money shall be published from time to time" (emphasis added). In contrast, Article I, Section 5, Clause 3, requiring each house to maintain and publish a journal of proceedings, expressly exempts from publication "such facts as may in their Judgment require Secrecy."¹²⁵ No Constitutional provision indicates that Congress itself is to have anything less than complete information about the receipt and expenditure of public funds.

B. *The Legislative History of the Statement and Account Clause*

The particular importance which the Framers attached to a public accounting is not difficult to understand: "A revolution had been fought largely because of popular resentment of a distant sovereign who taxed and spent without public accountability."¹²⁶

Nothing analogous to the Statement and Account Clause had been contained in the Articles of Confederation¹²⁷ or in the original draft of the Constitution.¹²⁸ When the Clause was first proposed at the Constitutional Convention, only one representative questioned the addition of the full-accounting requirement; and he merely expressed doubt about the practicality of requiring the Government to report "every minute shilling."¹²⁹ No objection was

125. The Statement and Account Clause has also been compared to Article II, Section 3, which requires the President "from time to time [to] give to the Congress Information on the State of the Union." This comparison is said to demonstrate that the Framers distinguished between "reporting" to Congress and "publishing" to the people. Brief of Ralph Spritzer as Amicus Curiae at 29-30, *Richardson v. United States*, 465 F.2d 844 (3d. Cir. 1972) [hereinafter "Amicus Brief"]. Regardless of whether the Statement and Account Clause creates a duty to the people, the Supreme Court's dictum that "the subject matter is committed to the surveillance of Congress," (418 U.S. at 179), indicates that at least Congress is entitled to receive complete information.

126. Amicus Brief, supra note 125, at 30.

127. The Articles of Confederation required only that Congress inform the states of its indebtedness. Articles of Confederation, Art. IX, § 15.

128. Brief for the Petitioners at 23, *United States v. Richardson*, 418 U.S. 166 (1974).

129. Rufus King was the Framer who expressed this view. 2 The Records of the Federal Convention of 1787, at 618 (M. Farrand ed. 1911) [hereinafter "M. Farrand"].

made to the principle of publishing the Government's accounts. Instead, the main question debated was the frequency with which accountings should be published. The original proposal was for annual publication, but James Madison's proposal, requiring publication "from time to time" in order to "leave enough to the discretion of the Legislature,"¹³⁰ prevailed. Madison, attempting not to weaken but to strengthen the Clause by his amendment,¹³¹ noted that the practical effect of the fixed-interval reports required under the Articles of Confederation had been counterproductive: "[A] punctual compliance being often impossible, the practice had ceased altogether."¹³² James Wilson, who seconded Madison's motion, added that "[m]any operations of finance cannot be properly published at *certain times*."¹³³ Wilson's statement must have been based on an assumption that full disclosure was to be required, for if full disclosure were not required, there would never be a necessity to delay reporting until the report could be "properly published." Statements made by the Framers at ratifying conventions in their home states also reflect their understanding that full accountings would be available both to Congress and to the people under the Statement and Account Clause.¹³⁴

The only doubt about the Clause was expressed by Framers who feared that the "from time to time" requirement might later be

130. *Id.* at 618-19.

131. That the Madison proposal was designed to strengthen the publication requirement is apparent from his explanation of the proposal at the 1787 Convention:

[I]f the accounts of the public receipts and expenditures were to be published at short stated periods, they would not be so full and connected as would be necessary for a thorough comprehension of them and detection of any errors. But by giving them an opportunity of publishing them from time to time, as might be found easy and convenient, they would be more full and satisfactory to the public, and would be sufficiently frequent.

3 M. Farrand, *supra* note 129, at 326.

132. 2 M. Farrand, *supra* note 129, at 619.

133. *Id.* at 618-19 (emphasis added).

134. For example, George Mason, who drafted the Clause, told the Virginia Convention that while some matters might require secrecy, he did not conceive that the receipts and expenditures of the public money ought ever to be concealed. The people, he affirmed, had a right to know the expenditures of their money.

3 M. Farrand, *supra* note 129, at 326.

In Maryland, James McHenry stated: "[T]he people who give their money ought to know in what manner it is expended." 3 M. Farrand, *supra* note 129, at 150. In New York, Chancellor Livingston advocated the Clause as a check against corruption:

Congress are to publish, from time to time, an account of their receipts and expenditures. These may be compared together; and if the former,

construed in a way which would violate the Framers' intent of full publication.¹³⁵ Interestingly, however, none of the proponents of the "from time to time" phrase listed the need for some secrecy as an argument supporting their position.

C. Subsequent Constructions of the Statement and Account Clause

In practice, the Statement and Account Clause has been interpreted as permitting Congress to make secret appropriations under certain circumstances. In 1811, for example, President Madison, a Framers, confidentially asked Congress for authorization to take possession of parts of Spanish Florida. Congress responded by appropriating \$100,000 for the occupation and by forbidding the publication of the appropriation.¹³⁶ However, that case differs in two important respects from that of the CIA budget: The entire Congress knew about the secret appropriation, and the appropriation was made public after the controversy over Florida had ended.

Only in relatively recent years has Congress permitted an entire agency—the CIA—to receive funds without the knowledge of all the members¹³⁷ and allowed the expenditure of significant sums of money to go unreported indefinitely.¹³⁸ Unfortunately, the statutes which waive the accounting requirement have not been tested in court, so it is impossible to determine how much significance should

year after year, exceed the latter, the corruption will be detected, and the people may use the constitutional mode of redress.

2 J. Elliot, *Debates on the Federal Constitution* 345 (1836) [hereinafter "Elliot"].

135. Patrick Henry cautioned:

the national wealth is to be disposed of under the veil of secrecy; for [with] the publication from time to time . . . they may conceal what they may think requires secrecy.

3 Elliot, *supra* note 134, at 462. This statement reflects concern that such a construction of "from time to time" would abuse the clear mandate and intent of the Clause. George Mason's similar concern was dismissed by Lee of Westmoreland as "trivial." In Lee's view, the "from time to time" requirement referred to "short, convenient periods," and anyone neglecting that provision "would disobey the most pointed directions." 3 Elliot, *supra* note 134, at 459.

136. See Miller, *Secret Statutes of the United States* 10, cited in Supplemental Brief of Appellee, *Richardson v. United States*, 465 F.2d 844 (3rd Cir. 1972); 3 Stat. §§ 471-72.

137. Statutes exempting executive agencies from congressional accounting requirements under specified circumstances include: 28 U.S.C. § 537 (1970) (certain Federal Bureau of Investigation expenditures), 31 U.S.C. § 107 (1970) (certain Presidential expenditures for foreign intercourse), and 42 U.S.C. § 2017 (b) (1970) (certain Atomic Energy Commission expenditures).

138. For example, there has never been a public accounting for the \$2 billion reportedly expended to develop the atomic bomb during World War II. Brief for Petitioners at 26, *United States v. Richardson*, 418 U.S. 166 (1974).

be attached to them when interpreting the Statement and Account Clause.¹³⁹ The most that can be said, therefore, is that during the lifetime of the Framers the Constitution was not construed as permitting appropriations which were ever secret from the entire Congress or which were indefinitely secret from the people, while more recent statutes authorizing such secrecy remain untested.

The plain language and the legislative history of the Statement and Account Clause, as well as its subsequent construction with respect to the 1811 Florida appropriation, strongly suggest that the Clause was intended to require a full accounting of all public funds—at least to the Congress, and probably to the people as well. It therefore seems doubtful that the transfer method of financing the CIA, with its resulting distortion of appropriations and published accounts, meets the constitutional standard.¹⁴⁰

VI. RECOMMENDATIONS

*We may say that power to legislate . . . belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.*¹⁴¹

History is not replete with examples of good sense holding sway for long periods. Therefore, Congress must act now to

139. It is conceivable that this problem will never be judicially resolved. The Supreme Court's *Richardson* decision raises the possibility that the Statement and Account Clause may be among the constitutional provisions that cannot be litigated. See *United States v. Richardson*, 418 U.S. at 179; *Richardson v. United States*, 465 F.2d at 873 (dissenting opinion of Judge Adams). On the other hand, it is possible that constitutional challenges based on the Clause will not be completely foreclosed by *Richardson*. A congressman's standing to sue in his official capacity has not yet been addressed by the Supreme Court. However, at least two lower federal courts have recently granted standing to congressmen. *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973); *Holtzman v. Richardson*, 361 F. Supp. 544 (E.D.N.Y. 1973), rev'd on other grounds sub nom. *Holtzman v. Schlesinger*, 484 F.2d 1307. See Special Committee to Study Questions Related to Secret and Confidential Government Documents, S. Rep. No. 93-466, 93d Cong., 1st Sess. 5-8 (1973) [hereinafter "Secret and Confidential Documents Report"].

140. See Amicus Brief, supra note 125, at 31, for one view of what that standard requires:

Only an accurate and identifiable head of appropriation—one bearing the name and thus disclosing at a minimum the general purpose for which funds are being employed—can satisfy the constitutional obligation to account for the "Receipts and Expenditures of all Public Money . . ."

141. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

*close the loopholes and put teeth in the oversight functions.*¹⁴²

The Constitution may prohibit secret appropriations altogether, but at the very least it mandates that Congress be informed regarding the expenditure of federal funds.¹⁴³ That and other considerations call for revisions in the present congressional system of budgetary oversight of the CIA. This section will explore possible solutions to the problem of maximizing Congress' fiscal control of the Agency while preserving the necessary degree of confidentiality. The proposals will focus on ways in which oversight might be performed more effectively within the existing legislative framework.

A. Necessary Attributes of Oversight Committees

On several occasions Congress has debated whether intelligence oversight should remain in the hands of the present subcommittees or instead be vested in a joint committee or variously constituted committees in both houses.¹⁴⁴ The structure of the oversight group is not, however, the most important element. Rather, it is critical that the oversight body: (1) represent Congress as a whole; (2) have genuine investigative power and not be completely dependent on the Agency's voluntary submission of the requisite information; and (3) actively assert control over CIA policies and expenditures. None of these conditions is currently met.

1. *The Oversight Body Must Represent the Entire Membership.* If, as is likely, Congress should delegate the oversight function to a relatively small group of members, the designated body must be more representative of Congress as a whole than past and present oversight committees have been. Since the committee (or committees or subcommittees) may not be able to account to the entire Congress by reporting all the data on which its conclusions are based, its members must have the personal confidence of every member of Congress, including "dissidents." Although the oversight subcommittees have traditionally been composed of senior members

142. 120 Cong. Rec. 5929 (daily ed. April 11, 1974) (remarks of Sen. Proxmire).

143. See text accompanying notes 124-140 *supra*.

144. For a description of periodic unsuccessful efforts in the House and Senate to change the committee system of oversight, see H. Ransom, *The Intelligence Establishment*, 160-79 (1970) and L. Kirkpatrick, *The U.S. Intelligence Community* 60-67 (1973).

of the parent committees, junior members could also be seated on the oversight body without doing violence to the committee system. Despite the possible political liabilities of membership on such a body to a junior congressman,¹⁴⁵ some junior members have in the past devoted considerable energy to solving the intelligence oversight problem.¹⁴⁶ Such members may be willing to risk the political handicaps of service on an oversight body. Further, should any doubt arise concerning the fitness of a representative or senator to serve on the oversight body, it would not be unreasonable to ask *all* prospective members, including those who have already served in similar capacities, to submit to a security clearance.¹⁴⁷

2. *Resumption of GAO Audits.* For any body to be effective in CIA oversight, it must have independent authority to audit the Agency. The present system, whereby the oversight subcommittees depend on the CIA to supply information, weakens the oversight function. GAO, which provides Congress with the means to audit executive agencies,¹⁴⁸ should be utilized for this purpose.

The 1949 Act's provision that certain CIA expenditures are "to be accounted for solely on the certificate of the Director,"¹⁴⁹ does not entirely exempt the CIA from accounting to Congress. At a minimum, it leaves Congress with the power to perform a compliance audit of the CIA to assure that all expenditures are properly accounted for by certificates from the DCI. Additionally, the Agency can grant GAO more extensive accounting access than the 1949 Act may strictly require. This was in fact done during the period immediately following the passage of the 1949 Act when, at the DCI's request, GAO continued to make on-site audits as it had done for CIA's predecessor, the Central Intelligence Group.¹⁵⁰

145. See text accompanying note 97 *supra*.

146. Among such members are Reps. Robert Drinan (D., Mass.), Michael Harrington (D., Mass.), and Paul McCloskey (R., Cal.) and Sen. Alan Cranston (D., Cal.)

147. According to DCI Colby, "security clearances do not enter into the picture in providing classified information to a member of Congress." Colby letter, *supra* note 60. However, the idea of subjecting members of Congress to security clearances is not a new one. According to Sen. Barry Goldwater (R., Ariz.), "[a]ny Senator can attend briefings by the CIA if he is cleared for top secret." 120 Cong. Rec. 9612 (daily ed. June 4, 1974).

148. See text accompanying note 110 *supra*.

149. 40 U.S.C. § 403j (1970). Cf. text accompanying note 83 *supra*.

150. GAO Letter, *supra* note 111, at 8. In view of the accounting provisions of the 1949 Act, however, GAO referred questionable payments to the CIA Comptroller's Office for corrective action and made no audit whatever of unvouchered expenditures. *Id.*

However, GAO has not conducted any reviews at the CIA nor any reviews which focus specifically on CIA activities since 1962.¹⁵¹ GAO's present position vis-a-vis the CIA was recently described by the Acting Comptroller General of the United States:

From prior experience, it is our view that strong endorsement by the Congressional oversight committees will be necessary to open the doors to intelligence data wide enough to enable us to perform any really meaningful reviews of intelligence activities.¹⁵²

The necessity for confidentiality does not foreclose the possibility for GAO audits of the CIA. GAO routinely audits the sensitive National Security Agency [hereinafter "NSA"].¹⁵³ Indeed, a recent GAO-NSA arrangement expands the scope of that audit.¹⁵⁴ The plans worked out with NSA could certainly be adapted for CIA audits. Under the plan which was in effect from 1955 through 1973, two or three GAO staff members who had special clearance were assigned permanently to NSA to perform compliance audits of NSA vouchers and accounts. These continuous audits were performed on NSA premises or at designated records storage sites where the confidentiality of NSA documents could be maintained.¹⁵⁵

In late 1973 and early 1974, NSA and GAO discussed adding management-type review to the compliance audits already being done and agreed to increase the number of GAO staff members cleared for NSA audits from two to ten and to begin the enlarged

151. In 1959 "comprehensive audits" covering not only the expenditure of funds but also the efficiency and economy of utilization of property and personnel were instituted. These audits continued until 1962, when GAO concluded (1) that under existing security restrictions it did not have sufficient access to make comprehensive reviews on a continuing basis which would produce evaluations helpful to Congress and (2) that the limited type of audit which it had conducted in the years prior to 1959 would not serve a worthwhile purpose. CIA concurred with the resultant GAO proposal to terminate all audit efforts in 1962. *Id.* at 9.

152. *Id.* at 13.

153. *Id.* at 11-13. NSA was established as an agency under the control of the Secretary of Defense by a classified executive order in November 1952. Walden, *The CIA: A Study in the Arrogation of Administrative Powers*, 39 *Geo. Wash. L. Rev.* 66, 67 (1970). It performs technical functions in support of Government intelligence activities. United States Government Manual 209 (1973-74).

154. GAO Letter, *supra* note 111, at 13.

155. *Id.* at 11-12. GAO refrained from publishing the results of its NSA audits so as not to violate Pub. L. No. 86-36 (Act of May 29, 1959, 73 Stat. 63), which forbids disclosure of any information regarding NSA activities. However, it did hold informal discussions with NSA to review the audits and resolve problems. GAO Letter, *supra* note 111, at 13.

review on selected parts of NSA's activities with fiscal year 1975.¹⁵⁶ By May 1974, seven GAO staff members had received the necessary clearance, and GAO had been advised that the clearance required for work at NSA would generally be acceptable for performing similar work at other organizations within the intelligence community with the exception of the CIA.¹⁵⁷ Research reveals no reported leaks by GAO personnel of confidential information concerning NSA, and there is no reason to believe that the chance of leaks concerning the CIA would be any greater. Nevertheless, the CIA has declined to grant GAO the access necessary for a competent audit.¹⁵⁸

The CIA has an estimated 15,000 employees,¹⁵⁹ all of whom have security clearances. To add some eight or ten GAO employees to the number of persons cleared by CIA would not appear to be an insuperable burden. Congress, dependent solely on the CIA's own accountings since 1962, will not be able to fulfill an effective oversight function until it insists that the Agency grant GAO the access—including appropriate security clearances for several of its staff—necessary for comprehensive reviews on a continuing basis.

3. *The Oversight Body Must Assert Control.* To preclude the oversight groups from taking a passive role, they should be required to meet at least monthly and to issue detailed reports to Congress on CIA activities and expenditures.¹⁶⁰ The oversight bodies should either participate directly in the budget allocation process or have *ex officio* representation on the Appropriations Committees' intelligence subcommittees. Through the GAO, they should carry out a continuous, independent audit of Agency spending. Any oversight body should be well enough informed as to all aspects of the CIA that it can provide Congress with an explanation whenever a question about the Agency arises. To meet this standard, the oversight body needs the power not only to perform independent audits through

156. *Id.* GAO agreed on the new plan notwithstanding its recognition that the special clearances required for GAO staff members who would be involved in such an audit would be expensive, requiring at least six months to complete, that higher clearances might be necessary for some aspects of the audit, and that the results would be highly classified and strictly limited in their distribution. *Id.*

157. *Id.*

158. See text accompanying notes 111-13 *supra*.

159. 119 Cong. Rec. 6863 (1973) (remarks of Sen. Proxmire).

160. If necessary for security reasons, an oversight body might compile complete reports to be made available only to other congressmen who have submitted to security clearances. "Sanitized" versions of such reports might be prepared for the use of those members who had not been cleared. See text accompanying note 173 *infra*.

the GAO but also to require the Agency to provide whatever additional information is needed.

Two bills attempting to meet this need were introduced in the 93d Congress and are likely to be reintroduced in the 94th Congress. The "Joint Committee on Intelligence Oversight Act of 1974,"¹⁶¹ introduced by Senator Baker and eleven co-sponsors, would require the DCI and the heads of other intelligence organizations to keep a proposed Joint Intelligence Oversight Committee "fully and currently informed with respect to all of the activities of their respective organizations," and would give the Committee "authority to require from any department or agency of the Federal Government periodic written reports regarding activities and operations within [its] jurisdiction."¹⁶² The bill would grant the Joint Committee subpoena power and provide that any witness failing to comply with a subpoena would be subject to punishment for contempt of Congress.¹⁶³ The other bill,¹⁶⁴ introduced in the House by Representative Ronald Dellums (D., Cal.), would require the DCI, at the request of a committee or subcommittee chairperson, to provide the oversight subcommittees with information sufficient to enable them to determine "whether the expenditure of funds by the Agency conforms to the authorized functions of the Agency and the congressional intent in establishing the Agency."¹⁶⁵ Although the bill does not specify any sanction, an oversight body which had subpoena power would be entitled to invoke the contempt statute,¹⁶⁶ a threat which may encourage the DCI to provide the requested information.¹⁶⁷

161. S. 4019, 93d Cong., 2d Sess. § 3(b) (1974) [hereinafter "S. 4019"]. Although Sen. Baker requested that the bill receive priority consideration, no hearings were held on it by the 93d Congress.

162. *Id.*

163. S. 4019, *supra* note 161, § 4(b). The penalty for contempt of Congress, a misdemeanor, is a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for 1-12 months. 2 U.S.C. § 192.

164. H.R. 13798, 93d Cong., 2d Sess. (1974). The House Armed Services Committee scheduled no action on the bill. Hogan letter, *supra* note 70.

165. H. R. 13798, *supra* note 164.

166. Although contempt of Congress is a severe sanction carrying a mandatory jail term, Congress has occasionally been willing to use it. See, e.g., House Comm. on Armed Services Proceedings Against George Gordon Liddy, H.R. Rep. No. 93-453, 93d Cong., 1st Sess. (1973) and cases enumerated therein.

167. The DCI might claim executive privilege in such a situation. For an argument that executive privilege is not applicable in this context, see Hearings on S. 2224, *supra* note 54, 112-34 (testimony of Raoul Berger). See generally Executive Privilege in III Executive Privilege, Secrecy in Government, Freedom of Information, Hearings before the . . . Committee on Government Operations and . . . Committee on the Judiciary, U.S. Senate, 93d Cong., 1st Sess. (1973).

These bills, combined with the contempt power, would facilitate the flow of information from the CIA to Congress. However, an even more effective measure would provide for regular, perhaps monthly, CIA reports to the oversight body which would enumerate the Agency's activities and their costs. The contempt power would assure that the monthly reports were in fact made. In addition, Agency funding for the ensuing year might be conditioned on a detailed justification of current expenditures. Such legislation, coupled with a congressional mandate requiring the oversight body to meet frequently, to use its independent investigative authority, and to report regularly to Congress, would help assure that the oversight body actually performed its duties and made full use of its expanded staff and its investigative powers.

4. *The Form of the Oversight Body.* Although the above considerations are important regardless of the form the congressional oversight body takes, some of the weaknesses of the present system are directly related to the fact that oversight is the responsibility of subcommittees. Unlike full committees, subcommittees are not required to meet regularly and do not have their own staff.¹⁶⁸ In addition, when the subject matter covered by a subcommittee is tangential to the full committee's principal concern, as intelligence may be to the Armed Services Committees, it is likely that the ancillary matter receives less attention.¹⁶⁹

Oversight by a full committee, either a joint committee as proposed by Senator Baker or by a committee of each house, would be a significant improvement over the present subcommittee system. Monthly meetings would be required,¹⁷⁰ a full-time professional staff would be available, and the interest and efforts of the members and staff would be focused on the CIA or, as is more likely, the entire intelligence community. Although a joint committee might appear to be more efficient in that it would avoid duplication of efforts, an autonomous committee in each house might better facilitate legislative, as opposed to purely consultative, functions.¹⁷¹

168. Under the present arrangement, staff support for each of the four intelligence subcommittees consists of part-time assistance from one or two professional members of the committee staff.

169. This possibility was raised by Sen. Lowell Weicker (R., Conn.), a co-sponsor of S. 4019, *supra* note 21, in remarks at The New York University School of Law, Oct. 31, 1974.

170. See, e.g., Rule 734 of the House of Representatives, which requires standing committees to meet not less than monthly. House Rules and Manual, H.R. Doc. 92-384.

171. See, e.g., 120 Cong. Rec. 6588 (daily ed. July 16, 1974) (remarks of Rep. Harrington).

B. *Participation by the Entire Congress in Intelligence Oversight*

Participation by the entire Congress in the oversight process would be a more sweeping change and would have more radical consequences than a restructuring of the present subcommittee system. Although the daily work of oversight would continue to be done by committee, the committee would make complete reports to Congress, with decision-making reserved for the full House and Senate rather than effectively delegated to the oversight body. Under such an arrangement, "Committees on Intelligence" might have a relationship to Congress similar to that presently enjoyed by other standing committees, except that their reports would be discussed in secret session rather than publicly.¹⁷² Alternatively, the oversight committees might report fully only to those members who have received security clearances or who specifically apply to the committees for information.¹⁷³ Because some of the problems presented by the various possible arrangements for plenary congressional oversight differ as between the House and the Senate, the two houses will at first be considered separately.

1. *The Senate.* The Senate presently utilizes a mechanism whereby the entire membership considers classified information in executive session. For many years, it held secret sessions whenever it considered a treaty, and it still holds occasional executive sessions to discuss classified or defense matters.¹⁷⁴ In most instances, it later issues a record of the secret session after deleting classified information.¹⁷⁵ A senator who releases confidential information obtained in

172. H.R. Res. 1231, 93d Cong., 2d Sess. (1974), proposed by Rep. Harrington, contains a variant of this idea. The bill would require a new oversight committee in the House to keep complete records and transcripts of its hearings, which would be available to all members of Congress. 120 Cong. Rec. 6588 (daily ed. July 16, 1974).

173. For example, S. 2224, *supra* note 103, provided that oversight committees receiving information from the CIA should promulgate regulations under which classified information received by the committees might be given to congressmen and their staffs who requested it. It should be emphasized that such an arrangement would work only so long as the oversight body was truly representative and enjoyed the trust of all factions in Congress. Otherwise, the committee's power to promulgate regulations for access to CIA information would appear to be a smokescreen whereby the committee might restrict rather than facilitate the flow of information—precisely the appearance which has led to the current need for reform.

174. 29 Cong. Q. 1787 (1971). The Senate held 8 such meetings between the end of World War II and mid-1971.

175. See, e.g., 119 Cong. Rec. 15,358-71 (daily ed. Aug. 1, 1973), the expurgated record of a Senate executive session held to consider the nomination of William Colby as DCI.

secret Senate proceedings may be expelled from the Senate,¹⁷⁶ but the severity of this penalty makes its use unlikely.¹⁷⁷ A sanction of exclusion from further executive proceedings might be more effective in that the Senate would be more willing to invoke it.¹⁷⁸ Another way to reduce the likelihood of leaks might be routinely to clear all senators and to exclude from executive sessions any senators who specifically asked not to be subjected to security clearances.¹⁷⁹ Since there are only 100 senators, each with a six-year term of office, routine clearance of all senators would not be an intolerable administrative burden.

2. *The House of Representatives.* The House of Representatives, by virtue of the large size of its membership and their brief term of office, presents more problems with regard to plenary oversight than does the Senate. Although it has not held a secret meeting in many years, the House has a procedure for executive sessions of the full membership which it could adapt to meet modern requirements.¹⁸⁰ Exclusion from future secret sessions could be a stronger sanction in the House than in the Senate, since representatives must face the electorate every two years and would have to explain their exclusion to the voters soon after the fact, while the issue was still "hot." The device of routine security clearances may be less practical for the House than for the Senate, since its 435 members serve two-year terms and processing a clearance requires at least six months.¹⁸¹ On the other hand, however, the "numbers of Members of Congress are not very large by comparison to the numbers of people in the executive branch that get this kind of information,"¹⁸² and the people deserve representatives who are entitled to know everything that occurs in government.¹⁸³

176. Senate Rule 36, S. Doc. 93-1.

177. See, e.g., Hearings on S. 2224, *supra* note 54, at 4-5, 89 (remarks of Sen. Cooper). The Senate did not invoke the expulsion sanction when Sen. Mike Gravel (D., Alas.) read classified information concerning the Vietnam war into the public record in 1972. See note 186 *infra*.

178. Such a sanction would not be an empty one, since the senator involved would have to justify his exclusion in a future campaign for re-election.

179. See note 147 *supra*.

180. House Rules and Manual, *supra* note 170, Rule 29.

181. GAO letter, *supra* note 111, at 12.

182. Hearings on S. 2224, *supra* note 54 at 55 (testimony of Herbert Scoville, Jr.).

183. Sen. Hughes (D., Iowa) has summarized this viewpoint:

I personally feel that the people of Iowa elected me to represent their interests with the CIA as well as every other facet of Government, and that I have an entitlement to be informed. And if I am untrustworthy,

An administratively practical compromise might be to clear only those representatives who specifically request clearance and to limit the oversight committee's dissemination of confidential information to the cleared representatives. In that way, the information would be available to congressmen who were sufficiently interested in the CIA and other intelligence organizations to request clearance, while time, money, and effort would not be expended clearing those members who lacked that interest.

3. *A Complication Common to Both Houses: Legislative Immunity.* The Speech or Debate Clause of the U.S. Constitution¹⁸⁴ creates an obstacle to broad congressional involvement in intelligence oversight by granting immunity from criminal prosecution to members of Congress who breach security by publishing classified information. This Clause has been held to provide immunity not only for statements made on the floor of either house, but also "against prosecutions that directly impinge upon or threaten the legislative process."¹⁸⁵ Although the Supreme Court has not defined the limits of the immunity conferred by the Clause, its decision in *Gravel v. United States*¹⁸⁶ indicates that at least the following types of conduct would be protected under the Clause in the case of a member or member's aide having possession of a classified document:

then I feel the CIA ought to tell the people of Iowa and the country why I am untrustworthy and on what they base it.

Colby Hearings, *supra* note 9, at 53.

184. The Speech or Debate Clause reads as follows:

The Senators and Representatives. . . shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

U.S. Const. art 2, § 2. The Clause does not immunize members of Congress from arrest for violating the law by making classified information public, for that is a criminal violation, and the members' privilege from arrest has been held to extend only to civil arrests. See *Gravel v. United States*, 408 U.S. 606, 614-15 (1972). It does, however, effectively immunize members of Congress from prosecution for releasing classified information.

185. *Gravel v. United States*, 408 U.S. 606, 616 (1972).

186. The conduct held protected in *Gravel* was a reading of the classified "Pentagon Papers" into the public record at a midnight meeting of a subcommittee of the Senate Committee on Public Works. The Court held that the general rule restricting judicial inquiry into matters of legislative purpose and operations precluded it from questioning the "regularity" of the meeting when there was no suggestion that the subcommittee itself was unauthorized or that the war in Vietnam was an issue beyond the purview of congressional debate and action. 408 U.S. at 610, n. 6.

1. Any speech or debate on the [House or] Senate floor concerning the classified document.
2. Any speech during a committee meeting, hearing, etc.
3. Any reading from the classified document either on the floor or in a committee meeting.
4. Any speech concerning the classified document in committee reports, hearings, or in resolutions.
5. Any placing of a classified document into the public record.
6. Any conduct at a committee meeting or on the [House or] Senate floor with respect to the classified document and any motive or purpose behind such conduct.
7. Any communications between a member and aide during the term of the aide's employment with respect to the classified document if related to a committee meeting or other legislative act of the member.¹⁸⁷

This broad immunity prompts an argument that classified information concerning the CIA should not be shared with any more than an absolutely necessary small number of congressmen. In this connection there is perhaps less concern about disloyalty than the possibility that conscientious objection to certain CIA activities might lead a member to release classified information. Routine security clearances might identify the rare disloyal member and exclude him from receipt of classified information before he ever gained an opportunity to release it, but they probably would not identify and exclude the member whose release of secrets might be motivated by his very loyalty to his country. Perceiving this difficulty, Senator Javits has stated that "an exact corollary to immunity is our responsibility for our own members and our own security,"¹⁸⁸ apparently referring to the availability of the sanction of expulsion for releasing confidential information.¹⁸⁹ However, since the Senate has been unwilling to invoke this sanction in the past, it must either determine to use the sanction of expulsion or devise a lesser, but meaningful, sanction that it would be willing to invoke. The House must likewise agree on a suitable sanction.

4. *Physical Security Requirements.* In addition to the risk created—or exacerbated—by congressmen's constitutional immunity with respect to the information contained in classified documents,

187. Secret and Confidential Documents Report, *supra* note 139, at 10-11.

188. Hearings on S. 2224, *supra* note 54, at 51.

189. See note 176 *supra* and accompanying text.

there is also some risk associated with the documents themselves. Unlike CIA headquarters, the Capitol and the Congressional Office Buildings are open to the public. How, then, can classified documents be kept secure and still be conveniently available to large numbers of senators and representatives?

The requirements for ensuring the physical security of classified documents in congressional buildings was discussed in detail during Senate hearings in 1972.¹⁹⁰ A management consultant on security and intelligence matters, a former CIA employee, described the basic requirements for a "secure area" in which classified documents would be stored and consulted and made the following recommendations:

- 1) An early start should be made for detailed security by planning so that the mechanism can be in place before the flow of material starts.

- 2) The security system should include a secure area which would include a vault and reading/conference room protected by a reception area and necessary alarms.

- 3) Provision should be made for control of the documents to include logs, rules for storage and removal, destruction, or return to the originating agency.

- 4) The responsibility for the security should be clearly placed and sufficient staff should be made available to establish, operate, and monitor the system.

- 5) Where problems arise, close liaison with the CIA will be helpful in finding solutions that are workable and safe.¹⁹¹

Admittance to the secure area would be limited to those named on a list held by a guard. Those few members who required continuous access would be permanently listed, while others with only occasional interest in the secure area could be specifically cleared for access at those times.¹⁹² Removal of classified documents from the secure area would be permitted only when absolutely necessary; in such cases "there should be some means whereby it is taken out by

190. Hearings on S. 2224, *supra* note 54.

191. *Id.* at 95.

192. Witnesses at the hearings generally emphasized the importance of keeping the number of persons with access to the secure area as small as possible consistent with the principle of "need to know." See, e.g., *id.* at 19, 28, 51 (testimony of Herbert Scoville, Jr.) and at 93, 99-100 (testimony of Joseph Smith). But see the remarks of Sen. Javits to the effect that every member of Congress must vote, and therefore all have an equal need to know. *Id.* at 51.

a courier and brought back the same day."¹⁹³ To prevent "technical penetration" or "bugging," it was suggested that conferences involving extensive discussion of CIA material should be held only in the secure area, which could periodically be "swept" to minimize the possibility that sensitive conversations might be overheard.¹⁹⁴ This testimony indicates that physical security for classified documents can be compatible with procedures whereby oversight committees in both houses might make available to other members of Congress the classified information on which their recommendations are based.¹⁹⁵

C. *Reforming the Appropriation Process*

A flaw in the oversight of CIA funding which urgently requires attention is the present appropriation system, whereby CIA funds are hidden in other appropriations and are never considered by, or identified to, Congress as a whole.

1. *The Baker-Weicker Proposal.* The "Joint Committee on Intelligence Oversight Act of 1974,"¹⁹⁶ contains the following provision:

No funds may be appropriated for the purpose of carrying out any intelligence or surveillance activity or operation by any office, or any department or agency of the Federal Government, unless such funds for such activity or operation have been specifically authorized by legislation enacted after the date of enactment of this Act.

Senator Weicker (R., Conn., a co-sponsor of the bill) has stated that this provision would give the joint committee total control of the intelligence agencies' budgets.¹⁹⁷ The purpose of the bill may indeed be to supersede the funding provisions of the 1949 Act, but the bill would not, in fact, have that effect. It would only restrict the use of funds *appropriated* for the CIA—of which there are none presently—while the practice of financing the CIA through se-

193. *Id.* at 93. Cf. H.R. Comm. on Armed Services, Rules Governing Procedure, Leg. Cal. of H.R. Comm. on Armed Services, 93d Cong., No. 8 (Aug. 23, 1974), at viii.

194. Hearings on S. 2924, *supra* note 54, at 93, 100-01.

195. *Id.* at 95 (testimony of Joseph Smith); see also *id.* at 17, 24-27 (testimony of Herbert Scoville, Jr.).

196. S. 4019, *supra* note 161.

197. Remarks at The New York University School of Law Oct. 27, 1974.

cret transfers from other appropriations would continue. Thus, the Baker-Weicker bill illustrates the point that there can be no meaningful reform of the appropriation process without expressly amending or replacing the funding mechanism of the 1949 Act so as clearly and unequivocally to end—or limit—the practice of financing the Agency by secret transfers.

2. *Limitations on Funds Transferred to the CIA under the 1949 Act.* In order to assert control over the purposes for which the CIA spends its funds while continuing to finance the Agency through transfers, Congress might expressly apply to the CIA limitations included in other appropriations bills. Such an unequivocal expression of congressional intent would unquestionably prevail over the CIA's general exemption from appropriations limitations under the 1949 Act.¹⁹⁸ Congress passed such an express limitation for the first time in December 1974, as part of the Foreign Assistance Act of 1974.¹⁹⁹

Congress might also combine a measure of congressional control with transfer funding by placing a ceiling on the amount of funds transferable under the 1949 Act without specific congressional approval.²⁰⁰ Enactment of such a ceiling would limit the amount of funds available to the Agency, whereas appropriations limitations would limit the purposes for which Agency funds may be expended.

The enactment of express appropriations limitations or ceilings on Agency funding is not a political impossibility. Since such bills would not alter the basic transfer method of funding, they do not necessarily invite opposition from members who prefer that CIA appropriations remain secret. Indeed, in the political climate prevailing at the beginning of the 94th Congress,²⁰¹ it may not be entirely naive to propose that Congress reassert its power of the purse by expressly amending the 1949 Act.

198. For a discussion of the disputed extent of the exemption mandated by the 1949 Act when appropriations limitations are not expressly applied to the CIA, see text accompanying notes 79-88 *supra*.

199. Pub. L. No. 93-559 (Dec. 30, 1974). See Editor's Note *infra*.

200. Sen. Symington made such a proposal in 1971 as an amendment to a Defense Department appropriation bill, 117 Cong. Rec. 42,923 (1971). The proposed amendment was rejected by a 56-31 vote. *Id.* at 42,932.

201. The "post-Watergate" reaction against secrecy within the executive branch and the fact that the 94th Congress includes several new members elected on "sweep-clean" platforms point toward congressional willingness to address the 1949 Act directly.

3. *A One-Line Appropriation For the CIA.* Passage of a bill mandating a one-line, i.e., unitemized, appropriation for the CIA and terminating the transfer funding mechanism would reassert Congress' constitutional power to establish budgetary priorities and need not endanger the national security.²⁰² Such a proposal would not limit the Agency's use of appropriated funds. Under the proposed system, specific limitations would have to be imposed in the same way as under the present system, by prohibitions expressly applied to the Agency.

The principal arguments in favor of the single-line appropriation are that it would permit Congress to express its sense of priorities and that it would "allow Congress and the taxpayer to know the exact amount of money going into other Government programs"²⁰³ by ending the artificial inflation of other appropriations with sums actually destined for the CIA. Other benefits would accrue as well. For example, if the amount of the CIA budget were known and discussed, congressmen might be motivated to ask more questions of their colleagues on the intelligence oversight bodies, thereby encouraging the conscientious performance of oversight du-

202. A model bill might read as follows:

A bill to require that appropriations be made specifically to the Central Intelligence Agency.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That commencing with the fiscal year beginning [date]—

(1) the Budget of the United States, submitted pursuant to section 201 of the Budget and Accounting Act, 1921, shall show proposed appropriations, estimated expenditures, and other related data for the Central Intelligence Agency, and

(2) appropriations shall be made to the Central Intelligence Agency in an appropriate appropriation Act.

For the purposes of this section, proposed appropriations, estimated expenditures, and other related data set forth in the Budget for the Central Intelligence Agency, and appropriations made to the Agency, may be shown as a single sum with respect to all functions and activities of the Agency.

Sec. 2. Commencing with the fiscal year beginning [date], no funds appropriated to any other Department or agency of the United States shall be made available for expenditures by the Central Intelligence Agency.

The proposed bill is identical to S. 2231, 92d Cong., 1st Sess. (1971), proposed by Sen. George McGovern (D., S.D.). See 117 Cong. Rec. 23,692 (1971). The bill died in the Senate Armed Services Committee. See also an amendment to the Fiscal Year 1975 military procurement bill proposed by Sen. William Proxmire (D., Wis.), which would have called for disclosure of the total amount requested in the budget for "the national intelligence program." 120 Cong. Rec. 9601 (daily ed. June 4, 1974). The amendment was rejected after extensive debate by a vote of 55-33. *Id.* at 9613.

203. 117 Cong. Rec. 23,692 (1971) (remarks of Sen. McGovern).

ties. Such a development would improve not only fiscal but also substantive congressional oversight of the Agency.

Supporters of this budget reform contend that it would permit the proper exercise of congressional power over budgetary priorities without endangering the national security. This view was endorsed by the Senate Select Committee on Secret and Confidential Documents,²⁰⁴ which recommended that the amount of the proposed allocation for each intelligence service be itemized in the Defense Department appropriation bill. The committee characterized the single-line budget as "the minimal information [Congress as a whole] should have about our intelligence operations."²⁰⁵

The publication of a single-line CIA budget has been attacked by some as a meaningless exercise of congressional power and by others as a serious national security risk. Those who regard it as an inadequate reform maintain that Congress will have difficulty deciding what level of funding is appropriate when it does not know the purposes for which the funds will be used.²⁰⁶ Although such a criticism is well founded, it ignores the fact that the choice is between a one-line appropriation and no plenary congressional voice whatsoever. The budget would continue to be justified to the oversight committees in detail, but the single-line appropriation would at least enable Congress as a whole

to judge if [it wants] to spend more on intelligence . . . and clandestine wars than on improvement of the environment or on education or even on other aspects of national defense.²⁰⁷

Furthermore, if the arrangements discussed above are adopted, members interested in receiving detailed CIA budget information could obtain it from the responsible committees.²⁰⁸

204. The Chairman and Co-Chairman of the Confidential Documents Committee were the Majority Leader (Sen. Mansfield) and the Minority Leader (Sen. Scott), respectively. Other members of the Committee included Sens. Pastore, Hughes, Clark, Gravel, Javits, Hatfield, Gurney, and Cook.

205. Secret and Confidential Documents Report, *supra* note 139, at 16.

206. See, e.g., Futterman, *supra* note 79, at 440. See also the statement of Sen. McClellan in opposition to the proposed Proxmire amendment to the military procurement bill:

First, the total amount. You want to end that ignorance? That is when you intend to put the camel's nose under the tent. That is the beginning. That is the wedge. . . . how can you . . . make an intelligent judgment on whether that is too much or too little, whether it is being expended wisely or unwisely, except when you can get the details?

120 Cong. Rec. 9609 (daily ed. June 4, 1974).

207. 117 Cong. Rec. 23,692 (1971) (remarks of Sen. McGovern).

208. See text accompanying note 173 *supra*.

Some of those who oppose the one-line appropriation on security grounds argue that publication of the one-line budget would *ipso facto* injure the national security.²⁰⁹ Others contend that such disclosure "is likely to stimulate requests for additional detail" and emphasize the potential national security danger in revealing the trends of various budgetary details over a period of years.²¹⁰ On the other hand, just as the oversight committees and the CIA itself have resisted pressures to make public the Agency budget, so they should be able to resist pressure to make public the details of the Agency budget after the gross figure is published. The suggestion that the one-line budget should not be revealed because it will result in congressional pressure to justify the budget would in effect deprive Congress of one of its most important functions, the allocation of public funds.

That publication of a single-line CIA budget would not create a security problem is perhaps best substantiated by analogy to the Defense Department budget, which is not only made public in the aggregate, but is also broken down in considerable detail. The one-line CIA budget is advocated on these grounds by Senator Symington, who speaks with special authority about national security matters.²¹¹ Emphasizing the difference between intelligence or security costs and intelligence or security plans, Senator Symington has stated that publication of overall intelligence costs no more entails "the release of knowledge about how the various intelligence

209. See, e.g., the view of Sen. John Stennis (D., Ala.), Chairman of the Senate Armed Services Committee and its Intelligence Subcommittee:

[I]f we disclose the amount of money spent on this effort, which includes the CIA, then we give to our adversaries all over the world, present and future, a true index as to what our activities are. There are deductions that can be made from our figures which could lead them along the path of information which would be priceless to them to know.

120 Cong. Rec. 9602 (daily ed. June 4, 1974).

210. DCI-elect Colby's written answers to prepared questions submitted by Sen. Proxmire. Colby Hearings, *supra* note 9, at 181. See also the views of Sen. Humphrey:

[U]just as surely as we are in this body today debating whether or not we ought to have a release of the figure, next year it will be whether it is too big or too little, and then it will be what is in it. Then when we start to say what is in it, we are going to have to expose exactly what we have been doing in order to gain information. . . .

120 Cong. Rec. 9606 (daily ed. June 4, 1974).

211. Sen. Symington is a member of the Appropriations, Foreign Relations, and Armed Services Committees and a former Secretary of the Air Force and member of the National Security Council. 117 Cong. Rec. 42,926 (1971): 119 Cong. Rec. 15,359 (daily ed. Aug. 1, 1973).

groups function, or plan to function" than publishing the cost of a nuclear aircraft carrier or a C-5A transport plane entails publication of plans for utilizing them in case of war.²¹² According to Senator Proxmire, the publication of itemized defense figures may actually have a valuable deterrent effect on potential enemies:

We break it down by component and by function. We then talk about each individual weapon. When will it be ready? How much will it cost? What does it look like in a technical sense? Of course, this detailed information is valuable to the U.S.S.R. But long ago, a decision was made that in our open society it was better to know the facts and ride herd on the Defense Department than to accept the intangible fear of enemy knowledge. In fact, many American strategists have argued that the size of the U.S. military budget and the characteristics of our overwhelming nuclear force should be made public in order to reinforce the psychology of deterrence. The enemy will not be deterred unless he truly believes the United States has these weapons.

The same goes for the intelligence budget. It is a form of deterrence for the potential adversary to know that we will continue to spend sizeable [*sic*] funds for intelligence. They will be less inclined to spring some surprise.²¹³

Senator Proxmire has also answered the charge that changes in the trend of U.S. intelligence spending which may become apparent over the years would be valuable to an enemy:

There is no way the Soviet Union can interpret whether our overall figure indicates what we are doing within our intelligence community. Suppose we decrease the amount we are spending. That may mean that our satellites are more effective. That may mean we have found methods that are more efficient in gathering intelligence than relying on manpower. If we increase the amount we are spending, it may mean the reverse. It may not mean that we are making a greater intelligence effort.²¹⁴

On balance, the proposal for a one-line CIA appropriation appears

212. 117 Cong. Rec. 42,926 (1971).

213. 120 Cong. Rec. 9603 (daily ed. June 4, 1974).

214. *Id.* at 9609. Sen. Proxmire's arguments were made with regard to the publication of the gross intelligence budget, not the CIA appropriation. His arguments are equally applicable to the publication of a single-line CIA budget.

to be at least a useful step forward, although it by no means solves all the problems inherent in congressional oversight of a secret agency.

VII. CONCLUSION

Experience indicates that the existing arrangement which vests both oversight and legislative power over the CIA in House and Senate subcommittees is not fully effective. Congress as a whole is largely ignorant of such basic matters as the amount of funds the Agency actually has at its disposal and how it expends those funds. The subcommittees sometimes appear to be perhaps too prone to defer to CIA determinations instead of making independent judgments regarding objective Agency needs and overall legislative priorities. The vulnerability of the transfer funding mechanism to constitutional attack also cannot be ignored.

At the same time, short of seeking to abolish the CIA altogether, it is difficult to argue seriously that all congressional oversight of the Agency can be done publicly. Therefore, this Note has sought to outline a middle course whereby the CIA's accountability to Congress might be increased without compromising the Agency's legitimate need for confidentiality. In this context, the Note has discussed such accommodations as broadening the spectrum of views represented on the subcommittees, renewing GAO audits of the Agency, and expressly applying appropriations limitations to the CIA which might be made without significantly disturbing the familiar forms. It has also discussed proposals for such structural changes as establishment of a joint intelligence oversight committee and the voting of a single-line CIA appropriation. The relative merits of these suggestions should be viewed in the context of the difficulties they would remedy and the new problems they might create, with deference to practical legislative conditions as well as to the standards of preserving justified confidentiality and strengthening legislative oversight.

It is unnecessary to determine whether total accountability is compatible with total confidentiality. What is important—and what this Note has attempted to demonstrate—is that the requisite confidentiality and a significant measure of legislative accountability can coexist in feasible oversight procedures.

EDITOR'S NOTE: As this Note goes to press, President Ford has signed the Foreign Assistance Act of 1974 [Pub. L. No. 93-559 (Dec. 30, 1974)]. In this Act Congress has for the first time expressly—if not unconditionally—applied to the CIA a spending limitation of the type discussed in the Note. Under this provision, the CIA may not expend funds for foreign "operations" (as distinguished from foreign "activities intended solely for obtaining necessary intelligence,") unless the President certifies such operations to be "important to the national security of the United States" and "in timely fashion" reports their "description and scope" to the "appropriate committees of the Congress." § 662 (b). See H. R. Rep. No. 1610, 93d Cong., 2d Sess. 12, 42-43 (Dec. 1974). Although possible loopholes in this provision are apparent, e.g., its lack of standards for determining when activities are "solely for obtaining . . . intelligence" and when they are "operations" and its vagueness with respect to the definition of "in timely fashion," the enactment of the statute is itself a positive step toward the reassertion of congressional control over CIA spending.

A second important innovation which has relevance to this Note is the Act's inclusion of the Senate Foreign Relations and House Foreign Affairs Committees among the congressional committees to whom the President must report on CIA operations abroad. § 662 (b). The inclusion of the Foreign Relations and Foreign Affairs Committees in this limited area of fiscal oversight of the CIA may presage the inclusion of these committees in the broader congressional CIA oversight mechanism.

APPENDIX II

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CLOAK AND LEDGER: IS CIA FUNDING CONSTITUTIONAL

*By Douglas P. Elliott**

The sovereign in this Nation is the people, not the bureaucracy. The statement of accounts of public expenditures goes to the heart of the problem of sovereignty. If taxpayers may not ask that rudimentary question, their sovereignty becomes an empty symbol and a secret bureaucracy is allowed to run our affairs.

Justice William O. Douglas¹

Introduction

The Central Intelligence Agency Act of 1949² established a unique funding system by which Congress appropriates funds to other governmental entities, which in turn transfer them to the CIA.³ The only accounting required for expenditures of the CIA is a certificate from its director.⁴ The result of these procedures is that the American public, and all but a few members of Congress, have no access to information concerning CIA finances.

In the current controversy surrounding the CIA, these funding procedures are being re-examined. The commission headed by Vice President Rockefeller recently recommended that Congress give "careful consideration to the question whether the budget of the CIA should not, at least to some extent, be made public, particularly in view of the provisions of Article 1, section 9, clause 7 of the Constitution."^{4a} This clause provides that:

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Ac-

* Member, second year class.

1. *United States v. Richardson*, 418 U.S. 166, 201 (1974) (Douglas, J., dissenting).

2. 50 U.S.C. §§ 403a-403j (1970) [hereinafter referred to as CIA Act].

3. *Id.* § 403f.

4. *Id.* § 403j(b).

4a. COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES, REPORT TO THE PRESIDENT 81 (June, 1975) [Hereinafter cited as ROCKEFELLER COMMISSION].

Shortly after the release of the commission report, Director of Central Intelligence William Colby rejected the suggestion that his agency's budget be made public. Interview, *Meet the Press*, National Broadcasting Co., June 29, 1975. *

count of the Receipts and Expenditures of all public Money shall be published from time to time.

Long before the CIA's recent emergence as a cause célèbre, an attempt was made to test the constitutionality of the agency's funding in court. For seven years, William B. Richardson, an American citizen and taxpayer from Greensburg, Pennsylvania, sought a judicial determination of the question. Richardson, who had a legal education, but was not a practicing attorney, engaged the United States government in complex litigation without the aid of counsel at the trial and appellate levels.

This note examines the validity of Richardson's challenge. It begins with a chronological account of the procedural barriers faced by Richardson in his protracted and ultimately unsuccessful litigation. The substantive discussion commences with an examination of the statutes enacted to provide public disclosure of governmental finances, and the modifications of normal accounting procedures that have been authorized in order to provide confidentiality in certain instances. The unique CIA procedures are then discussed, along with relevant legislative history and reforms that have been proposed in Congress over the years. The constitutionality of CIA appropriations and expenditures is then analyzed in view of the relevant constitutional history and the dictates of national security. Finally, there is a brief prognosis of the prospects for reforming the current procedures.

The Richardson Cases

Richardson's solitary quest began in 1967 when he wrote to the Government Printing Office requesting documents "published by the Government in compliance with Article I, section 9, clause 7 of the United States Constitution."⁵ A reply from the Fiscal Service of the Bureau of Accounts of the Department of the Treasury informed Richardson that the department published the *Combined Statement of Receipts, Expenditures, and Balances of the United States Government*. Richardson then wrote to the bureau, asking whether the CIA Act did not raise questions concerning the authenticity of the *Combined Statement*, and requesting further information on CIA expenditures. In its reply, the bureau stated that no such information was available.⁶

After unsuccessful efforts to prompt the Treasury Department to seek an opinion from the attorney general concerning the constitutionality of the CIA Act, Richardson filed suits in the United States District Court for the Western District of Pennsylvania. The suit against

5. *United States v. Richardson*, 418 U.S. 166, 168 (1974).

6. *Id.*

S.S. Sokol, commissioner of the Bureau of Accounts, sought a declaratory judgment ruling financing portions of the CIA Act be held unconstitutional. In addition, he requested that the court find that the defendant had failed to publish a statement of receipts and expenditures of the CIA in compliance with constitutional requirements.⁷

On May 8, 1968, the district court dismissed the complaint on the ground that Richardson lacked standing to sue because he had alleged no special injury.⁸

Subsequent to that decision, the United States Supreme Court eased the standing requirement for certain taxpayer actions, fashioning a two-pronged test in *Flast v. Cohen*.⁹ Richardson argued on appeal that he satisfied the newly articulated test. The Third Circuit, however, affirmed the dismissal on the ground that Richardson had failed to allege that the matter in controversy exceeded the value or sum of \$10,000, as required for federal jurisdiction.¹⁰

On January 8, 1970, Richardson filed a new action in the same district court. He sought a writ of mandamus to compel the secretary of the treasury to publish an accounting of CIA receipts and expenditures, and a writ of prohibition to enjoin further publication of the combined statement which failed to reflect them. He asserted jurisdiction under the Mandamus and Venue Act,¹¹ which confers original jurisdiction upon the federal district courts in mandamus actions to compel federal employees to perform duties owed to the plaintiff. The district court ordered the case dismissed for lack of standing; in addition, the complaint was held to be non-justiciable because it presented a political question.¹²

Richardson's subsequent appeal was considered by the Third Circuit *en banc*. On July 20, 1972, in a six-to-three decision, the court vacated the dismissal order and remanded the case for further proceedings by a three-judge district court.¹³ Writing for the majority,

7. *Richardson v. Sokol*, 285 F. Supp. 866, 867 (W.D. Pa. 1968).

8. *Id.*

9. 392 U.S. 83 (1968). "The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. . . . When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction." *Id.* at 102-03.

10. *Richardson v. Sokol*, 409 F.2d 3, 4-5 (3d Cir. 1969).

11. 28 U.S.C. § 1361 (1970).

12. The district court's decision was not published. The disposition of the case was explained in the appellate opinion. *Richardson v. United States*, 465 F.2d 844, 847 (3d Cir. 1972).

13. *Id.*

Judge Max Rosenn rejected the government's contention that the first prong of the *Flast* test permitted standing only to plaintiffs challenging appropriations per se.¹⁴ In considering the second prong, the court found that Richardson's claim concerned a specific section of the Constitution limiting the taxing and spending powers of Congress:

While article I, section 9, clause 7 is procedural in nature, [it is nonetheless a limitation] on the taxing and spending power. *It would be difficult to fashion a requirement more clearly conveying the framers' intention to regularize expenditures and to require public accountability.*¹⁵

The court found that the political question issue, which the district court had found to be fatal, was "intertwined with the merits," and would have to be developed at a subsequent hearing.¹⁶

The Supreme Court Resurrects the Standing Barrier

Pursuant to the government's request, the United States Supreme Court granted certiorari, and on June 25, 1974, reversed the circuit court in a five-to-four decision.¹⁷ In his majority opinion, Chief Justice Burger maintained that *Flast* "must be read with reference to its principal predecessor, *Frothingham v. Mellon*,"¹⁸ and quoted from that case:

The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.¹⁹

Construing the *Flast* and *Frothingham* decisions very narrowly, the chief justice maintained that the "mere recital" of Richardson's claim when examined against the statute under attack, demonstrated "how far he falls short of the standing criteria of *Flast* and how neatly he falls within the *Frothingham* holding left undisturbed."²⁰ Burger noted that although Richardson relied upon his taxpayer status for standing, his claim was not addressed to the taxing and spending power, but rather to statutes regulating the CIA. Richardson alleged no violation of a constitutional limitation on the taxing and spending

14. "We believe that the nexus between a taxpayer and an allegedly unconstitutional act need not always be the appropriation and the spending of his money for an invalid purpose. The personal stake may come from any injury in fact even if it is not directly economic in nature." *Id.* at 853.

15. *Id.* (emphasis added).

16. *Id.* at 856.

17. *United States v. Richardson*, 418 U.S. 166 (1974).

18. 262 U.S. 447 (1923).

19. *United States v. Richardson*, 418 U.S. 166, 172.

20. *Id.* at 174-75.

power, but rather asked the courts to require that the government provide him with detailed information about the spending of CIA funds. Thus, according to Burger:

[T]here is no "logical nexus" between the asserted status of taxpayer and the claimed failure of the Congress to require the Executive to supply a more detailed report of the expenditures of that agency.²¹

Burger summarized the question presented as a narrow one of whether Richardson's claim met the *Flast* standard for taxpayer standing. He held that it did not. The chief justice concluded that both *Frothingham* and *Flast* denied standing to plaintiffs, such as Richardson, who sought to use the federal courts as forums "in which to air . . . generalized grievances about the conduct of the government."²²

Chief Justice Burger was joined in his opinion by Justices White, Blackmun, Powell and Rehnquist. Justice Powell, however, wrote a separate concurring opinion urging repudiation of the *Flast* doctrine.²³ Finding the *Flast* "nexus" test lacking in "real meaning and . . . principled content,"²⁴ he advocated establishing the results of *Flast* and *Baker v. Carr*²⁵ as a periphery for federal taxpayer and citizen standing in the absence of statutory authorization to the contrary. He maintained that all taxpayer suits were attempts to air "generalized grievances," and urged his brethren to "explicitly reaffirm traditional prudential barriers against such public actions."²⁶

Although Justice Powell conceded that the majority opinion's application of the *Flast* test to Richardson's claim was "probably literally correct,"²⁷ he did not believe the test to be a "sound or logical limitation on standing."²⁸ With regard to the instant case, he candidly acknowledged:

The intensity of [Richardson's] interest appears to bear no relationship to the fact that, literally speaking, he is not challenging directly a congressional exercise of the taxing and spending power. On the other hand, if the involvement of the taxing and spending power has some relevance, it requires no great leap in reasoning to conclude that the Statement and Accounts Clause . . . on which respondent relies, is inextricably linked to that power. And that clause might well be seen as a "specific" limitation on congressional

21. *Id.* at 175.

22. *Id.*

23. *Id.* at 180 (Powell, J., concurring).

24. *Id.* at 184.

25. 369 U.S. 186 (1962).

26. *United States v. Richardson*, 418 U.S. 166, 196 (1974).

27. *Id.* at 184.

28. *Id.*

spending. Indeed, it could be viewed as the most democratic of limitations.²⁹

The four dissenting justices were able to avoid the policy issue of where the line should be drawn with respect to taxpayer standing. They emphasized Richardson's status as a citizen, rather than a taxpayer, and concluded that he should have standing to assert his interest as a citizen. Indeed, Justice Stewart, joined by Justice Marshall, rejected the Court's entire analysis of the standing issue, arguing that the *Flast* analysis was "simply not relevant to the standing question raised in this case."³⁰ The issue raised by Richardson was not whether Congress had engaged in taxing and spending in excess of constitutional authority, but whether the Constitution imposed upon the government an affirmative duty "to all taxpayers or citizen-voters of the Republic."³¹

The Stewart analysis thus proceeded from a fundamentally different basis than that of the majority. Richardson was "in the position of a traditional Hohfeldian plaintiff,"³² alleging that the statement and account clause gave him the right to receive information and burdened the government with a corresponding duty of supplying it:

Courts of law exist for the resolution of such right-duty disputes. When a party is seeking a judicial determination that a defendant owed him an affirmative duty, it seems clear . . . that he has standing to litigate the issue of the existence *vel non* of this duty once he shows that the defendant has declined to honor his claim.³³

When a specific duty was asserted, Stewart maintained, the duty itself indicated a relationship between plaintiff and defendant sufficient to insure that the court would not be used as a forum for general grievances. The courts are clearly available for the enforcement of duties arising from contracts between private parties, and:

when the asserted duty is, as here, as particularized, palpable, and explicit as those which courts regularly recognize in private contexts, it should make no difference that the obligor is the government and the duty is embodied in our organic law.³⁴

Justice Stewart concluded that it did not matter that those to whom the duty is owed may be numerous.³⁵

Justice Brennan wrote an opinion,³⁶ dissenting from the majori-

29. *Id.*

30. *Id.* at 205 (Stewart, J., dissenting).

31. *Id.*

32. *Id.* at 203.

33. *Id.*

34. *Id.* at 204.

35. *Id.* In support of his conclusion, Justice Stewart quoted a prior opinion of the Court: "[S]tanding is not to be denied simply because many people suffer the same injury." *Id.*

36. 418 U.S. at 235-38 (Brennan, J., dissenting).

ty's holdings in *Richardson* and the companion case of *Schlesinger v. Reservists Committee*.³⁷ Agreeing with Justice Stewart that the statement and account clause conferred upon Richardson a specific right, he observed that, properly construed, the complaint:

alleged that the violations caused him injury not only in respect of his right as a citizen to know how Congress was spending the public fisc, but also his right as a voter to receive information to aid his decision how and for whom to vote. These claims may ultimately fail on the merits, but Richardson has "standing" to assert them.³⁸

In his dissenting opinion,³⁹ Justice Douglas devoted most of his discussion to the merits of the case. As he was the only judge to do so during the entire course of Richardson's litigation, his observations are of particular interest.⁴⁰ On the issue of standing, he remarked simply that "resolutions of any doubts or ambiguities should be toward protecting an individual's stake in the integrity of constitutional guarantees, rather than turning him away without even a chance to be heard."⁴¹ For a more extensive presentation of his views on standing, he referred to his dissenting opinion in *Schlesinger*.⁴²

Justice Douglas found standing in the plaintiffs in both *Richardson* and *Schlesinger* because:

The interest of citizens in guarantees written in the Constitution seems obvious The Executive Branch under our regime is not a fiefdom or principality competing with the Legislative as another center of power. It operates within a constitutional framework, and it is that . . . framework that these citizens want to keep intact. That is, in my view, their rightful concern.⁴³

While the litigant must have a personal stake in the outcome, Justice Douglas saw no need that that stake be a monetary one.⁴⁴

All four dissenters approached the standing issue from a fundamentally different perspective than did the majority. Nonetheless, the

37. 418 U.S. 208 (1974).

38. *Id.* at 236 (Brennan, J., dissenting).

39. *United States v. Richardson*, 418 U.S. 166, 197-202 (1974) (Douglas, J., dissenting).

40. See text accompanying notes 136-38 *infra*.

41. 418 U.S. at 202 (Douglas, J., dissenting).

42. *Schlesinger v. Reservists Committee*, 418 U.S. 208, 229-35 (1974) (Douglas, J., dissenting). In this opinion, Justice Douglas began with the observation that the standing requirement is a "judicially created instrument" which serves three ends: (1) protection of the status quo "by reducing the challenges that may be made to it and its institutions"; (2) the barring from the courts of "political questions"; and (3) the ridding from the court dockets of questions which are abstract or involve no "concrete controversial issue." *Id.* at 229.

43. *Id.* at 234.

44. *Id.* See also note 14 *supra*.

decision brought Richardson's fortunes full circle. The majority opinion put Richardson in precisely the same position he had been in after the district court's ruling on his first case⁴⁵ more than six years earlier: outside the courthouse, unable to get in. Thus, the important constitutional issue raised by Richardson remains unresolved. It is to this issue that the remainder of this note addresses itself.

Statutory Appropriation and Accounting Provisions

A brief examination of statutory appropriation and accounting requirements will aid in the analysis of the substantive constitutional issues raised by the Richardson cases. In compliance with the constitutional provision regarding appropriations, the president annually submits a proposed budget to Congress, requesting a specific appropriation for each department or agency, and breaking that appropriation down into separate amounts to be used by the agency for specified purposes. Congress then reviews the requests, makes modifications it deems desirable, and ultimately makes its appropriations.⁴⁶

Compliance with the constitutional accounting requirement was first provided by statute in 1789, when the First Congress enacted legislation creating the treasury department.⁴⁷ The act provided, *inter alia*, that the treasurer annually present each house of Congress with "fair and accurate copies of all accounts" and "a true and perfect account of the state of the Treasury."⁴⁸ The statute's modern counterpart, which has been in effect since 1894, differs in some details, but is essentially the same.⁴⁹

Thus, from the earliest days of the Republic to the present, there have been laws requiring that Congress be provided annually with a complete and accurate accounting of receipts and expenditures of all federal agencies. Although there is no record of such reports ever being withheld from the public, since 1950 there has been a separate statutory provision guaranteeing public access to information concerning how tax money is spent:

45. *Richardson v. Sokol*, 285 F. Supp. 866 (W.D. Pa. 1968).

46. For a detailed account of the process, see generally R. FENNO, *THE POWER OF THE PURSE* (1966).

47. Act of Sept. 2, 1789, Ch. 12, § 1, 1 Stat. 65.

48. *Id.* § 4 (emphasis added). The House subsequently passed a resolution specifying that the account was to be broken down by "each head of appropriation." 2 *ANNALS OF CONG.* 302 (1792).

49. 31 U.S.C. § 1029 (1970). "It shall be the duty of the Secretary of the Treasury annually to lay before Congress . . . an accurate, combined statement of the receipts and expenditures during the last preceding fiscal year of all public moneys. . . . designating the amount of the receipts, whenever practicable, by ports, districts, and States, and the expenditures, by each separate head of appropriation." *Id.*

The Secretary of the Treasury shall prepare such reports for the information of the President, the Congress, *and the public* as will present the results of the financial operations of the Government⁵⁰

Modification of Normal Accounting Procedure

On occasion Congress has found it desirable to provide a measure of confidentiality in the conduct and financial accounting of certain governmental affairs. On such occasions Congress has created statutory modifications of normal accounting procedures.

The first such occasion was in 1793, when the Second Congress enacted a law granting the president discretion to authorize special accounting and selective public disclosure of financial data related to expenditures made "for the purposes of intercourse or treaty, with foreign nations, in pursuance of any law."⁵¹ The law further provided that a certificate completed by the president or the secretary of state concerning expenditures whose record was to be withheld from public disclosure would be "a sufficient voucher for the sum or sums therein expressed to have been expended."⁵² A virtually identical version of this provision is still law today,⁵³ and the secretary of state is permitted to delegate his certification authority to subordinates.⁵⁴

For most of the nation's history, the provision for secret foreign affairs expenditures was the only statutory exception to the rule of full financial disclosure.⁵⁵ Shortly before the United States entered World War I, however, Congress authorized confidentiality in the expenditure of funds for navy intelligence-gathering.⁵⁶ This authorization gave the secretary of the navy the same powers in intelligence expend-

50. 31 U.S.C. § 66b(a) (1970) (emphasis added). In response to this mandate, the Treasury Department publishes its COMBINED STATEMENT, which "is recognized as the official publication of the details of receipt and outlay data with which all other reports containing similar data must be in agreement. In addition to serving the needs of Congress, [the report is used by] the general public in its continuing review of the operations of government." U.S. DEPT OF TREASURY, COMBINED STATEMENT OF RECEIPTS, EXPENDITURES, AND BALANCES OF THE UNITED STATES GOVERNMENT 1 (1973) [hereinafter cited as COMBINED STATEMENT].

51. Act of Feb. 9, 1793, ch. 4, § 2, 1 Stat. 300.

52. *Id.*

53. 31 U.S.C. § 107 (1970).

54. *Id.* § 107a.

55. Historian Arthur M. Schlesinger, Jr. has observed that the power to account for expenditures by certificate only was "a power enjoyed in the early republic only by Presidents." A SCHLESINGER, THE IMPERIAL PRESIDENCY 316 (1973). The statement is slightly inaccurate, however, since the secretary of state also had this power. See text accompanying note 52 *supra*.

56. 31 U.S.C. § 108 (1970).

itures as those accorded to the president in foreign affairs expenditures.⁵⁷

In recent years, confidentiality has been authorized in other sensitive areas. The legislation creating the Atomic Energy Commission (AEC) contained a provision that "[a]ny Act appropriating funds to the Commission may appropriate specified portions thereof to be accounted for upon certification of the Commission only."⁵⁸

Similarly, Congress has provided that:

Appropriations for the Federal Bureau of Investigation are available for expenses of *unforeseen emergencies of a confidential character, when so specified in the appropriation concerned, to be spent under the direction of the Attorney General*. The Attorney General shall certify the amount spent that he considers advisable not to specify, and his certification is a sufficient voucher for the amount therein expressed to have been spent.⁵⁹

A comparison of these provisions reveals certain common characteristics: (1) in each case Congress appropriates funds to the agency in question in the normal manner; (2) only particular portions of these appropriations are exempted from normal accounting procedures; (3) specified persons are assigned the responsibility of determining whether disclosure of specific expenditures should be exempted in the national interest; and (4) such exemptions are exceptions to the normal rule of full disclosure accounting procedures for the agencies in question.

There are additional safeguards which apply to AEC and FBI accounting. Congress appropriates to these agencies designated sums which may be used for confidential purposes,⁶⁰ and these amount to only miniscule portions of the total appropriations for the agencies.⁶¹ Furthermore, in the case of the FBI these funds are designated for emergency use, and may be exempt from accounting procedures only at the direction of the attorney general, an official outside the bureau with the responsibility for its supervision.⁶²

57. *Id.* § 107.

58. 42 U.S.C. § 2017(b) (1970).

59. 28 U.S.C. § 537 (1970) (emphasis added).

60. See text accompanying notes 58-59 *supra*.

61. The budget for fiscal year 1975 called for a total AEC appropriation of approximately \$2.3 billion, of which a maximum of \$100,000 (0.0043%) was designated for confidential expenditures. The total appropriation for the FBI was approximately \$435 million, of which a maximum of \$70,000 (0.0161%) was designated for confidential expenditures. U.S. OFFICE OF MANAGEMENT & BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, APPENDIX 753, 608 (fiscal year 1975) [hereinafter cited as APPENDIX TO THE BUDGET].

62. See text accompanying note 59 *supra*.

Central Intelligence—The Great Exception

The Central Intelligence Agency Act of 1949⁶³ has been described as "a piece of legislation which is unique in the American system."⁶⁴ The act authorizes the agency to:

Transfer to and receive from other Government agencies such sums as may be approved by the Office of Management and Budget . . . for the performance of any of the functions or activities authorized under . . . this title, and any other Government agency is authorized to transfer to or receive from the Agency such sums *without regard to any provisions of law limiting or prohibiting transfers between appropriations*. Sums transferred to the Agency in accordance with this paragraph may be expended for the purposes and under the authority of . . . this title *without regard to limitations of appropriations from which transferred* . . .⁶⁵

The act further provides that:

The sums made available to the Agency may be expended *without regard to the provisions of law and regulations relating to the expenditure of Government funds*; and for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director [which] shall be deemed a sufficient voucher for the amount therein certified.⁶⁶

Chief Justice Burger understated the matter somewhat when he observed that the above section "provides different accounting and reporting requirements and procedures for the CIA, as is also done with respect to other governmental agencies dealing in confidential areas."⁶⁷ In support of his reference to other agencies, the chief justice cited the statutory sections dealing with FBI, AEC, and foreign affairs appropriations,⁶⁸ ignoring the fact that the CIA procedures are actually quite different from those of the other agencies.⁶⁹ In fact the

63. 50 U.S.C. §§ 403a-403j (1970).

64. V. MARCHETTI & J. MARKS, *THE CIA AND THE CULT OF INTELLIGENCE* 63 (1974) [hereinafter cited as MARCHETTI & MARKS]. (While this is the most recent and comprehensive source of information on many aspects of the CIA, it should be noted that the authors are decidedly critical of the agency.)

65. 50 U.S.C. § 403f (1970) (emphasis added).

66. *Id.* § 403j(b) (emphasis added).

67. *United States v. Richardson*, 418 U.S. 166, 175 (1974).

68. *Id.* n.7.

69. One commentator has described the various appropriation and accounting procedures as "a continuum of practices from full disclosure to strict secrecy." Note, *The CIA's Secret Funding and the Constitution*, 84 YALE L.J. 608, 616 (1975) [hereinafter cited as *Secret Funding*]. The formulation may be slightly misleading, however, since the term "continuum" implies a steady progression from one extreme to the other. It would be more appropriate to view full disclosure as the norm, with AEC, FBI and foreign affairs disclosure practices slight deviations from the norm, and the CIA procedure an extreme deviation from the norm. The slight deviations are actually much closer to full disclosure than they are to total secrecy. See text accompanying notes 51-62 *supra*.

CIA Act provided for radical departure from the practices required of other agencies, for the CIA was granted wholesale exemption from any published accounting of its receipts and expenditures.⁷⁰ The confidential certification of the director of central intelligence is the only documentation required for the expenditures of public funds generally estimated to amount to at least \$750 million per year.⁷¹ This allows the director "far more authority to operate secretly than any other agency head."⁷²

Under the operation of the CIA Act, Congress makes no direct appropriation for the CIA.⁷³ This practice differs from that used with respect to every other governmental agency. CIA funds are disbursed through a two-step procedure whereby money is appropriated by Congress to other agencies, which in turn transfer the funds to the CIA. Thus, CIA funds are concealed within the budgets and accounts of other agencies.⁷⁴

70. This, at least, has been the CIA's interpretation of the act. *But see* COMMITTEES ON CIVIL RIGHTS & INTERNAT'L HUMAN RIGHTS, ASS'N OF THE BAR OF THE CITY OF NEW YORK, *THE CENTRAL INTELLIGENCE AGENCY: OVERSIGHT AND ACCOUNTABILITY* 24 (1975) [hereinafter cited as *OVERSIGHT & ACCOUNTABILITY*].

71. MARCHETTI & MARKS, *supra* note 64, at 61; 119 CONG. REC. 6868 (daily ed. April 10, 1973) (remarks of Senator Proxmire).

The CIA actually controls a significantly larger amount of money through its "proprietary" corporations (ostensibly private companies that are actually fronts for CIA operations). Also, some of the projects it directs are financed by the Defense Department. Taking these facts into account, one CIA official has said that the agency's director operates a "multibillion-dollar conglomerate." MARCHETTI & MARKS, *supra* note 64, at 61-62 (emphasis in original). Another source has stated that as of 1967, the CIA was spending \$1.5 billion annually. D. WISE & T. ROSS, *THE ESPIONAGE ESTABLISHMENT* 172 (1967).

72. *OVERSIGHT & ACCOUNTABILITY*, *supra* note 70, at 27.

73. On occasion direct appropriations have been made to the CIA for construction purposes, and the amounts have been published. The government's financial publications therefore have listings for the CIA, but only the construction figures are provided. *See, e.g.*, APPENDIX TO THE BUDGET, *supra* note 61, at 884 (fiscal year 1972); COMBINED STATEMENT, *supra* note 50, at 421 (fiscal year 1972).

74. In a letter to Senator William Proxmire, Office of Management and Budget Director Roy L. Ash described the CIA funding procedures in some detail: "The specific amounts of the agency's approved appropriation request and the identification of the appropriation estimates in the President's annual Budget, within which these amounts are included, are formally provided by the Director of OMB to the Chairman of the Senate and House Appropriations Committees; similarly the Director is informed by them of the determination of the CIA budget, and OMB approval of the transfer of funds to CIA is based upon this decision."

"The transfer of funds . . . is accomplished by the issuance of Treasury documents routinely used for the transfer of funds from one government agency to another. The amount and timing of these transfers . . . are approved by OMB."

"Under established procedures, funds approved by OMB for transfer to CIA are limited to amounts notified to OMB by the Chairmen of the Senate and House Appropriations Committees. The specific appropriation accounts from which the funds will

As a result of these procedures, the amount of the annual CIA budget is known only to a "handful of Congressmen," and even they generally have limited knowledge of how the funds are spent.⁷⁵ Subcommittees of the House and Senate Appropriations Committees have responsibility for approving the CIA budget, and they share, with subcommittees of the two Armed Services Committees, responsibility for general oversight of the agency.⁷⁶ There are conflicting views on how much attention is actually given the CIA budget by these subcommittees, but apparently it is fairly minimal.⁷⁷

Legislative History

One might well question why Congress surrendered its normal financial controls with respect to CIA appropriations and accounting. In the years following World War II, it was widely believed that the devastating Pearl Harbor attack that had precipitated United States involvement in the war might have been avoided or its results mitigated if the country had a more dependable intelligence system.⁷⁸ In order to prevent a recurrence of this problem, and to provide a single in-

be transferred are also determined by this process." 120 CONG. REC. 9604 (daily ed. June 4, 1974).

The letter indicated, in Senator Proxmire's words, that "only two men in the entire Congress of the United States control the process by which the CIA is funded." *Id.* at 8602.

75. MARCHETTI & MARKS, *supra* note 64, at 341.

76. For informative discussions of congressional oversight of the CIA and its spending, see generally Note, *Fiscal Oversight of the Central Intelligence Agency: Can Accountability and Confidentiality Coexist*, 7 N.Y.U.J. INT'L L. & POL. 493 (1974) [hereinafter cited as *Fiscal Oversight*]; CIA: *Congress in Dark About Activities, Spending*, 29 CONG. Q. WEEKLY REP. 1840 (1971).

77. It has been said that the intelligence subcommittee of the House Appropriations Committee "spends approximately four days each year reviewing the budget requests of the CIA and other intelligence services." *Fiscal Oversight*, *supra* note 76, at 497. There are indications that the Senate subcommittee's budget review has been lacking in intensity, although it has been meeting more frequently since 1971, and may therefore be taking a more active role. *Id.* at 498-500.

Both subcommittees have been criticized for past laxity in reviewing the budget, exemplified by an episode alleged to have occurred in 1967. It is said that the CIA invited a member of the House subcommittee to attend a "rehearsal" of the agency's budget presentation. Because of his subsequent favorable assessment of the "rehearsal" presentation, the subcommittee dispensed with the agency's formal budget presentation. On the basis of representations of the House panel's chairman, the Senate subcommittee likewise dispensed with the budget presentation. Thus, for that year, the CIA budget was approved without any congressional hearing whatsoever. MARCHETTI & MARKS, *supra* note 64, at 346-47. Senator Mike Mansfield has charged that "both the executive and legislative branches have been inexcusably lax in supervising intelligence activities." REPORT, COMM'N ON THE ORGANIZATION OF THE GOVERNMENT FOR THE CONDUCT OF FOREIGN POLICY, 231-32, (June, 1975) (Comments by Senator Mike Mansfield).

78. See, e.g., 95 CONG. REC. 1948 (1949) (remarks of Senator Tydings).

tegrated intelligence product, President Truman created the Central Intelligence Group by presidential directive in 1946.⁷⁹ The following year, the agency was renamed and its function codified in the National Security Act of 1947.⁸⁰ That legislation made no provision for funding, and apparently funds were transferred from the Defense Department budget without statutory authorization.⁸¹ The Central Intelligence Agency Act of 1949⁸² was designed to define more specifically the role and operations of the agency.

The mood of the nation in the post-war years was characterized by widespread apprehension over covert Communist activities. Congress thus considered the CIA Act, in what has been described by one source as "an atmosphere of Cold War tension."⁸³ A participant in the consideration described the atmosphere in more colorful terms as a "wave of hysteria."⁸⁴

The proposed CIA Act reached the floor of the House of Representatives on March 7, 1949. Representative Lansdale Sasscer introduced the bill and provided a brief description of some of its provisions. At the conclusion of his presentation he remarked that without the appropriations and accounting language, there could "be no successful operation of an intelligence service."⁸⁵

Ironically, there was less debate over the secrecy provided by the funding provision than over the secrecy surrounding the legislation itself. Early in the debate, Representative Emanuel Celler, while indicating he would not oppose the bill, voiced objection to the surreptitious manner in which it was presented:

Certainly if the members of the Armed Forces [sic] Committee can hear the detailed information to support this bill, why cannot our entire membership? Are they the Brahmins and we the untouchables?⁸⁶

79. Presidential Directive of Jan. 22, 1946, 3 C.F.R. 1080 (1943-48 Comp.).

One commentator has observed that the Central Intelligence Group rested on a tenuous foundation: "Not only was it the creature of executive order and hence highly susceptible to elimination at the whim of the President or his successor, but it was wholly dependent upon its three constituent Departments—Army, Navy, and State—for funds, facilities, and personnel." Walden, *The C.I.A.: A Study in the Arrogation of Administrative Powers*, 39 GEO. WASH. L. REV. 66, 71 (1970) [hereinafter cited as Walden].

80. 50 U.S.C. §§ 401 *et seq.*, as amended; 5 U.S.C. §§ 171-2, 171 b, k-n (1970).

81. The act did authorize the agency to spend "[a]ny unexpended balances of appropriations, allocations, or other funds available or authorized to be made available" to the Central Intelligence Group. 50 U.S.C. § 403(f)(2) (1970).

82. *Id.* §§ 403a-403j.

83. MARCHETTI & MARKS, *supra* note 64, at 8.

84. 95 CONG. REC. 1946 (1949) (remarks of Representative Marcantonio).

85. *Id.* at 1945 (remarks of Representative Sasscer).

86. *Id.* (remarks of Representative Celler).

More strident in his criticism was Representative Vito Marcantonio, the only member of either house to speak in opposition to the bill. Marcantonio called his colleagues' attention to the report of the Armed Services Committee, which acknowledged that full and detailed explanations of some of the bill's provisions had not been made because of the "highly confidential nature" of such information.⁸⁷ Marcantonio asserted that the report made every section of the bill suspect, and warned his colleagues that in passing the bill they would be "suspending [their] legislative prerogatives and evading their duty to the people of this Nation."⁸⁸ He specifically opposed the expenditure provisions, maintaining that their enactment would amount to "*suspending all laws with regard to Government expenditures.*"⁸⁹ More indicative of the prevailing viewpoint, however, was Representative Dewey Short, who remarked:

We are engaged in a highly dangerous business. It is something I naturally abhor but sometimes you are compelled to fight fire with fire. . . . [P]erhaps *the less we say in public about this bill the better off all of us will be.*⁹⁰

Little more was said about the bill before the House approved it by an overwhelming majority of 348 to 4.⁹¹

On May 27, 1949, the bill was introduced for debate in the Senate, where it lacked even the minimal vocal opposition it had received in the House. A few senators expressed misgiving about various provisions of the bill, but its sponsor, Armed Services Committee Chairman Millard Tydings, was able to allay such concerns with somewhat vague reassurances.

For example, Senator Kenneth McKellar expressed doubts over the wisdom of the provision allowing the transfer of funds, noting its inconsistency with appropriation procedures employed for other agencies.⁹² Senator Tydings interrupted McKellar to explain that intelligence gathering was not a "normal function of the government, like . . . building a bridge."⁹³ He argued the processing of conventional vouchers might result in the disclosure of the names and activities of CIA agents, thereby exposing them to grave personal risks. It was, Tydings maintained, "a matter of life and death."⁹⁴

87. *Id.* at 1946 (remarks of Representative Marcantonio).

88. *Id.*

89. *Id.* (emphasis added).

90. *Id.* at 1947 (remarks of Representative Short) (emphasis added).

91. *Id.* at 1948 (roll call vote).

92. *Id.* at 6955 (remarks of Senator McKellar).

93. *Id.* (remarks of Senator Tydings).

94. *Id.* It is a matter of conjecture whether Tydings was using the term "agent" in the popular but somewhat inaccurate sense, or in the narrower sense in which the CIA uses the word:

This argument may have had some validity. It did not, however, justify the concealment of *all* CIA appropriations and expenditures. Tydings gave no indication of why the CIA could not follow the practice of other agencies which were authorized to use appropriated funds for particularly sensitive activities without an accounting.⁹³

There was no expression of concern in the Senate over the constitutionality of the proposed appropriations procedures associated with the CIA Act. In fact, Tydings argued that they were really quite democratic. He maintained that a common practice used by other governments in financing their intelligence activities was to "simply appropriate a disguised sum of money, without any authority of law."⁹⁴ He then noted that:

We are writing the whole law out. I regret we cannot proceed in any other way. If the Senate knew about the details, it might be willing to do as other countries do, but we do not do business that way. We are throwing every possible democratic safeguard around it as we go along.⁹⁷

With this assurance, the Senate passed the bill without a rollcall vote.⁹⁸

Second Thoughts About Secrecy

In the years that followed the passage of the CIA Act, a number of members of Congress began to question whether the extreme secrecy surrounding the CIA was entirely necessary or desirable. Since passage of the act, there have been over 150 legislative proposals to subject the agency to greater scrutiny,⁹⁹ although until recent months none had ever passed either house.

Few of these proposals have been aimed at exposing CIA activities to the public view. Rather, they have been directed toward in-

"'Agent' is a word that is used to signify the people who work at the end of the line. Usually they are foreigners and the instruments through which CIA operations are executed. The word 'agent' is never used to describe the CIA career employee who functions in a station as an operations officer—more commonly known as a case officer." P. AGEE, *INSIDE THE COMPANY: CIA DIARY 90* (British Penguin ed., 1975) [hereinafter cited as AGEE].

Of the estimated total of 16,500 CIA career employees, only about 5,000 serve overseas. MARCHETTI & MARKS, *supra* note 64, at 61. For geographic reasons alone, most CIA employees would therefore seem to face little danger of personal harm.

95. See text accompanying notes 51-62 *supra*.

96. 96 CONG. REC. 6955 (remarks of Senator Tydings). In fact, this is apparently how the CIA was funded prior to the 1949 act. See text accompanying note 81 *supra*.

97. 95 CONG. REC. 6955 (remarks of Senator Tydings).

98. *Id.* at 6956.

99. MARCHETTI & MARKS, *supra* note 64, at 342. The number may be considerably higher. More than eight years ago, Senator Fulbright stated that over two hundred such resolutions had been introduced. 112 CONG. REC. 15673 (1966).

creasing congressional oversight of the agency. The first major effort in this direction was a resolution introduced in the Senate in 1956 by Senator Mike Mansfield.¹⁰⁰ The resolution, which would have established a Joint Committee on Central Intelligence, was defeated by a vote of 59 to 27.¹⁰¹ All subsequent efforts to establish such a "watch-dog" committee have met similar fates.¹⁰²

Relatively little congressional attention has been directed toward the question of whether the CIA budget should be a matter of public record. A notable exception to this indifference to public disclosure was a bill introduced in 1971 by Senator George McGovern.¹⁰³ The bill provided for a direct appropriation to the CIA, and publication of the appropriation as a single sum. It also prohibited the transfer to the CIA of funds appropriated to another agency.¹⁰⁴ If this seemingly modest proposal had been enacted, the CIA's budget still would have been more secret than that of any other independent federal agency. Still, it must have appeared to many a radical departure from existing practices.

Senator McGovern cited two major purposes of the bill: "to allow the Congress to exercise its constitutional powers over Federal finances by knowing where the administration proposed to allocate each tax dollar;" and "to allow Congress and the taxpayer to know

100. S. Con. Res. 2, 84th Cong., 2d Sess. (1956).

101. 102 CONG. REC. 6068 (1956) (roll call vote).

102. The situation is changing in the Ninety-fourth Congress, however. Early this year, the Senate voted to establish a select committee to study the activities of the various intelligence agencies. See N.Y. Times, Jan. 28, 1975, at 1, col. 4 (city ed.). Several weeks later, the House followed suit by creating its own select committee. See N.Y. Times, Feb. 20, 1975, at 1, col. 7 (city ed.). As of this writing, the House select committee has just begun its investigation. The Senate panel, though, has been operational for some time, and appears to be conducting a thorough inquiry. It seems likely that this investigation will lead to the formation of a standing committee to scrutinize intelligence agencies. The Rockefeller Commission has recommended the establishment of a Joint Committee on Intelligence. ROCKEFELLER COMMISSION, *supra* note 4a, at 81.

103. S. 2231, 92d Cong., 1st Sess. (1971). The text of the bill appears in 117 CONG. REC. 23692 (1971).

104. The bill provided in part that:

"(1) [T]he Budget of the United States . . . shall show proposed appropriations, estimated expenditures, and other related data for the Central Intelligence Agency, and

(2) appropriations shall be made to the Central Intelligence Agency in an appropriate appropriation Act. . . . [P]roposed appropriations, estimated expenditures, and other related data set forth in the Budget for the Central Intelligence Agency, and appropriations made to the Agency, may be shown as a single sum with respect to all functions and activities of the Agency.

"Sec. 2. Commencing with the fiscal year beginning July 1, 1972, no funds appropriated to any other Department or agency of the United States shall be made available for expenditure by the Central Intelligence Agency." *Id.*

the exact amount of money going into *other* Government programs."¹⁰⁵

McGovern described the practice of hiding CIA appropriations in those of other agencies as "completely contrary to our democratic principles and *perhaps to the Constitution itself*."¹⁰⁶ He continued:

The American people have a *right to know* the purposes for which their tax dollars are used. Their elected representatives have the right to decide the priorities of the Nation as expressed in the Federal budget.¹⁰⁷

This conviction notwithstanding, the McGovern bill met the fate of most other proposals to shed more light on the CIA—a quiet death in committee.

Later the same year, more serious consideration was given to a proposal by Senator Stuart Symington. The proposal, in the form of an amendment to a defense appropriation bill,¹⁰⁸ would have placed a

105. 117 CONG. REC. 23692 (1971) (remarks of Senator McGovern) (emphasis added).

106. *Id.* (emphasis added).

107. *Id.* (emphasis added). See text accompanying note 174 *infra*.

McGovern also expressed a personal concern about possible CIA use of agriculture appropriations. *Id.* The senator had served as head of the Food for Peace program in the early days of the Kennedy administration, and may well have been concerned about accusations that over a six-year period, nearly \$700 million from Food for Peace appropriations had been diverted to military assistance programs, allegedly including CIA-directed paramilitary operations in Laos. See Fisher, *Executive Shell Game—Hiding Billions from Congress*, THE NATION, Nov. 15, 1971, in 117 CONG. REC. 40736 (1971). Regarding this use of Food for Peace funds, Fisher quoted Senator Proxmire: "This seems to me a kind of Orwellian perversion of the language; food for peace could be called food for war." 117 CONG. REC. at 40737.

Others have maintained that the CIA receives its entire funding from Defense Department appropriations: "All of the Invisible Government's hidden money is buried in the Defense Department budget, mainly in the multi-billion-dollar weapons contracts, such as those for the Minutemen and Polaris missiles." D. Wise & T. Ross, *THE INVISIBLE GOVERNMENT* 260 (1964) [hereinafter cited as Wise & Ross]. Another commentator has stated that "the great bulk of the C.I.A.'s funds almost surely comes from the Defense budget. . . . Furthermore, most of the . . . funds may be even more specifically located in the better than \$5 billion itemized simply as 'Intelligence and Communications' and not given a further word of explanation in the Defense Program and Budget." Futterman, *Toward Legislative Control of the C.I.A.*, 4 N.Y.U.J. INT'L L. & POL. 431, 441 (1971) [hereinafter cited as Futterman].

Thus, while both sources agree that the money comes from the Defense budget, they differ as to which portion of that budget it comes from. The item mentioned by Professor Futterman may actually be used only to fund the various intelligence agencies under the control of the Defense Department, some of which are kept under even greater secrecy than the CIA. The total annual budget of the National Security Agency, the Defense Intelligence Agency, and Army, Air Force and Naval Intelligence has been estimated at \$5.4 billion. MARCHETTI & MARKS, *supra* note 64, at 80.

108. H.R. 11731, 92d Cong., 1st Sess. (1971).

ceiling of \$4 billion on funds available for use by the CIA, the National Security Agency, the Defense Intelligence Agency, and the military intelligence services.¹⁰⁹

Symington candidly acknowledged that one of his purposes in introducing the amendment was to provide greater congressional access to information on intelligence appropriations.¹¹⁰ He challenged the view that the mere function of the intelligence agencies in itself demanded secrecy in appropriations, maintaining that this was inconsistent with policies pertaining to similarly vital information on appropriations for military equipment. "There is nothing secret," he reminded his colleagues, "about the . . . cost of a nuclear aircraft carrier, or the cost of the C-5A."¹¹¹ Knowledge of costs, argued Symington, did not equal knowledge of how the weapons would be utilized. Similarly, "knowledge of the overall cost of intelligence does not in any way entail the release of knowledge about how the various intelligence groups function, or plan to function."¹¹²

These arguments did not persuade Senator John Stennis, chairman of the Senate Armed Services Committee. Stennis countered the arguments in a manner reminiscent of Senator Tydings' original proselytizing for the CIA Act,¹¹³ maintaining that an intelligence agency could not be run in the same manner as "a tax collector's office or the HEW or some other such department."¹¹⁴ With extraordinary candor, Stennis then summarized the position of the proponents of financial secrecy in a single sentence:

109. 117 CONG. REC. 42923 (1971). This would probably have resulted in a significant reduction in total intelligence spending. This total was estimated at \$4 billion a decade ago. WISN & ROSS, *supra* note 107, at 277-78. More recently, however, the total has been estimated at more than \$6.2 billion, \$6.1 billion of which is spent by the agencies mentioned by Senator Symington. MARCHETTI & MARKS, *supra* note 64, at 80.

110. 117 CONG. REC. 42928 (1971) (remarks of Senator Symington).

111. *Id.* at 42925. In sharp contrast to the secrecy surrounding the CIA budget, the Defense Department's military budget is published in considerable detail, totalling ninety pages for fiscal year 1975. APPENDIX TO THE BUDGET, *supra* note 61, at 265-355 (fiscal year 1975). Included are such items as the amount the Army spends on the anti-ballistic missile system, *id.* at 291; the Navy's figure for fleet ballistic missile ships, *id.* at 301; and the Air Force outlay for ballistic missiles, *id.* at 307.

In addition to the statistics, detailed explanations of the uses to which the funds are to be put are published. One such explanation discussed plans to convert submarines "from the Polaris to the Poseidon missile capability to improve our sea-based ballistic missile weapons system. The activity also includes two Trident class ballistic missile firing submarines capable of firing a larger undersea strategic missile." *Id.* at 301.

It should be remembered, however, that some of the figures published for weapons procurement may include concealed CIA funds. See note 107 *supra*.

112. 117 CONG. REC. at 42925 (1971) (remarks of Senator Symington).

113. See text accompanying note 93 *supra*.

114. 117 CONG. REC. at 42930 (1971) (remarks of Senator Stennis).

You have to make up your mind that you are going to have an intelligence agency and protect it and *shut your eyes some and take what is coming.*¹¹⁵

Senator Stennis seems to have articulated the concerns of the majority of his colleagues, who defeated the Symington amendment by a vote of 56 to 31.¹¹⁶

In 1974, Senator William Proxmire introduced an amendment to the Department of Defense Appropriation Act for fiscal year 1975¹¹⁷ which, like the Symington amendment, would have resulted in disclosure of the total amount appropriated for intelligence agencies, but unlike the Symington proposal, would have placed no ceiling on such appropriations. The Proxmire amendment was procedural in nature, and would have required the director of central intelligence to submit an unclassified budget request to Congress each year, disclosing the total requested appropriation.¹¹⁸

Proxmire termed the existing CIA funding methods a "sleight of hand,"¹¹⁹ arguing that these procedures shielded the intelligence community from effective control by Congress, and "systematically deceived Congress as to the size of other civilian budgets."¹²⁰ In his view, the essential question to be answered in the debate was: "Will the public release of this aggregate budget in any way compromise our national security?"¹²¹ He contended that it would not.

Senator Stennis challenged this contention, arguing that such disclosure would "give to our adversaries all over the world . . . a true index as to what our activities are."¹²² According to Senator John

115. *Id.* (emphasis added). Other senators expressed similar sentiments. *Id.* at 42928 (remarks of Senator Ellender), 42929 (remarks of Senator Young).

116. *Id.* at 42932 (roll call vote).

117. S. 3000, 93d Cong., 2d Sess. (1974).

118. 120 CONG. REC. 9601 (daily ed. June 4, 1974). The amendment provided that: "On or before March 1 each year the Director of Central Intelligence shall submit an unclassified written report to the Congress disclosing the total amount of funds requested in the budget, transmitted to the Congress pursuant to section 201 of the Budget and Accounting Act of 1921 (31 U.S.C. 11), for the national intelligence program for the next successful fiscal year." *Id.*

119. *Id.* at 9602 (remarks of Senator Proxmire).

120. *Id.* A similar viewpoint is held by Representative Elizabeth Holtzman, who has disclosed that she once made an inquiry of the House parliamentarian as to procedures for blocking an appropriation bill containing hidden CIA funds on the ground that it was fraudulent. She was informed that there was no such procedure. Televised interview with Elizabeth Holtzman on "Newsroom," KQED, San Francisco, Feb. 4, 1975.

121. 120 CONG. REC. 9602 (daily ed. June 4, 1974) (remarks of Senator Proxmire).

122. *Id.* (remarks of Senator Stennis). Later in the debate, Stennis elaborated on the point: "If [the Soviets] are given this new information then certain deductions could be made about how much of the budget is going for these different activities and the first thing we know calculations are made and they come pretty close to being correct as to how much is spent by the military, how much is spent in the civilian area, how

McClellan, chairman of the Appropriations Committee disclosure of the overall figure would be like putting "the camel's nose under the tent."¹²³ McClellan and several other opponents of the amendment feared that publication of the total intelligence budget figure would result in concern over how the money was being spent, so that such information would be revealed on the floor of Congress and then in the press.¹²⁴ Senator John Pastore speculated about the possible presence of Russians in the press gallery.¹²⁵

Proxmire responded that nothing in his amendment would permit the above chain of events to occur, and that knowledge of overall intelligence expenditures was necessary for sound congressional judgment on budget priorities.¹²⁶ This contention led to the following colloquy:

Mr. PASTORE. The Senator can find it out privately, but he does not want to . . . He wants to tell the world about it.

Mr. PROXMIRE. I think the world ought to know the overall figures.

Mr. PASTORE. Does the Senator mean Russia should know?

Mr. PROXMIRE. Right.

Mr. PASTORE. My goodness, I quit.¹²⁷

Proxmire maintained that the overall figure would be of no use to the Russians, there being "no way the Soviet Union can interpret whether our overall figure indicates what we are doing" with regard to particular intelligence programs, since decreased cost might merely mean greater efficiency.¹²⁸ Furthermore, said Proxmire:

much is spent on satellites, and how much is spent by the CIA itself and where. Following a series of . . . inferences based on all the information they already have from us, from the newspapers . . . they will be able to make fairly good calculations." *Id.* at 9610.

123. *Id.* at 9609 (remarks of Senator McClellan).

124. *Id.* at 8605 (remarks of Senator Pastore), 9606 (remarks of Senator Jackson and Senator Humphrey), 9612 (remarks of Senator Thurmond and Senator Goldwater). There was no explanation of why, if such information was to be revealed at all, security could not be preserved by holding a closed session. This procedure has been utilized in the past when the Senate has debated CIA matters. See 112 CONG. REC. 15677 (1966).

125. 120 CONG. REC. 9604 (daily ed. June 4, 1974) (remarks of Senator Pastore).

126. *Id.* at 9606 (remarks of Senator Proxmire).

127. *Id.* (remarks of Senator Pastore and Senator Proxmire). It is doubtful that most senators could find out very much privately, as Senator Pastore suggested. Senator McClellan, chairman of the Appropriations Committee, stated that when colleagues had come to him seeking information, he was "torn between the personal desire to make them acquainted with everything . . . and the duty to help maintain and preserve our national security. . . . I have to make that choice." *Id.* at 9609 (remarks of Senator McClellan).

128. *Id.* at 9609 (remarks of Senator Proxmire).

I have not heard one, single, solitary, real, hypothetical, or imaginary example of how any damage is going to be done to the United States of America I have heard generalizations as to what might happen if we were to release information not called for by this amendment. That does not make any sense. Because we provide the overall total figure for intelligence does not mean we are going to tell anything about the CIA.

. . . [I]f this amendment is wrong, the burden of proof certainly is on those who would say it is wrong; because what we are doing is simply providing the taxpayer what they [sic] are entitled to know, information on where their [sic] money goes. . . .

So I say that proof has been lacking and I see no examples at all of any damage this could do.¹²⁹

The proof Senator Proxmire demanded was not forthcoming. Nonetheless, his amendment was defeated by a vote of 55 to 33.¹³⁰

Thus, twenty-six years after the passage of the CIA Act, the CIA budget remains shrouded in secrecy. On those rare occasions when Congress has considered proposals to diminish the secrecy, the debate has centered around matters of policy, with no consideration of the question of whether the present procedures are constitutional.¹³¹ The substantive constitutional issues which the courts would have faced had the Richardson cases been allowed to proceed on their merits remain to be considered.

The Constitutional Mandate

Richardson apparently did not allege that CIA funds were not spent "in consequence of appropriations made by law" as required by the first part of article 1, section 9, clause 7.¹³² Since the judicial opinions in the second Richardson case¹³³ focused primarily upon the standing issue, they offer little guidance in determining the extent of the mandate contained in the statement and account requirement of the second half of the clause. Judge Rosenn of the Third Circuit did express the view that the framers of the Constitution intended to insure that the public would receive an accounting from the government. Contrasting the use of the word "publish" in the clause with another constitutional requirement that the president provide Congress with in-

129. *Id.* at 9610.

130. *Id.* at 9613 (roll call vote).

131. The single exception was Senator McGovern's passing comment in 1971. See text accompanying note 106 *supra*.

132. Richardson sought to enjoin not CIA spending itself, but rather publication of the COMBINED STATEMENT which did not account for this spending. See text accompanying note 11 *supra*.

133. *United States v. Richardson*, 418 U.S. 166 (1974); *Richardson v. United States*, 465 F.2d 844 (3d Cir. 1972).

formation on the state of the union,¹³⁴ he concluded that the right to an accounting ran not just to Congress, but to the citizenry.¹³⁵

Justice Douglas reached the same conclusion. Acknowledging that secrecy has "some constitutional sanction,"¹³⁶ such as that in the provision excusing Congress from publishing reports in its journal about proceedings requiring secrecy,¹³⁷ Douglas maintained that "the difference was great when it came to an accounting of public money. Secrecy was the evil at which Art. I, section 9, clause 7 was aimed."¹³⁸

Chief Justice Burger, however, offered a different point of view. In a footnote to his majority opinion in *Richardson*, he maintained that "historical analysis of the genesis of clause 7 suggests that it was intended to permit some degree of secrecy of governmental operations."¹³⁹

Few would deny that the framers of the Constitution intended to allow some secrecy of certain "governmental operations." The subject of clause 7, however, is not operations per se, but rather the accounting of governmental receipts and expenditures. "Historical analysis" of the available records indicates an intent on the part of all participants in the debates to insure the greatest possible disclosure of such accounting information.¹⁴⁰ The only suggestions that the clause would permit secrecy came not from its supporters, but from those who opposed it on the ground that it failed to specify a time period within which the accounts were to be published.¹⁴¹ As the discussion below reveals, no participant in the debates over the wording of the clause expressed any desire to permit secrecy.

Constitutional History

The first part of clause 7, providing that no funds could be removed from the treasury except "in Consequence of Appropriations made by Law," was not included in the original draft of the Constitution, but was added early in the proceedings.¹⁴² There was apparently no debate over the provision, but early in the nation's history, Justice Story observed that it made Congress the guardian of the public treas-

134. U.S. CONST., art. II, § 3.

135. *Richardson v. United States*, 465 F.2d 844, 850-51 (3d Cir. 1972).

136. *United States v. Richardson*, 418 U.S. 166, 199 (1974) (Douglas, J., dissenting).

137. U.S. CONST., art. I, § 5, cl. 3.

138. *United States v. Richardson*, 418 U.S. 166, 199 (Douglas, J., dissenting).

139. *Id.* at 178 n.11 (opinion of the Court).

140. See text accompanying notes 151-54 *infra*.

141. 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 450, 462 (1881) [hereinafter cited as ELLIOT].

142. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1348, at 222 (5th ed. 1891).

ure, with the power to decide how and when the money should be spent. The purpose of the clause was "to secure regularity, punctuality, and fidelity, in the disbursements of the public money."¹⁴³ Without the clause, said Story,

*the executive would possess an unbounded power over the public purse . . . and might apply all its moneyed resources at his pleasure. The power to control and direct the appropriations constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public speculation. In arbitrary governments, the prince levies what money he pleases from his subjects, disposes of it as he thinks proper, and is beyond responsibility or reproof. It is wise to interpose, in a republic, every restraint, by which the public treasure, the common fund of all, should be applied with unshrinking honesty to such objects as legitimately belong to the common defence and the general welfare.*¹⁴⁴

Story noted that the constitutional provision required congressional authorization even of judicially ascertained claims. While conceding that this might be deemed a defect, he nonetheless noted that, "evils of an opposite nature" might occur if such claims were to be routinely paid without a prior appropriation, since this might provide an opportunity for collusion between the claimant and treasury officials.¹⁴⁵

The statement and account requirement in the clause was not added until very late in the proceedings of the constitutional convention.¹⁴⁶ It attracted relatively little debate when it was proposed during the discussion on revisions to the draft submitted by the committee on style. At that time, George Mason moved to insert a clause requiring that "an Account of the public expenditures should be annually published."¹⁴⁷ Gouverneur Morris and Rufus King found the proposal impracticable, since in King's view "the term expenditures went to every minute shilling."¹⁴⁸ Congress might even order a monthly publication, argued King, but it would be so general that it would "afford no satisfactory information."¹⁴⁹

James Madison then proposed that the words "from time to time" be substituted for the word "annually." Noting that the Articles of Confederation had required semi-annual publication,¹⁵⁰ and that

143. *Id.*

144. *Id.* (emphasis added).

145. *Id.* at 223.

146. M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 187-88 (1913).

147. J. MADISON, *NOTES ON THE DEBATES IN THE FEDERAL CONVENTION OF 1787* 641 (A. Koch ed., 1966) [hereinafter cited as Madison].

148. *Id.*

149. *Id.*

150. Article IX of the Articles of Confederation provided that Congress "shall have

the requirement had often been impossible to meet, he observed: "Require too much and the difficulty will beget a habit of doing nothing."¹⁵¹

Madison's proposal met with general approval and the clause was amended to reflect his wording and adopted.¹⁵²

In several of the state ratification debates, misgivings were expressed regarding the vagueness of the phrase "from time to time." In New York, such an expression of concern brought the following response:

The CHANCELLOR asked if the public were more anxious about anything under heaven than the expenditure of money. Will not the representatives . . . consider it as essential to their popularity, to gratify their constituents with *full and frequent* statements of the public accounts? *There can be no doubt of it.*¹⁵³

The most illuminating discussion of these concerns occurred at the Virginia convention, where the participants included both Mason, who had advocated annual publication, and Madison, who had proposed the less definite wording.

Mr. GEORGE MASON apprehended the loose expression of "publication from time to time" was . . . equally applicable to monthly and septennial periods The reason urged in favor of this ambiguous expression was, that there might be some matters which require secrecy. In matters relative to military operations and foreign negotiations, secrecy was necessary sometimes; *but he did not conceive that the receipts and expenditures of the public money ought ever to be concealed. The people . . . had a right to know the expenditures of their money; but . . . this expression was so loose [the expenditure] might be concealed forever from them, and might afford opportunities of misapplying the public money, and sheltering those who did it*

Mr. LEE . . . thought such trivial argument . . . would have no weight He conceived the expression to be sufficiently explicit and satisfactory. It must be supposed to mean . . . short, convenient periods. It was as well as if it had said one year, or

authority To . . . appropriate and apply [necessary sums of money] for defraying the public expenses: To borrow money or emit bills on the Credit of the United States transmitting every half year to the respective states an account of the sums of money so borrowed or emitted." (emphasis added.)

This requirement differed significantly from the constitutional provision in that the accounting was to be transmitted to the *states*, rather than to the general public.

151. MADISON, *supra* note 147, at 641.

152. *Id.*

153. 2 ELLIOT, *supra* note 141, at 347 (emphasis added). During the debates in North Carolina, similar questions were raised with regard to the frequency of publication required of the congressional journal. William R. Davie, who had been a delegate to the Constitutional Convention, replied that "there could be no doubt of their publishing them as often as it would be convenient and proper," and that this would be at least once annually. 4 ELLIOT at 72.

a shorter term. *Those who would neglect this provision would disobey the most pointed directions.*

Mr. MADISON thought it much better than if it had mentioned any specified period; because, if the accounts of the public receipts and expenditures were to be published at short, stated period, they would not be so *full and connected* as would be necessary for a *thorough comprehension* of them, and *detection of any errors*. But by . . . publishing them from time to time, as might be found easy and convenient, they would be more *full and satisfactory to the public*, and would be sufficiently frequent.¹⁵⁴

The above colloquy discloses several important points: (1) no one advocated secrecy, nor did anyone challenge Mason's assertion that the public had a "right to know"; (2) the disagreement concerned the question of whether fullest disclosure could be obtained by specifying particular periods for publication, or by allowing flexibility; and (3) the only issue in dispute was whether or not a particular time period should be specified. It seems to have been taken for granted that, when the accounting was published, it was to be full and accurate. Indeed, this was the very reason Madison cited for allowing flexibility. In retrospect, the date seems somewhat academic, since as Lee suggested, annual publication became the standard procedure.

CIA Funding and National Security

In view of the history and purposes of clause 7, CIA funding and accounting procedures appear on their face to be unconstitutional. While the congressional appropriation power is admittedly flexible,¹⁵⁵ it is difficult to imagine that the power could be so broad as to permit the clandestine transfer of appropriated funds from the designated agency to another agency "without regard to any provisions of law."¹⁵⁶ To maintain that this is a proper exercise of the appropriation

154. 3 ELLIOT, *supra* note 141, at 459-60 (emphasis added). None of the available historical records provide support for Mason's representation that the phrase "from time to time" was designed to facilitate secrecy.

155. See, e.g., *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1936). "That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain. Appropriations and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies." *Id.* at 321-22.

156. 50 U.S.C. § 403f(a) (1970). That this provision goes beyond the bounds of legitimate congressional discretion is suggested by Willoughby: "[T]he appropriating power of Congress does not go further than to authorize the expenditure of public moneys of the United States and to provide instrumentalities or rules and regulations whereby assurance may be had that the moneys thus appropriated will *actually be used for the purposes for . . . which their expenditure has been authorized by Congress.*" 1 W. WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* § 63, at 104 (2d ed. 1929) (emphasis added).

power is to maintain that the prohibition against money being drawn from the treasury other than "in consequence of appropriations made by law" may be suspended at any time Congress wishes. Perhaps even more overwhelming in its implications is the authorization for funds transferred to the CIA to be spent "without regard to limitations of appropriations from which transferred."¹⁵⁷ This provision permits the executive to circumvent the intent of Congress regarding the use of appropriated funds.¹⁵⁸ Moreover, the requirement of a published accounting of receipts and expenditures is rendered meaningless if one agency may be exempted completely from the accounting, and the statement of expenditures of those agencies from which funds are transferred is false or misleading.

If the constitutionality of the funding provisions of the CIA Act is to be sustained, it must be on national security grounds based on the congressional war powers provided by Article 1, section 8.¹⁵⁹ Such powers are not absolute, however, as Chief Justice Warren observed:

[T]he phrase "war power" cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. . . . [The] concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. *Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart.*¹⁶⁰

There are certain constitutional guarantees that need not always yield to assertions of national security. The "Pentagon Papers" case¹⁶¹ presented the Supreme Court with the task of attempting to formulate standards to be applied in situations where prior restraint of free expression is attempted on national security grounds. While the issues in that case are somewhat different from those involved with disclosure

157. 50 U.S.C. § 403f(a) (1970). A more general clause in the CIA Act gives blanket authorization that "sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds." *Id.* § 403j(b).

158. For an excellent discussion of the extent to which congressional intent may be circumvented, and methods by which Congress may impose substantive limitations on the use of funds by the CIA, see generally Futterman, *supra* note 107, at 448-55.

159. One commentator has suggested several other theories which might be advanced in defense of the constitutionality of the CIA practices: "Room might be found within the phrase 'from time to time.' Congress' authority over the detail to be included in the *Combined Statement* might authorize the practice. The secrecy might find some support in Congress' acknowledged power to withhold certain proceedings from publication in its journals, or it might be considered a longstanding practice and therefore presumed constitutional." *Secret Funding*, *supra* note 69, at 621-22.

The commentator has convincingly demonstrated the lack of viability of these theories. *Id.* at 622-26.

160. *United States v. Robel*, 389 U.S. 258, 263-64 (1967) (emphasis added).

161. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

of CIA appropriations, the conflicting interests present in both situations indicate that a brief examination of that case is in order.

The per curiam decision of the six-justice majority was very brief and general, stating only that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity,"¹⁶² and that the government had not met its "heavy burden of showing justification."¹⁶³ The Court thus rejected the government's assertion that prior restraint was permissible whenever publication of materials was alleged to pose a "grave and immediate danger to the security of the United States."¹⁶⁴

Each justice wrote a separate opinion in an attempt to deal with the issue more specifically. Justice Black viewed the First Amendment as providing absolute freedom of the press, which he viewed as a necessary protection for the press "so that it could *bare the secrets of government and inform the people*."¹⁶⁵ In Justice Black's view, national security could *never* justify prior restraint:

The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. *The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.* The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of . . . governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged.¹⁶⁶

Justice Douglas similarly asserted that the First Amendment provided an absolute guarantee,¹⁶⁷ although he left open the question of whether some degree of restriction could be valid in the event of a formal declaration of war.¹⁶⁸

Justice Brennan viewed First Amendment rights as very nearly absolute:

The entire thrust of the Government's claim . . . has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints on the press predicated upon *surmise or conjecture* that untoward consequences may result Thus, only governmental allegation and *proof* that publication must *inevitably, directly, and immediately* cause the occurrence of an event kindred to imperil-

162. *Id.* at 714.

163. *Id.*

164. See 403 U.S. 714, 741 (Marshall, J., concurring).

165. *Id.* at 717 (Black, J., concurring) (emphasis added).

166. *Id.* at 719 (emphasis added).

167. *Id.* at 720 (Douglas, J., concurring).

168. *Id.* at 722.

ing the safety of a transport already at sea can support even the issuance of an interim restraining order.¹⁶⁹

Justices Stewart, White and Marshall all agreed that the government had not met its burden, but did not articulate any explicit standards to be applied in prior restraint situations.¹⁷⁰ In his dissenting opinion, Justice Harlan implied that prior restraint was permissible in cases where the head of an executive department, such as the secretary of state or the secretary of defense, made a determination that "disclosure of the subject matter would irreparably impair the national security."¹⁷¹

Although the "Pentagon Papers" case dealt with First Amendment rights, the statement and account clause poses similar considerations. The framers of both provisions realized that public access to information about the government was essential to a democratic society, and both provisions were enacted as means of guaranteeing dissemination of such information. As Justice Stewart has recognized, public access to information regarding matters of defense and foreign affairs is particularly important.

In the absence of the governmental checks and balances present in other areas of our national life, the *only effective restraint* upon executive policy and power in the areas of national defense and international affairs may lie in an *enlightened citizenry*—in an *informed and critical public opinion which alone can here protect the values of democratic government*.¹⁷²

Justice Stewart's remarks suggest an integral relationship between the public's right to obtain information about the conduct of government, and the right of free expression. Without the former, the latter is reduced to the freedom to express uninformed opinion, which is hardly conducive to effective democratic government.

In other contexts, the Court has recognized an implicit First Amendment right to receive information: "It is now well established that the Constitution protects the right to receive information and ideas. . . . *This right . . . is fundamental to our free society.*"¹⁷³

169. *Id.* at 725-27 (Brennan, J., concurring) (emphasis added).

170. *Id.* at 727 (Stewart, J., concurring), 730 (White, J., concurring), 740 (Marshall, J., concurring).

171. *Id.* at 737 (Harlan, J., dissenting).

172. *Id.* at 728 (Stewart, J., concurring) (emphasis added). This statement echoes the sentiments of Madison, who wrote: "A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter to W.T. Barry, Aug. 4, 1822, in 9 THE WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910).

173. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). See also *Griswold v. Connecticut*.

Irrespective of the First Amendment, the statement and account clause may be viewed as vesting in the public a fundamental right to know how tax dollars are being spent. It will be remembered that the existence of such a right was asserted by George Mason, the original proponent of the statement and account requirement, and was denied by none of the participants in the constitutional debates.¹⁷⁴

The importance of this right does not, of course, necessarily indicate that the same standards relevant to prior restraint of expression are applicable. In the "Pentagon Papers" case, several of the justices indicated that prior restraint is to be regarded as a peculiar evil, and that they did not regard normal governmental classification of information as offensive.¹⁷⁵ However, they were referring to nonfinancial information, which the government does not have an explicit constitutional duty to reveal. Where such a duty does exist, the failure to perform it is analogous to prior restraint in the nature and seriousness of its consequences. It therefore seems appropriate to employ similar standards with respect to governmental assertions of national security.

Exactly which standard should be adopted is somewhat speculative. From a purely practical perspective, it is difficult to conceive of the government's duty to disclose financial information as absolute. No one at the Constitutional Convention disputed Rufus King's assertion that it would be impossible to account for "every minute shilling,"¹⁷⁶ and such a detailed accounting would certainly seem impossible in today's highly complex governmental structure. The duty being less than absolute, it is not unreasonable to assume that there may be circumstances under which its performance should be excused on national security grounds. A standard resembling Justice Brennan's formulation of publication resulting inevitably in very serious damage to the nation's interests¹⁷⁷ would seem most appropriate to the needs of a democratic society. Perhaps, however, even Justice Harlan's less stringent requirements of a determination that "disclosure of the subject matter would irreparably impair the national security"¹⁷⁸ would be sufficient.

cut, 381 U.S. 479, 482 (1965); *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

174. See text accompanying note 154 *supra*. This right was suggested by both Justice Douglas and Justice Stewart in their dissenting opinions in *Richardson*. 418 U.S. 166, 199 (Douglas, J., dissenting), 202 (Stewart, J., dissenting).

175. See 403 U.S. 713, 728-30 (Stewart, J., concurring), 733 (White, J., concurring), 741 (Marshall, J., concurring). See also *United States v. Robel*, 389 U.S. 258, 267 (1967).

176. See text accompanying note 148 *supra*.

177. See text accompanying note 169 *supra*.

178. *New York Times Co. v. United States*, 403 U.S. 713, 737 (Harlan, J., dissenting).

If Congress may legitimately limit the government's duty of disclosure of some financial information on national security grounds, it is necessary to determine the permissible form and scope of such limitations. In *United States v. Robel*, the Supreme Court held that:

when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a "less drastic" impact on the continued vitality of First Amendment freedoms.¹⁷⁹

Again the Court was concerned with First Amendment rights—in this case the right of free association. It seems clear, however, that the same test should be applied to burdens imposed on the right to know about government finances. That right is just as fundamental as the right of association, which is not mentioned in the Constitution.¹⁸⁰ Like the right to associate, the right to know is essential to the exercise of explicit First Amendment rights.¹⁸¹

With regard to the constitutionality of the financial portions of the CIA Act, two questions must be answered: (1) Would disclosure of CIA appropriations necessarily result in grave harm to the security of the nation?¹⁸² and (2) If so, could such harm be avoided by means having a less drastic impact on the interests served by the statement and account clause?

When CIA funding has been debated in Congress, phrases such as "national security" have been invoked as "talismanic incantations"¹⁸³ by those defending total secrecy. Of course full disclosure of the CIA budget might be harmful, but there has been a total lack of evidence that disclosure of the overall appropriation and expenditure figures would result in any damage to the nation's interests.¹⁸⁴ It must be concluded that the present system of camouflaged funding is not the least drastic means of protecting national security. The provisions

179. 389 U.S. 258, 268. Significantly, the Court explicitly declined to balance governmental interests against individual rights, requiring that legislation be narrowly drawn to avoid a conflict between the two. *Id.*, n.20.

180. See *id.* at 282-83 (White, J., dissenting). It has been maintained that "one need not believe that the [statement and account] Clause has the preeminent status accorded the First Amendment . . . in order to accept a test similar to *Robel's* for analyzing apparent violations." *Secret Funding*, *supra* note 69, at 628.

181. See text accompanying note 172 *supra*.

182. Various other formulations of the question could be substituted. See text accompanying notes 177-78 *supra*.

183. See text accompanying note 160 *supra*.

184. See text accompanying note 129 *supra*. Indeed, Senator Proxmire has argued that such disclosure would enhance security because knowledge of a substantial intelligence budget might deter potential adversaries from engaging in aggressive activities. 120 CONG. REC. 9603 (daily ed. June 4, 1974).

in the CIA Act for transfer of funds and exemption from accounting are therefore unconstitutional.

If total disclosure of CIA finances would jeopardize the national security and total concealment is unconstitutional, then the problem remaining is to locate that point between the two extremes at which legitimate national interests are protected with the least drastic intrusion on constitutional safeguards. In order to make such a determination, one must give some consideration to the nature of CIA activities.

Although the CIA was established for the primary purpose of intelligence coordination, it has never in practice been limited to that function. A high priority and substantial financial commitment of the agency has been its "covert actions," which involve a wide range of methods used to influence the internal politics of other nations.¹⁸⁵ The agency and its supporters find a mandate for such actions in a catch-all clause of the CIA Act which authorizes the agency "to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct."¹⁸⁶

There are those who feel that this provision has been given an overly expansive reading in order to justify the clandestine operations of the agency.¹⁸⁷ One of such persuasion is the former chairman of the Senate Foreign Relations Committee, J. William Fulbright, who during 1971 commented:

185. "At present the agency uses about two thirds of its funds and its manpower for covert operations and their support . . . 11,000 personnel and roughly \$550 million are earmarked for the Clandestine Services and those activities . . . such as communications, logistics, and training, which contribute to covert activities. Only about 20 percent of the CIA's career employees (spending less than 10 percent of the budget) work on intelligence analysis and information processing." MARCHETTI & MARKS, *supra* note 64, at 78-79.

For detailed accounts of a number of covert actions by former CIA officers, see generally MARCHETTI & MARKS, *supra* note 64, and AGEE, *supra* note 94.

186. 50 U.S.C. § 403(d)(5) (1970).

187. "Nowhere . . . does the . . . Act . . . purport to confer upon the C.I.A. the authority to engage in the type of covert activity necessary to topple foreign governments, invade the territory of unfriendly states, interfere in the domestic affairs of other countries, and engage in general acts of sabotage . . .

"It could well be argued that the directive of the National Security Council purporting to authorize the C.I.A. to engage in [such] acts . . . is beyond the authority conferred by the Act. . . . Revolutions, the fomenting of strikes, interference in elections—these activities would appear to be a far cry from matters related to intelligence as defined by the law." Walden, *supra* note 79, at 81.

"The C.I.A. was touted as being exclusively an intelligence coordinating body, and it was created as such. That it has ranged far and wide in its activities since that time is a commentary on the arrogation of powers by bureaucratic agencies and an amazing example of the expansion of administrative power." *Id.* at 84.

See also OVERSIGHT & ACCOUNTABILITY, *supra* note 70, at 13-14.

It is very unusual that we have an agency called an intelligence agency out operating a war It is not gathering intelligence in Laos; I submit it is organizing and paying for a war. It is running airlines and paying for them. That is not intelligence gathering at all.¹⁸⁸

It is highly questionable whether Congress intended to authorize such actions in the enabling legislation. There was no discussion of non-intelligence functions in the House and Senate debates on either the National Security Act or the CIA Act. During congressional hearings on the National Security Act, Secretary of the Navy James V. Forrestal denied rumors that the CIA would become engaged in operational activities.¹⁸⁹

Whatever the congressional intent, in subsequent years covert actions became so commonplace that former President Truman observed in 1963 that the CIA had "got out of hand."¹⁹⁰ Truman expanded upon this assessment by explaining that:

as nearly as I can make out, those fellows in the CIA don't just report on wars and the like, they go out and make their own, and there's nobody to keep track of what they're up to. They spend billions of dollars on stirring up trouble so they'll have something to report on. . . . [I]t's become a government all of its own and all secret. They don't have to account to anybody.¹⁹¹

Apart from their dubious legality, there is considerable doubt as to whether most covert actions are necessary or desirable. Such actions are directed not against the Soviet Union or China (the only nations capable of posing a serious military threat to the United States), but rather against leftist governments and revolutionary movements in third world nations.¹⁹² Even against these minor powers, CIA operations have often failed, the classic example being the abortive Bay of Pigs invasion in 1961.¹⁹³ Successful covert actions may pose problems of their own, such as the intense controversy surrounding the CIA's subversion of the democratically elected Marxist government in Chile.¹⁹⁴

188. 117 CONG. REC. 42929 (1971) (remarks of Senator Fulbright).

189. *Hearings on the National Security Act of 1947 Before the House Committee on Expenditures in the Executive Departments*, 80th Cong., 1st Sess. 120-21 (1947).

190. M. MILLER, *PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN* 391 (1974).

191. *Id.* at 391-92 (emphasis in original).

192. See MARCHETTI & MARKS *supra* note 64, at 373. See generally AGEE *supra* note 94.

193. A similar, though less spectacular failure was the CIA effort to overthrow the Sukarno government in Indonesia in 1958. MARCHETTI & MARKS *supra* note 64, at 29, 114.

194. See N.Y. Times, Sept. 8, 1974, at 1, col. 7; Sept. 17, 1974, at 10, col. 3; Sept. 20, 1974, at 1, col. 1; Sept. 21, 1974, at 12, col. 3; Oct. 21, 1974, at 2, col. 3; Oct. 23, 1974, at 2, col. 2; Los Angeles Times, Oct. 6, 1974, § 8, at 1, col. 1.

Opinion on CIA funding procedures has tended to correlate with opinion on covert actions. One faction approves of covert actions, and favors continued secret funding on the ground that it is necessary for the success of such operations.¹⁹⁵ The other faction has favored increased disclosure on the grounds that clandestine operations should be curtailed, and that extensive secrecy is not required for conventional intelligence activities.¹⁹⁶

In the aftermath of last fall's revelations concerning the Chilean involvement, Congress sharply restricted the CIA's authority to conduct covert actions, prohibiting funds from being spent on such activities without prior orders from the president and notification of the appropriate congressional committees.¹⁹⁷ This should result in a major reduction in the amount of funds spent on such operations and a concomitant decrease in the necessity for secret funding.

Most conventional intelligence activities would seem to require relatively little funding secrecy. Much of the information gathered comes from open sources such as newspapers and academic jour-

195. See, e.g., 117 CONG. REC. 42929, 42930 (1971) (remarks of Senator Young).

196. See, e.g., MARCHETTI & MARKS, *supra* note 64, at 373-77. Former Solicitor General Erwin N. Griswold addressed himself to these concerns in a footnote to the Rockefeller Commission's report: "Congress should, in my opinion, decide by law whether and to what extent the CIA should be an action organization, carrying out operations as distinguished from the gathering and evaluation of intelligence. If action operations were limited, there would be a lessened need for secrecy, and the adverse effect which the activities of the CIA sometimes have on the credibility of the United States would be modified."

One of the great strengths of this country is a deep and wide-flung capacity for goodwill. Those who represent us, both at home and abroad, should recognize the potentiality of that goodwill and take extreme care not to undermine it, lest their efforts be in fact counter-productive to the long-range security interests of the United States. ROCKEFELLER COMMISSION, *supra* note 4a, at 81, n.3.

197. The Foreign Assistance Act of 1961 (22 U.S.C. §§ 2422, 2423) was amended, and the new § 2422 provided that: "No funds appropriated under the authority of this chapter or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress, including the Committee on Foreign Relations of the United States Senate and the Committee on Foreign Affairs of the United States House of Representatives." Pub. L. No. 93-559; 88 Stat. 1795 § 32 (1974).

This was the first time the Foreign Relations and Foreign Affairs Committees had been given any jurisdiction over the CIA. Early this year, Senator John Sparkman, the new chairman of the Foreign Relations Committee, wrote a letter to CIA Director William Colby calling his attention to the new restriction, and advising him to review current CIA activities to determine which of them "may conceivably be viewed as within the scope of the law." N.Y. Times, Jan. 7, 1975, at 1, col. 3 (city ed.).

nals.¹⁹⁸ There would likewise appear to be little harm possible in revealing CIA expenditures on a number of routine items. The amount of money spent on ordinary office supplies, for instance, would be of little strategic interest to the Soviets. Similarly, it is not likely that the nation would be imperiled by disclosure of the total amount spent on salaries for career employees. Through their own intelligence efforts, the Soviets have already learned much more significant information about the CIA, apparently with minimal adverse consequences.¹⁹⁹

With the foregoing considerations in mind, some general assessments can be made regarding the constitutionality of CIA funding procedures under various modifications. The method which would preserve the most secrecy is Senator Proxmire's proposal to disclose the total amount spent by all intelligence agencies.²⁰⁰ There would be a single sum appropriated for all intelligence activities, which might meet the clause 7 requirement that expenditures be "in consequence of appropriations made by law," even though most appropriations are far more specific. The scheme would provide a substantial improvement by eliminating present inaccuracies in the budget figures and *Combined Statement* which result from secret transfers of funds. This method would not, however, satisfy the requirement of a "regular" accounting, of all receipts and expenditures, since it would not disclose receipts and expenditures for individual agencies. There is no evidenced need for this much secrecy. Thus, the Proxmire approach, while a major improvement, would fall short of constitutional standards.

198. "[O]ver 80 per cent of the information that goes into finished intelligence reports is from overt sources such as scientific and technical journals, political speeches and other public documents." AGEE, *supra* note 94, at 40.

There are significant exceptions to this general rule, however. Early this year, for instance, it was revealed that the CIA had spent over \$350 million over a period of several years in a remarkable, highly secret project to recover a sunken Russian submarine. See Los Angeles Times, Feb. 8, 1975, § 1, at 18, col. 1; Mar. 19, 1975, § 1, at 1, col. 5; N.Y. Times, Mar. 19, 1975, at 1, col. 8 (city ed.); Mar. 20, 1975, at 1, col. 3 (city ed.).

199. "[I]n many instances the opposition knows exactly what covert operations are being targeted against it, and it takes counteraction when possible. The U-2 overflights and, later, those of the photographic satellites were, and are, as well known to the Soviets and the Chinese as Soviet overhead reconnaissance of the United States is to the CIA; there is no way, when engaging in operations of this magnitude, to keep them secret from the opposition. It, too, employs a professional intelligence service. In fact, from 1952 to 1964, at the height of the Cold War, the Soviet KGB electronically intercepted even the most secret messages routed through the code room of the U.S. embassy in Moscow. This breach in secrecy, however, apparently caused little damage to U.S. national security . . ." MARCHETTI & MARKS, *supra* note 64, at 7. See also AGEE, *supra* note 94, at 68-69.

200. See note 118 *supra*.

Senator McGovern's proposal²⁰¹ closely resembles that of Senator Proxmire, but would provide disclosure of the overall CIA budget, rather than that of the entire intelligence community. This might be sufficient disclosure under the Constitution, since the *Combined Statement* does not provide much more detail than the total receipts and expenditures for certain other agencies.²⁰² Still, there would be unnecessary secrecy, and it is questionable whether this proposal would meet a "least drastic impact" test.

The approach most likely to comply with the Constitution and most suitable for a democratic society (short of full disclosure) would be patterned after the funding procedures for the Federal Bureau of Investigation and the Atomic Energy Commission.²⁰³ This would provide for open, itemized appropriations and expenditures for non-sensitive items. Additionally, a specified amount would be appropriated for confidential purposes for which the director of central intelligence would only account by certificate. This type of procedure has apparently provided sufficient confidentiality for the FBI and the AEC, and there is no reason to believe it would not be adequate for the legitimate needs of the CIA. Such a procedure would also have the support of longstanding precedent.²⁰⁴

Prospects for Reform

If portions of the CIA Act are unconstitutional, how might this anomaly be resolved? Ordinarily questions of such gravity are resolved either through litigation or legislation. The opportunity to litigate the issue, however, has been denied the citizen-taxpayer by the Supreme Court's *Richardson* holding.²⁰⁵ And Congress has a past record of refusing to enact even the most modest reforms. Nonetheless, neither door has been closed entirely.

Further Litigation

Holding that William Richardson had standing to litigate the issue, Judge Rosenn of the Third Circuit observed that if Richardson:

201. See note 104 *supra*.

202. For instance, the accounting for the AEC is broken down into just three categories: operating expenses, plant and capital equipment, and advances for cooperative work. *COMBINED STATEMENT*, *supra* note 50, at 392 (fiscal year 1972). More detailed budget information is available, however, including the amounts allocated for nuclear materials, weapons, reactor development, and isotopes development. *APPENDIX TO THE BUDGET*, *supra* note 61, at 797 (fiscal year 1972).

203. See text accompanying notes 58-59 *supra*.

204. See text accompanying notes 51-59 *supra*.

205. *United States v. Richardson*, 418 U.S. 166 (1974). For a discussion of the possibility that a plaintiff with a more carefully drafted complaint seeking specifically to enjoin CIA expenditures would be held to have standing, see *OVERSIGHT & ACCOUNTABILITY*, *supra* note 70, at 28-29.

as a citizen, voter and taxpayer, is not entitled to maintain an action . . . to enforce the dictate of . . . the United States Constitution that the Federal Government provide an accounting of the expenditure of all public money, then it is difficult to see how this requirement, which the framers of the Constitution considered vital to the proper functioning of our democratic republic, may be enforced at all.²⁰⁶

Although the United States Supreme Court reversed the Third Circuit's holding in *Richardson*, a careful reading of the Supreme Court's decision reveals that the possibility of future litigation of this issue may not be entirely precluded. In support of its holding the Court quoted the following passage from a prior decision:

It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he *has sustained or is immediately in danger of sustaining a direct injury* as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.²⁰⁷

Richardson was held to lack standing because his was a "general interest common to all members of the public." It does not necessarily follow, however, that no potential litigant exists who might allege and demonstrate a sufficiently "direct injury."

It has been suggested, for example, that members of Congress might be able to "surmount the standing barrier."²⁰⁸ Another possibility might be that a group of scholars from various disciplines would allege that the unreliability of the figures listed in federal financial statements has impaired their ability to conduct research on the efficacy of various government programs.²⁰⁹ This would certainly seem to be a direct injury to an interest not shared by the public generally.

In addition to the hurdle posed by the standing issue, there is the potential barrier of the political question doctrine. The chief justice suggested in *Richardson* that perhaps the framers of the Constitution intended to leave enforcement of the statement and account provision

206. *Richardson v. United States*, 465 F.2d 844, 854 (3d Cir. 1972). See also *United States v. Richardson*, 418 U.S. 166, 179 (opinion of the Court), 200 (Douglas, J., dissenting).

207. 418 U.S. 166, 177-78, quoting *Ex parte Lévit*, 302 U.S. 633, 634 (1938) (emphasis supplied by Chief Justice Burger).

208. *Secret Funding*, *supra* note 69, at 609. See also OVERSIGHT & ACCOUNTABILITY, *supra* note 70, at 29-30.

209. "Governmental secrecy prevents the layman, and even the scholar and the Congressman" from finding answers to questions about CIA efficiency. Sperling, *Central Intelligence and Its Control: Curbing Secret Power in a Democratic Society*, in 112 CONG. REC. 15758, 15761 (1966). Similar problems would confront one attempting to study the efficiency of programs from which CIA funds are transferred.

to the discretion of Congress.²¹⁰ Justice Douglas took vigorous exception to this notion:

One has only to read constitutional history to realize that statement would shock Mason and Madison. Congress of course has discretion; but to say that it has the power to read the clause out of the Constitution when it comes to one or two or three agencies is astounding. That is the bare-bones issue in the present case. Does Art. I, § 9, cl. 7, of the Constitution permit Congress to withhold "a regular Statement and Account" respecting any agency it chooses? Respecting all federal agencies? What purpose, what function is the clause to perform under the Court's construction?²¹¹

Justice Douglas concluded that the question was not political under the *Baker v. Carr* test of "a textually demonstrable constitutional commitment of the issue to a coordinate political department."²¹²

Baker v. Carr indicated a trend toward lowering the political question barrier by the Court. In view of the language of the majority opinion in *Richardson*, however, there is a possibility that the Court might curtail this trend, as it did with the trend toward relaxing taxpayer standing requirements.

Legislative Action

While the forecast for judicial action is less than optimistic, prospects for legislative reform of CIA procedures appear to be more promising than ever before. Last year the Ninety-third Congress restricted the use of appropriated funds for covert actions.²¹³ Following disclosures of extensive CIA domestic activities,²¹⁴ the reform-minded Ninety-fourth Congress quickly set in motion the first comprehensive investigations of the American intelligence community.²¹⁵ The era of congressional inaction and inattention appears to have come to an end, and it is likely that the present investigations will result in procedural and substantive reforms, as well as greatly enhanced congressional oversight of CIA operations. Whether the changes include greater disclosure of CIA finances cannot be predicted at this time.

Conclusion

For two and a half decades the United States government has

210. *United States v. Richardson*, 418 U.S. 166, 179 (1974).

211. *Id.* at 200-01 (Douglas, J., dissenting).

212. *Id.* at 201, quoting 369 U.S. 186, 217 (1962).

213. See note 197 *supra*.

214. See, e.g., *N.Y. Times*, Dec. 22, 1974, at 1, col. 8; Dec. 25, 1974, at 1, col. 8; Dec. 29, 1974, at 1, col. 1; Dec. 30, 1974, at 1, col. 3.

It was subsequently revealed that these domestic activities included the interception of confidential communications between Representative Bella Abzug and her legal clients. See *N.Y. Times*, Mar. 6, 1975, at 1, col. 4 (city ed.).

From the beginning, the CIA has been denied by law "police, subpoena, law-enforcement powers, [and] internal security functions." 50 U.S.C. § 403(d)(3) (1970).

215. See note 102 *supra*.

been systematically circumventing the Constitution by funding the Central Intelligence Agency through clandestine, interagency transfers, and by publishing financial statements that are, by design, incomplete and inaccurate. These practices were originally justified as a necessary protection of national interest. Even at the height of the cold war such actions arguably did more harm and good, for as a former CIA official has written:

[I]n fighting totalitarian systems . . . the democratic government runs the risk of imitating its enemies' methods and, thereby, destroying the very democracy that it is seeking to defend. I cannot help wondering if my government is more concerned with defending our democratic system or more intent upon imitating the methods of totalitarian regimes in order to maintain its already inordinate power over the American people.²¹⁶

Whatever perils the nation may have faced in 1949, very different problems must be confronted in 1975. One of the most serious of these problems is the inordinate power wielded by a large and complex intelligence establishment which is responsive only to the will of the executive. Even the frequently touted "power of the purse" has ceased to exist, as Congress unknowingly permits vast sums of money to be used by the CIA and other intelligence agencies. Such a situation has no place in a democratic society. If ours is to be a government of laws, rather than of men,²¹⁷ CIA appropriations must be made by law, rather than by cabal, and CIA expenditures must be subjected to at least minimal public scrutiny. Clause 7 demands no less. And if our government officials sincerely believe that compliance with the Constitution would imperil legitimate national interests, the answer lies in amending the Constitution, not ignoring it.

216. V. Marchetti, in *preface*, MARCHETTI & MARKS, *supra* note 64, at xiii.

217. "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

APPENDIX III

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THE CIA'S SECRET FUNDING AND THE CONSTITUTION

by

Elliot E. Maxwell

If you knew how much we spend and how much money we waste in this area, it would knock you off your chair. It's criminal!

Senator Allen Ellender
commenting on United
States intelligence
activities in 1971¹

Once again the Central Intelligence Agency (CIA) is in the news. The controversy now focuses on an alleged massive intelligence operation by the CIA against groups in the United States,² rather than on the necessity or wisdom of CIA covert intervention in Chile.³ However, it has largely ignored a prior issue, the massive secrecy that envelops the CIA. Even the simple total of CIA expenditures, estimated now at \$750 million,⁴ is kept from the public. In addition, Congress as a whole makes no appropriation to the CIA; the agency's funds are covertly transferred from the appropriations made to other governmental units.⁵ The vast majority of Congress—and the public—know nothing of the amounts involved. This funding secrecy may be unconstitutional.

Article I, § 9, Clause 7 of the Constitution provides:

No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

1. Wash. Post, Dec. 9, 1973, at A 9, col. 8. Ellender was then Chairman of the Intelligence Subcommittee of the Senate Appropriations Committee.

2. See N.Y. Times, Dec. 22, 1974, § 1, at 1, col. 8; Dec. 25, 1974, at 1, col. 8; Dec. 29, 1974, § 1, at 1, col. 1; Dec. 30, 1974, at 1, col. 3; Wash. Post, Dec. 25, 1974, at A 1, col. 6, 8.

3. See N.Y. Times, Sept. 8, 1974, at 1, col. 7; Sept. 21, 1974, at 12, col. 3; Sept. 22, 1974, § 4, at 21, col. 2; Oct. 21, 1974, at 2, col. 3; Oct. 23, 1974, at 2, col. 2; Wall St. J., Dec. 9, 1974, at 1, col. 4.

4. 119 CONG. REC. 56868 (daily ed. Apr. 10, 1973) (remarks of Sen. Proxmire). Marchetti and Marks would place the actual expenditures substantially higher. V. MARCHETTI & J. MARKS, *THE CIA AND THE CULT OF INTELLIGENCE* 59-73 (1974) [hereinafter cited as MARCHETTI & MARKS]. MARCHETTI & MARKS, published with a number of deletions suggested by the CIA, has been the subject of litigation. See, e.g., *United States v. Marchetti*, 466 F.2d 1309 (5th Cir.), cert. denied, 409 U.S. 1063 (1972). The final form of the book will be determined by rulings on appeals by both parties.

5. 50 U.S.C. 403f(a) (1970) authorizes the CIA to "transfer to and receive from other Government Agencies such sums as may be approved by the Office of Management and Budget for the performance of any of the functions or activities authorized under Sections 403 and 405 of this title...." See generally N.Y. Times, Dec. 29, 1974, § 4, at 1, col. 5.

The CIA's Secret Funding and the Constitution

On its face the Clause permits no exceptions to the requirement of an appropriation and an accounting. But the Clause is not self-defining; the first part leaves open the question of what are "appropriations made by law." The second part defines neither "regular statement and account" nor "from time to time." Cases involving the Clause⁶ have been rare and have provided no definitive test against which the CIA practice can be measured. Moreover, the Supreme Court is unlikely to pass on the constitutionality of the practice in the near future. Just last term, in *United States v. Richardson*,⁷ the Court held by a five-four majority that a plaintiff lacked standing as a taxpayer under the Clause to compel publication of the CIA's expenditures. But the constitutional issue is by no means foreclosed. The Court failed to reach the merits, and there may yet be plaintiffs—members of Congress, for example⁸—who could surmount the standing barrier.

This Note defines the meaning of the Clause by examining its language, history, and purposes, and it analyzes possible justifications for the present funding and disclosure practices. It concludes that the failure to make a specific appropriation to the agency and the failure to provide information about expenditures to the public are violations of the Constitution. Finally, it suggests the outlines of a test for budgetary disclosure in security-sensitive government operations.

I. The History of the Clause

Clause 7 was not the subject of extensive debate at the Constitutional Convention. The first part of the Clause, providing for congressional power over appropriations, was introduced early in the convention⁹ and remained basically unchanged.¹⁰

This congressional power took on a new importance in light of

6. See cases cited in notes 7, 35-39 *infra*.

7. 94 S. Ct. 2940 (1974).

8. See generally Note, *Standing to Sue for Members of Congress*, 83 YALE L.J. 1665 (1974). Other possible plaintiffs range from CIA pensioners, see MARINETTI & MARKS, *supra* note 4, at 64-65, to voters alleging that their franchise has been impaired because of the lack of constitutionally mandated disclosure of information on receipts and expenditures of public money.

Even if no plaintiff were found to have standing, the issue of what constitutes compliance with the constitutional requirement is still important to Congress and to the agencies responsible for transferring funds to the CIA and for preparing the accounts required by the Constitution.

9. 1 M. FARRAND, *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 524, 545 (1911) [hereinafter cited as *RECORDS*].

10. 2 *id.* at 14, 280, 509.

the grant to Congress of the power to impose customs and levy taxes, a grant which marked a significant change from the system under the Articles of Confederation.¹¹

The idea of an accounting of government spending, required under the second part of the Clause, was familiar; a provision for an accounting had existed under the Articles.¹² Yet no similar provision was proposed until the closing days of the Convention¹³ when Mason introduced a clause requiring that an account of public expenditures be published annually.¹⁴ Madison proposed to replace "annually" with language that would leave the timing of the publication to the legislature.¹⁵ Supporters of Madison's amendment argued that if the interval were fixed and proved to be too short, the statements would cease as they had done under the Articles,¹⁶ be incomplete,¹⁷ or be too general to be satisfactory.¹⁸ The amendment was adopted and the Clause rephrased to its present form with reports to be published "from time to time."¹⁹

At the state ratifying conventions the issue arose once more. It

11. Under the Articles of Confederation, only the states, not the central government, could levy taxes. See H. HOCKETT, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 149 (1939).

12. Article IX of the Articles of Confederation provided that the United States in Congress assembled shall have the authority to ascertain the necessary sums of money to be raised for the service of the United States and to appropriate and apply the same for defraying the public expenses—to borrow money or emit bills on the Credit of the United States transmitting every half-year to the respective states an account of the sums so borrowed or emitted. The provision for a report may not have been particularly important under the Articles, as the central government did not have the power to levy taxes. Whatever its importance, as a matter of practice reporting had ceased under the Articles. See note 15 *infra*.

13. It was considered, after the Committee of Style had reported its draft of the Constitution, along with a number of measures which some members of the Convention felt were "trivial" and were "delaying the completion of the work." M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 188-89 (1913). Among these items were the prohibition of capitation or any other direct tax and the prohibition of state laws impairing the obligation of contracts. *Id.* Farrand suggests that some of these were accepted by the majority as long as no important principles were involved in order that the final action of the Convention would be unanimous. *Id.* This, however, should not be taken to mean that the principles represented by the additions, were unimportant. See, e.g., *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); U.S. CONST. amend. XVI.

14. 2 RECORDS, *supra* note 9, at 618.

15. Mr. Madison proposed to strike out "annually" from the motion & insert "from time to time" which would enjoin the duty of the frequent publications and leave enough to the discretion of the Legislature. Require too much and the difficulty will beget a habit of doing nothing. The articles of Confederation require half-yearly publications on this subject—A punctual compliance being often impossible, the practice has ceased altogether.

Id. (reproducing the original record).

16. *Id.*

17. *Id.* at 619 (statement of Fitzsimmons).

18. "Mr. King remarked, that the term expenditures went to every minute shilling. This would be impracticable. Congs. might indeed make a monthly publication, but it would be insuch general Statements as would afford no satisfactory information." *Id.* at 618.

19. *Id.* at 619.

The CIA's Secret Funding and the Constitution

was argued that the absence of a fixed interval could result in no information being published and might in fact allow misapplication of funds to be concealed forever.²⁰ Proponents of the Clause again responded that leaving the interval to be fixed by Congress would result in fuller information being published, since no agency would be forced to publish an incomplete report to meet an inflexible and unrealistic deadline.²¹ They ridiculed the possibility that giving Congress discretion as to the frequency of publication would mean that information would be concealed forever; Congress would publish the reports at regular, frequent intervals.²²

The debates yield no detailed or comprehensive statement of the purposes of the Clause. No one, however, disagreed with Mason's assertion that the public had a "right to know" how the public money was being spent.²³ The main problem considered in the debates was how best to make such information available in a fashion which would allow for its "thorough comprehension."²⁴

II. The Purposes of the Clause

Congress's power and responsibility under the Clause could be given a broad or a narrow reading, as could the people's right to information. It is important, therefore, that the Clause be viewed in the light of its place in the larger constitutional structure.²⁵ Under the form of government established, the powers of government

20. See, e.g., D. ROBERTSON, *DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA, 1788*, at 326 (1803); p. 622 *infra*.

In New York, Smith echoed Mason's fear that the statements might be withheld until the information in them was useless. "From time to time" he noted might mean "from century to century." The Chancellor of New York replied, asking "[I]f the public were more anxious about any thing under heaven than the expenditure of their money. Will not the representatives... consider it as essential to their popularity, to gratify their constituents with full and frequent statements of the public accounts? There can be no doubt of it." 2 J. ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 347 (1836). The New York convention was not as sanguine as the Chancellor and voted a proposed amendment in the Constitution which read in part, "Provided that the words *from time to time* shall be so construed, as that the receipts and expenditures of public money shall be published at least once in every year...." *Id.* at 407.

21. See p. 622 *infra*.

22. Lee labelled Mason's argument trivial. "From time to time" was "sufficiently explicit and satisfactory," and meant, "in the common acceptance of language, short, convenient periods." D. ROBERTSON, *supra* note 20, at 326.

23. *Id.* (remarks of George Mason). See generally 3 RECORDS, *supra* note 9, at 149-50 ("when the Public Money is lodged in its Treasury... the People who give their Money ought to know in what manner it is expended") (remarks of James McHenry before the Maryland House of Delegates). Nor was there any suggestion in the debates that Congress could or would deprive itself of the information.

24. See p. 622 *infra*.

25. For a presentation of this type of approach, see C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

rest upon the consent of the governed.²⁶ Such a system is based on full public participation which in turn depends on the public's access to information.²⁷ As Madison wrote:

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.²⁸

The importance of such participation and information has been recognized in numerous ways. The Supreme Court has evolved a definition of the First Amendment which is based on the necessity of "uninhibited, robust and wide-open"²⁹ debate on public issues. Congress through several measures³⁰ has established a policy of maximum possible disclosure based on the premise that "[a] democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies."³¹ Even the latest revision of the system of executive classi-

26. See Declaration of Independence:

[T]o secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed....

Cf. H. ARENDT, *CRISES OF THE REPUBLIC* 85 (1972) (analysis of the concept of the consent of the governed in America, concluding that it necessarily entails "consent, not in the very old sense of mere acquiescence, with its distinction between rule over willing subjects and rule over unwilling ones, but in the sense of active support and continuing participation in all matters of public interest").

27. The withholding of information eventually leads to a diminished participation in government, J. WIGGINS, *FREEDOM OR SECRECY?* (1964), because the citizen feels that he or she is the victim of propaganda and has nothing to add to the debate but personal suspicions. H. LASSWELL, *NATIONAL SECURITY AND INDIVIDUAL FREEDOM* 35-36 (1950). As President Nixon wrote:

When information which properly belongs to the people is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and eventually incapable of determining their own destiny. Quoted in *HARV. L. SCH. BULL.*, June 1973, at 8.

28. Letter to W.T. Barry, Aug. 4, 1822, in 9 *THE WRITINGS OF JAMES MADISON* 103 (C. Hunt ed. 1910).

29. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Obviously without access to information "the uninhibited, robust, and wide-open debate" envisioned in *Sullivan* becomes exchange without substance. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 41 (1971); *United States v. Caldwell*, 408 U.S. 665, 715 (1972) (Douglas, J., dissenting) ("[e]ffective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and reexamination").

30. See, e.g., *Freedom of Information Act*, 5 U.S.C. § 552 (1970), as amended, 1974 Amendments to the Freedom of Information Act, Pub. L. No. 93-502 (Nov. 21, 1974); *National Environmental Policy Act (NEPA)*, 42 U.S.C. § 4321-47 (1970). Section 102(c), id. § 4332(c), of the NEPA has been interpreted as providing a means of bringing the critical evaluation of the public to bear on administrative agency decisionmaking. *Environmental Defense Fund v. Froehke*, 473 F.2d 346, 351 (8th Cir. 1972) (Army Corps of Engineers' environmental impact statement held inadequate to meet requirements of § 102(c)).

31. H.R. REP. NO. 1497, 89th Cong., 2d Sess. 12 (1966).

The CIA's Secret Funding and the Constitution

fication,³² which is designed to restrict access to information, was based on the asserted ground that government information should be readily available to the public.³³

Both parts of the Clause are important; the purposes of each merit separate treatment. Justice Story, writing in the early 19th century, succinctly described the purposes of the first part:

It is to secure regularity, punctuality, and fidelity, in the disbursements of the public money. As all the taxes raised from the people, as well as the revenues arising from other sources, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper, that Congress should possess the power to decide how and when any money should be applied for these purposes. *If it were otherwise, the executive would possess an unbounded power over the public purse of the nation*, and might apply all its moneyed resources at his pleasure. The power to control and direct the appropriations constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public speculation *It is wise to interpose in a republic, every restraint, by which the public treasure, the common fund of all, should be applied with unshrinking honesty to such objects as legitimately belong to the common defence and the general welfare.*³⁴

The Clause has been interpreted as providing Congress with absolute control over the public funds.³⁵ Congress exercises this authority by making appropriations, which are by definition specific amounts of money set aside for designated purposes.³⁶ It is not required to particularize each item in order for an appropriation to be valid,³⁷ but

32. Exec. Order No. 11,652, 3 C.F.R. 339-50 (1974).

33. *Id.* at 339. The policy of maximum disclosure was also instituted because the withholding of material which could be safely revealed undercut claims for the withholding of more sensitive material. Exec. Order No. 10,290, 16 Fed. Reg. 9798 (1951) (establishing an earlier version of the classification system). Justice Stewart has noted:

For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is maintained.

New York Times Co. v. United States, 403 U.S. 713, 729 (1971) (concurring opinion). See generally Rabi, *The Cost of Secrecy*, ATL. MONTHLY, Aug. 1960, at 41.

34. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1348, at 222-23 (5th ed. 1891) (emphasis added).

35. Ohio v. United States Civil Serv. Comm'n, 65 F. Supp. 776 (S.D. Ohio 1946); Burkhardt v. United States, 113 Ct. Cl. 658, 84 F. Supp. 553 (1949); Hart's Case, 16 Ct. Cl. 459, 484 (1880), *aff'd*, 118 U.S. 62 (1886) ("[t]he absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people").

36. Geddes v. United States, 38 Ct. Cl. 428, 444 (1903).

37. United States v. State Bridge Comm'n, 109 F. Supp. 690 (E.D. Mich. 1953).

the appropriation must be sufficiently indentifiable to make clear the intent of Congress.³⁸ Congress also has the authority to attach conditions to the use of funds appropriated for particular purposes.³⁹

The first part of the Clause, requiring "appropriation made by law" before money issues from the Treasury, thus places an important responsibility in the Congress, the lawmaking branch of government.⁴⁰ It allows Congress to control policy and to order priorities within the government as a whole and within each individual agency. To be effective in this task—to assure that there has been compliance with the appropriations laws it has passed, and that waste and corruption have been avoided—Congress would have to check how the Executive spent the appropriated funds. An accounting requirement running from the Executive to Congress may therefore be implicit in the first part of the Clause; Congress has in fact required reports from the Executive on almost all governmental spending.⁴¹

While there might be argument about a constitutional requirement that Congress be told how the money was spent, the second part of the Clause makes it clear that the information is to be released. The Constitution requires that the statement be "published"—made public—from time to time.⁴² While a regular statement would certainly be

38. *Id.* Thus a blanket appropriation to the Executive for all purposes of government, or an appropriation to the Office of Management and Budget (OMB) with the provision that OMB had authority to transfer funds to other government agencies, might be open to challenge.

39. *Ohio v. United States Civil Serv. Comm'n*, 65 F. Supp. 776 (S.D. Ohio 1946). In *Spaulding v. Douglas Aircraft Co.*, 60 F. Supp. 985, 988 (1945), *aff'd*, 154 F.2d 419 (9th Cir. 1946), the district court wrote:

Congress in making appropriations has the power and authority not only to designate the purpose of the appropriation, but also the terms and conditions under which the executive department of the government may expend such appropriations....

The purpose of the appropriations, the terms and conditions under which said appropriations were made, is a matter solely in the hands of Congress and it is the plain and explicit duty of the executive branch of the government to comply with the same.

But see 50 U.S.C. § 403f (1970):

In the performance of its functions, the Central Intelligence Agency is authorized to—
(a) Transfer to and receive from other Government Agencies such sums as may be approved by the Office of Management and Budget, for the performance of any of the functions or activities authorized under Sections 403 and 405 of this title.... Sums transferred... may be expended... without regard to limitations of appropriations from which transferred....

and *id.* § 403j(b):

The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds....

40. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1951).

41. See pp. 616, 617 *infra*.

42. That the Framers understood the significance in choosing the word "publish"—meaning that the information would go to the people and not only to the Congress—is clear. Compare U.S. Const. art. I, § 9, cl. 7 ("a regular Statement and Account... shall be published"), with *id.* art. II, § 3 (The President "shall from time to time give to the Congress Information of the State of the Union...").

The CIA's Secret Funding and the Constitution

useful to a vigilant Congress, simply providing the information to the legislators is not sufficient. Moreover, the language is precise: The statement and account are to be "regular," and they must cover "all public Money." The second part of the Clause, then, was designed to make congressional responsibility "more perfect"⁴³ and allow the people to check Congress⁴⁴ and the Executive through publication of information on what "money is expended, for what purposes, and by what authority."⁴⁵

Such information is useful for a number of reasons. The most obvious is that it allows the people to see the course of policy as reflected in governmental expenditures. The people could then determine for themselves whether too much money is being spent on defense, and too little on education, or whether too much money is spent on bombers as opposed to submarines. It allows the people, jointly with Congress, to determine if the expenditures by the Executive reflect the intent embodied in the appropriations. The information also provides an opportunity for the people to scrutinize appropriations by Congress and expenditures by the Executive to determine if they were for purposes allowed by the Constitution.⁴⁶ Finally, on a somewhat more mundane level, the information allows the people, as Story put it, to detect "errors," uncover "misapplication of funds," and discover "corruption and public speculation,"⁴⁷ supplementing the efforts of law enforcement officials charged with unearthing wrongdoing. If the people are dissatisfied with either

43. 2 J. STORY, *supra* note 34, § 1348, at 222-23.

44. See 2 J. ELLIOT, *supra* note 20, at 345 (statement of Chancellor Livingston):

You will give up to your state legislature everything dear and valuable; but you will give no power to Congress, because it may be abused; you will give them no revenue, because the public treasures may be squandered. But do you not see here a capital check? Congress are to publish, from time to time, an account of their receipts and expenditures. These may be compared together; and if the former, year after year, exceeds the latter, the corruption will be detected, and the people may use the constitutional mode of redress.

45. 2 J. STORY, *supra* note 34, § 1348, at 222-23. The reporting provision of Article I, § 9, Clause 7 might well come within the class of restrictions to which Justice Frankfurter was referring when he wrote: "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fenced in even the most disinterested assertions of authority." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1951) (concurring opinion).

46. David Ramsey, one of the early commentators on the Constitution, wrote that if Congress applied any funds for purposes other than those set forth in the Constitution, they would have exceeded their powers. The clause provides information so that "[t]he people of the United States who pay, are to be judges how far their money is properly applied." Ramsey, *An Address to the Freeman of South Carolina on the Subject of the Federal Constitution*, in *PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES* 374 (P. Ford ed. 1888). Without such information on expenditures, it would be impossible to mount the kind of challenge found in *Flast v. Cohen*, 392 U.S. 83 (1968).

47. 2 J. STORY, *supra* note 34, § 1348, at 222-23.

Congress or the Executive, based on the accounts required to be published, they will "use the constitutional mode of redress."⁴⁸

III. Government Funding and CIA Practices

An examination of appropriations and accounting under Clause 7 since the adoption of the Constitution reveals a continuum of practices from full disclosure to strict secrecy. The most prevalent funding practice, however, one which dates from the first Congress, provides for specific appropriation and disclosure, in some detail, of how the money was expended. In 1791, the House provided by resolution that the Secretary of the Treasury bring before the House an "accurate statement and account of the receipts and expenditures of all public money," broken down by "each head of appropriation."⁴⁹ The text of the resolution makes clear that the report was to account accurately for *all* public money.

Most federal spending currently follows a standard procedure⁵⁰ which might be described as the full disclosure model. The Executive proposes a budget for the agency divided into a number of subappropriations by the program activities of the agency (the program classification budget) or by the object of the expenditure, such as personnel, or travel and transport (the object classification budget). The budget also provides for funds, if necessary, for plant and capital equipment. The appropriations committees of Congress then screen

48. 2 J. ELLIOT, *supra* note 20, at 345 (statement of Chancellor Livingston). It might be possible to argue that since the ballot is available as a sanction for abuse of the public treasury by either Congress or the Executive, it could also be used to discipline a Congress that failed to provide adequate information in the regular statement. Such a view of congressional accountability, while appealing as a study in direct democracy, ignores the particular form of checks and balances which the Constitution establishes; under the Constitution, no plebiscite on each congressional action is required. The Clause represents a determination by the Framers that certain information should be available to inform the debate that takes place at the time of elections. If the spending information is disclosed, debate focuses on the merits of the spending rather than on the less gripping issue of a failure to disclose.

The position argued here certainly does not rest on an assumption that every voter will read the published accounts. Rather the information published there would be available to those citizens interested in a particular program or item, and through them would filter into the political process. Such filtering obviously cannot take place if the information is shut off at the source, and the public denied information which the Framers believed they had a right to know.

49. 2 ANNALS OF CONG. 302 (1792). The present provision is codified at 31 U.S.C. §§ 66b, 1029 (1970).

The "heads" of appropriation mentioned in the statute have been defined operationally for purposes of reporting—they simply are the agencies which have been appropriated funds and which therefore have a concomitant duty to account. A head of appropriation is thus a unit of arbitrary size, varying from a small commission to an agency receiving billions of dollars annually. Special provisions cover appropriations made for confidential purposes. See p. 617 *infra*.

50. See generally R. FENNO, *THE POWER OF THE PURSE* (1966).

The CIA's Secret Funding and the Constitution

the proposed budget, make recommendations, and bring them to the floor where Congress votes a specific appropriation to the agency. The resulting expenditures are subject to scrutiny by the congressional committees charged with substantive responsibility for the agency, by the Congress as a whole, and by the General Accounting Office (GAO), which serves as Congress's watchdog agency.⁵¹ Expenditures are described in the *Combined Statement*,⁵² the comprehensive account of government spending published pursuant to the requirements of the Clause. Proposed and actual appropriations and expenditures are reported in various other government publications,⁵³ and more information is available to the public under the Freedom of Information Act.⁵⁴

Since 1793 certain agencies have been appropriated funds specifically for confidential purposes;⁵⁵ these agencies occupy the center of the disclosure continuum.⁵⁶ For example, a foreign negotiation which requires secrecy might be funded from sums specifically appropriated to the State Department to be used for confidential purposes. Details of such expenditures are not published; their expenditure is accounted for by certification of the department head.⁵⁷ The total budgeted for confidential purposes, as well as the total and details of nonconfidential funds, are still made public.⁵⁸

51. See 31 U.S.C. § 67 (1970).

52. See, e.g., U.S. DEP'T OF TREASURY, COMBINED STATEMENT OF RECEIPTS, EXPENDITURES, AND BALANCES OF THE UNITED STATES GOVERNMENT (1974) [hereinafter cited as COMBINED STATEMENT].

53. The most important of these are the OMB's *Budget* and the *Appendix to the Budget*, which are published annually, and which have the appropriations proposed by the executive. Also available are the congressional hearings on the proposed appropriations, the reports of the congressional committees, and the debates on the floor of Congress.

54. 5 U.S.C. § 552 (1970), as amended, 1974 Amendments to the Freedom of Information Act, Pub. L. No. 93-502 (Nov. 21, 1974).

55. By the Act of February 9, 1793, Congress provided

that in all cases, where any sum or sums of money have issued, or shall hereafter issue, from the treasury, for the purposes of intercourse or treaty, the President shall be, and he hereby is authorized to cause the same to be duly settled annually with the accounting officers of the Treasury in the manner following, that is to say: by causing the same to be accounted for, specifically in all instances wherein the expenditures thereof may, in his judgment be made public; and by making a certificate or certificates, or causing the Secretary of State to make a certificate or certificates of the amount of such expenditures as he may think it advisable not to specify; and every such certificate shall be deemed a sufficient voucher for the sum or sums therein expressed to have been expended.

Act of Feb. 9, 1793, ch. 4, § 2, 1 Stat. 300, codified as 31 U.S.C. § 107 (1970). That such a provision should be applied first to foreign negotiations is not surprising, given the almost universal concern on the part of the Framers for the integrity of foreign negotiations. See 2 J. ELLIOT, *supra* note 20 at 52; 3 *id.* at 315-16; 4 *id.* at 72-73.

56. See, e.g., 31 U.S.C. § 107 (1970) (Dep't of State); 28 U.S.C. § 537 (1970) (Federal Bureau of Investigation); 42 U.S.C. § 2017(b) (1970) (Atomic Energy Comm'n).

57. See notes 55, 56 *supra*.

58. See, e.g., OMB, APPENDIX TO THE BUDGET FOR FISCAL YEAR 1972, at 625, 860 (1972).

The practices of the Atomic Energy Commission (AEC) provide a current example of this level of disclosure. Not only is the total budget of the AEC published,⁵⁹ but the published budget also includes a breakdown for program activities such as "nuclear materials," "weapons," "reactor development," and "civil applications of nuclear explosives."⁶⁰ Within each of the program activities, the cost in major categories is set out: for example, in the 1973 budget for the nuclear weapons program, \$400 million was to be spent for production, \$263 million for research and development, and \$109 million for testing.⁶¹ Also published is the object classification budget⁶² and the plant and capital equipment budget.⁶³ The total budgeted for "objects of a confidential nature," is likewise made public; it comes to \$100,000, a tiny part of the agency's entire budget.⁶⁴

The funding and accounting practices for the CIA are situated at the secrecy extreme of the continuum. In a pattern which apparently developed only after World War II,⁶⁵ virtually all of the funds⁶⁶ which the CIA receives and expends are treated as confidential—as if they were for purposes which require secrecy—and the certificate of the Director serves as a sufficient accounting for their expenditure.⁶⁷ Unlike the sums appropriated to the AEC and other agencies for objects of a confidential nature, however, CIA funds do not derive from a specific appropriation voted by the Congress. Rather the funds to be used by the CIA are concealed within the appropriations

59. OMB, APPENDIX TO THE BUDGET FOR FISCAL YEAR 1973, at 771 (1973).

60. *Id.*

61. *Id.* at 772.

62. *Id.* at 774.

63. *Id.*

64. *Id.* at 771. Sufficient information about the AEC is published in the budget documents to allow the public to inform itself about relative priorities by comparing appropriations for the AEC with appropriations for the Department of Labor, or comparing spending for nuclear weapons with spending for peaceful applications of nuclear energy. Such information is absolutely crucial for evaluation and criticism of policy choices. Enough information may be available for a determination of whether funds are being expended for constitutional purposes. The published documents do not make available the vast quantity of information which would be necessary in order for the people to determine if congressional intent in, and conditions on, the appropriations have been complied with, and if extravagance and corruption have been minimized or eliminated; some of the information necessary for this is available through the provisions of the Freedom of Information Act, 5 U.S.C. § 552 (1970), as amended, 1974 Amendments to the Freedom of Information Act, Pub. L. No. 93-502 (Nov. 21, 1974). On the difficulties of such an audit, see *Catch-22*, NEWSWEEK, Apr. 22, 1974, at 88.

65. It does not appear that any agency was totally funded through secret transfer of funds or was completely secret in its accounting for expenditures prior to the end of World War II. See note 101 *infra*. At present not only the CIA but also the National Security Agency (NSA) make no public accounting. See note 144 *infra*.

66. The only official reference in the budget documents to CIA expenditures in the last several years has been the publication of appropriations and expenditures for construction. See, e.g., U.S. DEPT. OF TREASURY, COMBINED STATEMENT OF RECEIPTS, EXPENDITURES, AND BALANCES OF THE UNITED STATES GOVERNMENT 421 (1972).

67. 50 U.S.C. § 403j(b) (1970), quoted in note 39 *supra*.

The CIA's Secret Funding and the Constitution

proposed for other agencies in the President's budget proposal. The intelligence subcommittees of the appropriations committees examine the budget requests and determine the funding for the CIA. But neither the amount of the funds made available to the CIA nor their places of concealment in the budget are systematically disclosed to the full appropriations committees; there is disagreement over whether even the intelligence subcommittees of the armed services committees, which are supposed to monitor CIA activities, have access to full funding information.⁶⁸ After Congress passes the appropriations for those other agencies in which CIA funds are concealed, the funds for the CIA are secretly transferred by the Office of Management and Budget (OMB) to the CIA.⁶⁹ The funds transferred are later reported as expenditures of the agencies to which the funds were originally appropriated.⁷⁰

Such practices must be judged a *prima facie* violation of the first part of the Clause. The CIA receives no specific appropriation; no clear statement of congressional intent can therefore be found. Instead, congressional intent in providing funds to one agency is actually negated by the transfer of those funds to the CIA without specific congressional authorization; the statute which provides for the administration of the CIA explicitly authorizes transfer "without regard to limitations"⁷¹ in the original appropriation, as well as expenditure "without regard to the provisions of law and regulations relating to the expenditure of Government funds."⁷² Congressional authority to make policy and set priorities through the appropriations power is severely undercut.

The auditing procedure suggested by the second part of the Clause is also abrogated. Neither Congress nor the public can determine whether the expenditures comply with the CIA's enabling laws,⁷³

68. Compare 117 CONG. REC. 42924 (1971) (remarks of Sen. Symington), and N.Y. Times, Dec. 23, 1974, at 1, col. 8; Dec. 27, 1974, at 37, col. 1; Dec. 29, 1974, § 4, at 1, col. 5, with Lyman Kirkpatrick Talks About the CIA, BROWN ALUMNI MONTHLY, Nov. 1974, at 23, 29 [hereinafter cited as Kirkpatrick].

69. 50 U.S.C. § 403f(a) (1970), quoted in note 5 *supra*.

70. Brief for Appellee (United States Government) at 3-1, Richardson v. United States, 465 F.2d 844 (3d Cir. 1972), *rev'd*, 94 S. Ct. 2940 (1974).

71. 50 U.S.C. § 403f(a) (1970), quoted in note 39 *supra*. If such a provision is valid, any congressional restriction on spending could be circumvented by transfer of both the funds and the responsibility for the activity to the CIA. See, e.g., Second Supplemental Appropriations Act of 1973, Pub. L. No. 93-50, § 307, 87 Stat. 129 (no Defense Dept. funds may, after Aug. 15, 1973, be used for combat activities in Cambodia, Laos, North Vietnam, and South Vietnam, or adjacent waters).

72. 50 U.S.C. 403j(h) (1970), quoted in note 39 *supra*.

73. For example, it was revealed in the press that the CIA had assisted with the training of local police in violation of the injunction in the National Security Act of 1947, § 102(d)(3), 50 U.S.C. § 403(d)(3) (1970), against the CIA's involvement in domestic security operations. N.Y. Times, Feb. 6, 1973, at 1, col. 1; MARCHETTI & MARKS, *supra* note 4, at 224-25. The concern with the possibility of CIA involvement in domestic affairs was clearly

or with the Constitution,⁷⁴ and whether they have been made without waste⁷⁵ or corruption.⁷⁶ Neither Congress nor the public can weigh CIA spending against that of other agencies; the CIA's internal ordering of priorities cannot be analyzed. Because the funds transferred to the CIA can come from any government agency,⁷⁷ the Congress and the public cannot with assurance accept the account covering any government agency as the regular statement and account the Constitution requires.

The system might be more palatable (even though its prima facie unconstitutionality would not be affected) if the public could have greater confidence in the virtual delegation to the appropriations subcommittees and the OMB of the authority to appropriate funds,⁷⁸ and to the armed services subcommittees of the task of overseeing the CIA's activities. Substantial evidence has surfaced in recent years, however, that the congressional subcommittees and committees in-

demonstrated at the hearings on the National Security Act of 1947. Representative Brown told the House Armed Services Committee,

I would want to make certain that the activities and functions of the Central Intelligence Agency were carefully confined to international matters, to military matters, and to matters of national security. We have enough people running around butting into everybody's business in this country without establishing another agency to do it. What we ought to do is to eliminate 90 percent of the present snoopers instead of adding to them.

Congressman Dorn added,

The Central Intelligence Agency is primarily concerned and almost entirely concerned with intelligence pertaining to military and foreign matters. I tell you, the crowd you have to worry about is the FBI and Tom Clark.

Hearings on the National Security Act of 1947 Before the House Comm. on Armed Services, 80th Cong., 1st Sess. 438-39 (1947). As a result of this concern the National Security Act of 1947 forbids the CIA from exercising any "police, subpoena, law enforcement powers, or internal security functions." On the secrecy of CIA domestic operations, see MARCHETTI & MARKS, *supra* note 4, at 224-29; N.Y. Times, Dec. 29, 1974, § 1, at 1, col. 1.

It has also been alleged that the CIA was engaged in a massive domestic intelligence operation, including surveillance of members of Congress and the Supreme Court. See N.Y. Times, Dec. 22, 1974, § 1, at 1, col. 8; Dec. 23, 1974, at 1, col. 8; Dec. 29, 1974, § 1, at 1, col. 1; Dec. 30, 1974, at 1, col. 3; Wash. Post, Dec. 25, 1974, at A 1, col. 6, 8; *Rattling Skeletons in the CIA Closet*, TIME, Jan. 6, 1975, at 44.

74. See Appellant's Brief at 4, A12, *Richardson v. United States*, 465 F.2d 844 (3d Cir. 1972), *rev'd*, 94 S. Ct. 2940 (1974).

75. See A. TULLY, *THE SUPER SPIES* 232 (1969); 117 CONG. REC. 40283-84, 42923-26 (1971) (remarks of Sen. Symington). See generally MARCHETTI & MARKS, *supra* note 4, at 58-59, 96-101, 278 (1974).

76. See MARCHETTI & MARKS, *supra* note 4, at 147.

77. See 50 U.S.C. § 403(a) (1970). Lyman Kirkpatrick has suggested, however, that the CIA's funds are hidden in the procurement section of the Department of Defense appropriation. Interview with Lyman Kirkpatrick, former CIA Executive Director-Comptroller, in Bristol, R.I., Dec. 6, 1973 (tape of interview on file with the Yale Law Journal). See generally N.Y. Times, Dec. 29, 1974, § 4, at 1, col. 5.

78. See 50 U.S.C. § 403(a) (1970). It is useful to remember what Justice Brennan wrote in *United States v. Robel*, 389 U.S. 259, 276 (1967) (concurring opinion):

Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people. . . . "Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators, who, under our system of government, are not endowed with authority to decide them." *Greene v. McElroy*, 360 U.S. 474, 507.

The CIA's Secret Funding and the Constitution

volved have been ineffective in exercising their supervisory authority.⁷⁹ The thoroughness of the OMB's monitoring has been subjected to similar criticism.⁸⁰

IV. Possible Means of Reconciling the CIA Funding Practice with the Clause

The current CIA funding practices clash with the apparent requirements of the Clause. Nonetheless, there are several theories

79. The subcommittees do not have the assistance of the GAO to help monitor all CIA expenditures, but "[i]ntelligence officials insist . . . that . . . funds are audited just as stringently." H. RANSOM, *THE INTELLIGENCE ESTABLISHMENT* 87 (1970). President Eisenhower told Allen Dulles to make sure that CIA internal auditing procedures were even more searching than those of the GAO. A. DULLES, *THE CRAFT OF INTELLIGENCE* 259 (1963). A 1955 Hoover Commission study noted, however, that the lack of outside surveillance raised "the possibility of the growth in license and abuses of power when disclosure of costs, organization, personnel, and functions are precluded by Law." Quoted in H. RANSOM, *supra*, at 161.

Senator Symington, a member of the Intelligence Subcommittee of the Armed Services Committee, has strongly criticized its work. See N.Y. Times, Dec. 23, 1974, at 1, col. 8; 117 CONG. REC. 42924-26 (1971). Symington noted that the subcommittee had not met at all in 1971. *Id.* at 42931. The subcommittee has met twice this year. N.Y. Times, Dec. 29, 1974, § 4, at 1, col. 5. Representative Norblad, a former member of the Intelligence Subcommittee of the Armed Services Committee, stated that it met annually for two hours. D. WISE & T. ROSS, *THE INVISIBLE GOVERNMENT* 265 (1964). That subcommittee met six times in 1974. N.Y. Times, Dec. 29, 1974, § 4, at 1, col. 5. See generally N.Y. Times, Dec. 27, 1974, at 37, col. 1; Dec. 10, 1974, at 15, col. 1; MARCHETTI & MARKS, *supra* note 4, at 323, 342. It should be noted that in the future the House Foreign Affairs Committee will share jurisdiction over foreign policy related activities of the CIA. Wash. Post, Dec. 24, 1974, at A 9, col. 8.

If the supervision by the armed services subcommittees is cursory, the burden of congressional supervision falls on the intelligence subcommittees of the Senate and House Appropriations Committees. The appropriations subcommittee in the Senate is made up of the most senior members of the Committee; the membership of the subcommittee in the House is secret. R. FENNO, *supra* note 50, at 151 n.6. MARCHETTI & MARKS, *supra*, at 345-47, criticize the procedures of the appropriations subcommittees and note that in 1967 the CIA did not even appear before the budgetary oversight subcommittees. The Senate subcommittee met five times this year. N.Y. Times, Dec. 29, 1974, § 4, at 1, col. 5. One exchange on the floor of the Senate calls into question that subcommittee's work. In response to Symington's criticism of CIA activities in Laos and to Cranston's questions, it was revealed by Ellender that neither he nor the Intelligence Subcommittee of the Senate Appropriations Committee had known anything about the CIA's employment of mercenaries in Laos before reports appeared in the press. After reading the reports, neither sought further information from the CIA. 177 CONG. REC. 42929-31 (1971).

Lyman Kirkpatrick, who strongly disagrees with Senator Symington's assessment of the amount of control exercised over the CIA, MARCHETTI 321, nonetheless has suggested that effective oversight by Congress would require two or three working days per month. L. KIRKPATRICK, *THE REAL CIA* 273 (1968). See generally P. MCGARVEY, *THE CIA* 216 (1972). There is some question as to the ability of Congress to supervise the CIA, no matter how much time is spent, when it is not clear that the CIA Director will always respond candidly to questions posed by members of Congress. See N.Y. Times, Nov. 23, 1974, at 14, col. 3; MARCHETTI & MARKS, *supra*, at 228-29.

80. In the absence of any checking by the GAO, the OMB might supplement the internal audits of the CIA. The OMB, however, has only five employees monitoring the budgets and expenditures of the entire intelligence community, of whom only one examiner (along with the branch chief) scrutinizes the CIA's budget. MARCHETTI & MARKS, *supra* note 4, at 336. But see Kirkpatrick, *supra* note 68, at 29. Richard Helms, former Director of the CIA, has maintained that the budget is gone over line-by-line by the OMB. MARCHETTI & MARKS, *supra*, at 339. Marchetti and Marks, however, describe the OMB as usually "indulgent" to the CIA; they allege that the CIA works hard at concealing its activities and any surplus funds from the OMB. *Id.* at 62, 337-39.

which Congress and the Executive might use to argue that the practices satisfy the Clause. Room might be found within the phrase "from time to time." Congress's authority over the detail to be included in the *Combined Statement* might authorize the practice. The secrecy might find some support in Congress's acknowledged power to withhold certain proceedings from publication in its journals, or it might be considered a longstanding practice and therefore presumed constitutional. This section evaluates each of these contentions and finds them wanting.

A. "From Time to Time"

One line of justification asserts that the Framers' choice of the phrase "from time to time"⁸¹ in place of a requirement for annual publication was designed to provide secrecy for sensitive expenditures. Under this theory, such expenditures would be revealed as the need for secrecy disappeared.

In the debates on Clause 7, the need for secrecy was mentioned briefly. At the Virginia Convention, Mason, who had fought for annual statements, stated that the need for secrecy was among the reasons which had been suggested for the adoption of the ambiguous phrase "from time to time."⁸² He did not indicate who had suggested this reason nor do the recorded debates note any such suggestion. Mason and other opponents of "from time to time" did fear that the "looseness" of the phrase might allow a decision not to publish any account. It might "afford opportunities of misapplying the public money, and sheltering those who did it" by allowing expenditures to be "concealed forever."⁸³ Madison argued against Mason's position not because of the need for secrecy but because

if the account of the public receipts and expenditures were to be published at short stated periods, they would not be so full and connected as would be necessary for a thorough comprehension of them, and detection of any errors. But by giving them an opportunity of publishing them from time to time, as might be found easy and convenient, they would be more full and satisfactory to the public, and would be sufficiently frequent.⁸⁴

81. This phrase was used several times in the Constitution, and has come to represent different time intervals. See U.S. CONST. art. I, § 5, cl. 3 (providing for the journals of Congress); *id.* art. II, § 5 (providing for the State of the Union message). The COMBINED STATEMENT, *supra* note 52, published pursuant to Clause 7 and to 31 U.S.C. §§ 66b, 1029 (1970) is issued annually, as is the State of the Union Message; a daily edition of the *Congressional Record* is available.

82. D. ROBERTSON, *supra* note 20, at 326.

83. *Id.*

84. *Id.* at 326-27.

The CIA's Secret Funding and the Constitution

If the need for secrecy were indeed the reason for adopting Madison's phrase, it is striking that such a need was not raised in the debates by any of the proponents; they suggested that the phrase meant short, convenient intervals,⁸⁵ and they justified it on the basis that it would provide fuller information to the public. The proponents appear to have agreed with Mason, who stated that he did not "conceive that the receipts and expenditures of the public money ought ever to be concealed."⁸⁶ Basing the decision never to reveal CIA expenditures on the phrase "from time to time," then, would run counter to the explanations of the phrase offered at the conventions by its supporters, and would confirm the worst fears of the opponents of the phrase, fears that were dismissed by the proponents as groundless.⁸⁷ It would also ignore the fact that the phrase has since been determined by Congress uniformly to require other agencies to report annually.

B. Congressional Control over the Form and Content of the Accounts

It has been argued that Congress has plenary power over the form and content of the accounts⁸⁸ and could decide therefore to provide no information on the expenditures of the CIA. This argument seems to read the Clause as relating only to a division of power between the Congress and the Executive. Perhaps the first part of the Clause has that purpose; it places the appropriations power squarely in the Congress and implies reporting by the Executive to Congress. But the second part requires that a regular statement be published—presented to the public. It was designed to allow the *people* to check not only the Executive but also the Congress.⁸⁹ If Congress possessed absolute authority over the inclusion or exclusion of information, this check would be rendered meaningless.

85. See note 22 *supra*.

86. D. ROBERTSON, *supra* note 20, at 326.

87. See note 22 *supra*. It might be possible to argue that, while reports of CIA expenditures need not be withheld forever, they might constitutionally be withheld for a period which would ensure that their revelation would not damage the national security, e.g., for a period of 10, 15, or 20 years. While such a practice might be justified under an expansive interpretation of "from time to time," it finds no support in the debates and there are serious questions whether the publication of expenditures, either in lump sum or in detail, poses any reasonable threat to national security. See pp. 632-33 *infra*.

88. Although we do not reach or decide precisely what is meant by a regular statement or account, it is clear that Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interests. *United States v. Richardson*, 94 S. Ct. 2940, 2947 n.11 (1974).

89. See notes 43-45 *supra*; *United States v. Richardson*, 94 S. Ct. 2940; 2956 (1974) (Douglas, J., dissenting).

While the Framers did not describe in detail what the regular statements were to include, the debates do indicate that the reports were to be "full," "not too general," connected enough for a "thorough comprehension," but not so detailed as to be "impracticable."⁹⁰ No mention was made of Congress's power simply to exclude an agency from the reports.

Congress therefore does have *some* power over the content and form of the accounts. But to provide almost no information whatsoever on the expenditures of a large and important agency is hardly a mere decision on detail; especially when inclusion would be practicable and would increase comprehensibility, and when the transfer procedures make suspect all other reported expenditures.

C. Congressional Control over the Journals

The Constitution provides that each house keep "a Journal of its Proceedings and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . ."⁹¹ Since Congress thus has the power to withhold from the public the congressional debates on the matters for which money is being appropriated, some have suggested that it would be inconsistent to assume an intention on the part of the Framers to provide an absolute obligation to publish every expenditure.⁹² But the two constitutional provisions are not equivalent.⁹³ There is an explicit provision for secrecy in the Journal Clause;⁹⁴ there is no such provision in the Statement

90. See note 18 & p. 622 *supra*.

91. U.S. CONST. art. I, § 5, cl. 3.

92. Appellant's Brief to the Supreme Court at 24-25, *United States v. Richardson*, 94 S. Ct. 2940 (1974).

93. In the course of the Virginia debates, Madison did imply that the journal was to include the statement of accounts. See note 96 *infra*. Patrick Henry apparently also believed that the regular statement would be included in the journal. He opposed the wide exception to publication in the journal and the ambiguity of "from time to time" because these provisions would "allow the national wealth . . . to be disposed of under the veil of secrecy." 3 J. ELLIOT, *supra* note 20, at 462.

The Constitution is not explicit as to whether the accounts must be published in the journal or in a separate document. Under the Articles of Confederation a journal was published monthly; until publication ceased, the accounts were published semi-annually. Given the differences in history and in content, and the fact that the provisions for a journal and a regular statement appear in different sections of the Constitution, the apparent belief of some of the Founders that one would include the other does not compel a conclusion that the Constitution requires inclusion nor that the journal secrecy was meant to apply to the accounts. Moreover, Congress has consistently provided for separate publications.

94. The congressional power to withhold the debates from publication was discussed thoroughly during the discussions on Article I, § 5, clause 3. The original proposal made no provision for journal secrecy. After the broad secrecy provision ultimately passed was added, there were several unsuccessful attempts to narrow the exception to one similar to that provided in the Articles of Confederation, article IX. See 2 RECORDS, *supra* note 9, at 180, 260; 3 J. ELLIOT, *supra* note 20, at 403.

The CIA's Secret Funding and the Constitution

and Account Clause. Rather the latter clause emphasizes regular accounting of *all* public money. The difference in plain language would seem to be a strong argument against this ground for nondisclosure of CIA expenditures.

In addition, the proceedings of Congress which were to be reported in the journal contained discussions of foreign negotiations and alliances, treaties not yet come to maturity; and possible military operations, the revelation of which the Framers feared.⁹⁵ The Framers believed that the amount of detail which was to be included and which was necessary to accomplish the purposes for which the regular statement was established would not compromise these vital interests.⁹⁶

D. Longstanding Practice

It might also be suggested that the CIA's funding secrecy cannot be called into question because it is a practice of long standing. Long-standing practice is not, in itself, a justification for practices which are unconstitutional.⁹⁷ Rather longstanding practice provides a "gloss" which aids in the interpretation of the Constitution;⁹⁸ longtime acceptance of a practice without attack may establish a form of presumption of the constitutionality of the practice.⁹⁹ Since the funding and budget disclosure provisions for the CIA have gone unchallenged from 1947 until recently, it might be contended that their constitutionality is presumed. However, 27 years hardly mean that the practice is sufficiently well established to claim the benefit of the doc-

95. See 2 J. ELLIOT, *supra* note 20, at 52; 3 *id.* at 315-16; 4 *id.* at 72-73; D. ROBERTSON, *supra* note 20, at 236; cf. Exec. Order No. 11,652, 3 C.F.R. 339 (1974).

96. A speech by Madison to the Virginia Convention supports this conclusion. Defending the journal secrecy provision, he stated that "the policy of not divulging the most important transactions, and negotiations of nations, such as those which relate to warlike arrangements and treaties, is universally admitted." D. ROBERTSON, *supra* note 20, at 236. He assured the Convention, however, that, "the Congressional proceedings are to be occasionally published, including *all receipts and expenditures* of public money, of which no part can be used, but in consequence of appropriations made by law." *Id.* (emphasis in original). He thereby implied that, despite possible inclusion in the journals, the constitutionally required accounts would not fall within the secrecy exception. See p. 623 *supra*.

97. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

98. *Id.* at 610-11.

99. As Chief Justice Burger wrote:

Not controlling, but surely not unimportant are nearly two centuries of acceptance of a reading of cl. 7 as vesting in Congress plenary power to spell out the details of precisely when and with what specificity Executive agencies must report the expenditure of appropriated funds and to exempt certain secret activities from comprehensive public reporting.

United States v. Richardson, 94 S. Ct. 2940, 2947 n.11 (1974).

trine,¹⁰⁰ especially when compared to the practice of disclosure which dates from 1791.

One might still respond that the practices of the CIA are simply examples, albeit somewhat more extreme, of congressional provisions for confidential expenditures. Since 1793 details of expenditures from appropriations made for confidential purposes have been withheld, but Congress always made a specific appropriation, and such appropriations were never for the entire budget of an agency. In many cases, information on the use made of those funds has been revealed shortly after the expenditure,¹⁰¹ or if withheld, would be available to Congress under certain conditions.¹⁰² CIA practice thus departs too drastically from earlier practices to claim them as precedent.¹⁰³

100. See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 611, 615 (1952) (Frankfurter, J., concurring).

101. See, e.g., D. MILLER, *SECRET STATUTES OF THE UNITED STATES* (1918) (discussion of funds secretly, but specifically, appropriated in 1811 and 1812 which were used for the occupation of Florida; the use of these funds was revealed in 1818). The most famous example of secret funding was the Manhattan Project. Details of the arrangements to fund the development of the atomic bomb were revealed immediately after World War II. See L. GROVES, *NOW IT CAN BE TOLD* 361 (1962). In the case of the Manhattan Project funds were provided through appropriations to "Engineering Service: Army" and "Expediting Prosecution of the War Effort" with the true use of funds known only to the congressional leadership. Representatives Martin, Rayburn, and McCormack, apparently without statutory authority, agreed to a plan whereby they would be given advance notice of the Manhattan Project's funding requirements and the places in the budget where the funds would be concealed. Selected members of the appropriations committees were to be told that these budget items had been discussed with the Secretary of War and should not be questioned. *Id.* at 360, 363. Other committee members and the other members of Congress would only be given general information about these items.

The large expenditures in "Engineering Service: Army" and "Expediting Prosecution of the War Effort" did not entirely escape congressional notice. A Special Senate Committee on the National Defense, headed by Harry S. Truman, sought to investigate them, but agreed to postpone the investigation until security permitted. *Id.* at 365.

Senator Millard Tydings remembered the funding in a different way. "General Marshall came before the Appropriations Committee one day and said in effect this:

Gentlemen, I want you to give me a billion dollars. I do not want you to ask me what it is going to be used for. It is a military secret, but I hope you will give me the money."

The Committee responded, to the recollection of Tydings, by asking whether a billion dollars would be enough. *Hearings on the National Security Act Before the Senate Comm. on Armed Services*, 80th Cong., 1st Sess., pt. 2, at 623 (1947).

While appropriations for the Project were concealed from Congress and the people, the justification offered was that concealment was a wartime necessity, preventing German discovery of our development of this new weapon. See note 130 *infra*. The project was under Army supervision; the funds were thus never transferred to a separate agency. The funds were a small part of the Army budget—a budget which was available even in wartime. Finally, as the Comptroller General told the Senate Special Committee on Atomic Energy, he and his staff had audited or were auditing every single penny expended on the Project. L. GROVES, *supra* at 361.

102. For example, details of expenditures by Daniel Webster from a discretionary fund were made available to the Senate by former President Tyler in 1846, when such expenditures came under investigation. See Dorsen & Shattuck, *Executive Privilege: The President Won't Tell*, in *NOSE OF YOUR BUSINESS: GOVERNMENT SECRECY IN AMERICA* 56 (N. Dorsen & S. Gillers ed. 1974).

103. It might also be argued that congressional practice since 1791 has been to appropriate money to, and require reports from, separate heads of appropriation (see note 49 *supra*). As the CIA does not constitute a head of appropriation—is not appropriated

The CIA's Secret Funding and the Constitution

V. The National Security Justification

The preceding section has demonstrated that alternative interpretations which would reconcile present CIA funding practices with Clause 7 are simply not convincing. Nonetheless, the requirements of the Clause are not absolute; if fulfilling them would endanger the national security, they would have to yield or at least be redefined. But the mere fact that national security is invoked does not close the question.¹⁰⁴ In the past when national security claims have been raised in support of particular congressional actions, the Court has not allowed them simply to override, without analysis, constitutional requirements or guarantees;¹⁰⁵ the claims have been analyzed using various tests which the courts have fashioned.¹⁰⁶

funds—it might be argued that the requirement for an account broken down by each separate head of appropriation does not apply to it. Under this interpretation, the funds which it receives are accounted for sufficiently under the expenditures reported by the agency which originally received the appropriation.

If this mechanical reading of the longstanding practice were to prevail, Congress could by statute reduce reporting to a single head, i.e., appropriate all funds to the OMB and have all funds reported as expended by the OMB. This would satisfy the congressional requirement for accounting by head of appropriation, but it would probably violate the first part of the Clause, and it would render the second part of the Clause meaningless. The "head of appropriation" requirement would be applied more logically if the CIA were required to report as a "functional" head of appropriation because money, though not appropriated to it, is set aside and transferred to it.

104. The importance of the Clause should not be minimized even when national security interests are involved. Justice Stewart wrote:

In the absence of the governmental checks present in other areas of our national life, the only effective restraint upon executive policy and power in the area of national defense and international affairs may lie in an enlightened citizenry.

New York Times Co. v. United States, 403 U.S. 713, 728 (1971) (concurring opinion).

105. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Alderman v. United States*, 394 U.S. 165 (1969).

106. The courts have not settled on any one test; even where arguable individual rights have been at issue, court treatment has ranged from demanding inquiry to an almost passive acceptance of the government's claim of a national security threat. Compare *New York Times Co. v. United States*, 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring) ("only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order"), with *Zemel v. Rusk*, 381 U.S. 1 (1965) (upholding passport restrictions against travel to certain countries as supported by the "weightiest considerations of national security," with little further analysis). Of the latter decision, recent commentary noted that "[t]he Court... failed to analyze carefully those [considerations]. Such an analysis would have revealed that rather limited foreign policy interests are served by the system of area restrictions." Note, *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1149 (1972).

A recent revision of the classification guidelines illustrates subtle but important differences in standards that could be used. The previous system authorized top secret classification for material "the unauthorized disclosure of which could result in exceptionally grave danger to the Nation..." Exec. Order No. 10,501, 3 C.F.R. 115 (Supp. 1953), 18 Fed. Reg. 7049 (1953) (emphasis added). The new test is "whether... unauthorized disclosure [of the information] could reasonably be expected to cause exceptionally grave danger to the national security." Exec. Order No. 11,652, 3 C.F.R. 340 (1974) (emphasis added). Examples of "exceptionally grave danger" are provided in both Executive Orders. The latter lists: "armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital defense

In *United States v. Robel*,¹⁰⁷ the Court was called upon to assess the constitutional validity of a congressional act which its proponents justified on the grounds of national security. It found the act unconstitutional; Chief Justice Warren, writing for the Court, summed up the test:

[W]e have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought and the specific prohibitions of the First Amendment. . . . We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict.¹⁰⁸

Robel involved First Amendment rights. But one need not believe that the Clause has the preeminent status accorded the First Amendment, nor that the rights it grants are individual rights, in order to accept a test similar to *Robel's* for analyzing apparent violations. The Clause sets forth a clear constitutional requirement in plain language in the text of Article I. Congress should be expected, in the legislation it passes, to minimize potential conflict with explicit provisions of the Constitution, whether those provisions be found in the Bill of Rights or elsewhere. It therefore makes sense

plans or complex cryptographic and communications intelligence operations; and the disclosure of scientific or technological developments vital to national security." *Id.* For a discussion of the justiciability of such standards, see Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311, 328 n.80 (1974).

The important variables in any test are therefore the seriousness of the expected effects of disclosure and the likelihood that disclosure will have such a result. A related question involves the respective roles of the courts and the Executive in assessing both likelihood and seriousness. See *New York Times Co. v. United States*, *supra*, at 757 (Harlan, J., dissenting) ("In my judgment the judiciary may not properly . . . redetermine for itself the probable impact of disclosure on the national security."). But see *N.Y. Times*, Nov. 22, 1974, at 21, col. 3 (1974 amendments to the Freedom of Information Act mandate court review of executive classification decisions).

Under a loose test of the national security claim—for example, whether revealing the information could conceivably have some negative impact on national security—even budget information on the interstate highway system could be withheld. Government expenditures on interstate highways have an arguable effect on national security. See Federal Aid Highway Act of 1956, ch. 462, § 108(a), 70 Stat. 378 ("Because of its primary importance to the national defense, the name of such system is hereby changed to the 'National System of Interstate and Defense Highways.'")

Given the purposes of the Clause, any standard which allowed such secrecy could not be tolerated. This Note recommends a standard based upon consequences one "could reasonably expect"; concealment via appropriation for confidential purposes should not be allowed unless the expected risk is substantial, and courts should not rest solely upon executive assertion but should examine the circumstances themselves.

107. 389 U.S. 259 (1967).

108. *Id.* at 268 n.20.

The CIA's Secret Funding and the Constitution

to give detailed consideration, as *Robel* did, to the exact goal Congress has sought, the ways in which the act in question is supposed to serve the goal, the impact the act has on constitutional requirements, and possible alternatives for achieving the congressional goal.

By establishing the CIA, Congress sought to promote the gathering of foreign intelligence information, a concededly valid legislative goal. The agency is to advise the National Security Council on intelligence matters, to correlate and evaluate intelligence materials for the Council, and to perform other intelligence-related tasks.¹⁰⁹ What must be examined is how the funding arrangements are related to the accomplishment of that goal, for their effect on the constitutional requirements of the Clause is clear: The appropriations requirement and the reporting requirement are both violated, to the point where they are almost rendered meaningless. An examination of the legislative history of the CIA Act¹¹⁰ may make it clear why Congress enacted these funding provisions, exactly what aims it sought to secure, whether alternatives were considered, and how Congress interpreted the requirements of the Clause.

The first legislative provisions for the CIA were provided by the National Security Act of 1947.¹¹¹ Secrecy for the CIA budget was touched upon at two points in the congressional hearings. Allen Dulles recommended a separate appropriation for the CIA as well as a provision for supplemental funding from other agencies in order to carry out special operations. It might be inferred that secret funds for these operations would be desirable, but he did not urge a completely secret budget.¹¹² Later in the hearings an officer of the Reserve Officer's Association recommended a classified budget.¹¹³ Congress did not act on either recommendation; it waited two years to provide an administrative blueprint for the CIA.

The 1949 bill provided for secret funding by transfer from other agencies. The Congress was told that almost all of the provisions of the bill already existed for other government agencies and were merely being extended,¹¹⁴ but no precedent for the funding or re-

109. 50 U.S.C. § 403 (1970).

110. *Id.* It is difficult to feel confident about any analysis of the CIA's legislative history due to the amount of material still classified. It has been alleged that certain secret protocols about the CIA were agreed to in 1947. See N.Y. Times, Dec. 26, 1974, at 46, col. 4.

111. Act of July 26, 1947, ch. 343, § 102, 61 Stat. 497.

112. *Hearings on S. 758 Before the Senate Comm. on Armed Services*, 80th Cong., 1st Sess. 528 (1947) [hereinafter cited as *Nat'l Defense Hearings*].

113. *Id.* at 550.

114. 95 CONG. REC. 1944 (remarks of Rep. Sasscer), 1948 (remarks of Rep. Vinson) (1949). The principal exception, the one power which apparently was being given the CIA alone, was the authority to admit a limited number of aliens without regard to the immigration laws. See *id.* at 1945 (remarks of Rep. Celler).

porting provisions was set forth in the hearings, reports, or floor debates.¹¹⁵

The debates in the House made clear that the funding provisions had been in use since the CIA's creation without congressional authorization,¹¹⁶ that the CIA Act would "legalize" this method of funding,¹¹⁷ that such a method was the only way to operate the agency efficiently without impairing security,¹¹⁸ and that it would not be "wise" to disclose the CIA's budget.¹¹⁹ No one suggested the existence of a constitutional requirement to publish appropriations and expenditures; the possibility of publishing parts of the CIA's budget was not raised.

Discussion of the funding arrangements was more extensive in the Senate,¹²⁰ though the floor managers were very concerned that too much information was being made public in the debate.¹²¹ One Senator questioned the bypassing of the traditional procedure of making specific appropriations to specific agencies;¹²² he was assured that while such procedures were fitting for normal governmental functions, if they were followed for the CIA they might result in the capture and death of CIA agents.¹²³ The Senate was told that every

115. Most of the hearings were in executive session. The unclassified sections of the hearings do not aid the analysis. As Chairman Vinson put it:

We will just have to tell the House they will have to accept our judgment and we cannot answer a great many questions that might be asked. We cannot have a Central Intelligence Agency if you are going to advertise it and all of its operations from the tower—what is the big building in New York?

Congressman Short: "The Empire State."

Hearings on H.R. 1741, H.R. 2546 & H.R. 2663 Before the House Comm. on Armed Services, 81st Cong., 1st Sess., ser. 26, at 487 (1949). The House committee report only summarized the bill's provisions for fear of compromising security. H.R. REP. NO. 160, 81st Cong., 1st Sess. 5 (1949).

The failure to provide detailed explanations caused considerable controversy. Representative Marcantonio told the House that

the Committee informs us through its report that the Members of the House must pass this bill without any explanation of all its provisions. This makes every single section of the bill suspect. . . . There has never been and there can never be any justification, at any time, for the representatives of the people . . . to abdicate their functions.

95 CONG. REC. 1946 (1949) (remarks of Rep. Marcantonio).

The most similar previous funding arrangement, that for the Manhattan Project, see note 101 *supra*, was not cited as precedent for the funding arrangements, although it was raised briefly in other contexts. See 95 CONG. REC. 1947 (remarks of Rep. Marcantonio & Rep. Short), 6955 (remarks of Sen. M. Tydings) (1949).

116. 95 CONG. REC. 1949 (1949) (remarks of Rep. Vinson).

117. *Id.*

118. *Id.*

119. *Id.*

120. See *id.* at 6955 (remarks of Sen. McKellar & Sen. M. Tydings).

121. *Id.* at 6952 (remarks of Sen. M. Tydings).

122. *Id.* at 6955 (remarks of Sen. McKellar).

123. *Id.* (remarks of Sen. M. Tydings). Senator Tydings's remarks seem directed not at budgetary disclosure or specific appropriations, but rather at disclosure of personnel or the public availability of pay vouchers.

The CIA's Secret Funding and the Constitution

democratic safeguard was being put around the CIA.¹²⁴

The bill passed and was signed by the President. The failure of the congressional committees to provide detailed information on the legislation, the absence of cited precedents for the funding provisions, and the lack of discussion about the requirement for an accounting—all create considerable uncertainty whether Congress carefully analyzed the requirements of national security, the procedures necessary for the successful operation of the CIA, and the commands of the Clause.

The one reason plainly asserted for the provision was the safety of American intelligence agents.¹²⁵ But the necessity of guaranteeing the safety of covert agents should not lead one to ignore the fact that a large majority of the estimated 16,500 employees of the CIA work in the United States.¹²⁶ Moreover, even during the immediate post-war period the vast bulk of the intelligence collected was obtained from overt sources.¹²⁷ Although other goals were not mentioned in the reported congressional deliberations on the CIA Act, the provisions might have been enacted to protect the security of CIA tactical operations,¹²⁸ to prevent disclosure of past operations,¹²⁹ or to keep secure technological advances such as the development of new weapons.¹³⁰

124. *Id.* Senator Tydings also told the Senate:

I think it is a question whether or not the law is being winked at unless this bill is written into law. It is written to effect a cure. It is a question as to whether we have the authority to act. In my opinion we have not the authority, but nobody is going to raise the question.

Id. It appears that until William Richardson filed his first suit, no one did question the authority. See *Richardson v. Sokol*, 285 F. Supp. 866 (W.D. Pa. 1968).

125. 95 CONG. REC. 6949 (1949) (remarks of Sen. M. Tydings); cf. Exec. Order No. 11,652, § 5(B)(4), 3 C.F.R. 339, 345 (1974). On the effectiveness and reliability of secret agents, see MARCHETTI & MARKS, *supra* note 4, at 23, 206-08. With this one exception, Congress did not set out clearly what interests it sought to protect by using those special procedures of the CIA Act. It would have been desirable for Congress to set out the interests to be protected, the alternative forms of disclosure available, the implications of each, and the tradeoffs involved. See generally *United States v. Robel*, 389 U.S. 258, 276 (1967) (Brennan, J. concurring); *Environmental Defense Fund v. Froehke*, 473 F.2d 346, 350-51 (8th Cir. 1972); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

126. MARCHETTI & MARKS, *supra* note 4, at 61.

127. *Nat'l Defense Hearings*, *supra* note 112, at 121.

128. The secrecy of tactical operations raises more difficult questions than the need to preserve agents' lives. Some critics have argued that there is no effective control of the intelligence agencies and that they function as an "invisible government." See D. Wise & T. Ross, *supra* note 79. Other critics have not gone so far but have pointed to a lack of effective congressional control. See note 79 *supra*. In either case it is possible to argue that more public disclosure and discussion of the CIA's tactical operations is the only way to control the tendency toward improper covert operations—a tendency which, it is claimed, is demonstrated by the CIA's role in Watergate. See MARCHETTI & MARKS, *supra* note 4, at 249-50.

129. The revelation of past activities might compromise present sources, prevent similar tactics being used again, or damage relations with the country or countries involved.

130. On the principal example of such secrecy, the Manhattan Project in develop the atomic bomb, see note 101 *supra*. When overall military strategy is based on deterrence, there are powerful arguments for revealing at least the existence of new weapons as they

The present practices admittedly protect these interests, but they are not the only means for doing so; there are alternatives that would serve. The most obvious alternatives involve barring future undisclosed transfers from other agency budgets, appropriating the CIA's funds, either in lump sum or in detail, and including CIA expenditures, again either in lump sum or in detail, in the *Combined Statement*.¹³¹ The impact of the alternatives on the interests Congress sought to protect is clear. It is nearly impossible to conceive of any scenario in which open lump-sum appropriation to the CIA and an accounting for the gross sum expended by the agency would substantially enhance any danger to these interests. There are too many links in the long chain between a figure as large as the estimated \$750 million the CIA spent in 1973¹³² and the particulars an enemy might want to know—the whereabouts of an agent, the details of tactics, even the broad outlines of strategy.¹³³ Although any such judgment involves elements of speculation,¹³⁴ it is instructive to note

are developed. For example, the Navy has sought publicity, in order to enhance deterrent value, for a new form of torpedo mine developed secretly, but the State and Defense Departments have urged secrecy for fear that the United States will be charged with a violation of the Seabed Treaty of 1972. N.Y. Times, Apr. 15, 1974, at 16, col. 5.

131. In 1971, Senator George S. McGovern introduced S. 2231, 92d Cong., 1st Sess. (1971). The bill provided that a single sum covering proposed appropriations and expenditures of the CIA be shown in the budget of the United States. *Id.* § 1. It also provided that no funds appropriated to any other department or agency could be made available for expenditure by the CIA. *Id.* § 2. The single figure would "allow the Congress to exercise its constitutional powers over Federal finances," but would not "endanger national security" by communicating "usable information to potential adversaries." 117 CONG. REC. 23692 (1971) (remarks of Sen. McGovern). The bill died in the Armed Services Committee.

132. 119 CONG. REC. 56868 (daily ed. Apr. 10, 1973) (remarks of Sen. Proxmire); MARQUETTI & MARKS, *supra* note 4, at 59.

133. Even strong supporters of the CIA have maintained that neither the CIA nor national security would be harmed by disclosure of its aggregate budget. Interview with Lyman Kirkpatrick, *supra* note 77; Interview with Elliot Richardson, former Sec'y of Defense, in New Haven, Conn., Apr. 2, 1974. As Allen Dulles noted, the withholding of too much information may hurt the CIA, since certain information must be given out if public confidence in the intelligence mission is to be strengthened. See A. DULLES, *supra* note 79, at 8. This view is, of course, not unanimously held; for example, Clay Whitehead, former Director of Telecommunications Policy of the Executive Office of the President, feels that revealing even the aggregate budget of the CIA would enable other nations to determine our intelligence capabilities. Interview with Clay Whitehead in New Haven, Conn., Mar. 26, 1974.

134. It is possible to argue that people outside of the CIA, not having access to secret information, cannot evaluate the impact of change on the agency or national security. Such an argument cannot be answered fully. It asks that ideas not be tested in the marketplace but that they be accepted on the basis of unchallengeable authority. So it is with secrecy. It is obviously difficult to define what should be kept secret in order not to impair the national security without knowing what is presently kept secret and why; the act of delimitation of the interests to be protected may in itself threaten national security. Among the facts which are currently being withheld on the basis of national security are: the executive order establishing the National Security Agency (NSA) in 1952, D. KAHN, *THE CODE BREAKERS* 675 (1967); the existence of the National Reconnaissance Office which spends over a billion dollars a year, Wash. Post, Dec. 9, 1973, at A9, col. 8; the number of Secret Service agents who were guarding the recently resigned Vice President, N.Y. Times, Feb. 14, 1974, at 21, col. 1; the reasons for the surveillance of former President Nixon's brother, N.Y. Times, Feb. 18, 1974, at 25, col. 1.

The CIA's Secret Funding and the Constitution

that aggregate budget figures for a related agency, the Defense Intelligence Agency, have been made known without any hint that such publication has caused significant national security problems.¹³⁵

The present funding and disclosure practices thus cannot be justified by invoking national security. They are unconstitutional and should be replaced. The Constitution requires, at a minimum, lump-sum appropriation and accounting, and an end to secret transfer of funds. Implementing these measures would prevent the funding and disclosure practices from clashing so blatantly with the requirements of the Clause. But if nothing beyond lump-sum appropriations by Congress and revelations of aggregate expenditures is accomplished, it may well be asked just how much has been gained. The achievement is small, but an achievement nonetheless. Possessing such information, the public—and Congress—could more accurately assess the nation's spending priorities, measuring the CIA's claim on the public treasury against other national endeavors. The public and the Congress would also have a notion of the level of CIA activity from year to year. Congress would have to live up to its constitutional responsibility of determining policy and priorities; forcing Congress as a whole to appropriate funds to the agency would mean that it could no longer pass that responsibility to the Executive—along with any potential blame for CIA activities that later prove unpopular. Congress would therefore have far greater incentive to inform itself about the activities for which it is providing the funds.

Congress could, of course, always require appropriation and disclosure¹³⁶ beyond lump-sum amounts, but it is hard to be optimistic that the courts would read the Clause as mandating more specific appropriations or more detailed disclosure. Yet such a reading is not implausible. If one examines the purposes of the Clause and asks that appropriations and disclosure practices seek to accomplish them to the fullest extent possible without posing an unreasonable threat to national security, then the Clause requires greater detail,¹³⁷ as to

135. See *The Forces that Monitor and Protect*, TIME, June 4, 1973, at 24.

136. Congressional interest in providing access to information which had been exempted from disclosure under the national security exception to the Freedom of Information Act, 5 U.S.C. § 552(b)(3) (1970), can be seen in a report by the House Government Operations Committee on the recent amendments to the Freedom of Information Act. See H.R. REP. NO. 876, 93d Cong., 2d Sess. 7-8, 11-14 (1974). President's Ford's veto of the amendment was overridden by Congress. See N.Y. TIMES, Nov. 22, 1974, at 21, col. 3. For the 1974 amendments themselves, see 1974 Amendments to the Freedom of Information Act, Pub. L. No. 93-502 (Nov. 21, 1974).

137. Even lump-sum appropriation and disclosure would prevent both Congress and the public from fixing or analyzing internal priorities within the CIA; it would also be impossible to determine if there has been waste, corruption, or spending prohibited by statute or by the Constitution.

both appropriations and accounting. The difficulty lies in determining how much detail; the constitutional text provides little guidance. But perhaps the present practices of most governmental agencies provide a standard. It might be argued on such a basis that appropriation by and publication of a program classification budget and an object classification budget are required for every agency, or possibly for every unit within an agency which spends more than a certain amount.¹³⁸ Whether such detail could reasonably be expected to result in placing an agent in danger or in compromising a tactical operation¹³⁹ seems a closer question than that raised by lump-sum disclosure. It does seem unlikely that the publication of figures which indicate that X million dollars are spent on rent, Y million on personnel, and Z million on data collection would have the feared results.¹⁴⁰ Where there is a reasonable probability that disclosure could substantially threaten national security interests, the recourse would be to appropriate and report these specific funds as expended for confidential purposes, as is now done by the AEC and other agencies.¹⁴¹ Details of other appropriations and expenditures would still be published.

138. It might be possible constitutionally to require specific appropriations and disclosure by any governmental unit which spends in excess of a certain sum (expressed either as a fixed dollar amount or as a percentage of the total budget) whether or not that unit is part of a larger agency. Even a figure as small as one hundredth of one percent of the aggregate budget would now be roughly \$90 million. Under such a system, units with a significant expenditure of funds would receive specific appropriations and be required to make reports. Such a requirement would increase congressional control over policy and priorities and would provide enormous amounts of information to the public. It would also eliminate the possibility that the CIA could simply be merged into a larger department to provide continuing concealment of expenditures from Congress and the public—a genuine possibility if the courts hold that the Clause requires only that each separate agency receive a lump-sum appropriation and make a lump-sum accounting.

While it might be difficult for courts to develop and apply a fixed numerical standard of this sort, such an action would not be unprecedented. See *White v. Regester*, 412 U.S. 755 (1973) (upholding Texas reapportionment plan which contained maximum population deviation between districts of 9.9 percent); *Gaffney v. Cummings*, 412 U.S. 735 (1973) (upholding Connecticut reapportionment plan which contained maximum population deviation between districts of 7.83 percent). Of these two decisions the dissenters wrote:

Since the Court expresses no misgivings about our recent decision in *Abate v. Mundt*, 403 U.S. 182... (1971), where we held that a total deviation of 11.9% must be justified by the State, one can reasonably surmise that a line has been drawn at 10%—deviations in excess of that amount are apparently acceptable only on a showing of justification by the State; deviations of less than that amount require no justification whatsoever.

Id. at 777 (Brennan, J., dissenting).

139. See note 106 *supra*.

140. Elliot Richardson, however, has indicated that publication of the aggregate budget would probably not cause any substantial difficulty, but that further breakdowns would allow other nations to detect the emphasis which we are placing on various areas, and that that would harm the national security. Interview with Elliot Richardson, *supra* note 133.

141. For example, if it were determined that disclosure of the total figure spent on covert personnel by the CIA could reasonably be expected to cause substantial damage to the national security, it could be omitted from the object classification "personnel" and lumped with "confidential purposes."

The CIA's Secret Funding and the Constitution

Constitutional requirements of appropriation and disclosure should apply not only to the CIA, but also to the National Security Agency, the Defense Intelligence Agency, and to the intelligence branches of the armed forces.¹⁴² It is estimated that these agencies, along with the CIA, spend between four and ten billion dollars annually;¹⁴³ they currently vary considerably in the extent of their disclosure of receipts and expenditures.¹⁴⁴ In each case the appropriation procedures and the level of disclosure of receipts and expenditures would be scrutinized to determine their relationship to the accomplishment of the goals which Congress set for the agency, and the effect on the interests sought to be protected by the legislation of alternatives involving greater disclosure. If disclosure could not reasonably be expected to do substantial damage to these interests,¹⁴⁵ fuller disclosure would be mandated. The minimum, as with the CIA, would be lump-sum appropriation and accounting.

Conclusion

The beginnings of the Cold War drastically altered the appropriations process and the availability of information about appropriations and expenditures, particularly in regard to agencies which operate in the area of foreign intelligence. The changes made it difficult, if not impossible, to accomplish the purposes for which Article I, § 9, Clause 7, was adopted. Congress ceased to exercise effective control over the purse by virtually delegating its appropriations power to another body; both Congress and the people were prevented from

142. See 119 CONG. REC. S6868 (daily ed. Apr. 10, 1973); *The Forces that Monitor and Protect*, TIME, June 4, 1973, at 24; MARCHETTI & MARKS, *supra* note 4, at 80.

143. Lyman Kirkpatrick, former Executive Director-Comptroller of the CIA, estimated intelligence expenditures at between four and six billion dollars annually. Interview with Lyman Kirkpatrick, *supra* note 77. Senator Proxmire estimated expenditures for foreign intelligence at approximately six billion dollars annually. 119 CONG. REC. S6868 (daily ed. Apr. 10, 1973). Andrew St. George estimated expenditures for intelligence at close to ten billion dollars annually. *The Cold War Comes Home*, HARPER'S MAG., Nov. 1973, at 78.

Perhaps one of the reasons for the disparity in estimates is the difficulty in agreeing as to which costs should be assigned to intelligence functions and which costs should be assigned to other budget categories. This is particularly true in regard to the intelligence activities of the various armed services. See 117 CONG. REC. 42923-34 (1971).

144. For example, the NSA, unlike the CIA, does not even provide information about construction. Its appropriations and expenditures are reported with those of the Defense Department, but the total of its expenditures are withheld. Letter from Roy R. Banner, General Counsel of the NSA, to Elliot E. Maxwell, Feb. 13, 1974 (on file with the Yale Law Journal). The NSA is even larger and more expensive than the CIA; estimates of its annual budget range from one to two billion dollars. Even the executive order establishing the NSA in 1952 has been withheld from the public. See D. KAHN, *THE CODE-BREAKERS*, 383-84 (Signet ed. 1973); 119 CONG. REC. S6868 (daily ed. Apr. 10, 1973) (remarks of Sen. Proxmire); MARCHETTI & MARKS, *supra* note 4, at 59-73.

145. See note 106 *supra*.

checking expenditures for constitutionality, legality, public acceptance, and waste. Congress must as a whole regain control over the appropriations power and must reassert its supervisory role over the CIA; the people must not be deprived of their right to know how the public money is being spent. There are certain instances in which the withholding of details about appropriations and expenditures is justified. But the importance of the information for the operation of a democratic society requires that such exceptions to the constitutionally mandated policy of disclosure be minimized,¹⁴⁶ and the public ensured access to the maximum possible budgetary information.

146. See *Soucie v. David*, 448 F.2d 1067, 1078 (D.C. Cir. 1971).

APPENDIX IV

XVI. DISCLOSURE OF BUDGET INFORMATION ON THE INTELLIGENCE COMMUNITY

At the present time the aggregate amount spent for the intelligence activities of the United States Government is classified. The individual budgets for the Central Intelligence Agency, the National Security Agency, and certain other units within the Department of Defense which gather national intelligence are likewise classified.

The budgets for these agencies—which spend billions of dollars annually—are kept not only from the American people but also from most Members of Congress. This secrecy prevents the public and most Members of Congress from knowing how much is spent on national intelligence and from determining whether that amount is consistent with other national needs and priorities. It prevents the public and most Members of Congress from knowing how much is spent by each of the national intelligence agencies and from determining whether that allocation among agencies is appropriate. Because funds for these agencies are concealed in the budgets of other agencies, the public and most Members of Congress cannot be certain that funds in the open appropriations are used for the purposes for which they were appropriated. No item in the overall federal budget is above suspicion as a hiding place for intelligence agency funds.¹ Finally, and most seriously, the present system of secrecy is inconsistent with the constitutional provision which states:

No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.²

¹ During the recent debate in the House of Representatives on the publication of the CIA's budget Congressman Koch described an encounter with DCI Helms, in which Congressman Koch asked about the size of the CIA budget and the number of CIA employees, questions that DCI Helms told Congressman Koch "we don't answer." As Congressman Koch described it, he then asked Mr. Helms "Are you telling me that I, a Member of Congress, do not have the right to know what the budget is, so that when I vote, I do not know what I am voting on?" DCI Helms said, "Yes . . . The item is placed in some other larger item, and you do not know." Congressman Koch then asked, "Do you mean that it might be included under Social Security?" to which DCI Helms replied, "We have not used that one yet, but that is not a bad idea." Cong. Rec. H9359, daily ed., 10/1/75, remarks of Rep. Koch.)

² U.S. Const., Art. I, Sec. 9, Cl. 7. For a fuller discussion of the constitutional and policy issues involved, see "The CIA's Secret Funding and the Constitution," 84 *Yale Law Journal* 608 (1975), "Fiscal Oversight of the Central Intelligence Agency: Can Accountability and Confidentiality Coexist?" 7 *New York University Journal of International Law and Politics* 493 (1974), and "Cloak and Ledger: Is CIA Funding Constitutional?" 2 *Hastings Constitutional Law Quarterly* 717 (1975).

A. THE PRESENT BUDGETARY PROCESS FOR INTELLIGENCE COMMUNITY AGENCIES AND ITS CONSEQUENCES

At present, the Director of Central Intelligence submits to the President recommendations for a consolidated national intelligence program budget. The consolidated national intelligence budget, as well as the budget requests from the various agencies within the intelligence community, are reviewed by the Office of Management and Budget (OMB) in the "same detail that [OMB] reviews the budget requests of any other executive branch agency."³ As former OMB Director Roy Ash described it:

The specific amounts of the CIA's approved appropriations request and the identification of the appropriation estimates in the President's annual Budget, within which these amounts are included, are formally provided by the Director of OMB to the chairmen of the Senate and House Appropriations Committees.⁴

In the past, special subcommittees of the House and Senate Appropriations Committees have considered the CIA budget in closed session; the chairman of the House Appropriations Committee noted that his subcommittee "tried and tried and tried to hold the secrecy of these matters as closely as we could."⁵

These practices have been changing. The entire House Defense Appropriation Subcommittee now scrutinizes the CIA budget. In September of 1975 the Chairman of the House Appropriations Committee invited all the Members of the House of Representatives to review the executive session hearings of the Defense Appropriations Subcommittee on the CIA's budget, although Members had to agree not to remove any documents from the room, not to take notes, and not to reveal the classified information to "unauthorized persons." While the Chairman invited this review by the Members, the full House Appropriations Committee voted not to receive figures on the CIA's budget from the Defense Appropriations Subcommittee.

Neither the Senate Appropriations Committee as a whole nor the Senate as a whole is informed, even in secret session, of the budget figures for the CIA, NSA or certain other intelligence units.

Once the subcommittees of the Appropriations Committee, agree upon the level of funding for the intelligence agencies, these funds are concealed in appropriation requests for other agencies on which the full Appropriations Committees and Senate and House of Representatives vote.

After congressional approval of these appropriations, the chairmen of the Senate and House Appropriations Committees notify the Office of Management and Budget of the size and true location of intelligence agency funds. Funds for the CIA are then transferred

³ Letter from Roy Ash to Senator Proxmire, 4/29/74, quoted in Cong. Rec. S9604, daily ed., 6/4/74, remarks of Sen. Proxmire. It might be argued that the intelligence budgets should be reviewed in even greater detail by OMB as neither the Congress as a whole nor the public can presently participate in the process of reviewing and debating the budget requests in this area.

⁴ Ash letter, 4/29/74.

⁵ Cong. Rec. H9363, daily ed., 10/1/75, remarks of Rep. Mahon. Until 1974, even the names of members of these special subcommittees were withheld from the public.

to the CIA from these appropriations.⁶ Former OMB Director Ash noted:

The transfer of funds to CIA . . . is accomplished by the issuance of Treasury documents routinely used for the transfer of funds from one government agency to another. The amount and timing of these transfers, . . . are approved by OMB.⁷

This whole process treats the CIA and other intelligence agencies in a manner radically different from other highly sensitive agencies of the United States Government, such as the Atomic Energy Commission and the Department of Defense. While intelligence agency budgets may require somewhat different handling, it is important that any special approach reflect real needs justifying departure from the careful processes which Congress has developed over the years for maintaining its power over the purse.

B. THE CONSTITUTIONAL REQUIREMENT

The present budgetary process apparently violates Article 1, Section 9, Clause 7 of the Constitution, which reads:

No Money shall be drawn from the Treasury, but in Consequence of Appropriations, made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

This constitutional provision was intended to insure that Congress would control the governmental purse and that the public would be informed of how Congress and the Executive spend public funds.⁸

In keeping with this constitutional mandate, Congress enacted 31 U.S.C. 66b(a), which provides that:

the Secretary of the Treasury shall prepare such reports for the information of the President, the Congress, and the public, as will present the results of the financial operations of the Government.

⁶ This is done pursuant to 50 U.S.C. 403f which authorizes the CIA to transfer to and receive from other government agencies funds as approved by the OMB.

⁷ Ash letter, 4/29/74. Under established procedures, funds approved by OMB for transfer to the CIA are limited to the amounts which the chairmen of the Senate and House Appropriations Committees specified to OMB.

⁸ See D. Robertson, *Debates and Other Proceedings of the Convention of Virginia, 1788* (Richmond, 1805), p. 326. The Chancellor of New York asked if the public were more anxious about any thing under heaven than the expenditure of their money?" 2 J. Elliot, *Debates in the Several States' Conventions on the Adoption of the Federal Constitution*, (Philadelphia: J. B. Lippencott, 1836), p. 347.

The clause was implemented during the first Congress. The act creating the Treasury Department required the Treasurer to annually present each House of Congress with "fair and accurate copies of all accounts" and a "true and perfect account of the state of the Treasury." Act of Sept. 2, 1789, Chapter 12, Section I, I Statute 65.

This Act was replaced by 31 U.S.C. 1029, which provides, "It shall be the duty of the Secretary of the Treasury annually to lay before Congress . . . an accurate, combined statement of the receipts and expenditures during the last preceding fiscal year of all public monies." The receipts, wherever practicable, were to be divided by ports, districts, and states, and the expenditures by each separate head of appropriation.

Fulfilling its charge, the Treasury Department publishes a *Combined Statement of Receipts, Expenditures, and Balances of the United States Government*, which

is recognized as the official publication of the details of receipt and outlay data with which all other reports containing similar data must be in agreement. In addition to serving the needs of Congress, [*the report is used by*] *the general public in its continuing review of the operations of Government.* [Emphasis added.]⁹

The *Combined Statement*, however, contains no entry for the Central Intelligence Agency, the National Security Agency or certain other intelligence units within the Department of Defense. While the figure for total funds received and expended by the United States Government is accurate, some funds listed as expended by particular agencies are, in fact, merely transferred from them to the Central Intelligence Agency.

William Colby, former Director of the CIA, has argued that the present practice is constitutional, maintaining that the Constitution permits concealment of funds for agencies such as the CIA. Not only does this position ignore the plain text of the Clause, but it is not supported by the debates, either at the Constitutional Convention or in the ratifying conventions in the various States.

Mr. Colby's argument relies chiefly on the fact that when the Statement and Account Clause was introduced it provided for annual publication of the account, but it was subsequently amended to allow congressional discretion over timing.¹⁰

The amendment was intended, however, not to permit concealment of expenditures from the full Congress and the American people, but rather to insure that the information would be made available in a fashion permitting its thorough comprehension.¹¹ Neither proponents nor opponents of the amendment argued against the assertion

⁹ U.S. Dep't of Treasury, *Combined Statement of Receipts, Expenditures and Balance of the United States Government* (1973), p. 1.

¹⁰ William E. Colby testimony, House Select Committee on Intelligence Hearings, 8/4/75, p. 120. Mr. Colby argued as follows:

"The so-called 'Statement and Account' clause . . . was not part of the initial draft [of the Constitution]. The language first suggested by George Mason would have required an annual account of public expenditures. James Madison, however, argued for making a change to require reporting 'from time to time.' Madison explained that the intent of his amendment was to 'leave enough to the discretion of the Legislature.' Patrick Henry opposed the Madison language because it made concealment possible. But when the debate was over, it was the Madison view that prevailed."¹¹

Mr. Colby also argued that the provision allowing Congress to keep their proceedings secret demonstrated the intent of the Framers to provide for concealment. That provision, unlike the Statement and Account Clause explicitly provides for secrecy; moreover, the Statement and Account Clause guarantees an accounting for *all* public money. For a fuller treatment of this argument, see "The CIA's Secret Funding and the Constitution," *Yale L.J.* 608 (1975).

It could be argued that the constitutional requirement is not violated as the *Combined Statement* provides an accurate total for receipts and expenditures. Under this theory all government funds could be appropriated to one government agency and secretly transferred to the other agencies. As long as the total appropriated and expended were published, the constitutional requirement would be fulfilled.

¹¹ 2 M. Farrand, *Records of the Federal Convention of 1787* New Haven: Yale University Press, 1966), pp. 618-19.

that the people had a "right to know" how their funds were being spent.¹²

It should also be noted that the proponents of congressional discretion did not argue that secrecy was needed. Rather they contended that leaving the interval of publication to be fixed by Congress would result in fuller disclosure, since no agency would be forced to publish an incomplete report to meet an inflexible and unrealistic deadline.¹³ A fixed schedule would result in statements that would be "incomplete"¹⁴ or "too general to be satisfactory."¹⁵ The proponents of the amendment ridiculed the possibility that granting Congress discretion would mean that information would be concealed forever; Congress would publish the reports at regular, frequent intervals.¹⁶

It has been implied that the constitutional requirement has been met, at least in the House of Representatives, in that all Members can examine the Defense Appropriations Subcommittee's executive session hearings on the CIA budget.¹⁷ As one Member of the House noted:

Secrecy in Government is distasteful to a free society, but preservation of our free society demands that we maintain a prudent cloak over vital intelligence operations, so long as the Representatives of the people have the right to examine what is covered—as they do in this situation.¹⁸

Knowledge on the part of *all* of Congress, would satisfy part of the constitutional requirement. As Justice Story noted, one of the purposes of the constitutional requirements is:

to secure regularity, punctuality and fidelity in the disbursements of the public money . . . it is highly proper, that Congress should possess the power to decide how and when any money should be applied for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation. . . . The power to control and direct the appropriations constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public speculation. . . . It is wise to interpose in a republic, every restraint, by which the public treasure, the common fund of all, should be applied with unshrinking honesty to such objects as legitimately belong to the common defense and the general welfare.¹⁹

But even if all of Congress had the information now held by the subcommittees of the Appropriations Committees, the Constitution would still be violated. The Constitution requires that the *public* know how its funds are being spent. The Constitution requires that the statement and account be made public "from time to time."²⁰ This re-

¹² D. Robertson, p. 326. See generally 3 M. Farrand, pp. 149-150.

¹³ 2 M. Farrand, pp. 618-619.

¹⁴ *Ibid.*, p. 618.

¹⁵ *Ibid.*

¹⁶ See D. Robertson, p. 326.

¹⁷ As was noted above at n. 368 this is not the case in the Senate.

¹⁸ Cong. Rec., H9360, daily ed., 10/1/75, remarks of Rep. Robinson.

¹⁹ 2 J. Story, *Commentaries on the Constitution of the United States*, Sec. 1348, pp. 222-223 (5th ed., 1891).

²⁰ Article I, Section 9, Clause 7 provides for publication in contrast to Article 2, Section 3, which provides that the President "shall from time to time give to the Congress Information on the State of the Union."

quirement was imposed to make congressional responsibility "more perfect"²¹ by allowing the people to check Congress and the executive through the publication of information on what "money is expended, for what purposes, and by what authority."²² As Chancellor Livingston pointed out:

You will give up to your state legislature everything dear and valuable; but you will give no power to Congress, because it may be abused; you will give them no revenue, because the public treasures may be squandered. But do you not see here a capital check? Congress are to publish, from time to time, an account of their receipts and expenditures. These may be compared together; and if the former, year after year, exceed the latter, the corruption will be detected, and the people may use the constitutional mode of redress.²³

The debates and later commentary indicate that the constitutional requirement was designed to allow citizens to chart the course of policy through an examination of governmental expenditures—to determine, for example, whether too much money is spent on defense and too little on education, or whether funds spent on bombers should be allocated to submarines. Publication of this information would also enable the people, with Congress, to determine whether expenditures by the executive conform to the intent of the appropriation. Publication of appropriations and expenditures would also provide an opportunity for the people to ascertain if both appropriations and expenditures were for constitutional purposes.²⁴

It is, however, unclear how much information on appropriations and expenditures is required by the Constitution to be published. No one at the Constitutional Convention disagreed with the assertion that it would be impossible to account for "every minute shilling." Even in the present disclosures of appropriations and expenditures of nonsensitive governmental agencies, there is a limit to the amount of detail which can be published.²⁵

The Supreme Court in *United States v. Robel*,^{25a} suggested a standard which might be used to fix the constitutional requirement particularly when claims that publication of the budget would damage national security are raised against the Government's duty to its citizens to publish from time to time a regular statement and account of re-

²¹ 2 J. Story, Sec. 1348, pp. 222-223.

²² *Ibid.*

²³ 2 J. Elliot, p. 345.

²⁴ As David Ramsey, one of the early commentators on the Constitution wrote: "If Congress applied any funds for purposes other than those set forth in the Constitution, they would have exceeded their powers. The Clause provides information so that '[t]he people of the United States who pay, are to be judges how far their money is properly applied.'"

"An address to the Freeman of South Carolina on the subject of the Federal Constitution," in Pamphlets on the Constitution of the United States, p. 374 (P. Ford, ed., 1888). See also *Flast v. Cohen*, 392 U.S. 83 (1968).

²⁵ Of course, a good deal more information, although not published, is available under the Freedom of Information Act.

^{25a} 389 U.S. 258 (1967).

coipts and expenditures of all public money. The Court held that "when legitimate concerns are expressed in a statute which imposes a substantial burden on First Amendment activities, Congress must achieve its goal by means which have the least drastic impact on the continued vitality of First Amendment freedoms."²⁶

Under this test the constitutionality of a level of disclosure of information on expenditures depends on whether there is another system of greater disclosure which, without endangering national security, would have a "less drastic" impact on the public's right to know how its funds are being spent. It is clear, however, that the present secrecy surrounding the appropriations and expenditures for intelligence—particularly the inflation of unspecified appropriations in which funds for intelligence are concealed—vitiates the constitutional guarantee.²⁷ Under the present system neither the public nor the Congress as a whole knows how much is being spent on national intelligence or by each intelligence agency. In addition, both Congress as a whole and the public are "deceived", as one Senator put it,²⁸ about the "true" size of other agency budgets. As certain unspecified general appropriations contain funds which are secretly transferred to the CIA, it is impossible for most Members of Congress or the public to know the exact amount of money which actually is destined for any government agency.²⁹ Congress is thus unable to set priorities through the allocation of funds,³⁰ or to determine if expenditures by the executive conform to congressional intent and are being spent wisely and well. Members of the public cannot determine with any confidence whether they agree with Congress' allocation of resources and cannot monitor expenditures by the executive branch.

²⁶ 389 U.S. 258, 268. While the public's right to information on governmental expenditures has not been accorded the "preeminent" status of the First Amendment, the test is an appropriate place to begin an analysis.

²⁷ As Justice Black wrote, "The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our republic." *New York Times Co. v. United States*, 403 U.S. 713 at 719 (1971). In the same case, Justice Stewart wrote, "In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the area of national defense and international affairs may be in an enlightened citizenry." *Id.* at 728. Justice Stewart's remarks apply equally well to the exercises of power by the Congress.

²⁸ Cong. Rec. S9602, daily ed., 6/4/74, remarks of Sen. Proxmire.

²⁹ Cong. Rec., H9361, daily ed., 10/1/75, remarks of Rep. Evans. As Congressman Evans recently noted, the secrecy surrounding these funds for the intelligence community is infectious: "When we are tucking it away in another pocket in the budget, we are also making a secret of something else that should not be a secret."

³⁰ See e.g., Cong. Rec., H9372, daily ed., 10/1/75, remarks of Rep. Leggett. Congressman Leggett noted, "How can we 'oversee' in any fashion if we have no knowledge of the Agency's command on our resources? How can we set budgetary priorities in a meaningful fashion, if we have no basis for comparing intelligence with unemployment, health, or other competing program areas?"

C. ALTERNATIVES TO CONCEALING INTELLIGENCE BUDGETS FROM CONGRESS AND THE PUBLIC

Within certain limits, Congress has the power to determine how information about the receipts and expenditures of public moneys is made available to the public.³¹

Congress could choose to publish CIA or NSA budgets and expenditures, for example, in detail equal to those of nonsensitive agencies. This approach, however, might threaten the security of intelligence operations or agents. Congress has available another model for budget disclosure to protect the security of certain activities.

Since 1793, certain agencies, such as the AEC, the FBI, and the Department of State have been appropriated funds specifically for "confidential purposes," which for security reasons, are exempt from normal accounting procedures.³² In each instance, however, Congress appropriates funds to the agency directly and publicly specifies the small percentage of the appropriation which is for "confidential purposes" and thus exempt from normal accounting procedures. Drawing on this practice, Congress obviously could publish detailed budgets for the intelligence agencies while providing a lump sum to each for "confidential purposes."

Congress could also devise other models. Congress could publish only the total appropriated to each intelligence agency.³³ As the Special Senate Committee To Study Questions Related to Secret and Confidential Documents³⁴ suggested in 1973, the publication

of such funds should provide members with the minimal information they should have about our intelligence operations. Such information would also end the practice of inflating certain budget figures for use to hide intelligence costs and would insure that all Members would know the true cost of each budget item they must vote upon.

³¹ *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1936). In fixing the level of detail revealed, however, a congressional decision cannot override a constitutional requirement such as that of Article I, Section 9, Clause 7, particularly as one purpose of that requirement was to serve as a check on Congress.

³² The first such statute authorized special procedures for sums relating to foreign "intercourse or treaty." By the Act of February 9, 1793, Congress provided: "that in all cases, where any sum or sums of money have issued, or shall hereafter issue, from the treasury, for the purposes of intercourse or treaty, the President shall be, and he hereby is authorized to cause the same to be duly settled annually with the accounting officers of the Treasury in the manner following, that is to say: by causing the same to be accounted for, specifically in all instances wherein the expenditures thereof may, in his judgment be made public; and by making a certificate or certificates, or causing the Secretary of State to make a certificate or certificates of the amount of such expenditures as he may think it advisable not to specify; and every such certificate shall be deemed a sufficient voucher for the sum or sums therein expressed to have been expended." [Act of Feb. 9, 1793, ch. 4, sec. 2, 1 Stat. 300, codified as 31 U.S.C. 107 (1970).]

³³ When the AEC was first established only a one line entry in the weapons account was included in the 1947 budget, p. 382.

³⁴ S. Res. 93-466, 93rd Cong., 1st Sess., 10/12/73, p. 16.

The Special Committee recommended that the Appropriations Committee itemize the Defense Department appropriations bill in order that the "total sums proposed to be appropriated for intelligence activities by each of the following agencies: Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, National Reconnaissance Office, and any separate intelligence units within the Army, Navy, and Air Force" could be revealed.³⁵

Finally, the Congress could decide that only the total budget figure for national intelligence be published. This would be the aggregate of funds provided to CIA, NSA, DIA, and the national intelligence components in the Departments of Defense, State, and Treasury. Although there may be problems defining what constitutes "national intelligence," the Director of Central Intelligence already prepares a national intelligence budget. The Director could, with the appropriate congressional committees determine what agencies or departments would be included.³⁶

The secrecy presently surrounding intelligence expenditures vitiates the constitutional guarantee. Even publishing one figure—the total appropriations and expenses for national intelligence—would have a salutary effect. It would eliminate the inflation of figures presently in the Budget and in the Combined Statement resulting from the concealment of intelligence agency funds in other agency appropriations and expenditures. Congress would be able to establish its priorities by placing the amount appropriated for national intelligence activities against other claims on the public purse; the public could make its own independent judgment about priorities.³⁷

As Senator Proxmire noted, publication of the aggregate budget for national intelligence might also have the effect of deterring potential adversaries by showing that the United States Government continues to spend sizeable amounts on intelligence.³⁸ As former DCI and Secretary of Defense Schlesinger noted, publication of this figure might also

³⁵ The Committee specifically did not request that any line items be revealed, although they did recommend the publication of the total number of personnel employed by each agency.

³⁶ The Senate Select Committee has proposed an oversight committee which would have jurisdiction over authorization for national intelligence activities of the United States Government, S. 93-2893.

³⁷ Former Director Colby has argued that publication of the CIA budget would not aid the public in any way. As he put it, "Knowledge of the Agency budget would not enable the public to make a judgment on the appropriateness of the amount without the knowledge of the product and the ways it is obtained." (William Colby testimony, House Select Committee on Intelligence, 8/4/75, p. 123.)

³⁸ Cong. Rec. S9603, daily ed., 6/4/74, Remarks of Senator Proxmire. However, as Senator Pastore noted, if the public figure declined "then the Russians and the Chinese Communists know that we are doing less, and that might let them become more audacious." *Id.* at S9605.

decrease speculation about the budget and focus the debate on intelligence on more significant issues.³⁹

Finally, the disclosure of any figures on intelligence expenditures might well increase the effectiveness of oversight of the intelligence agencies by both individual members of Congress and by the appropriately charged congressional committees. Members of the House might be encouraged to inspect executive session hearings on intelligence agency budgets; ⁴⁰ members of the oversight committees of both houses might be spurred to review the proposed budgets more closely, in anticipation of a possible debate on the figures.⁴¹

D. THE EFFECT UPON NATIONAL SECURITY OF VARYING LEVELS OF BUDGET DISCLOSURE

Even given the constitutional requirement, any disclosure of budgetary information on agencies in the Intelligence Community has been strongly resisted. In responding to a proposal for the publication of the total sum budgeted for the national intelligence community, Senator Stennis noted that:

[I]f it becomes law and is carried out, [it] would, as its practical effect, virtually destroy 80 to 90 percent of the effectiveness of much of our most important work in the field of intelligence.⁴²

And Congressman Burlison told the House that if an amendment which provided for publication of the total figure budgeted for the CIA were adopted, "i[t] will totally paralyze the intelligence community."⁴³

An examination of the effect on national security of publication of any data on the intelligence community budgets is difficult, in part because the examination itself must not be allowed to jeopardize the national security. Given the constitutional guarantee, however, the burden of proof must fall on those who would deny this information to

* During testimony before the Senate Select Committee, Mr. Schlesinger was asked whether there was a good reason for actually publishing a budget figure. He replied: "Only in that the public debate at the present time covers so wide a range that if you had an official number, the debate would tend to die down and focus on something more significant than whether we're spending \$11 billion on intelligence." (James Schlesinger testimony, 2/2/76, p. 54.)

Mr. Schlesinger was later asked whether he thought there was any chance of convincing the American people or the enemy of the truthfulness of any figure that is published, to which Mr. Schlesinger replied: "I do not believe that you could persuade the Soviets that that is a truthful figure, but I am not sure that that is our objective. Whether or not you could persuade the American public, I think there is a large segment of the American public that would be persuaded. . . ." Schlesinger, 2/2/76, p. 56.)

³⁹ See e.g., Cong. Rec., H9361, daily ed., 10/1/75, remarks of Rep. Obey.

⁴⁰ See e.g., Cong. Rec., S9603, daily ed., 6/4/74, remarks of Sen. Proxmire.

⁴¹ Cong. Rec. S9610-11, daily ed., 6/4/74, remarks of Sen. Stennis.

⁴² Cong. Rec. H9366, daily ed., 10/1/75, remarks of Rep. Burlison.

the public. The possible effects on the national security of certain levels of budget disclosure are examined below.⁴⁴

1. *The Effect on National Security of Publication of the National Intelligence Community Budget*

Many individuals familiar with the intelligence community agree that publication of a gross figure for national intelligence would not, in itself, damage the national security.

During his confirmation hearings as Director of Central Intelligence, James Schlesinger, former Secretary of Defense and past head of the OMB, told Senator Harry F. Byrd, Jr., in regard to the publication of the gross figure for national intelligence: "I think that the security concerns are minimal. The component figures, I would be more concerned about but for the gross national intelligence program figures, I think we could live with that on a security basis, yes."⁴⁵

Former DCI Helms told the Senate Select Committee that because it was so large, publication of a single figure for national intelligence might be "satisfactory."⁴⁶

While it has been suggested that the publication of even a total for the national intelligence budget would aid our enemies,⁴⁷ Mr. Schlesinger told the Senate Select Committee that our enemies "already know in the first place and it's broadly published. All that you would have is a confirmed official figure for information. That is

⁴⁴ There are many possible variants of budget disclosure running from the full disclosure policy governing such government agencies as the Department of Agriculture, through the budget disclosure utilized by the FBI and AEC which provides for a specific appropriation of funds for "confidential" purposes which are exempted from normal accounting requirements, to the possible disclosure of an aggregate figure for each national intelligence agency or for national intelligence as a whole. The Committee has not attempted to analyze the constitutional implications and effect on national security of each, but has focused on the disclosure of the global sum for national intelligence and the aggregate budgets of each intelligence agency.

⁴⁵ Quoted in Cong. Rec., S9603, daily ed., 6/4/74, remarks of Sen. Proxmire.

⁴⁶ Richard Helms testimony, 1/30/76, pp. 36, 37. Because the figure is so large, the introduction of expensive collection systems would not result in a "conspicuous bump" in the budget which would alert hostile powers to new activities by the United States. For a fuller discussion of this argument and its relationship to the publication of the CIA's aggregate budget, see pp. 378-381.

John Clarke, a former Comptroller of the CIA and an advisor to DCI Colby, was asked about the effects of publication of the total national intelligence budget and specifically whether publication of the figure would disclose the existence of, or the start of, a high-cost technical collection system. Mr. Clarke responded, "I have not run the studies on this, but I would be very hard pressed to find a case that I could support. The budget figures don't reflect that. They are down. Historically, at least they have been down inside of a larger figure and it doesn't really pop out in a big way. And it can be explained away." (John Clarke testimony, 2/5/76, p. 47.)

⁴⁷ See e.g. p. 376.

more or less in the public domain anyhow without public confirmation, without official confirmation."⁴⁸

Mr. Schlesinger described for the Select Committee the impact of publishing the total national intelligence budget:

I am not so concerned about that from the security aspect as some people are. I'm not sure I recommend it, but I'm not so concerned about it from the security aspect.

It could do some good in that there are some inflated notions around about how much the United States Government is actually spending on intelligence, and if you had an official statement, I think that would put the total amount of expenditures in better context for the public.^{48a}

2. *The Effect on National Security of Disclosure of the Total Appropriated to or Expended by Each National Intelligence Agency*

Publication of the total of the CIA's budget or of the other agencies' budgets has also been opposed. In a Freedom of Information Act suit, DCI Colby argued against publication of the Agency's budget total, as follows:

Publication of either the CIA budget or the expenditures made by CIA for any given year would show the amounts planned to be expended or in fact expended for objects of a confidential, extraordinary or emergency nature. This information would be of considerable value to a potentially hostile foreign government. For example, if the total expenditures made by the Agency for any particular year were publicized, these disclosures, when taken with other information publicly available . . . would enable such governments to refine their estimates of the activities of a major component of the United States intelligence community, including specifically the personnel strength, technological capabilities, clandestine operational activities, and the extent of the United States Government intelligence analysis and dissemination machinery. . . . The subsequent publication of similar data for other fiscal years . . . would enable a potentially hostile power to refine its estimates of trends in the United States Government intelligence efforts.

He continued:

The business of intelligence is to a large extent a painstaking collection of data and the formation of conclusions utilizing a multitude of bits and pieces of information. The revelation of one such piece, which might not appear to be of significance to anyone not familiar with the process of intelligence analy-

⁴⁸ Schlesinger, 2/2/76, p. 52. Mr. Schlesinger noted that, as the Intelligence Community has "no constituency," it tends to be "blamed for one thing or another," and "if you had an openly published figure . . . there would be pressure within the Congress at budget mark-up time to take a 15 percent or 20 percent whack at it just for good measure and . . . there is no way of having a public debate about the merits of intelligence." *Id.* at 51-52. Mr. Schlesinger's argument implies that Congress as a whole should not be given information because it should not be allowed to exercise its control over the purse.

sis (and which, therefore, might not arguably be said to be damaging to the national security) would, when combined with other similar data, make available . . . information of great use and which would result in significant damage to the national security of the United States.

He provided the following example of the impact on the nation's security of publication of the CIA's budget:

If it were learned that CIA expenditures have increased significantly in any one given year, but that there has been no increase in Agency personnel (apparent from traffic, cars in the parking lots, etc.) it would be possible to make some reasonable estimates and conclusions to the effect that, for example, CIA had developed a costly intelligence collection system which is technological rather than manpower intensive; and that such system is operational. Knowledge readily available at the time about reconnaissance aircraft photography, and other technology, can result in a more accurate analysis about a new collection system which would enable a potentially hostile power to take steps to counter its effectiveness . . . the development of the U-2 aircraft as an effective collection device would not have been possible if the CIA budget had been a matter of public knowledge. Our budget increased significantly during the development phase of that aircraft. That fact, if public, would have attracted attention. . . . If it had been supplemented by knowledge (available perhaps from technical magazines, industry rumor, or advanced espionage techniques) that funds were being committed to a major aircraft manufacturer and to a manufacturer of sophisticated mapping cameras, the correct conclusion would have been simple to draw. The U.S. manufacturers in question . . . would have become high priority intelligence targets. . . . And I'm sure that the Soviets would have taken steps earlier to acquire a capability to destroy very-high-altitude aircraft. They did indeed take these steps, with eventual success, but only sometime after the aircraft began operating over their territory—that is, once they had knowledge of a U.S. intelligence project.⁴⁹

A close examination of Mr. Colby's statement raises a number of questions as to the effect of publication of the CIA's aggregate budget. Although Mr. Colby notes that the CIA's total budget figure would allow governments to "refine their estimates of the activities of a major component of the United States intelligence community," he provides no evidence of *how* the publication of this one figure would increase the other government's knowledge of, for example, the clan-

⁴⁹ Defendant's Answers to Plaintiff's Interrogatories, *Halperin v. Colby*, Civil Action No. 75-0676, United States District Court for the District of Columbia, pp. 3-5. Other knowledgeable figures have reached different conclusions about the effect of publishing the CIA's budget. For example, Elliot Richardson, presently Secretary of Commerce and formerly Secretary of Defense, has stated that publication of the amount of the CIA's expenditures would not be damaging to the national security.

destine operational activities of the CIA.⁵⁰ There would, of course, be some "refinement" if it were known that the CIA's budget was \$X millions rather than \$X + 1 millions. Such refinement goes on at all times, but the question is whether such a gain by hostile powers is sufficient to justify overriding the constitutional requirement that the American people be told how their funds are spent. Having an officially acknowledged budget total does not signal to a hostile power manpower levels in the Clandestine Service, let alone the number of deep cover agents. Having an officially acknowledged aggregate figure does not reveal the cost of a reconnaissance vehicle, let alone its technical capability.

Mr. Colby has maintained that one-time publication of the total amount budgeted for the CIA would set a precedent and that information revealed through successive publication would provide hostile powers with insights into United States intelligence activities.

Of particular importance is Mr. Colby's claim that successive disclosures of the CIA's aggregate budget would eliminate the effectiveness of major technical collection systems like the U-2. A change in the CIA's total budget from one year to the next may be due to a number of factors: inflation, cutbacks in activities, a major reorganization, or long term gains in efficiency, for example. Assuming that an increase in the CIA's budget alerted hostile powers to some change in the Agency's activities, it would not in itself reveal what the new activity was—a new covert action project, more material procurement, or an increase in analytical capability through mechanization. For Mr. Colby's argument to be valid not only must the hostile power be able accurately to determine what the activity is—for instance, a new reconnaissance system—but that power would have to gain, covertly, an enormous amount of tightly guarded information, such as the technological capabilities of the vehicle and the surveillance systems which it contained.⁵¹ It would seem that a hostile power able to gain that information would be able to discover the total of the CIA's budget, a much more widely known figure. The possibility that a hostile power may pierce all the barriers designed to limit dissemination of closely held information cannot be used to justify denying the American people information which the Constitution guarantees them, and which is widely published, and which must be assumed to be within the grasp of hostile powers.

It is far from clear, moreover, that the development and introduction of a major new system will be announced by a change in the Agency's total budget.

The CIA budget may be large enough not to change substantially when a new system comes on line. A preliminary analysis of past CIA budgets has indicated that major new activities have not always resulted in "bumps" and that some "bumps" in the budget still are not

⁵⁰ Mr. Colby's statement ignores the fact that figures for the CIA budget are already widely publicized, although not officially confirmed. In this regard, it is interesting to note that the Central Intelligence Agency withdrew its objection to the far more detailed budget disclosure in *The CIA and the Cult of Intelligence* by Victor Marchetti and John D. Marks.

⁵¹ Beyond that, a hostile power would also have to have both a capability and an inclination to take those steps necessary to counter the system.

generally understood.⁵² Because of the importance of expensive technical collection systems, however, the Select Committee believes that the "conspicuous bump" argument deserves fuller study by the future oversight committees,⁵³ particularly in light of the results of the publication of the aggregate figure for national intelligence recommended by the Committee.

Finally, the claims about damage to the national security resulting from publication of the aggregate figure for each intelligence agency must be viewed in the light of far more detailed, and continuing, exposure of the budgets of other agencies vital to the national security. Enormous amounts of information have been provided to the public, for instance, about the work of the Department of Defense and the Atomic Energy Commission. Yet disclosure of funds appropriated and expended by these agencies did not and does not reveal vital national secrets. As Senator Symington noted, "There's nothing secret about the . . . cost of a nuclear aircraft carrier or the cost of the C-5A." But "knowledge of the cost does not equal knowledge of how the weapons operate or how they would be utilized." Similarly, knowledge "of the overall cost of intelligence does not in any way entail the release of information about how the various intelligence groups function, or plan to function."⁵⁴

E. THE ARGUMENT THAT PUBLICATION OF ANY INFORMATION WILL INEVITABLY RESULT IN DEMANDS FOR FURTHER INFORMATION

Some opponents of budget disclosure, while admitting that publishing aggregate figures for the intelligence community or intelligence agencies will not harm national security, have argued that publication of such figures will inevitably lead to demands for ever more detail. As Director Colby told the House Select Committee on Intelligence:

Moreover, once the budget total is revealed, the demand for details probably would grow. What does it include? What does it exclude? Why did it go up? Why did it go down? Is it worth it? How does it work?

⁵² One series of activities which did cause a bump in the CIA's budget was the Agency's activities in Laos, which were clearly known to powers hostile to the U.S. but were kept secret from the American people for many years.

⁵³ If new systems would be revealed by "bumps" in the CIA's budget a solution other than denying all information on CIA expenditures to the American people might be found. James Schlesinger has suggested that the published figure could be based on actual dollars spent by the CIA rather than on the dollars which could be spent; while obligations may fluctuate dramatically over the years, actual outlays "tend to move smoothly over a period of years." (Schlesinger, 2/2/76, p. 55.)

⁵⁴ 117 Cong. Rec., p. S42925, remarks of Sen. Symington. As Congressman Leggett of the House Armed Services Committee noted: "We have a book here, the Committee Report of about 4000 secrets of the Department of Defense in which they talk about the money for the SAM-D but yet do we know how the SAM-D works? The answer is: no.

"We have the details of the money for Thailand, and it is spelled out. But do we know what the money is actually used for? No.

"We can go through the FBI budget. Does that tell us what they are doing? The answer is: no." (Cong. Rec., H9371, daily ed., 10/1/75, remarks of Rep. Leggett.)

There would be revelations . . . which would gradually reduce the unknown to a smaller and smaller part of the total, permitting foreign intelligence services to concentrate their efforts in the areas where we would least like to attract their attention.

We—and I specifically mean in this instance both intelligence professionals and Members of Congress—would have an acute problem when the matter of our budget arose in the floor of the House or Senate. Those who knew the facts would have two unpleasant choices—to remain silent in the face of all questions and allegations, however inaccurate, or to attempt to keep the debate on accurate grounds by at least hinting at the full story.

My concern that one revelation will lead to another is based on more than a "feeling." The atomic weapons budget was considered very sensitive, and the Manhattan Project was concealed completely during World War II. With the establishment of the AEC, however, the decision was made to include in the 1947 budget a one-line item for the weapons account. That limitation was short-lived. By 1974, a 15-page breakout and discussion of the Atomic Weapons Program was being published. Were the intelligence budget to undergo a similar experience, major aspects of our intelligence strategy, capabilities and successes would be revealed.⁵⁵

⁵⁵ William Colby testimony, House Select Committee on Intelligence, 8/4/75, p. 122.

Senator McClellan described the consequences of publishing the total budget for national intelligence. "That is when you intend to put the camel's nose under the tent. That is the beginning. That is the wedge. You say you do not want to know all the details and how the money is spent. But, if you get the overall figures of one billion dollars or half-a-billion dollars or five billion, or whatever, then how are you going to know, how can you evaluate, how can you judge or make an intelligent judgment on whether that is too much or too little, whether it is being expended wisely or unwisely, except when you can get the details?"

"Row? You cannot know. And, if you receive these figures and if you end this ignorance as to the total amount, next you will want to end the ignorance as to the different agencies and how it is spent, and through whom it is spent. Next will want to end the ignorance of what it is spent for. Next you want to end the ignorance of how that intelligence is procured. There is no end to it." (Cong. Rec. S9609, daily ed., 6/4/74, remarks of Sen. McClellan.)

During the same debate Senator Humphrey noted that while he did not oppose the purpose of the disclosure of the total budget for national intelligence, "the problem is it is sort of like loose string or a ball of twine, so to speak, that starts to unravel." (*Id.* at S9606, remarks of Sen. Humphrey.) During a more recent House debate on the publication of the CIA's budget, Congressman Young described such publication as "the first baby step." (Cong. Rec. H9376, daily ed., 10/1/75, remarks of Rep. Young.)

As James Schlesinger told the Select Committee, "But one of the problems here is the camel's nose under the edge of the tent, and I think that that is the fundamental problem in the area. There are very few people who can articulately argue that the publication of these figures in and of themselves, if it stopped there, would be harmful. The argument is that then the pressure would build up to do something else, that once you have published for example the . . . budget, that the pressures would build up to reveal the kinds of systems that are being bought for that money, and it is regarded as the first step down a slippery slope for those who worry about those kinds of things." (Schlesinger, 2/2/76, p. 53.)

There are several problems with this argument. While there obviously will be pressure, the problem as Mr. Helms agreed "is not insuperable."⁵⁶ For many years Congress has refused to reveal the figures for the national intelligence budget and the aggregate budgets of the intelligence agencies. It seems unlikely that given this past history, Congress will suddenly reverse itself and fail to protect information whose disclosure would harm the national security. Much more likely is that Congress will, as Senator Church proposed, "establish very stringent rules when it came to handling the money figures."⁵⁷

More importantly, as Congressman Koch noted:

The real fear on both sides of the aisle that some have expressed is, "Gee, if we do that, that is the first step."

Maybe it is, but, whatever the second step is, it is what this House wants it to be, and if this House decides that this is the last step, so be it. If the House decides that it wants to have more information it will have to have a vote on it.

What is wrong with that? That is what is called the democratic system. We are sent here to be part of that system.⁵⁸

It is instructive to note in this context the amount of budgetary information provided on the Atomic Energy Commission. That information has constantly increased. Yet each step of the way, Congress has had the opportunity to limit disclosure and chose not to. This experience confirms congressional control over the process. More importantly the national security was not harmed by disclosure of a substantial amount of budgetary information about an agency and a weapons program crucial to the defense of the United States.

Finally, the argument is without limits. It could be used to justify much greater secrecy. It could be used to justify the withholding of all information on the Defense Department because information which the Congress wishes to protect would be threatened by pressures caused by the publication of any information on that Department.

F. THE ARGUMENT THAT THE UNITED STATES SHOULD NOT PUBLISH INFORMATION OF ITS INTELLIGENCE BUDGET SINCE NO OTHER GOVERNMENT IN THE WORLD DOES

It has also been argued that the United States should not publish its intelligence budget when no other government in the world does.⁵⁹ Yet as Congressman Moss noted:

I point out to those Members who do not know the difference between this country and others, and the fact that we become unique in disclosing this that, thank God, we do become unique. We have grown great and maintained our strength as an open society and we should continue to be an open society to the maximum consistent with our true security requirements.

⁵⁶ Helms, 1/30/76, p. 39.

⁵⁷ *Ibid.*

⁵⁸ Cong. Rec. H9359, daily ed., 10/1/75, remarks of Rep. Koch.

⁵⁹ William Colby testimony, House Select Committee on Intelligence, 8/4/75, p. 120.

I do not want us to emulate the Russians or the Chinese or even our British brethren in the operation of the various agencies of their governments under their official secrets acts and other areas. I want us to realize the strength that we gain from an alert electorate and informed electorate.⁶⁰

G. SUMMARY AND CONCLUSION

The budget procedures which presently govern the Central Intelligence Agency and other agencies of the intelligence community prevent most Members of Congress as well as the public from knowing how much money is spent by any of these agencies or even how much is spent on intelligence as a whole. In addition, most Members of Congress and the public are deceived about the appropriations and expenditures of other government agencies whose budgets are inflated to conceal funds for the intelligence community. The failure to provide this information to the public and to the Congress prevents either from effectively ordering priorities and violates Article 1, Section 9, Clause 7, which provides that:

No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

The Committee finds that publication of the aggregate figure for national intelligence would begin to satisfy the constitutional requirement and would not damage the national security. While substantial questions remain about the relationship between the constitutional requirement and the national security, the Committee recommends the annual publication of the aggregate figure. The Committee also recommends that any successor committees study the effects of publishing more detailed information on the budgets of the intelligence agencies.

⁶⁰ Cong. Rec. H9363, daily ed., 10/1/75, remarks of Rep. Moss.

APPENDIX V

OPEN BUDGET: PROS, CONS, AND RELEVANT STATEMENTS

The question of whether budget figures for the Intelligence Community, or more particularly the CIA, should be disclosed publicly has been debated for years. Thus far, Congress has upheld the need for secrecy. On 4 June 1974 the Senate by a vote of 55 to 33 defeated an amendment which would have required disclosure of the total amount of funds requested for the National Intelligence Program. On 1 October 1975 the House defeated by a vote of 267 to 147 an attempt to require disclosure of the total dollar figure of the Central Intelligence Agency budget. The debate is not over, for Section 13(a)(8) of S. Res. 400 directs the Senate Select Committee on Intelligence to study whether disclosure of amounts of funds authorized for intelligence activities is in the public interest and to report on this question no later than 1 July 1977. The major arguments for and against disclosure are outlined below, as are views of the President, Vice President, the previous Director-designate, and three former Directors.

Pro Disclosure Arguments

--The Constitution requires public accounting for all Government expenditures. Article I, Section 9, Clause 7 states:

"No Money shall be drawn from the Treasury but in Consequence of Appropriations made by law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

Failure to publish budget figures could be construed as a prima facie violation of this Clause.

--The reason for requiring publication of expenditures "from time to time" in Article I, Section 9, Clause 7 was to insure that the accountings would be complete, not rushed and inadequate because of a deadline. According to records of the Virginia ratification convention, the supporters of inclusion dismissed the possibility that it would be used to justify budget secrecy.

--The public is deprived of its right to participate in the affairs of Government because it does not have adequate information. Without specific budget information the public cannot determine if Government funds are being properly allocated. In addition, since funds can be transferred from other agencies, the public cannot be sure that other appropriations represent the true allocation of funds for that area of concern or agency.

--Publication of a simple budget figure for intelligence activities would eliminate harmful speculation about spending levels and result in public acceptance of intelligence expenditures.

--The total budget figure for the entire Intelligence Community has not changed markedly over the past seven years. Thus, public disclosure of the total figure would not reveal any tell-tale fluctuations which could alert potentially hostile powers to new initiatives in collection or analyses of intelligence.

Pro Secrecy Arguments

--Expenditures for intelligence activities are reflected in the Treasurer's Statement and Account of Receipts. The House Appropriations Committee in the Report on the Fiscal 1978 Defense Appropriations Bill cited a brief which concluded that the current practice is constitutional.

--The Constitutional debates indicate that one of the reasons for the phrasing of the Statements and Accounts Clause was to permit secrecy in matters which required it. There is also much historical precedent for budget secrecy. In addition, there are similar provisions today for certain FBI funds and for certain Navy and Atomic Energy Commission expenditures.

--Public debate over expenditures for intelligence activities would not be aided by disclosure of total figures. The degree of disclosure necessary for informed public debate and eventual acceptance of such expenditures would be destructive of intelligence sources and methods.

--Once a total figure is published, the pressure for more detailed disclosure will constantly increase. The growth in detail of the budget of the Atomic Energy Commission is an example. Each new bit of information, coupled with what is already available from other sources, may give the experienced analyst of a potentially hostile power greater insight into the direction, scope and nature of intelligence activities. For example, one single fact released by the Chinese permitted U.S. intelligence analysts to piece together a detailed history of economic developments in China since the Revolution.

--Once the total budget figure is placed into the legislative process, it will be open to debate on the floor of Congress at least six times each budget year, and the potential for harmful disclosures in these floor debates would be enormous. During these debates, members of oversight committees will be expected to defend the total figure and may be challenged on its component parts. It will be difficult for them to refute unfounded claims made by those attacking the budget without revealing sensitive information. For example, there could be charges made on the floor that particular collection programs were useless, or that there were excessive monies being paid certain foreign leaders and that these funds were being wasted, etc. It would be hard for oversight committee members to meet and fend off these attacks without going into details and revealing sensitive matters.

--Publication of part of the Intelligence budget would raise debate over what was and was not included in the published figures, leading to rapid erosion of the secrecy of the portions withheld. The same problems would result from the publication of the total Agency budget, the total Intelligence Community budget, or any other figure covering "intelligence." Immediate demands for a precise explanation of activities covered and not covered by the term "intelligence activities" would be made.

--Even if there have not been tell-tale fluctuations in the intelligence budget for the past seven years, there is no guarantee that they will not occur in the future. Moreover, there have been notable fluctuations in the budgets of individual Community members and the Community as a whole in earlier years which, if disclosed, could have resulted in the discovery of intelligence sources and methods by potentially hostile powers. The jump in the Agency budget resulting from the development of the U-2 is but one example. We should not destroy the protection which may be necessary for future budgets because disclosure of recent budgets may not have given away important information.

--Since it is publicly acknowledged that funds for the CIA and the Defense elements of the Intelligence Community are included within the Defense budget, identification of the specific amounts would not give the public additional information regarding the "actual" budgets of agencies and departments not covered by the Defense budget. For the same reason, Members of Congress need not fear that they are unknowingly voting funds for CIA when they vote on any non-Defense appropriation.

Relevant Statements on Budget Disclosure

The New York Times, in a 7 July 1976 story based upon interviews with then candidate Carter and with his aides and advisors, states that President Carter's foreign policy program will include making public the budget of the Central Intelligence Agency. In addition, then President-elect Carter was present at a 23 December 1976 news conference during which Theodore Sorensen, then CIA Director-designate, stated his view that the CIA budget could be made public. The President has made no public statements on this issue since his election.

The St. Paul Dispatch of 24 September 1975 reports then Senator Mondale as calling for limited budget disclosure of intelligence operations and as saying that "blind" appropriations are not constitutional. The following month, during a speech at Dennison College, then Senator Mondale stated, "I believe we must make the budget for these clandestine activities come out of the State Department and the Defense Department budgets and be subject to strict impersonal (sic) authorization."

In his confirmation hearings as Secretary of Defense in June 1973, former Director James Schlesinger stated that indicating the total figure of national intelligence programs might be acceptable. He added, however, that he would not advocate disclosure because of the resulting risks to intelligence sources and methods.

Former Director William Colby, during his confirmation hearings in July 1973, stated that disclosure of a single figure would not be a security problem but opposed the move because it would lead to further requests. Two years later he stated his opposition to disclosure of even a total figure.

In his dealings with Congress, former Director George Bush consistently stressed the need for budget secrecy.

APPENDIX VI

166

OCTOBER TERM, 1973

Syllabus

418 U. S.

UNITED STATES ET AL. V. RICHARDSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 72-885. Argued October 10, 1973—Decided June 25, 1974

Respondent, as a federal taxpayer, brought this suit for the purpose of obtaining a declaration of unconstitutionality of the Central Intelligence Agency Act, which permits the CIA to account for its expenditures "solely on the certificate of the Director . . ." 50 U. S. C. § 403j (b). The complaint alleged that the Act violated Art. I, § 9, cl. 7, of the Constitution insofar as that clause requires a regular statement and account of public funds. The District Court's dismissal of the complaint for, *inter alia*, respondent's lack of standing under *Flast v. Cohen*, 392 U. S. 83, was reversed by the Court of Appeals. That court held that respondent had standing as a taxpayer on the ground that he satisfied *Flast's* requirements that the allegations (1) challenge an enactment under the Taxing and Spending Clause of Art. I, § 8, and show (2) a "nexus" between the plaintiff's status and a specific constitutional limitation on the taxing and spending power. *Held*: Respondent lacks standing to maintain this suit. Pp. 171-180.

(a) *Flast*, which stressed the need for meeting the requirements of Art. III, did not "undermine the salutary principle . . . established by *Frothingham* [*v. Mellon*, 262 U. S. 447] . . . that a taxpayer may not 'employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.'" Pp. 171-174.

(b) Respondent's challenge, not being addressed to the taxing or spending power but to the statutes regulating the CIA's accounting and reporting procedures, provides no "logical nexus" between his status as "taxpayer" and the asserted failure of Congress to require more detailed reports of expenditures of the CIA. Pp. 174-175.

(c) Respondent's claim that without detailed information on the CIA's expenditures he cannot properly follow legislative or executive action and thereby fulfill his obligations as a voter is a generalized grievance insufficient under *Frothingham* or *Flast* to show that "he has sustained or is immediately in danger of

166

Opinion of the Court

sustaining a direct injury as the result" of such action. *Ex parte Lévit*, 302 U. S. 633, 634. Pp. 176-178.

465 F. 2d 844, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 180. DOUGLAS, J., filed a dissenting opinion, *post*, p. 197. BRENNAN, J., filed a dissenting opinion, *post*, p. 235. STEWART, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 202.

Solicitor General Bork argued the cause for the United States et al. On the brief were former *Solicitor General Griswold*, *Assistant Attorney General Wood*, *Deputy Solicitor General Lacovara*, *Harriet S. Shapiro*, *Walter H. Fleischer*, and *William D. Appl*.

Osmond K. Fraenkel argued the cause for respondent. With him on the brief were *Melvin L. Wulf*, *Burt Neuborne*, and *James R. Kelley*.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to determine whether the respondent has standing to bring an action as a federal taxpayer¹ alleging that certain provisions concerning public reporting of expenditures under the Central Intelligence Agency Act of 1949, 63 Stat. 208, 50

¹ Respondent's complaint alleged that he was "a member of the electorate, and a loyal citizen of the United States." At the same time, he states that he "does not challenge the formulation of the issue contained in the petition for certiorari." Brief for Respondent in Opposition to Pet. for Cert. 1. The question presented there was: "Whether a federal taxpayer has standing to challenge the provisions of the Central Intelligence Act which provide that appropriations to and expenditures by that Agency shall not be made public, on the ground that such secrecy contravenes Article I, section 9, clause 7 of the Constitution." Pet. for Cert. 2.

U. S. C. § 403a *et seq.*, violate Art. I, § 9, cl. 7, of the Constitution which provides:

“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”

Respondent brought this suit in the United States District Court on a complaint in which he recites attempts to obtain from the Government information concerning detailed expenditures of the Central Intelligence Agency. According to the complaint, respondent wrote to the Government Printing Office in 1967 and requested that he be provided with the documents “published by the Government in compliance with Article I, section 9, clause (7) of the United States Constitution.” The Fiscal Service of the Bureau of Accounts of the Department of the Treasury replied, explaining that it published the document known as the Combined Statement of Receipts, Expenditures, and Balances of the United States Government. Several copies of the monthly and daily reports of the office were sent with the letter. Respondent then wrote to the same office and, quoting part of the CIA Act, asked whether this statute did not “cast reflection upon the authenticity of the Treasury’s Statement.” He also inquired as to how he could receive further information on the expenditures of the CIA. The Bureau of Accounts replied stating that it had no other available information.

In another letter, respondent asserted that the CIA Act was repugnant to the Constitution and requested that the Treasury Department seek an opinion of the Attorney General. The Department answered declining to seek such an opinion and this suit followed. Respondent’s complaint asked the court to “issue a perma-

nent injunction enjoining the defendants from publishing their 'Combined Statement of Receipts, Expenditures and Balances of the United States Government' and representing it as the fulfillment of the mandates of Article I Section 9 Clause 7 until same fully complies with those mandates."² In essence, the respondent asked the federal court to declare unconstitutional that provision of the Central Intelligence Agency Act which permits the Agency to account for its expenditures "solely on the certificate of the Director" 50 U. S. C. § 403j (b). The only injury alleged by respondent was that he "cannot obtain a document that sets out the expenditures and receipts" of the CIA but on the contrary was "asked to accept a fraudulent document." The District Court granted a motion for dismissal on the ground respondent lacked standing under *Flast v. Cohen*, 392 U. S. 83 (1968), and that the subject matter raised political questions not suited for judicial disposition.

The Court of Appeals sitting en banc, with three judges dissenting, reversed, 465 F. 2d 844 (CA3 1972), holding that the respondent had standing to bring this action.³ The majority relied chiefly on *Flast v. Cohen*,

² App. 15-16. Respondent's complaint also asked for a three-judge district court and this application was denied by a single District Judge with directions to place the case on the calendar in the usual manner. The Court of Appeals, in the judgment under review, ordered that, on remand, the case be considered by a three-judge court. The District Court has granted a stay of respondent's motion to convene a three-judge court, pending disposition of this petition for writ of certiorari. On September 26, 1972, the Third Circuit denied a petition for mandamus, filed by respondent, to compel the immediate convening of a three-judge court.

³ The majority found that the respondent had standing to bring this suit as a taxpayer. One judge held that he had standing as a citizen. This case was originally argued before a panel consisting of two Circuit Judges and one District Judge sitting by designa-

supra, and its two-tier test that taxpayer standing rests on a showing of (a) a "logical link" between the status as a taxpayer and the challenged legislative enactment, i. e., an attack on an enactment under the Taxing and Spending Clause of Art. I, § 8, of the Constitution; and (b) a "nexus" between the plaintiff's status and a specific constitutional limitation imposed on the taxing and spending power. 392 U. S., at 102-103. While noting that the respondent did not directly attack an appropriations act, as did the plaintiff in *Flast*, the Court of Appeals concluded that the CIA statute challenged by the respondent was "integrally related," 465 F. 2d, at 853, to his ability to challenge the appropriations since he could not question an appropriation about which he had no knowledge. The Court of Appeals seemed to rest its holding on an assumption that this case was a prelude to a later case challenging, on the basis of information obtained in this suit, some particular appropriation for or expenditure of the CIA; respondent stated no such an intention in his complaint. The dissenters took a different approach urging denial of standing principally because, in their view, respondent alleged no specific injury but only a general interest common to all members of the public.

We conclude that respondent lacks standing to maintain a suit for the relief sought and we reverse.

tion. After a second round of briefs, the Court of Appeals determined *sua sponte* to hear the case en banc without further argument. The District Judge sat with the Court of Appeals en banc. This point was not raised in the question presented in the petition for certiorari but the Solicitor General, in a footnote, called attention to the District Judge's participation. He expressed the view that, although 28 U. S. C. § 46 (c) limits en banc hearings to circuit judges in active service (and any retired circuit judge who participated in the initial hearing), the error was harmless. Brief for United States 5-6, n. 4. In these circumstances we need not reach the question.

I

As far back as *Marbury v. Madison*, 1 Cranch 137 (1803), this Court held that judicial power may be exercised only in a case properly before it—a “case or controversy” not suffering any of the limitations of the political-question doctrine, not then moot or calling for an advisory opinion. In *Baker v. Carr*, 369 U. S. 186, 204 (1962), this limitation was described in terms that a federal court cannot

“pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.”
Liverpool Steamship Co. v. Commissioners of Emigration, 113 U. S. 33, 39.”

Recently in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U. S. 150 (1970), the Court, while noting that “[g]eneralizations about standing to sue are largely worthless as such,” *id.*, at 151, emphasized that “[o]ne generalization is, however, necessary and that is that the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to ‘cases’ and ‘controversies.’” *

Although the recent holding of the Court in *Flast v. Cohen*, *supra*, is a starting point in an examination of respondent’s claim to prosecute this suit as a taxpayer, that case must be read with reference to its principal predecessor, *Frothingham v. Mellon*, 262 U. S. 447 (1923). In *Frothingham*, the injury alleged was that the congressional enactment challenged as unconstitutional would, if implemented, increase the complain-

* 397 U. S., at 151. See also K. Davis, *Administrative Law Treatise* § 22.09-6, p. 753 (Supp. 1970).

ant's future federal income taxes.⁵ Denying standing, the *Frothingham* Court rested on the "comparatively minute[,] remote, fluctuating and uncertain," *id.*, at 487, impact on the taxpayer, and the failure to allege the kind of direct injury required for standing.

"The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.*, at 488.

When the Court addressed the question of standing in *Flast*, Mr. Chief Justice Warren traced what he described as the "confusion" following *Frothingham* as to whether the Court had announced a constitutional doctrine barring suits by taxpayers challenging federal expenditures as unconstitutional or simply a policy rule of judicial self-restraint. In an effort to clarify the confusion and to take into account intervening developments, of which class actions and joinder under the Federal Rules of Civil Procedure were given as examples, the Court embarked on "a fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayer suits." 392 U. S., at 94. That re-examination led, however, to the holding that a "taxpayer will have standing consistent with Article III to invoke federal

⁵ In *Frothingham*, the plaintiff sought to enjoin enforcement of the Federal Maternity Act of 1921, 42 Stat. 224, which provided for financial grants to States with programs for reducing maternal and infant mortality. She alleged violation of the Fifth Amendment's Due Process Clause on the ground that the legislation encroached on an area reserved to the States.

judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions *which operate to restrict the exercise of the taxing and spending power.*" *Id.*, at 105-106. (Emphasis supplied.) In so holding, the Court emphasized that Art. III requirements are the threshold inquiry:

"The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness . . . upon which the court so largely depends for illumination of difficult constitutional questions.'" *Id.*, at 99, citing *Baker v. Carr*, 369 U. S., at 204.

The Court then announced a two-pronged standing test which requires allegations: (a) challenging an enactment under the Taxing and Spending Clause of Art. I, § 8, of the Constitution; and (b) claiming that the challenged enactment exceeds specific constitutional limitations imposed on the taxing and spending power. 392 U. S., at 102-103. While the "impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers," *id.*, at 85, had been slightly lowered, the Court made clear it was reaffirming the principle of *Frothingham* precluding a taxpayer's use of "a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *Id.*, at 106. The narrowness of that holding is emphasized by the concurring opinion of MR. JUSTICE STEWART in *Flast*:

"In concluding that the appellants therefore have standing to sue, we do not undermine the salutary principle, established by *Frothingham* and reaffirmed

today, that a taxpayer may not 'employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.'" *Id.*, at 114.

II

Although the Court made it very explicit in *Flast* that a "fundamental aspect of standing" is that it focuses primarily on the *party* seeking to get his complaint before the federal court rather than "on the issues he wishes to have adjudicated," *id.*, at 99, it made equally clear that

"in ruling on [taxpayer] standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.*, at 102.⁶

We therefore turn to an examination of the issues sought to be raised by respondent's complaint to determine whether he is "a proper and appropriate party to invoke federal judicial power," *ibid.*, with respect to those issues.

We need not and do not reach the merits of the constitutional attack on the statute; our inquiry into the "substantive issues" is for the limited purpose indicated above. The mere recital of the respondent's claims and an examination of the statute under attack demonstrate how far he falls short of the standing criteria of *Flast* and how neatly he falls within the *Frothingham*

⁶ In some cases, the operative effect of this "look at the substantive issues" could lead to the conclusion that the "substantive issues" were nonjusticiable and in consequence no one would have standing. See *Gilligan v. Morgan*, 413 U. S. 1, 9 (1973); *Flast v. Cohen*, 392 U. S. 83, 95 (1968); *Pas v. Ullman*, 367 U. S. 497, 508-509 (1961).

holding left undisturbed. Although the status he rests on is that he is a taxpayer, his challenge is not addressed to the taxing or spending power, but to the statutes regulating the CIA, specifically 50 U. S. C. § 403j (b). That section provides different accounting and reporting requirements and procedures for the CIA, as is also done with respect to other governmental agencies dealing in confidential areas.⁷

Respondent makes no claim that appropriated funds are being spent in violation of a "specific constitutional limitation upon the . . . taxing and spending power . . ." 392 U. S., at 104. Rather, he asks the courts to compel the Government to give him information on precisely how the CIA spends its funds. Thus there is no "logical nexus" between the asserted status of taxpayer and the claimed failure of the Congress to require the Executive to supply a more detailed report of the expenditures of that agency.⁸

The question presented thus is simply and narrowly whether these claims meet the standards for taxpayer standing set forth in *Flast*; we hold they do not. Respondent is seeking "to employ a federal court as a forum in which to air his generalized grievances about the conduct of government." 392 U. S., at 106. Both *Frothingham* and *Flast*, *supra*, reject that basis for standing.

⁷ See 28 U. S. C. § 537 (Federal Bureau of Investigation); 31 U. S. C. § 107 (foreign affairs); 42 U. S. C. § 2017 (b) (Atomic Energy Commission).

⁸ Congress has taken notice of the need of the public for more information concerning governmental operations, but at the same time it has continued traditional restraints on disclosure of confidential information. See Freedom of Information Act, 5 U. S. C. § 552; *Environmental Protection Agency v. Mink*, 410 U. S. 73 (1973).

III

The Court of Appeals held that the basis of taxpayer standing

"need not always be the appropriation and the spending of [taxpayer's] money for an invalid purpose. The personal stake may come from an injury in fact even if it is not directly economic in nature. *Association of Data Processing Organizations, Inc. v. Camp*, [397 U. S. 150,] 154 (1970)." 465 F. 2d, at 853.*

The respondent's claim is that without detailed information on CIA expenditures—and hence its activities—he cannot intelligently follow the actions of Congress or the Executive, nor can he properly fulfill his obligations as a member of the electorate in voting for candidates seeking national office.

This is surely the kind of a generalized grievance described in both *Frothingham* and *Flast* since the im-

* The Court of Appeals thus appeared to rely on *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U. S. 150 (1970). Abstracting some general language of that opinion from the setting and controlling facts of that case, the Court of Appeals overlooked the crucial factor that standing in that case arose under a specific statute, Bank Service Corporation Act of 1962, 76 Stat. 1132, 12 U. S. C. § 1861. The petitioners in *Data Processing* alleged competitive economic injury to private business enterprise due to a ruling by the Comptroller of the Currency permitting national banks to sell their data processing services to other banks and to bank customers whose patronage the data processing companies sought. We recognized standing for those private business proprietors who were engaged in selling the same kind of services the Comptroller allowed banks to sell; we held only that the claims of impermissible competition were "arguably . . . within the zone of interests protected" by § 4 of the Bank Service Corporation Act. 397 U. S., at 156. In short, Congress had provided competitor standing. The Court saw no indication that Congress had sought to preclude judicial review of administrative rulings of the Comptroller of the Currency as to the limitations Congress placed on national banks.

pact on him is plainly undifferentiated and "common to all members of the public." *Ex parte Lévit*, 302 U. S. 633, 634 (1937); *Laird v. Tatum*, 408 U. S. 1, 13 (1972). While we can hardly dispute that this respondent has a genuine interest in the use of funds and that his interest may be prompted by his status as a taxpayer, he has not alleged that, as a taxpayer, he is in danger of suffering any particular concrete injury as a result of the operation of this statute. As the Court noted in *Sierra Club v. Morton*, 405 U. S. 727 (1972):

"[A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." *Id.*, at 739.

Ex parte Lévit, *supra*, is especially instructive. There Lévit sought to challenge the validity of the commission of a Supreme Court Justice who had been nominated and confirmed as such while he was a member of the Senate. Lévit alleged that the appointee had voted for an increase in the emoluments provided by Congress for Justices of the Supreme Court during the term for which he was last elected to the United States Senate. The claim was that the appointment violated the explicit prohibition of Art. I, § 6, cl. 2, of the Constitution.¹⁰ The Court disposed of Lévit's claim, stating:

"It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he *has sustained or is immedi-*

¹⁰ "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time"

ately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." 302 U. S., at 634. (Emphasis supplied.)

Of course, if *Lévit*'s allegations were true, they made out an arguable violation of an explicit prohibition of the Constitution. Yet even this was held insufficient to support standing because, whatever *Lévit*'s injury, it was one he shared with "all members of the public." Respondent here, like the petitioner in *Lévit*, also fails to clear the threshold hurdle of *Baker v. Carr*, 369 U. S., at 204. See *supra*, at 171, and *Flast, supra*.¹¹

¹¹ Although we need not reach or decide precisely what is meant by "a regular Statement and Account," it is clear that Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest. It is therefore open to serious question whether the Framers of the Constitution ever imagined that general directives to the Congress or the Executive would be subject to enforcement by an individual citizen. While the available evidence is neither qualitatively nor quantitatively conclusive, historical analysis of the genesis of cl. 7 suggests that it was intended to permit some degree of secrecy of governmental operations. The ultimate weapon of enforcement available to the Congress would, of course, be the "power of the purse." Independent of the statute here challenged by respondent, Congress could grant standing to taxpayers or citizens, or both, limited, of course, by the "cases" and "controversies" provisions of Art. III.

Not controlling, but surely not unimportant, are nearly two centuries of acceptance of a reading of cl. 7 as vesting in Congress plenary power to spell out the details of precisely when and with what specificity Executive agencies must report the expenditure of appropriated funds and to exempt certain secret activities from comprehensive public reporting. See 2 M. Farrand, *The Records of the Federal Convention of 1787*, pp. 618-619 (1911); 3 *id.*, at 326-327; 3 J. Elliot, *Debates on the Federal Constitution* 462 (1836); D. Miller, *Secret Statutes of the United States* 10 (1918).

It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a *representative* Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.

As our society has become more complex, our numbers more vast, our lives more varied, and our resources more strained, citizens increasingly request the intervention of the courts on a greater variety of issues than at any period of our national development. The acceptance of new categories of judicially cognizable injury has not eliminated the basic principle that to invoke judicial power the claimant must have a "personal stake in the outcome,"

Baker v. Carr, *supra*, at 204, or a "particular, concrete injury," *Sierra Club*, *supra*, at 740-741, n. 16, or "a direct injury," *Ex parte Lé vitt*, *supra*, at 634; in short, something more than "generalized grievances," *Flast*, *supra*, at 106. Respondent has failed to meet these fundamental tests; accordingly, the judgment of the Court of Appeals is

Reversed.

[For dissenting opinion of Mr. JUSTICE BRENNAN, see *post*, p. 235.]

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court because I am in accord with most of its analysis, particularly insofar as it relies on traditional barriers against federal taxpayer or citizen standing. And I agree that *Flast v. Cohen*, 392 U. S. 83 (1968), which set the boundaries for the arguments of the parties before us, is the most directly relevant precedent and quite correctly absorbs a major portion of the Court's attention. I write solely to indicate that I would go further than the Court and would lay to rest the approach undertaken in *Flast*. I would not overrule *Flast* on its facts, because it is now settled that federal taxpayer standing exists in Establishment Clause cases. I would not, however, perpetuate the doctrinal confusion inherent in the *Flast* two-part "nexus" test. That test is not a reliable indicator of when a federal taxpayer has standing, and it has no sound relationship to the question whether such a plaintiff, with no other interest at stake, should be allowed to bring suit against one of the branches of the Federal Government. In my opinion, it should be abandoned.

I

My difficulties with *Flast* are several. The opinion purports to separate the question of standing from the merits, *id.*, at 99-101, yet it abruptly returns to

166

POWELL, J., concurring.

the substantive issues raised by a plaintiff for the purpose of determining "whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.*, at 102. Similarly, the opinion distinguishes between constitutional and prudential limits on standing. *Id.*, at 92-94, 97. I find it impossible, however, to determine whether the two-part "nexus" test created in *Flast* amounts to a constitutional or a prudential limitation, because it has no meaningful connection with the Court's statement of the bare-minimum constitutional requirements for standing.

Drawing upon *Baker v. Carr*, 369 U. S. 186, 204 (1962), the Court in *Flast* stated the "'gist of the question of standing'" as "whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" 392 U. S., at 99. As the Court today notes, *ante*, at 173, this is now the controlling definition of the irreducible Art. III case-or-controversy requirements for standing.¹ But, as Mr. Justice Harlan pointed out

¹ See also, e. g., *Barlow v. Collins*, 397 U. S. 159, 170-171 (1970) (BRENNAN, J., dissenting); Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv. L. Rev. 645, 658 (1973). The test announced in *Baker* and reiterated in *Flast* reflects how far the Court has moved in recent years in relaxing standing restraints. In *Frothingham v. Mellon*, 262 U. S. 447 (1923), for example, the Court declared that to permit a federal taxpayer suit "would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." *Id.*, at 489. And in denying standing to citizens and taxpayers seeking to bring suit to invalidate the Nineteenth Amendment in *Fairchild v. Hughes*, 258 U. S. 126 (1922), the Court stated:

"It is frankly a proceeding to have the Nineteenth Amendment declared void. In form it is a bill in equity; but it is not a case

in his dissent in *Flast*, 392 U. S., at 116 *et seq.*, it is impossible to see how an inquiry about the existence of "concrete adverseness" is furthered by an application of the *Flast* test.

Flast announced the following two-part "nexus" test:

"The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction." *Id.*, at 102-103.

Relying on history, the Court identified the Establishment Clause as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power

within the meaning of § 2 of Article III of the Constitution : . . ." *Id.*, at 129.

166

POWELL, J., concurring

conferred by Art. I, § 8. 392 U. S., at 103-105. On the other hand, the Tenth Amendment, and apparently the Due Process Clause of the Fifth Amendment, were determined not to be such "specific" limitations. The bases for these determinations are not wholly clear, but it appears that the Court found the Tenth Amendment addressed to the interests of the States, rather than of taxpayers, and the Due Process Clause no protection against increases in tax liability. *Id.*, at 105.

In my opinion, Mr. Justice Harlan's critique of the *Flast* "nexus" test is unanswerable. As he pointed out, "the Court's standard for the determination of standing [*i. e.*, sufficiently concrete adverseness] and its criteria for the satisfaction of that standard are entirely unrelated." *Id.*, at 122. Assuming that the relevant constitutional inquiry is the intensity of the plaintiff's concern, as the Court initially posited, *id.*, at 99, the *Flast* criteria "are not in any sense a measurement of any plaintiff's interest in the outcome of any suit." *Id.*, at 121 (Harlan, J., dissenting). A plaintiff's incentive to challenge an expenditure does not turn on the "unconnected fact" that it relates to a regulatory rather than a spending program, *id.*, at 122, or on whether the constitutional provision on which he relies is a "specific limitation" upon Congress' spending powers. *Id.*, at 123.²

² Mr. Justice Harlan's criticisms of the Court's analysis in *Flast* have been echoed by several commentators. *E. g.*, Scott, *supra*, n. 1, at 660-662; Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 604-607 (1968). As Professor Scott notes:

"[The *Flast* 'nexus' test] can be understood as an expedient by a court retreating from the absolute barrier of *Frothingham*, but not sure of how far to go and desirous of a formula that would enable it to make case by case determinations in the future. By any other standard, however, it is untenable." 86 Harv. L. Rev., at 661.

The ambiguities inherent in the *Flast* "nexus" limitations on federal taxpayer standing are illustrated by this case. There can be little doubt about respondent's fervor in pursuing his case, both within administrative channels and at every level of the federal courts. The intensity of his interest appears to bear no relationship to the fact that, literally speaking, he is not challenging directly a congressional exercise of the taxing and spending power. On the other hand, if the involvement of the taxing and spending power has some relevance, it requires no great leap in reasoning to conclude that the Statement and Account Clause, Art. I, § 9, cl. 7, on which respondent relies, is inextricably linked to that power. And that Clause might well be seen as a "specific" limitation on congressional spending. Indeed, it could be viewed as the most democratic of limitations. Thus, although the Court's application of *Flast* to the instant case is probably literally correct, adherence to the *Flast* test in this instance suggests, as does *Flast* itself, that the test is not a sound or logical limitation on standing.

The lack of real meaning and of principled content in the *Flast* "nexus" test renders it likely that it will in time collapse of its own weight, as Mr. Justice DOUGLAS predicted in his concurring opinion in that case. 392 U. S., at 107. This will present several options for the Court. It may either reaffirm pre-*Flast* prudential limitations on federal and citizen taxpayer standing; attempt new doctrinal departures in this area, as would Mr. Justice STEWART, *post*, at 203-204; or simply drop standing barriers altogether, as, judging by his concurring opinion in *Flast*, *supra*, and his dissenting opinion today, would Mr. Justice DOUGLAS.³ I believe the first option to be the

³ But see *Scripps-Howard Radio, Inc. v. FCC*, 316 U. S. 4, 18, 20-21 (1942) (DOUGLAS, J., dissenting). Mr. Justice BRENNAN's

166

POWELL, J., concurring

appropriate course, for reasons which may be emphasized by noting the difficulties I see with the other two. And, while I do not disagree at this late date with the *Baker v. Carr* statement of the constitutional indicia of standing, I further believe that constitutional limitations are not the only pertinent considerations.

II

MR. JUSTICE STEWART, joined by MR. JUSTICE MARSHALL, would grant citizen or taxpayer standing under those clauses of the Constitution that impose on the Federal Government "an affirmative duty" to do something on behalf of its citizens and taxpayers. *Post*, at 203-204. Although he distinguishes between an affirmative constitutional duty and a "constitutional prohibition" for purposes of this case, *post*, at 202, it does not follow that MR. JUSTICE STEWART would deny federal taxpayer standing in all cases involving a constitutional prohibition, as his concurring opinion in *Flast* makes clear.⁴ Rather, he would find federal taxpayer standing,

view, see *post*, at 237-238, that federal taxpayers are able to meet the "injury-in-fact" test that he articulated in *Barlow v. Collins*, 397 U. S., at 167-173, renders his position, for me at least, indistinguishable from that of MR. JUSTICE DOUGLAS. Furthermore, I think that MR. JUSTICE BRENNAN has modified the standard he identified in *Barlow* by finding it satisfied in this case. It is a considerable step from the "distinctive and discriminating" economic injury alleged in *Barlow*, see *id.*, at 172 n. 5, to the generalized interest of a taxpayer or citizen, as MR. JUSTICE BRENNAN appears to have acknowledged in his opinion in that case. *Ibid.*

⁴ In *Flast v. Cohen*, 392 U. S. 83 (1968), MR. JUSTICE STEWART based his concurrence in the majority's opinion on the view that the Establishment Clause constitutes an explicit prohibition on the taxing and spending power:

"Because that clause plainly *prohibits* taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right

and perhaps citizen standing, in all cases based on constitutional clauses setting forth an affirmative duty and in unspecified cases where the constitutional clause at issue may be seen as a plain or explicit prohibition.

For purposes of determining whether a taxpayer or citizen has standing to challenge the actions of the Federal Government, I fail to perceive a meaningful distinction between constitutional clauses that set forth duties and those that set forth prohibitions.⁵ In either instance, the relevant inquiry is the same—may a plaintiff, relying on nothing other than citizen or taxpayer status, bring suit to adjudicate whether an entity of the Federal Government is carrying out its responsibilities in conformance with the requirements of the Constitution? A taxpayer's or citizen's interest in and willingness to pursue with vigor such a suit would not turn on whether the constitutional clause at issue imposed a duty on the Government to do something for him or prohibited the Government from doing something to him. Prohibitions and duties in this context are opposite sides of the same coin. Thus, I do not believe that the inquiry whether federal courts should entertain public actions is

not to be taxed for the support of a religious institution. The present case is thus readily distinguishable from *Frothingham v. Mellon*, 262 U. S. 447, where the taxpayer did not rely on an *explicit constitutional prohibition* but instead questioned the scope of the powers delegated to the national legislature by Article I of the Constitution." 392 U. S., at 114. (Emphasis supplied.)

⁵ One commentator, who espouses a broadening of standing in what he refers to as "public actions," apparently shares this difficulty. See L. Jaffe, *Judicial Control of Administrative Action* 484 (1965):

"[The ability of a taxpayer or citizen to bring a public action] should not depend on whether the questioned official conduct is of a positive or negative character, that is, whether it consists of the performance of an improper act or the failure to fulfill a duty."

166

POWELL, J., concurring

advanced by line drawing between affirmative duties and prohibitions.⁹

In short, in my opinion my Brother STEWART's view fails to provide a meaningful stopping point between an all-or-nothing position with regard to federal taxpayer or citizen standing. In this respect, it shares certain of the deficiencies of *Flast*. I suspect that this may also be true of any intermediate position in this area. MR. JUSTICE DOUGLAS correctly discerns, I think, that the alternatives here as a matter of doctrine are essentially bipolar. His preference is clear: "I would be as liberal in allowing taxpayers standing to object to . . . violations of the First Amendment as I would in granting standing to people to complain of any invasion

⁹ Such an approach might well lead to problems of classification that would divert attention from the fundamental question of whether public actions are an appropriate matter for the federal courts. And, if distinctions between constitutional prohibitions and duties are to make a difference, there are certain to be some incongruous rules as to when such a public action may be brought. This is apparent when one attempts to categorize the provisions of the Constitution primarily addressed at limiting the powers of the National Government—Art. I, § 9, and the Bill of Rights. All of the clauses of Art. I, § 9, except the seventh, which is at issue here, are stated as prohibitions. In fact the seventh clause is in part a prohibition against expenditures of public money in the absence of appropriations and in part an affirmative duty to publish periodically an account of such expenditures. The rationale for according special treatment solely to one-half of Art. I, § 9, cl. 7, and not to the other and not to the remaining clauses of Art. I, § 9, is not immediately apparent.

The same observation may be made of the Bill of Rights. The First Amendment through the Fifth, the Eighth, and possibly the Tenth are stated in terms of prohibitions. The Sixth Amendment and portions of the Seventh can be classified as duties. The Ninth defies classification. Rational rules for standing in public actions are, it seems to me, unlikely to emerge from an effort to make the format of a particular Amendment determinative.

of their rights under the Fourth Amendment or the Fourteenth or under any other guarantee in the Constitution itself or in the Bill of Rights." *Flast v. Cohen*, 392 U. S., at 114 (concurring opinion). My view is to the contrary.

III

Relaxation of standing requirements is directly related to the expansion of judicial power.⁷ It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government. I also believe that repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches. We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch.⁸ Moreover, the

⁷ One commentator predicted this phenomenon and its possible implications at the outset of the past decade of dramatic changes in standing doctrine:

"[J]udicial power expands as the requirements of standing are relaxed. . . . [I]f the so-called public action . . . were allowed with respect to constitutional challenges to legislation, then the halls of Congress and of the state legislatures would become with regularity only Act I of any contest to enact legislation involving public officials in its enforcement or application. Act II would, with the usual brief interlude, follow in the courts. . . ." Brown, *Quis Custodiet Ipsos Custodes?*—The School-Prayer Cases, 1963 Sup. Ct. Rev. 1, 15-16.

⁸ Cf. A. Bickel, *The Least Dangerous Branch* 122 (1962).

166

POWELL, J., concurring

argument that the Court should allow unrestricted taxpayer or citizen standing underestimates the ability of the representative branches of the Federal Government to respond to the citizen pressure that has been responsible in large measure for the current drift toward expanded standing. Indeed, taxpayer or citizen advocacy, given its potentially broad base, is precisely the type of leverage that in a democracy ought to be employed against the branches that were intended to be responsive to public attitudes about the appropriate operation of government. "We must as judges recall that, as Mr. Justice Holmes wisely observed, the other branches of the Government 'are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' *Missouri, Kansas & Texas R. Co. v. May*, 194 U. S. 267, 270." *Flast v. Cohen*, 392 U. S., at 131 (Harlan, J., dissenting).

Unrestrained standing in federal taxpayer or citizen suits would create a remarkably illogical system of judicial supervision of the coordinate branches of the Federal Government. Randolph's proposed Council of Revision, which was repeatedly rejected by the Framers, at least had the virtue of being systematic; every law passed by the legislature automatically would have been previewed by the Judiciary before the law could take effect.⁹ On the other hand, since the Judiciary cannot

⁹ Randolph's Resolutions, also referred to as the Virginia Plan, served as the "matrix" for the document ultimately developed by the Constitutional Convention. See 1 J. Goebel, *History of the Supreme Court of the United States* 204 (1971). The eighth of Mr. Randolph's 15 proposals was as follows:

"8. Resd. that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said

select the taxpayers or citizens who bring suit or the nature of the suits, the allowance of public actions would produce uneven and sporadic review, the quality of which

Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by [an unspecified number] of the members of each branch." 1 M. Farrand, *The Records of the Federal Convention of 1787*, p. 21 (1911) (hereafter *Farrand*).

See 1 J. Elliot, *Debates on the Federal Constitution* 144 (1836). Madison ably supported the proposal, but it was defeated on three separate votes. 1 *Farrand* 140, 2 *Farrand* 71-72, 298.

The analogy between the proposed Council of Revision and unrestricted taxpayer or citizen standing is not complete. For example, Randolph proposed to link the Judiciary directly to the Executive, in large measure to enhance the Executive and to protect it from legislative encroachments. See, e. g., 1 *Farrand* 108, 138; 2 *Farrand* 74, 79. Thus, reliance on the Framers' rejection of the Council must be approached with caution. Nevertheless, the arguments advanced at the Convention in support of and in opposition to the Council provide an interesting parallel to present contentions regarding unrestrained public actions. For example, Madison spoke of the "good" that would "proceed from the perspicuity, the conciseness, and the systematic character wh. the Code of laws wd. receive from the Judiciary talents." 1 *Farrand* 139. He declared that the proposal would be useful "to restrain the Legislature from encroaching on the other co-ordinate Departments, or on the rights of the people at large; or from passing laws unwise in their principle, or incorrect in their form . . .," *ibid.*, and that such a system would be "useful to the Community at large as an additional check" against unwise legislative measures. 2 *Farrand* 74. Those opposed to the proposal, including Gerry, Martin, and Rutledge, preferred to rely "on the Representatives of the people as the guardians of their Rights & interests." *Id.*, at 75. Judges were not presumed "to possess any peculiar knowledge of the mere policy of public measures . . .," *id.*, at 73, or any "higher . . . degree" of knowledge of mankind and of "Legislative affairs" *Id.*, at 76. It was "necessary that the Supreme Judiciary should have the confidence of the people . . .," *id.*, at 76-77, and this would "soon be lost, if they are employed in the task of remonstrating

166

POWELL, J., concurring

would be influenced by the resources and skill of the particular plaintiff. And issues would be presented in abstract form, contrary to the Court's recognition that "judicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury." *Sierra Club v. Morton*, 405 U. S. 727, 740-741, n. 16 (1972).¹⁰

The power recognized in *Marbury v. Madison*, 1 Cranch 137 (1803), is a potent one. Its prudent use seems to me incompatible with unlimited notions of taxpayer and citizen standing. Were we to utilize this power as indiscriminately as is now being urged, we may witness efforts by the representative branches drastically to curb its use. Due to what many have regarded as the unresponsiveness of the Federal Government to recognized needs or serious inequities in our society, recourse to the federal courts has attained an unprecedented popularity in recent decades. Those courts have often acted as a major instrument of social reform. But this has not always been the case, as experiences under the New Deal illustrate. The public reaction to the substantive due process holdings of the federal courts during that period requires no elaboration, and it is not unusual for history to repeat itself.

agst. popular measures of the Legislature." *Id.*, at 77. Moreover, the "Judges ought never to give their opinion on a law till it comes before them." *Id.*, at 80.

The arguments adduced at the Convention in opposition to the Council of Revision ultimately prevailed. I believe that analogous arguments should guide us in refusing as a general matter to entertain public actions.

¹⁰ Some Western European democracies have experimented with forms of constitutional judicial review in the abstract, see, e. g., M. Cappelletti, *Judicial Review in the Contemporary World* 71-72 (1971), but that has not been our experience, and I think for good reasons. Cf. Bickel, *supra*, n. 8, at 115-116.

Quite apart from this possibility, we risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens. The irreplaceable value of the power articulated by Mr. Chief Justice Marshall lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.

The considerations outlined above underlie, I believe, the traditional hostility of the Court to federal taxpayer or citizen standing where the plaintiff has nothing at stake other than his interest as a taxpayer or citizen. It merits noting how often and how unequivocally the Court has expressed its antipathy to efforts to convert the Judiciary into an open forum for the resolution of political or ideological disputes about the performance of government. See, e. g., *Ex parte Lé vitt*, 302 U. S. 633, 634 (1937); ¹¹ *Frothingham v. Mellon*, 262 U. S. 447, 488 (1923); ¹² *Fairchild v. Hughes*, 258 U. S. 126, 129

¹¹ "It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public."

¹² "The party who invokes the power [of the Judiciary to declare a statute unconstitutional] must be able to show not only that the

166

POWELL, J., concurring

(1922); ¹³ *Tyler v. Judges of Court of Registration*, 179 U. S. 405, 406 (1900).¹⁴ These holdings and declarations reflect a wise view of the need for judicial restraint if we are to preserve the Judiciary as the branch "least dangerous to the political rights of the Constitution" Federalist No. 78, p. 483 (Lodge ed. 1908).

To be sure standing barriers have been substantially lowered in the last three decades. The Court has confirmed the power of Congress to open the federal courts to representatives of the public interest through specific statutory grants of standing. *E. g.*, *FCC v. Sanders Bros. Radio Station*, 309 U. S. 470 (1940); *Scripps-Howard Radio, Inc. v. FCC*, 316 U. S. 4 (1942); *Flast v. Cohen*, 392 U. S., at 130-133 (Harlan, J., dissenting); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U. S. 205, 212 (1972) (WHITE, J., concurring). Even in the absence of specific statutory grants of standing, economic interests that at one time would not have conferred standing have been re-examined and found sufficient. Compare, *e. g.*, *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U. S. 150 (1970), and

statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

¹³ "[Standing will be denied where a plaintiff] has only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted."

¹⁴ "Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the suit personal to himself, and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens."

Barlow v. Collins, 397 U.S. 159 (1970), with, e.g., *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939), and *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938). See also *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970). Noneconomic interests have been recognized. E.g., *Baker v. Carr*, 369 U.S. 186 (1962); *Sierra Club v. Morton*, 405 U.S. 727 (1972). A stringently limited exception for federal taxpayer standing has been created. *Flast v. Cohen, supra*. The concept of particularized injury has been dramatically diluted. E.g., *United States v. SCRAP*, 412 U.S. 669 (1973).

The revolution in standing doctrine that has occurred, particularly in the 12 years since *Baker v. Carr, supra*, has not meant, however, that standing barriers have disappeared altogether. As the Court noted in *Sierra Club*, "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 405 U.S., at 738. Accord, *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973).¹⁵ Indeed, despite the diminution of standing requirements in the last decade, the Court has not broken with the traditional requirement that, in the absence of a specific statutory grant of the right of review, a plaintiff must allege some particularized injury that sets him apart from the man on the street.¹⁶

¹⁵ See *ibid.*:

"Although the law of standing has been greatly changed in the last 10 years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." (Footnotes omitted.)

¹⁶ For example, as the Court noted in *Sierra Club v. Morton*, 405

166

POWELL, J., concurring

I recognize that the Court's allegiance to a requirement of particularized injury has on occasion required a reading of the concept that threatens to transform it beyond recognition. *E. g.*, *Baker v. Carr*, *supra*; *Flast v. Cohen*, *supra*.¹⁷ But despite such occasional digressions, the requirement remains, and I think it does so for the reasons outlined above. In recognition of those considerations, we should refuse to go the last mile toward abolition of standing requirements that is implicit in broadening the "precarious opening" for federal taxpayers created by *Flast*, see 392 U. S., at 116 (Fortas, J., concurring), or in allowing a citizen *qua* citizen to invoke the power of the federal courts to negative unconstitutional acts of the Federal Government.

U. S. 727 (1972), "if any group with a bona fide 'special interest' could initiate . . . litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so." *Id.*, at 739-740. The clear implication is that allowing "any individual citizen with [a] . . . bona fide special interest" to trigger federal court litigation is a result to be avoided. All standing cases, even the most recent ones, include references to the need for particularized injury or similar language. None of them as yet has equated the interest of a taxpayer or citizen, suing in that status alone, with the particularized interest that standing doctrine has traditionally demanded. To take that step, it appears to me, would render the requirement of direct or immediate injury meaningless and would reduce the Court's consistent insistence on such an injury to mere talk.

¹⁷ *Baker v. Carr* may have a special claim to *sui generis* status. It was perhaps a necessary response to the manifest distortion of democratic principles practiced by malapportioned legislatures and to abuses of the political system so pervasive as to undermine democratic processes. *Flast v. Cohen* may also have been a reaction to what appeared at the time as an immutable political logjam that included unsuccessful efforts to confer specific statutory grants of standing. See, *e. g.*, C. Wright, *The Law of Federal Courts* 40 (2d ed. 1970). Cf. 392 U. S., at 115-116 (Fortas, J., concurring).

In sum, I believe we should limit the expansion of federal taxpayer and citizen standing in the absence of specific statutory authorization to an outer boundary drawn by the *results* in *Flast* and *Baker v. Carr*. I think we should face up to the fact that *all* such suits are an effort "to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government or the allocation of power in the Federal System." *Flast v. Cohen*, 392 U. S., at 106. The Court should explicitly reaffirm traditional prudential barriers against such public actions.¹⁸ My reasons for this view are rooted in respect for democratic processes and in the conviction that "[t]he powers of the federal judiciary

¹⁸ The doctrine of standing has always reflected prudential as well as constitutional limitations. Indeed, it might be said that the correct reading of the *Flast* nexus test is as a prudential limit, given the *Baker v. Carr* definition of the constitutional bare minima. The same is undoubtedly true of, for example, the second test created in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U. S. 150, 153 (1970)—"whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." See also *Barrows v. Jackson*, 346 U. S. 249, 255 (1953): "Apart from the [constitutional] requirement, this Court has developed a complementary rule of self-restraint for its own governance . . . which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others." See *Flast v. Cohen*, 392 U. S., at 120, 130-133 (Harlan, J., dissenting). Whatever may have been the Court's initial perception of the intent of the Framers, see n. 1, *supra*, it is now settled that such rules of self-restraint are not required by Art. III but are "judicially created overlays that Congress may strip away. . . ." G. Gunther & N. Dowling, *Cases and Materials on Constitutional Law* 106 (8th ed. 1970). But where Congress does so, my objections to public actions are ameliorated by the congressional mandate. Specific statutory grants of standing in such cases alleviate the conditions that make "judicial forbearance the part of wisdom." *Flast, supra*, at 132 (Harlan, J., dissenting) (footnote omitted).

166

DOUGLAS, J., dissenting

will be adequate for the great burdens placed upon them only if they are employed prudently, with recognition of the strengths as well as the hazards that go with our kind of representative government." *Id.*, at 131 (Harlan, J., dissenting).

MR. JUSTICE DOUGLAS, dissenting.

I would affirm the judgment of the Court of Appeals on the "standing" issue. My views are expressed in my dissent to the *Schlesinger* case, *post*, p. 229, decided this day. There a citizen and taxpayer raised a question concerning the Incompatibility Clause of the Constitution which bars a person from "holding any Office under the United States" if he is a Member of Congress, Art. I, § 6, cl. 2. That action was designed to bring the Pentagon into line with that constitutional requirement by requiring it to drop "reservists" who were Members of Congress.

The present action involves Art. I, § 9, cl. 7, of the Constitution which provides:

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

We held in *Flast v. Cohen*, 392 U. S. 83, that a taxpayer had "standing" to challenge the constitutionality of taxes raised to finance the establishment of a religion contrary to the command of the First and Fourteenth Amendments. A taxpayer making such outlays, we held, had sufficient "personal stake" in the controversy, *Baker v. Carr*, 369 U. S. 186, 204, to give the case the "concrete adverseness" necessary for the resolution of constitutional issues. *Ibid.*

Respondent in the present case claims that he has

a right to "a regular statement and account" of receipts and expenditures of public moneys for the Central Intelligence Agency. As the Court of Appeals noted, *Flast* recognizes "standing" of a taxpayer to challenge appropriations made in the face of a constitutional prohibition, and it logically asks, "how can a taxpayer make that challenge unless he knows how the money is being spent?" 465 F. 2d 844, 853.

History shows that the curse of government is not always venality; secrecy is one of the most tempting coverups to save regimes from criticism. As the Court of Appeals said:

"The Framers of the Constitution deemed fiscal information essential if the electorate was to exercise any control over its representatives and meet their new responsibilities as citizens of the Republic; and they mandated publication, although stated in general terms, of the Government's receipts and expenditures. Whatever the ultimate scope and extent of that obligation, its elimination generates a sufficient, adverse interest in a taxpayer." *Ibid.* (Footnote omitted.)

Whatever may be the merits of the underlying claim, it seems clear that the taxpayer in the present case is not making a generalized complaint about the operation of Government. He does not even challenge the constitutionality of the Central Intelligence Agency Act. He only wants to know the amount of tax money exacted from him that goes into CIA activities. Secrecy of the Government acquires new sanctity when his claim is denied. Secrecy has, of course, some constitutional sanction. Article I, § 5, cl. 3, provides that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy"

166

DOUGLAS, J., dissenting

But the difference was great when it came to an accounting of public money. Secrecy was the evil at which Art. I, § 9, cl. 7, was aimed. At the Convention, Mason took the initiative in moving for an annual account of public expenditures. 2 M. Farrand, *The Records of the Federal Convention of 1787*, p. 618 (1911). Madison suggested it be "from time to time," *id.*, at 618-619, because it was thought that requiring publication at fixed intervals might lead to no publication at all. Indeed under the Articles of Confederation "[a] punctual compliance being often impossible, the practice ha[d] ceased altogether." *Id.*, at 619.

During the Maryland debates on the Constitution, McHenry said: "[T]he People who give their Money ought to know in what manner it is expended," 3 Farrand, *supra*, at 150. In the Virginia debates Mason expressed his belief that while some matters might require secrecy (*e. g.*, ongoing diplomatic negotiations and military operations) "he did not conceive that the receipts and expenditures of the public money ought ever to be concealed. The people, he affirmed, had a right to know the expenditures of their money." 3 J. Elliot, *Debates on the Federal Constitution* 459 (1836). Lee said that the clause "must be supposed to mean, in the common acceptance of language, short, convenient periods" and that those "who would neglect this provision would disobey the most pointed directions." *Ibid.* Madison added that an accounting from "time to time" insured that the accounts would be "more full and satisfactory to the public, and would be sufficiently frequent." *Id.*, at 460. Madison thought "this provision went farther than the constitution of any state in the Union, or perhaps in the world." *Ibid.* In New York, Livingston said: "Will not the representatives . . . consider it as essential to their popularity, to gratify their con-

stituents with full and frequent statements of the public accounts? There can be no doubt of it," 2 Elliot, *supra*, at 347.*

From the history of the clause it is apparent that the Framers inserted it in the Constitution to give the public knowledge of the way public funds are expended. No one has a greater "personal stake" in policing this protective measure than a taxpayer. Indeed, if a taxpayer may not raise the question, who may do so? The Court states that discretion to release information is in the first instance "committed to the surveillance of Congress," and that the right of the citizenry to information under Art. I, § 9, cl. 7, cannot be enforced directly, but only through the "[s]low, cumbersome, and unresponsive" electoral process. One has only to read constitutional history to realize that statement would shock Mason and Madison. Congress of course has discretion; but to say that it has the power to read the clause out of the Consti-

*Livingston used the proposed Art. I, § 9, cl. 7, to combat the idea that the new Congress would be corrupt. He said in part: "You will give up to your state legislatures everything dear and valuable; but you will give no power to Congress, because it may be abused; you will give them no revenue, because the public treasures may be squandered. But do you not see here a capital check? Congress are to publish, from time to time, an account of their receipts and expenditures. These may be compared together; and if the former, year after year, exceed the latter, the corruption will be detected, and the people may use the constitutional mode of redress. The gentleman admits that corruption will not take place immediately: its operations can only be conducted by a long series and a steady system of measures. These measures will be easily defeated, even if the people are unapprized of them. They will be defeated by that continual change of members, which naturally takes place in free governments, arising from the disaffection and inconstancy of the people. A changeable assembly will be entirely incapable of conducting a system of mischief; they will meet with obstacles and embarrassments on every side." 2 Elliot, *supra*, at 345-346.

166

DOUGLAS, J., dissenting

tution when it comes to one or two or three agencies is astounding. That is the bare-bones issue in the present case. Does Art. I, § 9, cl. 7, of the Constitution permit Congress to withhold "a regular Statement and Account" respecting any agency it chooses? Respecting all federal agencies? What purpose, what function is the clause to perform under the Court's construction? The electoral process already permits the removal of legislators for any reason. Allowing their removal at the polls for failure to comply with Art. I, § 9, cl. 7, effectively reduces that clause to a nullity, giving it no purpose at all.

The sovereign in this Nation is the people, not the bureaucracy. The statement of accounts of public expenditures goes to the heart of the problem of sovereignty. If taxpayers may not ask that rudimentary question, their sovereignty becomes an empty symbol and a secret bureaucracy is allowed to run our affairs.

The resolution of that issue has not been entrusted to one of the other coordinate branches of government—the test of the "political question" under *Baker v. Carr*, 369 U. S. at 217. The question is "political" if there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department," *ibid.* The mandate runs to the Congress and to the agencies it creates to make "a regular Statement and Account of the Receipts and Expenditures of all public Money." The beneficiary—as is abundantly clear from the constitutional history—is the public. The public cannot intelligently know how to exercise the franchise unless it has a basic knowledge concerning at least the generality of the accounts under every head of government. No greater crisis in confidence can be generated than today's decision. Its consequences are grave because it relegates to secrecy vast operations of government and keeps the

public from knowing what secret plans concerning this Nation or other nations are afoot. The fact that the result is serious does not, of course, make the issue "justiciable." But resolutions of any doubts or ambiguities should be toward protecting an individual's stake in the integrity of constitutional guarantees rather than turning him away without even a chance to be heard.

I would affirm the judgment below.

MR. JUSTICE STEWART, with whom MR. JUSTICE MARSHALL joins, dissenting.

The Court's decisions in *Flast v. Cohen*, 392 U. S. 83 (1968), and *Frothingham v. Mellon*, 262 U. S. 447 (1923), throw very little light on the question at issue in this case. For, unlike the plaintiffs in those cases, Richardson did not bring this action asking a court to invalidate a federal statute on the ground that it was beyond the delegated power of Congress to enact or that it contravened some constitutional prohibition. Richardson's claim is of an entirely different order. It is that Art. I, § 9, cl. 7, of the Constitution, the Statement and Account Clause, gives him a right to receive, and imposes on the Government a corresponding affirmative duty to supply, a periodic report of the receipts and expenditures "of all public Money."¹ In support of his standing to litigate this claim, he has asserted his status both as a taxpayer and as a citizen-voter. Whether the Statement and Account Clause imposes upon the Government an affirmative duty to supply the information requested and whether that duty runs to every taxpayer or citizen are questions that go to the substantive merits of this liti-

¹ "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

166

STEWART, J., dissenting

gation. Those questions are not now before us, but I think that the Court is quite wrong in holding that the respondent was without standing to raise them in the trial court.

Seeking a determination that the Government owes him a duty to supply the information he has requested, the respondent is in the position of a traditional Hohfeldian plaintiff.² He contends that the Statement and Account Clause gives him a right to receive the information and burdens the Government with a correlative duty to supply it. Courts of law exist for the resolution of such right-duty disputes. When a party is seeking a judicial determination that a defendant owes him an affirmative duty, it seems clear to me that he has standing to litigate the issue of the existence *vel non* of this duty once he shows that the defendant has declined to honor his claim. If the duty in question involved the payment of a sum of money, I suppose that all would agree that a plaintiff asserting the duty would have standing to litigate the issue of his entitlement to the money upon a showing that he had not been paid. I see no reason for a different result when the defendant is a Government official and the asserted duty relates not to the payment of money, but to the disclosure of items of information.

When the duty relates to a very particularized and explicit performance by the asserted obligor, such as the payment of money or the rendition of specific items of information, there is no necessity to resort to any extended analysis, such as the *Flast* nexus tests, in order to find standing in the obligee. Under such circumstances, the duty itself, running as it does from the defendant to the

² Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033 (1968). See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L. J. 16 (1913).

plaintiff, provides fully adequate assurance that the plaintiff is not seeking to "employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *Flast, supra*, at 106. If such a duty arose in the context of a contract between private parties, no one would suggest that the obligee should be barred from the courts. It seems to me that when the asserted duty is, as here, as particularized, palpable, and explicit as those which courts regularly recognize in private contexts, it should make no difference that the obligor is the Government and the duty is embodied in our organic law. Certainly after *United States v. SCRAP*, 412 U. S. 669 (1973), it does not matter that those to whom the duty is owed may be many. "[S]tanding is not to be denied simply because many people suffer the same injury." *Id.*, at 687.

For example, the Freedom of Information Act creates a private cause of action for the benefit of persons who have requested certain records from a public agency and whose request has been denied. 5 U. S. C. § 552 (a) (3). The statute requires nothing more than a request and the denial of that request as a predicate to a suit in the district court. The provision purports to create a duty in the Government agency involved to make those records covered by the statute available to "any person." Correspondingly, it confers a right on "any person" to receive those records, subject to published regulations regarding time, place, fees, and procedure. The analogy, of course, is clear. If the Court is correct in this case in holding that Richardson lacks standing under Art. III to litigate his claim that the Statement and Account Clause imposes an affirmative duty that runs in his favor, it would follow that a person whose request under 5 U. S. C. § 552 has been denied would similarly lack standing under Art. III de-

166

STEWART, J., dissenting

spite the clear intent of Congress to confer a right of action to compel production of the information.

The issue in *Flast* and its predecessor, *Frothingham*, *supra*, related solely to the standing of a federal taxpayer to challenge allegedly unconstitutional exercises of the taxing and spending power. The question in those cases was under what circumstances a federal taxpayer whose interest stemmed solely from the taxes he paid to the Treasury "[would] be deemed to have the personal stake and interest that impart the necessary concrete adverse-ness to such litigation so that standing can be conferred on the taxpayer *qua* taxpayer consistent with the constitutional limitations of Article III." 392 U. S., at 101. But the "nexus" criteria developed in *Flast* were not intended as a litmus test to resolve all conceivable standing questions in the federal courts; they were no more than a response to the problem of taxpayer standing to challenge federal legislation enacted in the exercise of the taxing and spending power of Congress.

Richardson is not asserting that a taxing and spending program exceeds Congress' delegated power or violates a constitutional limitation on such power. Indeed, the constitutional provision that underlies his claim does not purport to limit the power of the Federal Government in any respect, but, according to Richardson, simply imposes an affirmative duty on the Government with respect to all taxpayers or citizen-voters of the Republic. Thus, the nexus analysis of *Flast* is simply not relevant to the standing question raised in this case.

The Court also seems to say that this case is not justiciable because it involves a political question. *Ante*, at 179. This is an issue that is not before us. The "Question Presented" in the Government's petition for certiorari was the respondent's "standing to challenge the provisions of the Central Intelligence Agency

Act which provide that appropriations to and expenditures by that Agency shall not be made public, on the ground that such secrecy contravenes Article I, section 9, clause 7 of the Constitution."³ The issue of the justiciability of the respondent's claim was thus not presented in the petition for certiorari, and it was not argued in the briefs.⁴ At oral argument, in response to questions about whether the Government was asking this Court to rule on the justiciability of the respondent's claim, the following colloquy occurred between the Court and the Solicitor General:

"MR. BORK: . . . I think the Court of Appeals was correct that the political question issue could be resolved much more effectively if we were in the full merits of the case than we can at this stage. I think standing is all that really can be effectively discussed in the posture of the case now.

"Q: . . . [I]f we disagree with you on standing, the Government agrees then that the case should go back to the District Court?

"MR. BORK: I think that is correct."

³ The Court has often indicated that, except in the most extraordinary circumstances, it will not consider questions that have not been presented in the petition for certiorari. *E. g.*, *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 177-178 (1938); *National Licorice Co. v. NLRB*, 309 U. S. 350, 357 n. 2 (1940); *Irvine v. California*, 347 U. S. 128, 129 (1954) (opinion of Jackson, J.); *Mazer v. Stein*, 347 U. S. 201, 206 n. 5 (1954).

⁴ The District Court dismissed the complaint on the alternative grounds of lack of standing and nonjusticiability (because the court thought that the question involved was a political one). The Court of Appeals reversed the standing holding, but concluded that the justiciability issue was so intertwined with the merits that it should await consideration of the merits by the District Court on remand. The Government then brought the case here on petition for certiorari.

166

STEWART, J., dissenting

The Solicitor General's answer was clearly right. "[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast, supra*, at 99-100.

On the merits, I presume that the Government's position would be that the Statement and Account Clause of the Constitution does not impose an affirmative duty upon it; that any such duty does not in any event run to Richardson; that any such duty is subject to legislative qualifications, one of which is applicable here; and that the question involved is political and thus not justiciable. Richardson might ultimately be thrown out of court on any one of these grounds, or some other. But to say that he might ultimately lose his lawsuit certainly does not mean that he had no standing to bring it.

For the reasons expressed, I believe that Richardson had standing to bring this action. Accordingly, I would affirm the judgment of the Court of Appeals.

APPENDIX VII

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MORTON H. HALPERIN,

Plaintiff,

v.

WILLIAM E. COLBY, et al.,

Defendants.

Civil Action
No. 75-0676

AFFIDAVIT OF MORTON H. HALPERIN

City of Washington) SS:
District of Columbia)

MORTON H. HALPERIN, being duly sworn, deposes and says:

1. I am the plaintiff in the above captioned litigation.
2. I am currently Director of the Project on National Security and Civil Liberties sponsored by the American Civil Liberties Union Foundation and the Center for National Security Studies of the Fund for Peace.
3. From 1960-1966 I was associated with the Harvard University Center for International Affairs where I did research and taught courses on national security policy. From 1966-1969 I was an official in the Department of Defense, serving as Deputy Assistant Secretary of Defense for Planning and Arms Control. In 1969 I served as Assistant for Planning on the staff of the National Security Council. From 1969-1970, I was a consultant to the National Security Council. Since 1969 I have done extensive research and writing on the American intelligence community, including the Central Intelligence Agency (CIA).

4. In making my request for the two lump sum figures reflecting the CIA budget authority for Fiscal Year 1976 and the statement of expenditures of public money by the CIA for Fiscal Year 1974, I was convinced that the release of this information could not reasonably be expected to cause damage to the national security.
5. In reaching the judgment that the CIA budget authority and expenditure figures, as requested, could be made public, I studied carefully the testimony and other statements of Directors of Central Intelligence as well as other studies of the CIA budget. I also considered what budgetary information is and has been made public regarding other United States intelligence agencies.
6. In particular, I was aware of statements by former Director of Central Intelligence, James R. Schlesinger, Jr., and the current Director of Central Intelligence, William E. Colby. These statements appeared to me to set forth the view that the overall CIA budget figure could be disclosed without harm. Many of these statements are attached to the answers to interrogatories to William E. Colby, filed in this case. Two such statements are:
 - (a) the answer given by Mr. Colby to a written question from Senator William Proxmire following a hearing on Mr. Colby's confirmation to be Director of Central Intelligence, in which Mr. Colby stated that "While I believe that disclosure of the total figure of the intelligence community budget would not present a security problem at this time, it is likely to stimulate requests for additional detail".

[William E. Colby's Answers to Prepared Questions from Senator Proxmire, July 27, 1973, appended to Colby Answers to Interrogatories]; and

(b) answers to questions by Mr. Schlesinger during a hearing on his confirmation to be Secretary of Defense, in which Mr. Schlesinger set forth his judgment that "for the gross figure [of the budget of intelligence agencies including the CIA] I think the security concerns are minimal. The component figure I would be more concerned about but for the gross national intelligence program figures I think we could live with that on a security basis, yes" [Hearing before Committee on Armed Services, United States Senate, on Nomination of James R. Schlesinger to be Secretary of Defense, 93rd Cong., 1st Sess. (June 18, 1973), at 68, appended to Colby Answers to Interrogatories].

7. Both Mr. Colby and Mr. Schlesinger indicated that release of the details of the intelligence budget might cause injury but that the release of a lump sum figure would not. They objected to the release of a lump sum figure principally because they feared that it would generate pressure to release additional details.
8. I have carefully examined the answers to interrogatories submitted by Mr. Colby. Mr. Colby has stated his belief that release of the CIA budget for a single year, and even more for a series of years, would permit other governments to "refine" their estimates of the activities and expenditures of the CIA. It is true that intelligence organizations by their nature seek every

possible piece of information and use it in "refining" their estimates on many issues. From this perspective almost every fact released about the CIA would enable some analyst in some country to "refine" some "estimate" of some aspect of American intelligence. Indeed this would be true of much information which is released about the CIA, other intelligence agencies and other national security agencies including the Department of Defense.

9. The question posed in determining if information is properly classified is whether its release could reasonably be expected to cause damage to the national security. There is a substantial gap between an analyst in a foreign country refining an intelligence estimate and a reasonable expectation of damage to the national security. I do not believe that there is a reasonable expectation that this gap would be filled by the release of the lump sum budget figure for one year. Mr. Colby provides no explanation of how the two specific numbers requested would enable a foreign government to take an action that would reasonably be expected to cause damage to the national security. I have not seen any such explanation elsewhere.

10. Mr. Colby argues instead that release of the two lump sum figures would inevitably lead to the release of similar figures for other years. He then argues that the release of figures for a number of years would result in significant damage to national security. I do not believe that even the release of the similar numbers for a number of years could reasonably be expected to cause

damage to the national security.

11. The only specific example of possible injury which Mr. Colby gives is that a very large increase in the budget might alert a foreign government to the fact that a major new technological program was under way. He cites as an historical example the U-2. However, this program was, on information and belief, the first large technological program of the CIA. At that time it necessitated a large increase in the CIA budget. However, since that time, on information and belief, the CIA has had a variety of technological programs and new programs have not produced substantial fluctuations in the CIA budget. Moreover, a major new program could be financed from the Defense Department intelligence budget which is, on information and belief, approximately 80 per cent of the intelligence community budget.
12. One of the reasons why I do not believe that the release of the CIA budget could reasonably be expected to cause injury to the national security is that it is, on information and belief, only some 10 to 15 per cent of the total intelligence budget. What is included in the CIA budget as opposed to that of the Defense Department is, on information and belief, essentially arbitrary. Thus, if release of the CIA budget confirms the general assumption (discussed below) that the CIA budget is approximately \$750 million, foreign analysts would have no way of knowing what intelligence activities of the U.S. Government were included in that total.
13. The approximate size of the CIA budget has been widely reported. For example, a New York Times reporter

and former Defense Department official, Leslie H. Gelb, cited "knowledgeable officials" as the source for the fact that one of the figures requested in this case -- the CIA budget authority for Fiscal Year 1976 -- is \$750 million out of a total intelligence budget of \$4 billion. A copy of Mr. Gelb's article is attached to my affidavit.

14. Figures for the CIA budget are also given in the book, The CIA and the Cult of Intelligence (Knopf 1974), co-authored by a former CIA official, Victor Marchetti. According to that study, the CIA budget is approximately \$750 million per year [p.61]. The publication of that figure was originally objected to by the CIA when it reviewed the manuscript of this book prior to publication. The CIA later withdrew the objection and permitted the figure to be published.
15. The report to the President by the Commission on CIA Activities within the United States, published in June 1975, recommends that "Congress should give careful consideration to the question whether the budget of the CIA should not, at least to some extent, be made public, particularly in view of the provisions of Article I, Section 9, clause 7 of the Constitution" [p.81]. This recommendation from a commission which had extensive access to CIA files and whose report reflects a desire to maintain the effectiveness of the CIA suggests to me that the overall budget figure could be released without causing damage to the CIA or to the National Security.
16. An article in the Yale Law Journal reports that "even strong supporters of the CIA have maintained that neither

the CIA nor national security would be harmed by disclosure of the aggregate (CIA) budget". The author cites as his source interviews with Lyman Kirkpatrick, former CIA Executive Director-Comptroller, and Elliot Richardson, former Secretary of Defense. [The CIA's Secret Funding and the Constitution, 84 YALE L.J. 603, 632 (1975)].

17. A Senate Special Committee which considered the question of secrecy and classification, recommended in October 1973 that the overall sums for the CIA and all other intelligence agencies be made public. The Committee's recommendation was as follows:

III. At the request of Senator Cranston, the Committee discussed providing the Senate the overall sums requested for each separate intelligence agency. The release of such sums would provide members with the minimal information they should have about our intelligence operations. Such information would also end the practice of inflating certain budget figures so as to hide intelligence costs, and would insure that all members will know the true cost of each budget item they must vote upon.

Accordingly, the Committee recommends that the Appropriations Committee itemize in the Defense Department Appropriations bill the total sums proposed to be appropriated for intelligence activities by each of the following agencies: Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, National Reconnaissance Office and any separate intelligence units within the Army, Navy, and Air Force. The Committee does not request that any line items be revealed.

The Committee also recommends that the committee reports indicate the total number of personnel to be employed by each of the above agencies. The Committee does not request any information about their duties. [Questions Related to Secret and Confidential Documents, Report of the Special Committee to Study Questions Related to Secret and Confidential Government Documents, Sen. Rep. No. 93-466, 93rd Cong., 1st Sess. (Oct. 12, 1973), at 16].

18. Other national security and intelligence agencies, including the Atomic Energy Commission and various

components of the Department of Defense, have specific programs which must be kept secret in the interest of national security. This is done by releasing the overall budget and specific detail about most programs but permitting the agency to classify some parts of its budget and to spend certain sums on an unvouchered basis. In my judgment the CIA could protect programs which require secrecy in the same way.

MORTON H. HALPERIN

Sworn to before me this

____ day of _____, 1975

Notary Public

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORTON H. HALPERIN,

Plaintiff,

v.

Civil Action No. 75-0676

WILLIAM E. COLBY,
et al.,

Defendants.

DEFENDANTS' ANSWERS TO PLAINTIFF'S INTERROGATORIES

Pursuant to Rule 33 FED. R. CIV. P. Defendants submit their answers to Plaintiff's interrogatories as follows:

[Answers 1 through 6 omitted.]

- (7) Do you in fact contend that release of (a) the lump sum 1976 budget; and
(b) the lump sum 1976 [sic] expenditures could reasonably be expected to
(separately with respect to each):
(i) cause damage to the national security;
(ii) damage intelligence sources and methods?

Answer

- (i) Yes.
(ii) Yes.

- (8) If your answer to any part of the foregoing Interrogatory is affirmative, please state the detailed factual basis for your answer(s).

Answer

Publication of either the CIA budget or the expenditures made by CIA for any given year would show the amounts planned to be expended or in fact expended for objects of a confidential, extraordinary or emergency nature. This information would be of considerable value to a potentially hostile foreign government. For example, if the total expenditures made by the Agency for any particular year were publicized, these disclosures, when

taken with other information publicly available and thus presumed to be known to other governments' intelligence services, would enable such governments to refine their estimates of the activities of a major component of the United States intelligence community, including specifically the personnel strength, technological capabilities, clandestine operational activities, and the extent of the United States Government intelligence analysis and dissemination machinery. Thus this information being made available to other intelligence services would enable a potentially hostile government to refine its estimates of the amount of funds expended by CIA for those activities. The subsequent publication of similar data for other fiscal years, which would inevitably result if a precedent were established for the release of such data for any one year, would enable a potentially hostile power to refine its estimates of trends in the United States Government intelligence efforts. The business of intelligence is to a large extent a painstaking collection of data and the formation of conclusions utilizing a multitude of bits and pieces of information. The revelation of one such piece, which might not appear to be of significance to anyone not familiar with the process of intelligence analysis (and which, therefore, might not arguably be said to be damaging to the national security) would, when combined with other similar data, make available to the intelligence analyst of a potentially hostile power information of great use and which would result in significant damage to the national security of the United States. For example, if it were learned that CIA expenditures have increased significantly in any one given year, but that there has been no increase in Agency personnel (apparent from traffic, cars in the parking lots, etc.) it would be possible to make some reasonable estimates and conclusions to the effect that, for example, CIA had developed a costly intelligence collection system which is technological rather than manpower intensive; and that such system is operational. Knowledge readily available at the time about reconnaissance aircraft, photography and other technology, can result in an accurate analysis about a new collection system which would enable a potentially hostile power to take steps to counter its effectiveness. As I stated before the Congress on August 4, 1975,

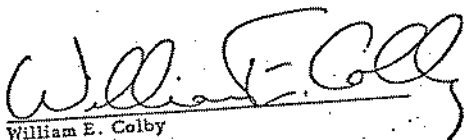
the development of the U-2 aircraft as an effective collection device would not have been possible if the CIA budget had been a matter of public knowledge. Our budget increased significantly during the development phase of that aircraft. That fact, if public, would have attracted attention abroad to the fact that something new and obviously major was in process. If it had been supplemented by knowledge (available perhaps from technical magazines, industry rumor, or advanced espionage techniques) that funds were being committed to a major aircraft manufacturer and to a manufacturer of sophisticated mapping cameras, the correct conclusion would have been simple to draw. The U.S. manufacturers in question, their employees and their suppliers and subcontractors would have become high priority intelligence targets for foreign espionage. And I am sure that the Soviets would have taken steps earlier to acquire a capability to destroy very-high-altitude aircraft. They did indeed take these steps, with eventual success, but only some time after the aircraft began operating over their territory--that is, once they had knowledge of a U.S. intelligence project.

Release of a single year budget figure alone would inevitably lead to demands for more detailed breakdowns by component or activity for monies appropriated or spent and could result in unauthorized disclosures of such additional information with cumulative damage to the national security.

The explanation and justification for the need for secrecy of the Agency budget has been explained by me in the terms set forth above to the Congress. On several occasions, according to my personal knowledge, similar explanations have been made to the Congress respecting the need for secrecy in CIA financial matters by prior Directors of Central Intelligence. The CIA budget and the amount of CIA expenditures have remained secret from the inception of the Agency in 1947 until now. The recent reaffirmation

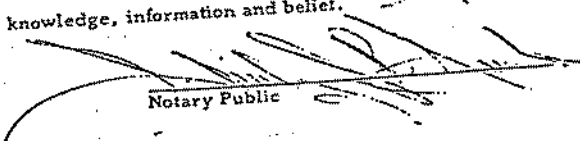
of congressional expression in this matter is the rejection of an amendment to the Defense Appropriations Act of 1974, which would have required the publication of the aggregate budget of the intelligence community. See. 120 CONG. REC. S 9601 (daily ed. June 4, 1974).

[Answers 9 through 14 omitted.]


William E. Colby

STATE OF VIRGINIA)
COUNTY OF FAIRFAX) ss.

On this 5 day of Sept, 1975 before me appeared William E. Colby, by me personally known, and being first duly sworn did state that the above and foregoing answers were made on behalf of the defendants and that the same were true to the best of his knowledge, information and belief.


Notary Public

APPENDIX VIII

STATEMENT OF WILLIAM E. COLBY

(Director of Central Intelligence 1973-76)

SENATE SELECT COMMITTEE ON INTELLIGENCE

April 27, 1977

Mr. Chairman, I appreciate very much the Committee's invitation to express my views whether the budget for intelligence should continue to be a secret or should be revealed in public. I spoke to this issue publicly when I was Director of Central Intelligence on August 4, 1975 before the Select Committee on Intelligence of the House of Representatives; I am pleased to supplement those comments with some more timely ones as this Committee considers this question.

Let me first say that under our Constitution and form of government there is a presumption against secrecy in our governmental activities. I fully accept this presumption and support a change from the centuries old tradition of total secrecy about intelligence. Some of intelligence's recent difficulties were the result of holding too long to this tradition in a new and American political atmosphere. We are now developing a new approach to intelligence, making public as much of its activities and reports as possible. For example, many of the information reports and assessments of our intelligence can be made available to Congress and to the public who must share in the foreign policy decisions of our government, as President Carter did with the recent oil study. I believe we need further steps in this direction to change existing habits and procedures toward the regular provision of open information and assessments on foreign matters to our public.

I also believe that many of the over-all policies and procedures of our intelligence agencies can be made public, and I participated in opening some of these while I was in office. I am happy to see that an open Presidential Executive Order has clarified the proper limits and improper activities which might otherwise be conducted by intelligence, replacing previous vague, secret, and ambiguous directives. I understand that this Committee is considering amendments to the National Security Act of 1947 to incorporate into law specific missions, responsibilities and limitations for American intelligence. I fully support this effort.

But our nation does, and must, have secrets. Certain important contributions to our free society will only work if their secrecy is protected. The secret ballot box is vital to our free country. The privacy of our income tax returns is protected by criminal sanctions against an Internal Revenue Service officer who would expose them without authorization. Approximately thirty such statutes exist in our Code today in order that certain important functions be protected if they must exist in secret. None of us knows who "Deep Throat" was but we have all benefited by his revelation of abuses of power. Public identification of him could discourage future "Deep Throats"; consequently his identity is being protected by the journalist who dealt with him.

It is equally necessary that our nation protect the sources of information necessary to keep it safe and free in the complicated and dangerous world in which we live. The present National Security Act requires that the Director of Central Intelligence protect intelligence sources and methods. It is from this statutory charge that I think we should consider the question of opening the intelligence budget to public, and inevitable foreign, scrutiny.

A contention exists that secrecy of the Intelligence budget conflicts with Article 1, Section 9, Clause 7 of the Constitution which states that "No money shall be

drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time." This clause of the Constitution was adopted after debates in the Constitutional Convention over whether concealment of certain expenditures should exist in the public interest, and was not part of the initial draft. Language was first suggested by George Mason which would have required an annual account of public expenditures. James Madison, however, argued for a change only to require reporting "from time to time" and explained that the intent of his amendment was to "leave enough to the discretion of the legislature." Patrick Henry opposed the Madison language because he said it made concealment possible. But when the debate was over, it was the Madison language and purpose which prevailed. An indicator of what the "discretion of the legislature" might include appears in Article 1, Section 5, Clause 3, stating that "Each House shall keep a Journal of its proceedings and from time to time publish the same, except such parts as may in their judgment require secrecy."

Confidential expenditures have existed from the earliest days of the Republic. President Washington in his first message requested a special fund for intelligence activities. Congress, with many Members having participated in the formulation of the Constitution, agreed and provided for expenditures from the fund to be recorded in the "private journals" of the Treasury. Later Congresses provided secret funds to a series of Presidents, Madison, Polk, and others, and a number of examples of confidential budgets can be found in our history. To contend that the Constitution requires total exposure of our intelligence budget is to contest two hundred years of consensus about the Constitution and the need for secrecy in certain of our affairs. In this, of course, the United States is similar to every other nation of the world which provides for the possibility of secret budgets for intelligence; indeed to my knowledge there is no nation which publishes its intelligence expenditures.

It is important also to clarify how secret the intelligence budget really is. In fact a number of bodies review it in as much detail as they wish and have the ability to reduce or conceivably add to it. Within the Executive Branch the budget of each intelligence agency is reviewed by the Committee on Foreign Intelligence reporting to the National Security Council. The Office of Management and Budget also reviews these budgets in detail and has independent examiners who question the need for each separate item in these budgets. The budget is then incorporated in the President's recommended budget to the Congress so that the President, himself, is fully aware of the amount and the make-up of the intelligence budget. Within the Congress, the intelligence budget requests are submitted to the Appropriations Committee of each House and to the appropriate substantive oversight committees, in the Senate now the Senate Committee on Intelligence, in the House the Armed Services Committee. Detailed briefings on these budget requests are provided and questions are answered in whatever detail the individual Members of the subcommittees charged with these reviews request. I understand that the final figures are then certified to the Budget Committees of each House, which then also become aware of the size of the intelligence budget. Certainly this degree of availability enables the Congress as well as the Executive to set the proper level of our intelligence expenditures through its qualified representatives, and audit and monitor the effectiveness of the agencies' use of the funds appropriated.

To relieve the concern of some Members of the Senate or the House that they could be kept in ignorance of something on which they are required to vote, the Chairmen of the Appropriations Committees of the Senate and of the House on the floor have offered to inform any Member of the final figure for intelligence in the annual appropriation bill. Thus any member willing to undertake in respect the confidence extended by these Chairmen could be aware of the figures involved. Lastly, the Chairmen of the Senate Appropriations Committee and of the House Appropriations Committee have stated on the floor that the entire expenditure for the CIA budget is included within the budget for the Defense Department, so that the total sum expended for defense is known to include whatever is necessary for intelligence.

Mr. Chairman, the intelligence budget may be secret, but it is subjected to a great deal of intensive review by the Executive and the Legislative Branches of our Constitutional system. In this light, it is significant that the Senate in June 1974 by a vote of 55 to 33 decided to retain its secrecy and the House made the same decision in the fall of 1975 by a vote of 260 to 140.

I believe no one seriously contends that the budget of the Central Intelligence Agency or of the other intelligence agencies should be made totally available to any public scrutiny, thus exposing its detailed activity to foreigner as well as citizen alike. This would clearly make it impossible to conduct secret intelligence operations or protect the nation's sources and vulnerable technology. But the contention is made that a total figure could be published as a compromise between the present secrecy and total exposure. A short review of this question will show how unreal this suggestion is.

On April 1st the New York Times carried a front page story to the effect that an intelligence budget totalling 6.2 billion was being requested for fiscal year 1978. A review of that story clearly shows the problems which would arise in any effort to reveal a total figure for the intelligence budget. The story indicates serious question as to exactly what the 6.2 refers to. It refers to figures published elsewhere of 4 billion, and of 10 billion, and states that these refer to different ways of determining what is in the "intelligence budget." I do not know the 1978 request, but I am in no way assisted in determining the value or lack of value of the 6.2 billion requested for 1978 by that story. I am left in total confusion as to exactly what is meant by the figure and what it covers.

Thus any effort to release an official figure for the Intelligence budget would have to be accompanied by considerable description of exactly what kinds of programs were covered and what kinds of programs were excluded. For example, language would be necessary to explain whether the radar, the intercept devices, the intelligence staff on a United States cruiser would be included in the figure or not, and exactly which agencies were included and which not. This kind of clarification would have to go on until a very clear line appeared between the kinds of operations covered under the budget, and those left out. The process would be accompanied by debate as to the wisdom of the dividing line selected, which could only reveal considerable detail about our intelligence programs.

These difficulties in one year would be compounded by the figure for a second and subsequent years. The immediate question would arise as to why the figure went up or went down. Any changes in the coverage of the figure through transfer of programs from one service to another, or one category of activity to another, would have to be explained to avoid presenting a false picture. Again the result would only be to outline in public more and more details of our over-all intelligence program.

The public debate apparently sought by publishing the figure would inevitably erode the secrecy of detail which had been agreed at the outset. The demand would rise for the break down of the total figure into its component major elements of investment, personnel, operations by type, regional allocations, etc. Each such breakdown would then provide the basis for separate trends over the years, revealing the variations in the composition of our intelligence program as it adjusted to new circumstances.

My concern is not theoretical, Mr. Chairman. In 1947 the Atomic Energy Commission account for our then-secret atomic weapons program was felt to be so sensitive that only a one-line item was placed in the budget that year to account for all such weapons expenditures. In theory many of these expenditures are still secret, but that one line item by 1974 had expanded to 15 pages of detailed explanation of the Atomic Energy Commission's weapons program. I could only foresee a similar erosion of the secrecy which will be necessary to successful intelligence operations in the future.

Another real example shows the probable effect of such a move. The Chinese Government did not publish the value of its industrial production after 1950. But they did publish percentage increases for the nation and most of the provinces, apparently believing this would not reveal the absolute figures. The revelation of one key figure made it easy to determine the absolute figure for all this data, when the Chinese reported that the value of industrial production in 1971 was 21 times that of 1949. Since we did know the figure for 1949, it was easy to determine the 1971 figure and to reconstruct the absolute figures both before and after that date, both nationally and by province. Other nations have followed our example in expanding the intelligence discipline to include the scrutiny and study of public releases of information. With a public budget figure for intelligence, and its inevitable erosion to specify its sub-programs, it would

be easy for foreign nations, and our own energetic investigative reporters, to associate increases in intelligence funding with new ventures in operations or in technology, thereby stimulating countermeasures by their targets to make such programs fruitless, and leave America in ignorance.

Mr. Chairman, you are being asked to make a watershed decision on this question. If you decide to make this total budget figure public, I confidently predict that you will be inundated by a series of questions in the coming years as to what the figure includes and what it excludes. Why does it go up? Why does it go down? Is it worth it? How does it work? And I believe that we will in very short time be losing much of the value of the sums appreciated for these intelligence activities.

Thus, I believe that it is not necessary, that it would not be helpful to the public, that it would be destructive to our future intelligence operations, and that it would be unwise for our nation to be the first in the world to reveal its intelligence budget.

STATEMENT BY GEORGE BUSH, FORMER DIRECTOR OF CENTRAL INTELLIGENCE

My view has been and continues to be that budget figures for CIA and for the Intelligence Community should not be made public. When Director of Central Intelligence, I testified to this before several committees of both the Senate and the House.

I see no reason to change my mind. On the last vote on this question, both Houses of Congress voted, by about two to one, not to disclose budget figures. I hope the results will be the same on the next vote.

There is a myth abroad in the United States. The myth, often perpetuated by inaccurate reporting, is that the Congress does not know what's in the CIA budget or Intelligence Community budget. As this Committee knows very well, there is no truth to that myth. Indeed, this Committee, in my view, has done a very thorough job in examining the budgets.

Every penny of the CIA budget and Intelligence Community budget is reported to Congress.

In something as sensitive as intelligence budgets, the American people must place confidence in their elected representatives; and, in the case of the Executive Branch, the people must place confidence in the President and his appointees. To see that executive control is being asserted over the intelligence budget. I think such control is being asserted.

Let me just cite some of the budget process so those interested in the budget question will understand that this is not a process without checks and disclosure.

Last year, after various agencies made up their intelligence budgets, the Committee on Foreign Intelligence had many meetings at which the agencies had to justify, in detail, their budget requests.

The Committee on Foreign Intelligence had to make certain priority-setting decisions. In most cases, but not all, the decision involved budget cuts.

The Office of Management and Budget got fully into the act. It made a detailed review of the budget. There was no withholding from the Office of Management and Budget.

The President familiarized himself with the budget and indeed some items were appealed to the President.

The President's Foreign Intelligence Advisory Board has full access to the budget figures. The Board does not approve or disapprove budget requests but it has access to extensive budget detail.

Public opinion to the contrary, several committees of Congress, including, of course, this one, take a detailed look at intelligence budgets. Staff investigators come to CIA and other agencies and spend week after week going over information related to budget requests.

The argument against revealing our total figure relates to the so-called unravelling process. I have concluded that one figure, standing alone, is all but meaningless. If it's a Community figure, some in the public will think it's a CIA figure. This "meaningless" figure will inevitably lead to a demand on the part of some for more detail. The revelation of that detail, in my view, will set bench marks from which meaningful conclusions can be drawn by opposition forces as subsequent years' numbers become available.

I believe that skilled observers on intelligence will be able to reach meaningful conclusions about our intelligence activities if budget figures are revealed from year to year.

I worry about the whittling away process that might take place.

I recognize the basic dilemma. We are an "open society," our people do have a "right to know;" but this right to know must give way at times to the legitimate demands for non-disclosure in certain national security categories. I am convinced intelligence budgets must continue to be in this category.

The answer, it seems to me, lies in a vigorous congressional oversight. It lies, too, in assuring the American people that certain committees of Congress do have complete access to Intelligence Community budget figures.

The answer lies in continuing the restoration of confidence in the Intelligence Community and especially in CIA. It also lies, I might add, in this Committee's letting the American people know the kind of thorough oversight you are doing on their behalf. Other committees with oversight responsibilities should also help.

There will always be an honest difference of opinion on this question. Many members of the press and some members of Congress will continue to press for more and more disclosure of intelligence matters, be it budget figures or operational matters.

I hope this Committee will resist the urge to move towards accommodation by revealing budget figures. The demand will not cease.

The rebuilding of confidence that thorough oversight can help accomplish will lead to a much broader recognition of the view that a strong foreign intelligence capability is essential to the survival of the free world. Such a capability is impossible to maintain if sources and methods of intelligence are not protected.

Revelation of budget figures will do more to enlighten a skilled adversary than it will to educate the American people, particularly if I am correct in my fear that the release of one figure whets the demand for more and more figures.

Convince the people that several congressional committees, acting on behalf of the American people are dealing properly and thoroughly with sensitive intelligence matters, and then, in my view, the problems will be solved.

The people want us to have a strong foreign intelligence capability. They will, in my view, support the Congress if it couples its insistence on secrecy in some intelligence matters with its determination to represent the people through penetrating congressional oversight.

APPENDIX IX

"Covert Financing", Chapter 9 of *Presidential Spending Power*, by Louis Fisher, copyright 1975, reprinted by permission of Princeton University Press.

9

Covert Financing

IN a democratic society, budgeting is expected to satisfy such fundamental standards as visibility, clarity, explicitness, and comprehensiveness. Without adherence to those standards the public is unable to judge and hold accountable the actions of governmental officials.

It was in the interest of accountability that the Framers included in the Constitution the following clause: "A regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." Various statutes buttress that constitutional principle. The Budget and Accounting Procedures Act of 1950 stated that the Federal Government shall provide "full disclosure of the results of financial operations. . . ." The Secretary of the Treasury is directed by law to prepare reports on the results of financial operations "for the information of the President, the Congress, and the public. . . ."¹

The force of those constitutional and statutory injunctions has been diluted over the years. Although a statement of receipts and expenditures is published each year by the Treasury Department, billions of dollars in Federal funds remain hidden from public view. They undergo no audit by the General Accounting Office. They are concealed even from most Members of Congress.

COVERT FINANCING

The Statement and Account Clause was first breached by the use of confidential funds for diplomatic purposes, as authorized by Congress in 1790. Building on that precedent, confidential funds began to appear in other appropriation accounts with little or no relationship to diplomatic activities. Entirely separate is the area of secret funds, notably for the Central Intelligence Agency and other elements of the U.S. intelligence community. In 1974 the Supreme Court decided a case in which CIA funding was challenged as a violation of the Statement and Account Clause. Beyond the areas of confidential and secret funds are other dark corners of the budget, where congressional knowledge and GAO auditing are slight or nonexistent.

STATEMENT AND ACCOUNT CLAUSE

The requirement for a public statement of receipts and expenditures did not appear in the early drafts of the Constitution. Not until September 14, 1787, when the Philadelphia Convention was drawing to a close, did George Mason propose that "an Account of the public expenditures should be annually published."² Debate on the motion was brief and confusing.

Converneur Morris objected that publication would be "impossible in many cases." Was that an allusion to the need for secrecy in diplomatic and military matters? Given the war with England and the operations of the Continental Congress, surely the delegates appreciated the need for confidentiality. Rufus King remarked that it would be "impracticable" to publish the expenditures of "every minute shilling," suggesting monthly statements of a more general character.³ His objection appears to be aimed not at the need for secrecy but rather the pragmatic issue of how much detail to include and with what frequency.

James Madison proposed that statements be made "from time to time" instead of annually. While it would be the

PRESIDENTIAL SPENDING POWER

objective to publish on a frequent basis, adoption of general language in the Constitution would "leave enough to the discretion of the Legislature." James Wilson, supporting Madison, added that many operations of finance "cannot be properly published at certain times." Both of those statements could be read as oblique references to the need for secrecy. At any rate, Madison's phrase "from time to time" was adopted without a dissenting vote. The Mason amendment was rewritten to include an accounting for receipts as well as expenditures. Moreover, the requirement for publication was applied to "all public Money."⁴

The issue was muddled somewhat at the Virginia ratifying convention, June 17, 1788. Mason objected to the phrase "from time to time" as being too loose an expression. He claimed that the "reasons urged in favor of this ambiguous expression, was, that there might be some matters which might require secrecy." How does *timing* relate to *coverage*? Perhaps he was referring to delays in the publication of sensitive material. Mason offered this elaboration:

In matters relative to military operations, and foreign negotiations, secrecy was necessary sometimes. But he did not conceive that the receipts and expenditures of the public money ought ever to be concealed. The people, he affirmed, had a right to know the expenditure of their money.⁵

Of course it makes no sense at all to argue both for secrecy and full disclosure. His statement would be consistent only by assuming that the cost of secret operations, after a brief period of time, would be made available to the public.

It would be too doctrinaire to assert that secret funding is totally incompatible with representative government. The Framers were not innocents in this matter. John Jay, who had served as minister to Spain and as Secretary for Foreign Affairs prior to the Philadelphia Convention, justified secrecy in the diplomatic area. As he observed in *Federalist*

COVERT FINANCING

64: "It seldom happens in the negotiation of treaties, of whichever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehension of discovery." To reveal the parties involved, or the purposes for which the funds were to be used, might have compromised negotiators and embarrassed the participating nations.

CONFIDENTIAL FUNDS

From the very start, then, it was the practice of Congress to provide the President with a fund over which he had complete control. He could exercise his own judgment in concealing the purposes to which funds were applied. The appropriation was public, but the expenditure could remain confidential.

An act of July 1, 1790 provided \$40,000 to the President to pay for special diplomatic agents. It was left to the President to decide the degree to which such expenditures should be made public. In 1793 Congress continued that fund for the purposes of intercourse or treaty with other nations. The President was allowed to make a certificate of such expenditures, with each certificate "deemed a sufficient voucher for the sum or sums therein expressed to have been expended." Certificates simply state that funds have been spent, without supplying invoices or other documentary evidence on the details of the expenditure. Reliance on certificates, as a substitute for vouchers, is a departure from standard auditing and accounting practices. The 1793 authority has been carried forward and remains part of contemporary law.⁴

President Polk and Congress confronted one another on this subject of confidential funds. In 1846 the House of Representatives asked Polk to furnish an account of all payments made on Presidential certificates for the contingent expenses of foreign intercourse, spanning the period from

PRESIDENTIAL SPENDING POWER

March 4, 1841 to the retirement of Daniel Webster from the Department of State. Polk reminded the legislators that the President had statutory authority to decide whether such expenditures should be made public. While he himself had settled all expenditures for contingent expenses of foreign intercourse by regular vouchers, he refused to surrender certificates made by his predecessor. Only through the impeachment process, he said, could the House compel release of those papers.⁷

The use of confidential funds by President Lincoln resulted in a Supreme Court decision. Under a contract with the President, made in July 1861, an individual by the name of William A. Lloyd was to proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial. Instead of being paid \$200 a month, as agreed to in the contract, he was only reimbursed his expenses. When his inheritors tried to recover compensation for the services, the Court of Claims dismissed the petition, partly because it was divided as to the authority of the President to bind the United States by the contract.

The Supreme Court said it had no difficulty as to the President's authority: "He was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy: and contracts to compensate such agents are so far binding upon the government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control." The Court emphasized, however, that such contracts, by their very nature, are forever confidential. Both President and agent "must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter." Any disclosure might com-

COVERT FINANCING

promise or embarrass the Government or endanger the life or injure the character of the agent. To allow action in the Court of Claims would expose the very details which were to be kept secret. On that principle the claim was denied.⁸

20TH CENTURY USAGE

In 1916, on the eve of America's entry into World War I, Congress authorized the Secretary of the Navy to make a certificate of expenses for "obtaining information from abroad and at home." Such certificates would be deemed a sufficient voucher for the sum expended. That provision is still part of current law.⁹

On August 25, 1941, just prior to American involvement in World War II, Congress authorized the President to use up to \$2.5 million in unvouchered expenditures from his Emergency Fund. Several months later, after the bombing of Pearl Harbor, the President received an Emergency Fund of \$100 million, of which \$10 million could be spent on a confidential basis. The level of confidential funds rose to \$25 million in July 1942 and \$50 million in October 1942. It was increased an additional \$25 million in July 1943.¹⁰

At one time confined to diplomatic and wartime expenses, confidential funds became a regular feature of many appropriation accounts. By fiscal 1973, twenty different accounts for executive agencies contained confidential funds. Four were tied directly to the President: Compensation of the President; White House Office, Salaries and Expenses; White House Office, Special Projects; and Executive Residence, Operating Expenses. Six were associated with diplomatic or military matters: Emergencies in the Diplomatic and Consular Service; Contingencies, Defense; and the Operation and Maintenance accounts for Army, Navy, Air Force, and Defense Agencies. Confidential funds for the latter six accounts were several million dollars each.

Three other accounts had national security overtones: Atomic Energy Commission (\$100,000 in confidential

PRESIDENTIAL SPENDING POWER

funds), National Aeronautics and Space Administration, Research and Development Programs (\$35,000), and Federal Bureau of Investigation (\$70,000). The remaining confidential funds were found in District of Columbia, Chief of Police (\$200,000), Bureau of Narcotics and Dangerous Drugs (\$70,000), Immigration and Naturalization Service (\$50,000), Bureau of Customs (\$50,000), U.S. Secret Service (\$50,000), Coast Guard (\$15,000), and Department of Justice, Salaries and Expenses, General Legal Activities (\$30,000). Not included in this list are funds for the U.S. intelligence community (to be discussed later in this chapter) as well as a number of other agencies whose expenditures are not subject to CAO audit.¹¹

In addition to confidential funds that are inserted each year in appropriation bills, the executive branch has access to other funds for confidential purposes. The Foreign Assistance Act of 1961, as amended, grants the President a special authority to spend up to \$50,000,000 in confidential funds. That is a cumulative amount, not annual. Available to the Agency for International Development are annual amounts of \$50,000 for confidential expenses and \$2,000 in confidential funds for the Inspector General, Foreign Assistance. The Peace Corps has access to \$5,000 a year in confidential funds.¹²

Confidential funds are usually easy to spot in appropriation bills. For example, the "Operation and Maintenance, Defense Agencies" account for fiscal 1973 included \$4.3 million to be spent on the approval or authority of the Secretary of Defense, "and payment may be made on his certificate of necessity for confidential military purposes, and his determination shall be final and conclusive upon the accounting officers of the Government." More difficult to find is the \$200,000 fund for the D.C. Chief of Police. Language in the appropriation bill merely stated that the "limitation on expenditures of funds by the Chief of Police for prevention and detection of crime during the current fiscal year

COVERT FINANCING

shall be \$200,000." To understand that the funds may be handled by certificates rather than vouchers, one must check back to 1960 legislation. Similarly, language in the appropriation bill for the State Department sets aside \$2.1 million for "Emergencies in the Diplomatic and Consular Service." Cross-checking a reference to the U.S. Code is necessary before one discovers that the funds may be accounted for by certificates.¹³

Unvouchered expenditures are often justified as necessary to pay informers. The \$70,000 in FBI funds is used for "criminal and security investigations where the name of the informant or the nature of the expenditure must be kept secret so as not to jeopardize the investigative operations. The personal safety of the recipient of the funds is the paramount consideration in situations of this type." The \$200,000 for the D.C. Chief of Police is available for expenses involved in investigating such activities as narcotics traffic and gambling. Undercover men use the funds when making purchases of narcotics or during visits to restaurants and bars.¹⁴

Most of the provisions for confidential funds were vulnerable to a point of order, since they lacked authorizing language.¹⁵ Beginning in 1973, Members took advantage of that situation as the Watergate affair dramatized the need to place curbs on executive actions, as did the shocking revelations of Federal expenditures on President Nixon's homes at San Clemente and Key Biscayne.¹⁶ On June 20, 1973, Bob Eckhardt, Democrat of Texas, offered an amendment to delete the \$15,000 confidential Coast Guard fund. To the suggestion that Members of Congress should have faith in the integrity of executive officials, Eckhardt responded:

I am sort of losing faith in the officers of the Government who are permitted to expend money without the General Accounting Office having any authority over the matter, and I am particularly losing faith in such inves-

PRESIDENTIAL SPENDING POWER

tigations by officers of the Government unless we know what it is all about.¹⁷

The Eckhardt amendment was adopted by voice vote and the \$15,000 fund was subsequently eliminated from the Transportation appropriation bill that became law.¹⁸

Eckhardt also attempted to delete the \$100,000 confidential fund for the AEC. When advised that Congress should trust the AEC chairman to use those funds with discretion, Eckhardt countered: "I thank the gentleman but I would trust the Comptroller [General] also." Later in the debate the ranking members of the House appropriations subcommittee handling the bill—Joe Evins and John Rhodes—developed some legislative history. They said that the Comptroller General could look behind the certificate of an AEC chairman to make sure that the matter was actually of a confidential nature. With that assurance Eckhardt withdrew his amendment. A subsequent investigation by House Appropriations disclosed that the AEC confidential fund was used on such rare occasions (and probably not at all for a number of years) that there was no need to appropriate \$100,000 for that purpose. Consequently, the fund was omitted from the AEC appropriation bill for fiscal 1975.¹⁹

Confidential funds in the D.C. appropriation bill were subject to a point of order because of a lack of substantive legislation. As a result of a point of order by Rep. H. R. Gross in 1973, followed by Senate action against other D.C. confidential accounts, six confidential funds were struck from the bill. The only remaining fund was \$200,000 for the Chief of Police. An authorization bill, enacted October 26, 1973, authorized seven D.C. confidential funds: for the Chief of Police, the D.C. Commissioner, the chairman of the D.C. Council, the Superintendent of Schools, the President of the Federal City College, the President of the Washington Technical Institute, and the President of the D.C. Teachers College.²⁰

COVERT FINANCING

The largest confidential funds are found in Defense Department accounts. In 1973 and 1974 Eckhardt was successful in raising points of order against the "Contingencies, Defense" account, since it constituted legislation in an appropriation bill. However, each time the funds were restored by the Senate and the conference committee. His efforts did result in the reduction of the account from \$5 million to \$2.5 million (in the fiscal 1975 act) and led to a softening of the language. Instead of the money being accounted for "solely" on the certificate of the Defense Secretary, payments "may be made on his certificate." The change in language was an invitation to GAO to audit.²¹

A similar development occurred with confidential funds in the Operation and Maintenance (O&M) accounts for the military. Eckhardt made points of order against them in 1973 on the ground that authorization was lacking. He was sustained by the Chair. Although the Senate and conference committee once again restored the funds to the appropriation bill, the prospect for GAO auditing improved. Language in the fiscal 1973 bill, to the effect that Defense Department determinations "shall be final and conclusive upon the accounting officers of the Government," was later changed to provide simply that "payments may be made" on the certificate of the Secretary of the department. Eckhardt withdrew a point of order against confidential funds for Air Force O&M, in the fiscal 1975 bill, after obtaining from Mahon the understanding that such funds could be audited and reviewed by the GAO.²²

Confidential funding for "White House Office, Special Projects" dates back to a 1955 request by the Budget Bureau. From an initial amount of \$1,250,000, the Special Projects account was generally funded at an annual level of \$1.5 million. During hearings in 1973, the House Committee on Appropriations asked whether the fund had been used to finance the Special Investigations Unit operating out of the White House (the so-called plumbers group of Water-

PRESIDENTIAL SPENDING POWER

gate fame). The Committee requested OMB to furnish a list of individual vouchers and expenditures for the account. When the Administration declined to supply the information, the Committee deleted the entire budget request.²³

The Senate Appropriations Committee restored \$1 million, inserting a requirement to provide both Appropriations Committees with quarterly reports of a "detailed accounting" of expenditures for the Special Projects account.²⁴ In floor action, Senator Mondale offered an amendment to strike the \$1 million. He placed his amendment in the context of these developments:

... a little thing has happened along the way called Watergate, which opened up for the American public to see the tremendously dangerous tendency that exists when we grant, without specification, without control, without information, substantial funds to the White House which are used by them behind the protection of executive privilege and the separation of powers to do as they please.²⁵

Although the Mondale amendment was defeated by a 52-36 vote, House and Senate conferees agreed to delete all funds for the Special Projects account. No funds for that purpose were included in the Treasury-Post Office appropriation bill signed by President Nixon. And as a result of legislative history stimulated by Congressman Dingell, in 1973, confidential funds in other White House accounts were subject to greater scrutiny by the GAO.²⁶

Eckhardt offered a more general amendment in 1973 to require that expenditures made solely on the certificate of an executive officer be subject to the scrutiny of the Comptroller General, who would determine whether the expenditure was indeed of a confidential or special nature. Eckhardt himself ran afoul of a point of order. His amendment was rejected because it was legislation in an appropriation bill. He also introduced the same proposal in bill form to allow the Comptroller General to examine confi-

COVERT FINANCING

dential expenditures and to report to Congress any apparent irregularities.²⁷ No action was taken on the bill during the 93d Congress (1973-75).

A number of reasonable arguments can be presented to justify the need for confidential funding, whether for national security, foreign affairs, or domestic investigations. However, some elementary principles should be followed.

First, authorize confidential funds by substantive law (passed by authorization committees) rather than including them in appropriation bills surrounded by waivers to protect against points of order. That would simply adhere to House and Senate rules. Second, the appropriation bill should state the amount, repeat the authorizing language, and cite the authority. To illustrate: "not to exceed (dollar amount) can be used for emergencies and extraordinary expenses, as authorized by (U.S. Code citation), to be expended on the approval or authority of the Secretary, and payments may be made on his certificate of necessity for confidential purposes." At the present time, in many appropriation bills, it is impossible to detect the presence of confidential funds. Third, some form of GAO audit should be carried out to ensure that funds are spent in accordance with legislative authority. Hundreds of agency officials share knowledge about the funds; we can extend the same trust to GAO officials. Fourth, have agencies report annually on the *degree* to which the authority is used. For example: "Of \$50,000 in confidential funds authorized, the agency used \$37,500."

SECRET FUNDS

Confidential funding is overt to the extent that such funds are cited in appropriation bills. In that sense the appropriation is public while the expenditure and auditing are concealed from Congress and the public. Secret funding, in contrast, is covert at every stage: from appropriation straight through to auditing.

PRESIDENTIAL SPENDING POWER

An early case of secret funding involved President Madison. Concerned that certain territory south of Georgia might pass from Spain to another foreign power, he asked Congress for authority to take temporary possession. Voting in secret session, in 1811, Congress provided \$100,000 for that purpose. The public did not know of the action until years later, in 1818, when Congress published the secret statute.²⁸

Secret funding was employed during World War II to develop and produce an atomic bomb. Administration officials contacted three leaders of the House of Representatives: Speaker Rayburn, Majority Leader McCormack, and Minority Leader Martin. An additional \$1.6 billion was needed to manufacture the bomb, an amount the Administration wanted without "a trace of evidence" as to how it would be spent. Clarence Cannon, chairman of House Appropriations, and John Taber, ranking majority member, agreed to make an inscrutable appropriation. Some of the money was tucked away under two accounts: "Engineer Service, Army" and "Expediting Production." Only a handful of Congressmen knew how the money was being used. About \$800 million was spent before some members of House Appropriations knew of the project.²⁹

CENTRAL INTELLIGENCE AGENCY

The Central Intelligence Act of 1949 contained extraordinary authority over the transfer and application of funds. It provided that sums made available to the CIA "may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds. . . ." For objects of a confidential nature, expenditures could be accounted for solely on the certificate of the CIA Director, with each certificate deemed a sufficient voucher for the amount certified. In addition, rather than appropriating funds directly to the CIA, Congress authorized the agency to transfer to and receive from other Government agencies "such sums as may be approved by the Bureau of the Budget" for the performance of any functions or activities autho-

COVERT FINANCING

rized by the National Security Act of 1947. Other agencies were authorized to transfer to or receive from the CIA such sums "without regard to any provisions of law limiting or prohibiting transfers between appropriations."³⁰

This transfer authority converts a number of appropriation accounts into a vast mixing bowl. Although explicit sums are voted for departments and agencies, that tidiness is quickly upset by siphoning off agency funds and funneling them to the CIA. The funds for the CIA are initially appropriated to the Defense Department. After the chairmen of the Appropriations Committees inform OMB of the level of the CIA budget, OMB approves the transfer of that amount from the Defense Department to the CIA.³¹

The total budget of the entire U.S. intelligence community has been estimated at \$6 billion a year. A study by *Newsweek* in 1971 reported that a dozen agencies employed 200,000 and spent some \$6 billion annually. Senator Proxmire released comparable figures in 1973. The CIA portion came to \$750 million. The largest amount for the intelligence community was \$2.8 billion for the Air Force, followed by the National Security Agency with \$1 billion. Other amounts: \$775 million each for the Army and Navy intelligence activities, \$100 million for the Defense Intelligence Agency, and \$8 million for the State Department. Intelligence expenditures of the FBI, the AEC, and the Treasury Department were not estimated.³²

Current criticism of the CIA results from its evolution as an intelligence-gathering agency, confined to foreign activities, to that of a participant-catalyst of military and political operations. Harry Howe Ransom, the leading scholar on the subject, writes that nothing in the public record "nor in such archives as are accessible (for example, in the Truman Library) suggests that Congress ever intended to create or knew that it was creating an agency for para-military operations and a wide range of foreign political interventions." Senator Stennis, during debate in 1974, said that he came to the Senate soon after the original CIA bill was passed

PRESIDENTIAL SPENDING POWER

"and there was nothing clearer around here, not anything that sounded louder, than the fact that the CIA act was passed for the purpose of foreign intelligence." He said he was "shocked and disappointed and considerably aroused" when he learned of CIA's involvement in the Watergate affair.³³

During the last decade the CIA has come under heavy fire for its secret funding of private organizations, Radio Free Europe and Radio Liberty, military operations in Laos, domestic intelligence gathering, and financial support in Chile for opponents of Allende.

With regard to private organizations, in 1967 it was reported in the press that the CIA had been secretly subsidizing religious organizations, student groups, labor unions, universities, and private foundations. President Johnson appointed a three-member committee, headed by Under Secretary of State Katzenbach, to review the relationship between the CIA and private American voluntary organizations. The committee reported that covert CIA assistance had been made available by the last four Administrations, dating back to October 1951. It recommended that "no federal agency shall provide any covert financial assistance or support, direct or indirect, to any of the nation's educational or private voluntary organizations." President Johnson accepted the committee's statement of policy and directed all agencies of the Government to implement it fully.³⁴

A footnote in the committee's report explained that its statement of policy did not entirely close the door to covert financing of private voluntary organizations. Exceptions might be necessary: "Where the security of the nation may be at stake, it is impossible for this committee to state categorically now that there will never be a contingency in which overriding national security interests may require an exception—nor would it be credible to enunciate a policy which purported to do so. In no case, however, should any

COVERT FINANCING

future exception be approved which involved any educational, philanthropic, or cultural organization."³⁵

The CIA continued to finance the broadcasting that had been conducted by Radio Free Europe (to Eastern Europe) and by Radio Liberty (to Soviet Russia). In 1971 Senator Case estimated that several hundred million dollars had been expended from CIA budgets over the previous decades to fund the two radios. He introduced legislation to require that, in the future, the two stations be subject to annual appropriations by Congress. Starting with a continuing appropriation act in 1971, funding for the two radios has been overt. A CAO report revealed that between 1949 and mid-1971 the Federal Government had spent \$482 million in covert funds to support the two radios.³⁶

Senator Case, member of both the Appropriations and the Foreign Relations Committees, had to rely on an article in the *Christian Science Monitor* to learn that the Administration had agreed to finance Thai troops in Laos. Further investigation by Senate staff members disclosed that the CIA was covertly financing Thai troops fighting in northern Laos. The cost of the operation ran to several hundred million dollars a year. An amendment by Senator Symington, to establish a ceiling of \$200 million on U.S. expenditures in Laos during fiscal 1972, had to be raised to \$350 million. Symington later said that the secret war in Laos was done without knowledge on the part of members of the Senate Armed Services Committee.³⁷

CONGRESSIONAL OVERSIGHT

A five-man Senate Armed Services subcommittee, responsible for reviewing CIA activities, met with CIA witnesses twice in 1970, not at all in 1971, and only once in 1972. The other CIA subcommittee in the Senate, located in the Appropriations Committee, did not have a more attractive record. With regard to CIA operations in Laos, Senator Ellender (at that time chairman of the Appropriations

PRESIDENTIAL SPENDING POWER

Committee) said he "did not know anything about it." He did not ask, in his oversight function, whether CIA funds were being used to carry on the war in Laos: "It never dawned on me to ask about it."³⁸ This frank exchange then took place between Senators Ellender and Cranston:

MR. CRANSTON. . . . I am sure I never would have thought to ask such a question. But it appeared in the press that perhaps that was happening. I would like to ask the Senator if, since then, he has inquired and now knows whether that is being done?

MR. ELLENDER. I have not inquired.

MR. CRANSTON. You do not know, in fact?

MR. ELLENDER. No.

MR. CRANSTON. As you are one of the five men privy to this information, in fact you are the No. 1 man of the five men who would know, then who would know what happened to this money?

The fact is, not even of the five men, and you are the chief one of the five men, know the facts in the situation.

MR. ELLENDER. Probably not.³⁹

House supervision of the CIA does not appear to be much better. Congressman Norblad, in a floor statement in 1963, said that he had been on the CIA subcommittee of House Armed Services: "We met annually—one time a year, for a period of 2 hours in which we accomplished virtually nothing." Congressman Nedzi, chairman of that subcommittee in later years, suggested in 1971 that only the Budget Bureau and the Kremlin had a full understanding of intelligence activities: "Perhaps they are the only ones. We simply don't have that kind of detailed information. . . . I have to be candid and tell you I don't know whether we are getting our money's worth." A step toward closer review was taken by the Committee Reform Amendments of 1974, which expands the jurisdiction of the House Foreign Affairs Committee to include oversight functions

COVERT FINANCING

of "intelligence activities relating to foreign policy." Beginning February 21, 1975, the CIA began sharing budget details with the entire defense subcommittee of House Appropriations, rather than a select few from that subcommittee.⁴⁰

With respect to the budgets of the U.S. intelligence community, several proposals have been advanced for greater legislative control. In 1971 Senator Symington proposed a ceiling of \$4 billion for expenses of the CIA, the National Security Agency, the Defense Intelligence Agency, and for "intelligence work performed by or on behalf of the Army, Navy, and the Air Force." The motion was rejected by a vote of 56 to 31. Part of the opposition came from those who considered Symington's language too broad, possibly applying even to tactical intelligence. No one could suggest a means of distinguishing between intelligence needed to conduct a battle and intelligence to be covered by the \$4 billion.⁴¹ Rather than approach the issue from this abstract conceptual plane, Members of Congress could have proceeded on a more down-to-earth level by simply naming the agencies and bureaus to be made subject to the budget ceiling.

Congress did succeed, in the Foreign Assistance Act of 1971, in placing restrictions on CIA expenditures and transfer authority. The Act imposed a ceiling of \$341 million for assistance to Cambodia. The statutory language was broad in its coverage. Notwithstanding any other provision of law, no funds authorized to be appropriated by the Foreign Assistance Act of 1971 or any other law could be obligated in any amount in excess of \$341 million for the purpose of carrying out directly or indirectly any economic or military assistance for Cambodia. The effect was to limit CIA's ability to transfer its funds to supplement the Cambodian operation.⁴² (For further background on this legislation, see pages 107-10.)

As a means of imposing a more general control on the CIA, Senator McCovern introduced a bill in 1971 to require

PRESIDENTIAL SPENDING POWER

publication in the budget of "proposed appropriations, estimated expenditures, and other related data" for the CIA. Each of the items would be shown as a single sum. Furthermore, the bill would have prohibited the CIA from spending funds that had been appropriated for other departments or agencies. The standard practice has been to inflate certain military appropriation accounts, allowing the superfluous funds to be transferred to the CIA and other intelligence agencies. "As a result," noted McGovern, "we are led to believe that some programs are better financed than, in fact, they are. We have no way of knowing what these programs and agencies might be."⁴³

Similar criticism has been voiced by other Senators. During debate in 1971 on the defense appropriation bill, Senator Fulbright remarked that when "you look at an item in this bill you wonder if it is really the amount of money for the A-14, for example, or if it is for the NSA. One cannot tell what it is."⁴⁴ One Senator told me that in one of his economy drives he made an attack on a particular appropriation. Later he received a call from a colleague, who sat on one of the oversight subcommittees, and was advised that the money was actually for the CIA.

To appropriate directly to the CIA would preserve the integrity of other accounts and make for more rational debate and decision by Congress. But how would Congress know that a lump sum amount would be too much or too little unless it knew how the money was to be spent? Congress imposed one restriction in 1974 when it prohibited the CIA from spending funds for operations in foreign countries, "other than activities intended solely for obtaining necessary intelligence. . . ." The restriction can be lifted if the President finds that an operation is important to the national security and reports to Congress on the nature and scope of the operation. In 1975, Senator Proxmire introduced a bill to authorize the CAO to audit and analyze the expenditures of intelligence agencies.⁴⁵

COVERT FINANCING

Would publication of the *aggregate* budget figures for the intelligence community jeopardize national interests? CIA Director Colby, as well as his predecessor James Schlesinger, testified that the release of such information would not violate national security. Colby said that the question was basically up to Congress, adding that he had found Congress "at least as responsible on this as our friends elsewhere in government, and we have, as you know, shared with Congress some very sensitive material which has been successfully protected by the Congress." He volunteered the view that the American constitutional structure might require publication of more budget information than might be convenient from a narrow intelligence point of view. However, after he was confirmed as CIA Director, Colby was quoted by Senator Pastore as being opposed to revealing the size of his agency's budget: "Please do not do this. If you want to make my job easier, please do not do this."⁴⁶

Schlesinger was asked about the CIA budget during his nomination hearing as Secretary of Defense. He expressed some misgivings at releasing a "free floating figure, unsupported and unsupportable in public," possibly inviting flat percentage cuts in intelligence activities. But he felt that publishing a gross figure would have only a "minimal" effect on security concerns. While he would be more concerned about the component figures, "for the gross national intelligence program figures I think we could live with that on a security basis, yes."⁴⁷

LITIGATION

Pressure for public funding of the CIA has been building from yet another source: the courts. William B. Richardson, a resident of Greensburg, Pa., sought judgment to declare the Central Intelligence Act in violation of the Statement and Account Clause of the Constitution. He had written to the Government Printing Office in 1967 to re-

PRESIDENTIAL SPENDING POWER

quest the document which would satisfy that clause. He examined available Treasury documents but could find no listing of CIA expenses. His administrative remedies exhausted, he turned to the courts.

In 1968 a U.S. District Court in Pennsylvania held that Richardson lacked standing to raise a justiciable controversy. A month later, in the church-state case of *Flast v. Cohen*, the Supreme Court substantially broadened the grounds on which taxpayers could establish standing, but the district court holding against Richardson was affirmed by the U.S. Court of Appeals for the Third Circuit. The Supreme Court denied certiorari to review the Richardson case; only Justice Douglas supported his motion for review.⁴⁸

Richardson initiated a new suit in 1970, this time asking that a three-judge court be convened to determine the constitutionality of the CIA act. Once again the district court decided he lacked standing. Moreover, the subject matter raised "political questions in a governmental sense and the subject is not open to a United States District Court for adjudication in any manner."⁴⁹ Up to that point Richardson had been blocked by three procedural hurdles: standing, jurisdiction, and justiciability.

But this time he was successful when he brought the matter to the court of appeals. On July 20, 1972, by a 6-3 vote, the circuit court vacated the district court ruling and directed that a statutory three-judge court be designated to adjudicate the issue. Judge Max Rosenni, writing the opinion, underscored the importance of the Statement and Account Clause:

A responsible and intelligent taxpayer and citizen, of course, wants to know how his tax money is being spent. Without this information he cannot intelligently follow the actions of the Congress or of the Executive. Nor can he properly fulfill his obligation as a member of the electorate. The Framers of the Constitution deemed fiscal

COVERT FINANCING

information essential if the electorate was to exercise any control over its representatives and meet their new responsibilities as citizens of the Republic.⁵⁰

The Supreme Court agreed to review the procedural aspects of the case, i.e., whether Richardson had standing to request a three-judge court. A separate writ of certiorari by Richardson, urging the Court to examine the substance and constitutionality of the issue, was rejected.⁵¹

The Court's decision was handed down June 25, 1974. Chief Justice Burger, writing for a 6-3 majority, held that Richardson lacked standing to maintain his suit. Relief was available, noted Burger, through the electoral process. If citizens felt that Members of Congress were delinquent in performing their duties, they could elect others to produce the publication of CIA expenditures. In a dissenting opinion, Justice Douglas denied that Congress was, at liberty to suspend a constitutional provision. To claim that Congress had the power to read the Statement and Account Clause out of the Constitution, he said, was "astounding."⁵²

OTHER DARK CORNERS

Beyond the question of confidential and secret funds lie other veiled areas of the Federal budget. Before discussing a few examples directly under the President, brief consideration can be given to a regulatory agency: the Federal Reserve System. Although it spends half a billion dollars a year, its funds are not appropriated by Congress. Nor is there any auditing by CAO. By buying and selling Government securities held in its portfolio, the "Fed" derives income from interest on the bonds. Federal Reserve earnings in calendar 1973 came to \$5 billion. After deducting \$495 million for its operating expenses, plus additional amounts for dividends to banks, losses on securities, etc., it returned the balance (\$4.3 billion) to the Treasury. The House of Representatives passed legislation in 1974 to provide for a

PRESIDENTIAL SPENDING POWER

measure of GAO auditing, but no action was taken by the Senate.⁵³

FREE WORLD FORCES

The financing of the war in Vietnam illustrates how billions can be spent for programs known to a handful of Congressmen. In September 1966, President Johnson expressed his "deep admiration as well as that of the American people for the action recently taken by the Philippines to send a civic action group of 2,000 men to assist the Vietnamese in resisting aggression and rebuilding their country." Other announcements from the White House created the impression that not only the Philippines but also Thailand, South Korea, and other members of the "Free World Forces" had shown a willingness to sacrifice blood and resources in the stand against Communism.⁵⁴

Hearings held by the Symington subcommittee in 1969 and 1970 revealed that the United States had offered sizable subsidies. The Philippines received river patrol craft, engineering equipment, a special overseas allowance for its soldiers, and additional equipment to strengthen Filipino forces at home. It cost the United States \$38.8 million to send one Filipino construction battalion to Vietnam. Senator Fulbright remarked that "all we did was go over and hire their soldiers in order to support our then administration's view that so many people were in sympathy with our war in Vietnam." Although the Philippine government denied that U.S. contributions represented a subsidy or a fee in return for sending the construction battalion, a GAO investigation confirmed that *quid pro quo* assistance had indeed been given. Moreover, there was evidence that the Johnson Administration had increased other forms of military and economic aid to the Philippines.⁵⁵

The Symington subcommittee also uncovered an agreement that the Johnson Administration had entered into with the Royal Thai Government in 1967. The United States agreed to cover any additional costs associated with

COVERT FINANCING

the sending of Thai soldiers to Vietnam: payment of overseas allowances, modernization of Thai forces, and the deployment of an anti-aircraft Hawk battery in Thailand. After the Foreign Ministry of Thailand denied that U.S. payments had been offered to induce Thailand to send armed forces to Vietnam, the GAO reported that U.S. funds had been used for such purposes as training Thai troops, payment of overseas allowances, and payment of separation bonuses to Thai soldiers who had served in Vietnam. The GAO estimated that the United States had invested "probably more than \$260 million in equipment, allowances, subsistence, construction, military sales concessions, and other support to the Thais for their contribution under the Free World Military Assistance program to Vietnam."⁵⁶

Subsidies were also used to support the sending of South Korean forces to Vietnam. Assistance included equipment to modernize Korean forces at home, equipment and all additional costs to cover the deployment of Korean forces in Vietnam, additional loans from the Agency for International Development, and increased ammunition and communication facilities in Korea. To assure that the dispatch of men to Vietnam would not weaken the defensive capabilities of the Republic of Korea, the Johnson Administration agreed to finance the training of forces to replace those deployed in Vietnam, and to improve South Korea's anti-infiltration capability. From fiscal 1965 to fiscal 1970, Korea's military presence in Vietnam cost the United States an estimated \$927.5 million.⁵⁷

The legal basis for assistance to Free World Forces in Vietnam derived from legislation passed in 1966. Funds were made available to support Vietnamese "and other free world forces in Vietnam, and related costs . . . on such terms and conditions as the Secretary of Defense may determine." Assistance was broadened in 1967 to include local forces in Laos and Thailand. Reports on such expenditures were submitted only to the Armed Services and Appropriations committee of both Houses. The general language of

PRESIDENTIAL SPENDING POWER

the statutes did not reveal the types of financial arrangements the Administration might enter into, or with what country. Staff members who had access to the reports told me they did not know the nature and dimension of financing the Free World Forces until hearings were held by the Symington subcommittee.⁵⁸

MILITARY ASSISTANCE

On the basis of a GAO report, Senator Edward Kennedy announced that money appropriated for refugee programs, for public health, agriculture, economic and technical projects, and for the "Food for Peace" program, had been diverted to pay for CIA-directed paramilitary operations in Laos. The term "refugee" was a euphemism created by the Agency for International Development to describe the development and support of those operations. Hearings in 1972 confirmed that AID funds had been used to supply Lao military and paramilitary forces with food and medical care and supplies.⁵⁹

Hearings by the Joint Economic Committee in 1971 highlighted the fact that nearly \$700 million in Food for Peace funds had been channeled into military assistance programs over the past six years. Since 1954, when the Food for Peace (P.L. 480) program was enacted, \$1.6 billion of those funds had been allocated to military assistance. Statutory authority existed, but few Members of Congress were aware that Food for Peace was such a capacious vehicle for military assistance. Nor could they have gained that understanding by reading the budget, which described Food for Peace in these terms: "The United States donates and sells agricultural commodities on favorable terms to friendly nations under the Agricultural Trade Development and Assistance Act (Public Law 480). The program combats hunger and malnutrition, promotes economic growth in developing nations, and develops and expands export markets for U.S. commodities." Senator Proxmire castigated the use of rheto-

COVERT FINANCING

ric by the Administration to conceal the nature of the Food for Peace program. "This seems to me," he said, "to be kind of an Orwellian perversion of the language; food for peace could be called food for war."⁶⁰

The budget itself was deceptive in how much was spent for military assistance. For example, 1971 outlays for military assistance were estimated at \$1.175 billion in Defense Department funds, plus an additional \$504 million in supporting assistance. The apparent total: \$1.679 billion. However, Senator Proxmire obtained from the Pentagon its estimates for military assistance for fiscal 1971: \$3.226 billion in the Military Assistance Program, Military Assistance Service Funded, and related programs; \$600 million in supporting assistance; \$7 million in additional public safety programs; \$143 million in Food for Peace funds used for common defense purposes; and \$2.339 billion for military export sales. Under that calculation the total rose to \$6.317 billion.⁶¹

Even when Congress appropriates overtly it can act "in the blind" by providing funds for activities that are justified in vague terms by the Administration. In 1972 Congressman Harrington declared that the defense authorization bill contained \$830 million that members of the Armed Services Committee "know nothing about. Some of the members of the Armed Services Committee, including the gentleman from New York (Mr. Stratton) and myself have asked for and been refused information. . . ." Three members of that same committee complained in 1973 that the military assistance program for Vietnam and Laos had been "pro forma justified" to the committee. In the words of one member: "All of the backup figures for the \$1.185 billion allegedly justified are *Secret Classified*. I haven't seen the figures and the Committee has no idea what program is justified in this area." The dispute continued in 1974 when Senator Fulbright charged that \$490 million in military assistance was hidden in the Pentagon's budget. The money was ear-

PRESIDENTIAL SPENDING POWER

marked for "War Reserve Materials"—stockpiled equipment and munitions destined for Vietnam, Thailand, and Korea.⁶²

Although the Statement and Account Clause can be interpreted to allow room for a modest amount of confidential funding, particularly in the diplomatic area, we have reached the point where probably \$10 billion to \$15 billion in the Federal budget is obscured because of confidential funds, secret funds, or cryptic budget justifications. Members of Congress cannot act intelligently on vast portions of the budget because they are denied basic data. Their constituents cannot hold the Members accountable because the issues and amounts are obfuscated. Elementary accounting practices by the GAO are rendered impossible.

In Federalist 58 James Madison claimed that the power over the purse "may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." Without public knowledge, without public debate, we have traveled far from that basic underpinning of democratic government.

REFERENCES TO PAGES 198-204

CHAPTER NINE

¹ Statement and Account Clause: Article I, Section 9, Clause 7. 1950 Act: 64 Stat. 834, sec. 111, codified at 31 U.S.C. 65 (1970). Direction to Secretary of the Treasury: 31 U.S.C. 66b(a) (1970).

² Farrand, *Records*, II, 618.

³ *Ibid.*

⁴ *Ibid.* at 618-19.

⁵ *Ibid.*, III, 326.

REFERENCES TO PAGES 205-209

⁶ 1 Stat. 128-29 (1790); 1 Stat. 300 (1793), but see also 2 Stat. 609, sec. 3 (1810); 31 U.S.C. 107 (1970).

⁷ Richardson, *Messages and Papers*, v, 2281-86. See *Hinds' Precedents*, II, §1561. Background on this dispute appears in Henry Merritt Wriston, *Executive Agents in American Foreign Relations* (1929), 260-67.

⁸ *Totten, Administrator v. United States*, 92 U.S. (2 Otto.) 105 (1875).

⁹ 39 Stat. 557 (1916); 31 U.S.C. 108 (1970). See also 10 U.S.C. 7202, which authorizes unvouchered expenditures by the Secretary of the Navy for emergency and extraordinary expenses.

¹⁰ 55 Stat. 682 (Aug. 25, 1941); 55 Stat. 818 (Dec. 17, 1941); 56 Stat. 705 (July 25, 1942) and 56 Stat. 990 (Oct. 26, 1942); 57 Stat. 432 (July 12, 1943).

¹¹ An Administration request in 1973 for confidential funds for the new Bureau of Alcohol, Tobacco and Firearms was rejected by House Appropriations. As a substitute, the Committee provided a lump sum of \$100,000 in confidential funds to be disbursed by the Secretary of the Treasury to the bureaus and services under his command. H. Rep. 399, 93-1 (1973), 8. That eliminated the two previous sums of \$50,000 each for the Bureau of Customs and the Secret Service. See P.L. 93-143, 87 Stat. 511. Beginning in fiscal 1974 the Drug Enforcement Administration (successor to the Bureau of Narcotics and Dangerous Drugs) received a confidential fund of \$70,000. P.L. 93-62, 87 Stat. 644. For restrictions on GAO audit authority, see U.S. General Accounting Office, *Legislation Relating to the Functions and Jurisdiction of the General Accounting Office* (Jan. 1971), Chapter C, and the supplement dated Jan. 1973.

¹² For those four authorities, see Title 22 of the U.S. Code, sections 2364(c), 2396(a)(8), 2384(d)(7), and 2514(d)(7).

¹³ Operation and Maintenance account: 86 Stat. 1188. D.C. funds; 87 Stat. 310, sec. 10; 74 Stat. 20. State Department funds: 86 Stat. 1110; 31 U.S.C. 107. The State Department account appears to be used largely to pay for Presidential gifts to foreign countries. See General Accounting Office, "Funding of Presidential Gifts and Grants to Middle East Countries," B-181244 (Oct. 31, 1974), at 11-12, 15-16.

¹⁴ FBI: 119 Cong. Rec. H5701 (daily ed. June 29, 1973),

REFERENCES TO PAGES 209-212

statement by Rep. Slack. Authority for FBI confidential fund appears at 28 U.S.C. 537 (1970). D.C.: *District of Columbia Appropriations for Fiscal Year 1974* (Part 1), hearings before the Senate Committee on Appropriations, 93-1 (1973), 668.

¹⁵ Exceptions include 3 U.S.C. 102 (Presidential compensation), 3 U.S.C. 103 (Presidential travel), 8 U.S.C. 1555 (immigration), 10 U.S.C. 7202 (Navy), 28 U.S.C. 537 (FBI), 31 U.S.C. 107 (foreign affairs), 31 U.S.C. 108 (Navy), 31 U.S.C. 529d (U.S. Customs Service), 42 U.S.C. 2017 (AEC). See also citations in note 12 above.

¹⁶ See Dan Cordtz, "The Imperial Life Style of the U.S. President," *Fortune*, Oct. 1973, at 142-47, 220-24, and *Federal Expenditures at San Clemente and Key Biscayne*, hearings before the House Committee on Appropriations, 93-1 (1973).

¹⁷ 119 Cong. Rec. H5018 (daily ed. June 20, 1973).

¹⁸ *Ibid.* at H5019; P.L. 93-98, 87 Stat. 330.

¹⁹ Eckhardt, Evins, and Rhodes: 119 Cong. Rec. H5612-13 (daily ed. June 28, 1973). Use of AEC fund: information obtained from staff members of House Appropriations, AEC, and GAO. Several sources in the executive branch told me the fund had not been used since 1959. For fiscal 1975 AEC appropriation bill, see P.L. 93-393, 88 Stat. 782. A reorganization act on Oct. 11, 1974 (P.L. 93-438) broke AEC into two parts, one assigned to the new Energy Research and Development Administration (ERDA) and the other parceled out to the new Nuclear Regulatory Commission (NRC). The authority for the confidential fund remains available to ERDA and probably also to NRC.

²⁰ Gross: 119 Cong. Rec. H4869 (daily ed. June 18, 1973). Senate action: 119 Cong. Rec. S14082 (daily ed. July 19, 1973); concurred in by conferees: H. Rep. 416, 93-1 (1973), 6. D.C. authorization bill in 1973: P.L. 93-140, 87 Stat. 505, sec. 9, and 87 Stat. 509, sec. 26.

²¹ Eckhardt on Contingencies, Defense: 119 Cong. Rec. H10409 (daily ed. Nov. 30, 1973), and 120 Cong. Rec. H7740 (daily ed. Aug. 6, 1974). Compare 86 Stat. 1190, 87 Stat. 1032, and 88 Stat. 1218.

²² Eckhardt on O&M accounts: 119 Cong. Rec. H10405-06 (daily ed. Nov. 30, 1973). Compare 86 Stat. 1186-88, 87 Stat. 1028-30, and 88 Stat. 1215-16. Eckhardt and Mahon: 120 Cong. Rec. H7760 (daily ed. Aug. 6, 1974).

²³ *General Government Matters Appropriations, 1956*, hear-

REFERENCES TO PAGES 212-215

ings before the Senate Committee on Appropriations, 84-1 (1955), 1-4. *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1974* (Part 3), hearings before the House Committee on Appropriations, 93-1 (1973), 601; H. Rep. 399, 93-1 (1973), 25-26.

²⁴ S. Rep. 378, 93-1 (1973), 21.

²⁵ 119 Cong. Rec. S15944 (daily ed. Sept. 5, 1973).

²⁶ Mondale amendment: *ibid.* at S15946; H. Rep. 570, 93-1 (1973), 5; P.L. 93-143, 87 Stat. 510. Dingell: 119 Cong. Rec. H7146-47 (daily ed. Aug. 1, 1973).

²⁷ Eckhardt amendment: 119 Cong. Rec. H5703 (daily ed. June 29, 1973). His bill: H.R. 10250, 93-1 (1973). See also his remarks at 119 Cong. Rec. E5790-91 (daily ed. Sept. 13, 1973).

²⁸ 3 Stat. 471-72. See David Hunter Miller, *Secret Statutes of the United States* (1918).

²⁹ Joe Martin, *My First Fifty Years in Politics* (1960), 100-01. Funding under two accounts: Leslie R. Groves, *Now It Can Be Told* (1962), 360-61. \$800 million: Elias Huzar, *The Purse and the Sword* (1950), 338. See also James A. Robinson, *Congress and Foreign Policy-Making* (1967), 36-38.

³⁰ 50 U.S.C. 403 (1970).

³¹ For OMB operation, see letter from OMB Director Ash to Senator Proxmire, April 29, 1974, reprinted at 120 Cong. Rec. S9603-04 (daily ed. June 4, 1974). Senator McClellan stated that only one bill—the defense appropriation bill—contained funds for the CIA; 120 Cong. Rec. S14334 (daily ed. Aug. 5, 1974). The following day, when asked if money to fund the CIA was in the defense appropriation bill, Appropriations Chairman Mahon answered, "That is correct," 120 Cong. Rec. H7709 (daily ed. Aug. 6, 1974).

³² *Newsweek*, Nov. 22, 1971, at 29. See also at 32 for an organizational chart of the U.S. intelligence community, including details on budgets and functions. The CIA budget was estimated at \$750 million. Proxmire: 119 Cong. Rec. S6868 (daily ed. April 10, 1973). Victor Marchetti and John D. Marks, *The CIA and the Cult of Intelligence* (1974), at 58-64, put the CIA budget at \$750 million, but noted that the Pentagon also contributes additional amounts in the hundreds of millions of dollars to fund espionage programs and clandestine activities. A story on a \$1.5 billion secret program called the National Re-

REFERENCES TO PAGES 216-219

connaissance Office, funded by Air Force appropriations, appears in the *Washington Post*, Dec. 12, 1973, at A1:1.

³³ Harry Howe Ransom, "Secret Intelligence Agencies and Congress," *Society* (March/April 1975), at 34. Also of the opinion that Congress did not create the CIA to engage in subversion of foreign governments is Jerrold L. Walden, "The C.I.A.: A Study in the Arrogation of Administrative Powers," 39 *G.W. L. Rev.* 66, 82-84 (1970). Stennis: 120 Cong. Rec. S9505 (daily ed. June 3, 1974).

³⁴ *Public Papers of the Presidents, 1967*, I, 403. For details on CIA subsidies to supposedly private organizations, see Jerrold L. Walden, "Proselytes for Espionage—The CIA and Domestic Fronts," 19 *J. Pub. Law* 179 (1970).

³⁵ *Wkly Comp. Pres. Doc.*, III, 556.

³⁶ Case estimate and bill: 117 Cong. Rec. S130 (daily ed. Jan. 25, 1971), and S. 18, 92-1 (1971). Continuing appropriation: 85 Stat. 90 (July 1, 1971). GAO study: *Washington Post*, June 6, 1972, F9:3. See also *Public Financing of Radio Free Europe and Radio Liberty*, hearing before the Senate Committee on Foreign Relations, 92-1 (1971).

³⁷ Case: 117 Cong. Rec. S7503 (daily ed. May 20, 1971). Senate staff study: *Washington Post*, May 22, 1971, A17:1, and *Laos: April 1971*, staff report for the Senate Foreign Relations Committee (committee print 1971). Symington ceiling: 117 Cong. Rec. S15762-82 (daily ed. Oct. 4, 1971); 85 Stat. 428, sec. 505. Symington also at 119 Cong. Rec. S15364 (daily ed. Aug. 1, 1973).

³⁸ For record of Senate Armed Services Committee, see remarks of Senator Proxmire, 120 Cong. Rec. S5929 (daily ed. April 11, 1974). Ellender: 117 Cong. Rec. S19527 (Nov. 23, 1971). See Symington at 117 Cong. Rec. S17996 (daily ed. Nov. 10, 1971).

³⁹ 117 Cong. Rec. S19529 (daily ed. Nov. 23, 1971).

⁴⁰ Norblad: 109 Cong. Rec. 15086 (Aug. 15, 1963). Nedzi: *Washington Post*, Dec. 21, 1971, A28:1. For Committee Reform Amendments of 1974, see H. Res. 988, sec. 101, passed by the House on Oct. 8, 1974. CIA relationship with entire defense subcommittee: *Washington Post*, Feb. 22, 1975, A2:1. Congress' record of controlling the CIA is discussed by Marchetti and

REFERENCES TO PAGES 219-222

Marks, *The CIA and the Cult of Intelligence* (1974), 341-49. For a conclusion (which I do not accept) that the Constitution by itself requires a specific appropriation to the CIA and an accounting to the public about its expenditures, see Note, "The CIA's Secret Funding and the Constitution," 84 *Yale L. J.* 608 (1975). I favor a direct appropriation to the CIA, removal of the authority to transfer funds back and forth between agencies, and GAO auditing, but I would argue on grounds of good public policy rather than constitutional requirements.

⁴¹ 117 Cong. Rec. S19521-30 (daily ed. Nov. 23, 1971).

⁴² P.L. 92-226, 86 Stat. 29 (Feb. 7, 1972).

⁴³ 117 Cong. Rec. S10527 (July 7, 1971); S. 2231, 92-1 (1971).

⁴⁴ *Ibid.* at S19526 (Nov. 23, 1971). The practice of padding the defense budget to conceal CIA money brought forth the comment from Senator Cranston that "we have no idea what the figures really are, whether for the C-5A, the B-1 bomber, the Trident, or for military housing. We do not know whether those figures are accurate or inaccurate." 119 Cong. Rec. S15363 (daily ed. Aug. 1, 1973).

⁴⁵ Restriction on operations: P.L. 93-559, 88 Stat. 1804, sec. 32 (1974). Proxmire: S. 653, 94-1 (1975). See his remarks at 121 Cong. Rec. S1771-75 (daily ed. Feb. 11, 1975), which include an important study by GAO on auditing of the intelligence agencies. For an evaluation of the McGovern bill, see Stanley N. Futterman, "Toward Legislative Control of the C.I.A.," 4 *N.Y.U. J. Int'l Law & Pol.* 431, 441 (1971). A thorough review of congressional control over the CIA is by Robin Berman Schwartzman, "Fiscal Oversight of the Central Intelligence Agency: Can Accountability and Confidentiality Co-exist?" 7 *N.Y.U. J. Int'l Law & Pol.* 493 (1974).

⁴⁶ *Nomination of William E. Colby*, hearings before the Senate Committee on Armed Services, 93-1 (1973), 17, 181. Pastore: 120 Cong. Rec. S9605 (daily ed. June 4, 1974).

⁴⁷ *Nomination of James R. Schlesinger, To Be Secretary of Defense*, hearing before the Senate Committee on Armed Services, 93-1 (1973), 67-68.

⁴⁸ *Richardson v. Sokol*, 285 F.Supp. 866 (W.D. Pa. 1968). *Flast v. Cohen*, 392 U.S. 83 (1968). *Richardson v. Sokol*, 409

REFERENCES TO PAGES 222-226

F.2d 3 (3d Cir. 1969); the court of appeals did not decide the standing question because it believed the district court lacked jurisdiction. *Richardson v. Sokol*, 396 U.S. 949 (1969).

⁴⁹ *Richardson v. United States*, C.A. No. 7023 (W.D. Pa. 1970); not reported, but reprinted at *United States v. Richardson*, "Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit," U.S. Supreme Court Docket No. 72-885, at 55a-58a.

⁵⁰ *Richardson v. United States*, 465 F.2d 844, 853 (3d Cir. 1972), footnote omitted.

⁵¹ *United States v. Richardson*, 410 U.S. 953 (No. 72-885), 955 (No. 72-894).

⁵² *United States v. Richardson*, 418 U.S. 166, 200-01 (1974). Burger's reference to political remedies, *ibid.* at 179.

⁵³ See *To Provide For an Audit of the Federal Reserve System by the General Accounting Office*, hearings before the House Committee on Banking and Currency, 93-1 (1973); H. Rep. 585, 93-1 (1973); and 120 Cong. Rec. H4554-87 (daily ed. May 30, 1974). See also 118 Cong. Rec. H973-76 (daily ed. Feb. 9, 1972); *ibid.* at H4818 (May 22, 1972); 119 Cong. Rec. H10366 (daily ed. Nov. 29, 1973); *ibid.* at H11134-36 (Dec. 11, 1973). Calendar 1973 figures obtained from the budget office of the Federal Reserve.

⁵⁴ *Public Papers of the Presidents, 1966*, II, 1029.

⁵⁵ *United States Security Agreements and Commitments Abroad: The Republic of the Philippines* (Part 1), hearings before the Senate Committee on Foreign Relations, 91-1 (1969), 261, 358. Denial: *New York Times*, Nov. 20, 1969, 13:1. GAO: 116 Cong. Rec. S4453 (daily ed. March 25, 1970).

⁵⁶ *United States Security Agreements and Commitments Abroad: Kingdom of Thailand* (Part 3), hearings before the Senate Committee on Foreign Relations, 91-1 (1969), 625-57. Denial: *New York Times*, Dec. 16, 1969, 10:1. CAO: 116 Cong. Rec. S19743 (daily ed. Dec. 9, 1970).

⁵⁷ *United States Security Agreements and Commitments Abroad: Republic of Korea* (Part 6), hearings before the Senate Committee on Foreign Relations, 91-2 (1970), 1529-47.

⁵⁸ 80 Stat. 37, sec. 401 (1966); 80 Stat. 82, sec. 102 (1966); 81 Stat. 53, sec. 301 (1967); 81 Stat. 248, sec. 639 (1967). For additional details on Free World Forces, see Louis Fisher,

REFERENCES TO PAGES 226-231

"Presidential Spending Discretion and Congressional Controls," 37 *Law & Contemp. Prob.* 135, 141-42 (1972).

⁵⁹ *Problems of War Victims in Indochina* (Part II: Cambodia and Laos), hearings before the Senate Committee on the Judiciary, 92-2 (1972), 38-39. See *Washington Post*, Feb. 7, 1971, A2:8, and *Washington Evening Star*, Feb. 7, 1971, A1:1.

⁶⁰ *Economic Issues in Military Assistance*, hearings before the Joint Economic Committee, 92-1 (1971), 2, 293. Hereafter cited as *Economic Issues*. Statutory authority: 7 U.S.C. 1704(c) (1970). *The Budget of the United States Government, Fiscal Year 1972*, at 101. Proxmire: *Economic Issues*, at 61.

⁶¹ *The Budget of the United States Government Fiscal Year 1972*, at 86, 96. *Economic Issues*, at 203.

⁶² Harrington: 118 Cong. Rec. H6141 (daily ed. June 27, 1972). Members of the Armed Services Committee: H. Rep. 383, 93-1 (1973), 120. Emphasis in original. The three members are Robert Leggett, Patricia Schroeder, and Ronald Dellums. Fulbright: 120 Cong. Rec. S7062 (daily ed. May 6, 1974). See *ibid.* at E2906-07 (May 9, 1974) and S9972-75 (June 6, 1974).

APPENDIX X

CENTRAL INTELLIGENCE AGENCY WASHINGTON, D.C. 20505

Honorable John L. McClellan, Chairman
Committee on Appropriations
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Senate Select Committee recently voted to bring before the full Senate the question of whether to publicly release the budget totals of the intelligence agencies. I am writing to express my opposition to such disclosures. I agree fully with the President, who stated in an April 21 letter to Senator Church: "It is my belief that the net effect of such a disclosure could adversely affect our foreign intelligence efforts and therefore would not be in the public interest." Past Directors have taken this same position.

I believe the disclosure of intelligence budgets would provide adversaries with significant insight into the nature, scope, and direction of our national foreign intelligence programs, particularly were the figures to be released on an annual basis, as recommended by the Select Committee. Budget totals, when correlated with other information, will enable our adversaries to make more accurate conclusions about major Intelligence Community programs. This would aid them in thwarting our efforts to collect important information. The U.S. Government would benefit considerably from access to this same information regarding Soviet intelligence efforts.

In addition, once overall intelligence agency budget figures are made public, I believe it will be impossible to prevent the disclosure of budget details. Definitional questions about where "intelligence" expenditures stop and operational expenditures begin would lead to open discussion of sensitive intelligence programs and techniques. The history of the disclosure of the Atomic Energy Commission budget illustrates the futility of attempting to stop the disclosure at a single figure. Coverage of the AEC weapons budget evolved from a one-line entry in 1949 to a fifteen-page breakout of weapons program, operating costs, and weapons facilities project costs in 1974.

It has been suggested that withholding intelligence budget figures is unconstitutional. The Select Committee report argues that Article I, Section 9, Clause 7 of the Constitution requires that intelligence budgets be publicly revealed. This Clause reads:

(391)



"No Money shall be drawn from the Treasury, but in Consequence of Appropriations, made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

Of course, the constitutionality of the present practice can only be determined by a court, and no court has reached this question. I believe, however, that the present practice is in accord with the Constitution. I would note also that there is historical precedent for the secrecy of certain funds and that similar provision is made for special funds of other departments and agencies. Furthermore, it has been publicly stated in the Congress that all funds appropriated for CIA and intelligence activities of the Department of Defense are in the Defense Appropriations Act. In doing so, Congress has exercised its discretion to make public a total defense figure, which includes closely-related intelligence costs without releasing a separate intelligence figure.

Of even greater concern to me is the possibility that, in its consideration of the various proposals for future congressional oversight of intelligence agencies, the Senate might fragment budgetary authorization among several committees of the Congress. As you know, Section 8 of the Central Intelligence Agency Act of 1949 provided permanent budgetary authorization for the Central Intelligence Agency. Annual Authorization for the military intelligence organizations (which comprise approximately 85 percent of the total intelligence community budget) is under the jurisdiction of the Armed Services Committees. I do not believe a Senate resolution should be promulgated which would be contrary to the Central Intelligence Agency Act. In any event, I feel strongly that fragmentation of the intelligence community budget among several committees of the Congress would create confusion and would hamper, if not render impossible, the exercise of the responsibilities of the Director of Central Intelligence over the intelligence community in furtherance of statute and Executive Order 11905.

I urgently request your consideration of these matters in connection with the upcoming discussions of the Senate's oversight of the intelligence community.

Sincerely,

George Bush
Director

THE WHITE HOUSE

WASHINGTON

April 21, 1976

Dear Mr. Chairman:

It is my understanding that the Select Committee expects to publish in its final report the budget figure for the Intelligence Community.

It is my belief that the net effect of such a disclosure could adversely affect our foreign intelligence efforts and therefore would not be in the public interest.

Over the past two years both Houses of Congress have voted by overwhelming margins against the disclosure of information concerning our foreign intelligence budget. I believe that these votes reflect the judgment of the Congress, which I also hold, that such disclosure over a period of time would reveal information helpful to our foreign adversaries.

Director of Central Intelligence George Bush has briefed your Committee on the harm to United States foreign intelligence agencies that could result from publication of this budget information. He is available for further discussion of this issue with the Committee members.

I urge the Committee to reconsider its position. In assuring that our foreign intelligence agencies are held accountable to the public, we must not undermine their

capability to provide the foreign intelligence needed by me and other elected and appointed officials in order to meet our constitutional responsibilities.

Sincerely,

A handwritten signature in cursive script, reading "Gerald R. Ford". The signature is written in dark ink and is positioned below the word "Sincerely,".

The Honorable Frank Church
Chairman
Select Committee to Study
Governmental Operations with
Respect to Intelligence Activities
United States Senate
Washington, D. C. 20510

cc: The Honorable John Tower
Vice Chairman

The Legal Basis for the Special Funding
Authorities Established Under Title 50, Sections 403f
and 403j, in Furtherance of the Central Intelligence
Agency Mission and Functions

1. The secrecy that is inherently necessary to insure the success of intelligence-gathering programs must be paralleled by secrecy in the funding of these programs. Without secrecy in funding there is no chance that the secrecy of the programs themselves can be maintained: knowing the direction and volume of money flow within the intelligence community can be every bit as revealing as knowing the commitment of manpower or hardware to a particular program. The Executive and the Legislative branches have carefully preserved and jointly controlled throughout our history the ability to make allocations of resources without revealing either the magnitude or the ends of the allocation. The use of these procedures has varied at different times, but the right to use them has never been extinguished. Congress sought to preserve budgetary secrecy in structuring our modern national intelligence efforts.

50 U.S.C. 403f states, through section (a), that:

In the performance of its functions, the Central Intelligence Agency is authorized--

(a) Transfer to and receive from other Government agencies such sums as may be approved by the Bureau of the Budget, for the performance of any of the functions or activities authorized under sections 403 and 405 of this title, and any other Government agency is authorized to transfer to or receive from the Agency such sums without regard to any provisions of law limiting or prohibiting transfers between appropriations. Sums transferred to the Agency in accordance with this paragraph may be expended for the purposes and under the authority of sections 403a - 403j of this title without regard to limitations of appropriations from which transferred.

This provision permits funds to be made available for CIA expenditure without having first been publicly identified either in part or in aggregate as CIA funds, as would be the case in the normal appropriation process.

Funds can thus be transferred to CIA from portions of the defense budget after being placed there by Congress with the knowledge that they are actually CIA funds. By this means, Congress and the Executive retain tight control of intelligence expenditures and intelligence information. The report of the Senate Committee on Armed Services [S. Rept. No. 106, 81st Cong., 1st Sess., (1949)] on section 403f(a) states that it "provides for the annual financing of Agency operations without impairing security." The reference to "annual financing" indicates that the intent was to protect the aggregate figure from disclosure as well as individual transfers.

2. 50 U.S.C. 403j may be said to complement section 403f. While 403f protects from disclosure the flow of funds to the Agency, 403j protects Agency expenditures from disclosure. 50 U.S.C. 403j(b) provides that:

The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds; and for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified.

Congress has enacted similar provisions to operate in other situations where a compelling need for secrecy has been found. Thus, provision is made for secrecy in accounting for certain Federal Bureau of Investigation expenditures at 28 U.S.C. 107, for certain Department of the Navy expenditures at 31 U.S.C. 108, and for Atomic Energy Commission expenditure at 42 U.S.C. 2017(b). In the case of the Central Intelligence Agency, disclosure of the type of expenditure information protected by the provisions of 50 U.S.C. 403j would reveal the objects and purposes of covert programs, thereby rendering them futile. Knowledge that funds are being expended pursuant to a contract with a certain division of a corporation is enough to reveal the nature of the project to intelligence professionals, or at the very least to allow adversaries to target the most significant intelligence initiatives for further probing. For example, disclosure of the commitment of research and development funds to the most highly talented design section of a major aircraft manufacturer when other expenditures were being made with a manufacturer of sophisticated mapping cameras would have made the existence of the U-2 program an easy guess. Examples from recent years, as intelligence gathering becomes more technically sophisticated, are more numerous. The tracing of expenditures to individuals can be just as damaging. Disclosure of the fact that an individual has received money from CIA, either as a conduit for covert funding or in exchange for services rendered, will destroy the usefulness of that individual as a covert intelligence asset in the future, not to mention the threat to personal safety to those who have cooperated in the past. Also, disclosure of expenditure information would force the termination of certain highly advantageous intelligence liaison programs with foreign governments which would be embarrassed by revelation of cooperation with CIA.

3. The origin of the statutory and regulatory framework that controls the handling of United States Government funds can be traced to Article I, Section 9, Clause 7, the Statement and Account Clause, which states that:

"No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

This portion of the Constitution establishes the principle of maintaining accountability between the Executive and Legislative Branches throughout the process of appropriating and expending funds. And, of course, both branches remain accountable to the electorate. As would be expected, the procedures for fulfilling the obligation of maintaining accountability are not set out in the Constitution, leaving room for variation in the method and level of accountability to be required under different circumstances. Logic would indicate that the constitutional requirement of maintaining accountability cannot be read as being absolute, in the sense that a record of every expenditure must be made generally available. Such a requirement, apart from the Herculean proportions of the task, would make any covert Government program impossible, and some secrecy in Government operation has existed, necessarily, from the earliest days of the Republic. However, evidence that this portion of the Constitution is not to be read in impossibly rigid and absolutist terms can be found in the history of the clause itself. The history of the clause and the history of secrecy in Government operations subsequent to its adoption indicate that sufficient flexibility exists under the accountability requirements of the clause to encompass the special procedures reflected in 50 U.S.C. 403f and 403j.

4. The actual wording of the clause exists as evidence of the fact that the framers of the Constitution desired to leave room for legislative discretion and some secrecy in fulfilling the requirement for an accounting of receipts and expenditures. The Statement and Account Clause was not contained in the original draft of the Constitution. It was suggested from the floor during the final stages of the Constitutional Convention, when George Mason moved to require an annual account of public expenditures. James Madison proposed to amend this motion so that the envisioned reporting would take place "from time to time." This change was proposed in order to "leave enough to the discretion of the Legislature." Madison's amendment was adopted. 2 Farrand, *The Records of the Federal Convention of 1787*, p. 618-619 (1911). The debate between Mason and Madison was renewed in the Virginia ratifying convention in 1788. Mason opposed Madison's "from time to time" terminology because he viewed it as making provision for secrecy, and he felt there should be no room for secrecy. According to Farrand,

The reasons urged in favor of this ambiguous expression, was, that there might be some matters which might require secrecy. In matters relative to military operations, and foreign negotiations, secrecy was necessary sometimes. But he [Mason] did not conceive that the receipts and expenditures of the public money ought ever to be concealed. *** But that this expression was so loose, it might be concealed forever from them***.

3 Farrand, *supra*, at 326.

Patrick Henry also recognized Madison's language as a provision enabling secrecy when required and opposed it for that reason. Henry feared that the adoption of Madison's language meant that:

the national wealth is to be disposed of under the veil of secrecy; for [with] the publication from time to time *** they may conceal what they think requires secrecy.

3 Elliot's Debates on the Federal Constitution, 462 (1836).

The debates indicate, therefore, that one of the reasons, besides allowing for administrative flexibility, for modifying Mason's original phrasing of the Statements and Accounts Clause was to permit secrecy in matters which required it. Even though Mason failed to conceive of circumstances under which expenditures ought to be concealed from the public, the language which Patrick Henry viewed as allowing Congress to "conceal what they may think requires secrecy" ultimately was adopted. It therefore seems clear that the framers contemplated that Congress would have the power to withhold certain appropriations and expenditure data from the public, at least temporarily. Madison, at least, was of the opinion that Congress should have such power to authorize secrecy in certain cases:

The congressional proceedings are to be occasionally published, including all receipts and expenditures of public money, of which no part can be used, but in consequence of appropriations made by law. This is a security which we do not enjoy under the existing system. That part which authorizes the government to withhold from public knowledge what in their judgment may require secrecy, is imitated from the confederation***.

[Farrand, *supra*, 312.]

5. To entertain for the moment a view opposite to the foregoing, that is, that Congress has no authority to make any appropriation or expenditure in secret, can be seen to result in a striking anomaly. The Statements and Accounts Clause, Article I, Section 9, Clause 7, does not in express terms authorize, but Article I, Section 5, Clause 3 does:

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, except such Parts as may in their Judgment require Secrecy.

It appears extremely unlikely that the framers would include in the Constitution an absolute obligation that every appropriation and expenditure be publicized, while explicitly authorizing each House to keep secret its debates and decisions on these very matters.

6. The history of congressional understanding of the Statement and Account Clause shows that it has not been interpreted as preventing Congress from deciding (as it has in enacting the Central Intelligence Agency Act) that certain classes of Federal expenditures should not be disclosed where delicate questions of foreign policy or national security are involved. Not long after the Constitution was adopted, Washington declined to make public the amount of money expended by General St. Clair in furtherance of a mission in the territory of Florida. See, 10 Federal Bar Journal 109 (1949). Shortly after the Constitution was adopted, President Madison (who had proposed the more flexible language of the Statements and Account Clause) sent a confidential communication to Congress outlining his recommendation that he be authorized to take possession of parts of Spanish Florida. Congress then passed a Secret Appropriation Act, appropriating \$100,000 for occupation and forbidding the publication of the appropriation law. See Miller, Secret Statutes of the United States, 4-5 (1918). The enactment was not made public until 1818 when the controversy over Florida had ended. And almost from the foundation of the Government under the Constitution there was a contingent fund (later denominated the Secret Fund), which was used by the President to finance the secret operations of the Government, including intelligence gathering. The legislation establishing the fund provided that the President might account for the same:

... By causing the same to be accounted for specifically in all instances wherein the expenditures thereof may in his judgment be made public, and by making a certificate ... of the amount of such expenditures as he may think advisable not to specify; and every such certificate shall be deemed a sufficient voucher for the sums therein expressed to have been expended. Act of February 9, 1793, 2 Annals of Cong. 1412, 1 Stat. 299.

The similarity of purpose and language between this early legislation and 50 U.S.C. 403j(b), set out above, is striking.

7. More recently, Congress has found secrecy to be in the national interest in several settings. For example, over \$2 billion was secretly expended on the Manhattan project to develop the atomic bomb during World War II. Of the statutes set out above that make provision for a confidential, or restricted, accounting for the funds involved, that for the Atomic Energy Commission dates from 1946 and was amended in 1963, and that for the Federal Bureau of Investigation dates from 1950 and was added to in 1966. The provision for the Department of the Navy was enacted in 1916 and has not since been amended. The provision for the confidentiality of expenditures pursuant to foreign relations may be said to span all periods of our history as a nation since its first enactment in 1773. A comparison provision, now codified at 31 U.S.C. 1972, permitting delegation by the Secretary of State of certification authority, was contained in each Department of State Appropriations Act from 1947 to 1953.

8. Both Houses of Congress have within the past two years directly confronted the question of intelligence budget secrecy. The Senate in June 1974 rejected an amendment to the Fiscal 1975 Defense Authorization bill which would have required the disclosure of the intelligence community budget. The Senate vote was 55-33. The House of Representatives in October 1975 rejected an amendment to the Fiscal 1976 Defense Appropriation bill which would have disclosed the CIA budget. The House vote was 267-147.

9. It is clear that Congress is authorized to exercise considerable flexibility in establishing procedures by which the requirement for maintaining accountability between the Executive and Legislative Branches and to the people, as mandated by the Statements and Accounts Clause, is to be fulfilled. The origins of the clause itself and subsequent history indicate Congress is at liberty to adopt special procedures whereby certain appropriation and expenditure information is restricted to Congress and the Executive Branch. Present appropriation procedures for CIA reflect the fact that the secrecy required for the success of intelligence efforts must be matched with similar secrecy in the attendant financial processes.

Historical Note on the Secrecy of Foreign Intelligence-Gathering Activities
and Their Confidential Funding

1. Intelligence gathering depends upon secrecy and confidentiality for success. General Washington stated this self-evident proposition in a letter to one of his intelligence officers, Elias Dayton, on 26 July 1777:

"The necessity of procuring good Intelligence is apparent and need not be further urged---All that remains for me to add, is, that you keep the whole matter as secret as possible. For upon Secrecy, Success depends in most Enterprises of the kind, and for want of it, they are generally defeated....

The secrecy which must attend intelligence-gathering operations themselves must apply also to processes of funding these operations. This dual requirement for confidentiality and budgetary secrecy in intelligence matters was recognized and accommodated early in our nation's history.

2. The nation's first foreign intelligence efforts were conducted by a subordinate body of the Congress and it was this body which first wrestled with the problems of confidentiality and budgetary secrecy. In the early stages of the Revolution the Continental Congress exercised control over foreign affairs. On 29 November 1775, the Congress created the Committee of Secret Correspondence to "correspond with our friends in Great Britain, Ireland and other parts of the world," and Congress agreed "to defray all such expenses as may arise by carrying on such correspondence, and for the payment of such agents as they may send on this service." (Jol. Cont. Cong., III, 392.) In carrying out its foreign relations responsibilities, the Committee met its need for foreign intelligence information by secretly employing overseas agents. For example, one of the Committee's first acts was to write Arthur Lee, a well-connected American living in England. The Committee wrote (12 December 1775):

"It would be agreeable to Congress to know the disposition of foreign powers toward us, and we hope this object will engage your attention. We need not hint that great circumspection and impenetrable secrecy are necessary. The Congress rely on your zeal and ability to serve them, and will readily compensate you for whatever trouble and expense compliance with their desire may occasion. We remit you for the present \$200." (emphasis added) [Wharton, *The Revolutionary Diplomatic Correspondence of the United States*, II, 63-64 (1889)].

The Committee employed many such secret intelligence agents, including Charles Dumas, Silas Deane, Thomas Story and Jonathan Austin, and was able to obtain much useful information on foreign developments and attitudes from these sources.

3. Even though the Committee was a creature and subordinate of the Congress, it found itself in the position of insisting upon the secrecy and confidentiality of its operations as against Congress as a whole. Responsible as they were for conducting secret activities and protecting personal confidences, the Committee members recognized the elementary principle that the more widely a secret is held, the more poorly it is kept. The Committee's reluctance to disseminate sensitive information to Congress as a whole is all the more noteworthy in light of the strict injunction of secrecy under which Congress operated. (On 9 November 1775 the Continental Congress adopted the "Resolution of Secrecy" under which any member who disclosed a matter which the majority had determined should be kept secret was to be expelled "and deemed an enemy to the liberties of America.") On one occasion, for example, the Committee kept the contents of important despatches secret from Congress. Speaking of a despatch from Arthur Lee, the Committee said:

"Considering the nature and importance of it, we agree in opinion, that it is our indispensable duty to keep it a secret, even from Congress. . . . We find, by fatal experience, the Congress consists of too many members to keep secrets." (emphasis added) (Force, American Archives, Fifth Series, II, 818.)

4. The Committee's insistence upon secrecy was not limited to the fruits of their intelligence activities but extended to operational matters as well. When on 10 May 1776 the Committee was called upon to "lay their proceedings before Congress," it was authorized to withhold "the names of persons they have employed or with whom they have corresponded." (Jol. Cont. Cong. IV, 345.) Finally, matters pertaining to the funding and instructions of intelligence agents were closely held by the Committee and were not subject to plenary review by the Congress. [See Wriston, *Executive Agents in American Foreign Relations*, 3-15, (1929)].

5. As a general rule, the subordinate bodies created by the Continental Congress had very little independent power. The exception to this was the Committee of Secret Correspondence which came to exercise broad powers in its foreign intelligence-gathering mission. The Committee's circumspection with its sensitive information is instructive today. It demonstrates that the principled, but practical, men who founded the Republic were willing to take those measures necessary to ensure the success of their foreign intelligence efforts, even where this meant controlling access to information within Congress itself.

6. With the adoption of the Constitution, the executive power passed to the President and with it the principal responsibility for the conduct of foreign relations. Commenting on this new distribution of power, John Jay, whose diplomatic experience in the service of Congress during the Revolution and the Confederation had given him insight into the weaknesses and requirements of American practice, discussed the problems of conducting secret foreign intelligence gathering:

"...There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest." (The Federalist)

7. Until recent times, Presidents have conducted their foreign intelligence responsibilities largely through the instrumentality of confidential agents. It was recognized at an early date that some form of secret funding had to be devised to guarantee the confidentiality of these intelligence operations. The Statement and Account Clause of the Constitution was not deemed an obstacle to this endeavor by its authors. In response to President Washington's first annual message, the Congress provided for the so-called "contingent fund." Therefore, almost from the foundation of the government under the Constitution there has been a fund which the President could account for "by making a certificate... of the amount of such expenditure, as he may think it advisable not to specify; and every such certificate shall be deemed a sufficient voucher for the... sums therein expressed to have been expended." (Stat. at Large, I, 299.) This fund was used by successive Presidents for their foreign intelligence-gathering efforts. So general was the idea that this fund was designed for secrecy that it has often been called the "secret service fund," and indeed the element of secrecy entered into one of the first agencies of Washington's administration, the dispatch of David Humphreys to Lisbon in 1790.

8. Perhaps the most succinct statement concerning the purpose of the secret fund was made by John Forsyth during a Congressional debate in 1831 on a treaty between the United States and Turkey:

"The experience of the Confederation having shown the necessity of secret confidential agencies in foreign countries, very early in the progress of the Federal Government, a fund was set apart, to be expanded at the discretion of the President of the United States on his responsibility only, called the contingent fund of foreign intercourse.... It was given for all purposes to which a secret service fund should or could be applied for the public benefit. For spies, if the gentlemen please; for persons sent publicly and secretly to search for important information, political, or commercial;... for agents to feel the pulse of foreign Governments...." (Cong. Debates, 21 Cong. 2 Sess., VII, 295.)

[For a comprehensive survey of the use of confidential agents, especially intelligence-gathering agents, by successive Presidents from Washington to Franklin Roosevelt, and the provisions made for their secret funding, see Wriston, Executive Agents in American Foreign Relations 1929]

9. From time to time Presidents have had to protect the confidentiality of their foreign intelligence efforts and the funding processes which supported these efforts. In 1844, the Senate inquired of President Tyler concerning the activities in England of one Duff Green. The President delayed until the agent's mission was complete and replied to the Senate, declaring:

"... [A]lthough the contingent fund for foreign intercourse has for all time been placed at the disposal of the President, to be expended for the purposes contemplated by the fund without any requisition upon him for a disclosure of the names of persons employed by him, the objects of their employment, or the amount paid to any particular person, and although such disclosures might in many cases disappoint the objects contemplated by the appropriation of that fund, yet in this particular instance I feel no desire to withhold the fact that Mr. Duff Green was employed by the Executive to collect such information, from private or other sources, as was deemed important to assist the Executive in undertaking a negotiation then contemplated, but afterwards abandoned." (Richardson, Messages and Papers, IV, 328.)

In another incident, the House of Representatives requested President Polk to furnish the House with an account of all payments made on the President's certificate from the contingent fund during certain preceding administrations. President Polk, in a carefully considered message of 20 April 1846 declined to furnish the data requested. The President stated:

"The expenditures of this confidential character, it is believed, were never before sought to be made public, and I should greatly apprehend the consequences of establishing a precedent which would render such disclosures hereafter inevitable." (emphasis added)

In other words, Polk was arguing that even the partial release of past figures relating to the contingent fund would lead inexorably to the erosion of the fund's secrecy. The same can be said today with respect to the funding of the nation's foreign intelligence programs.

10. President Polk continued, and his statement makes a good conclusion for this note:

"The experience of every nation on earth has demonstrated that emergencies may arise in which it becomes absolutely necessary for the public safety or the public good to make expenditures the very object of which would be defeated by publicity.... Some governments have very large amounts at their disposal, and have made vastly greater expenditures than the small amounts which have from time to time been accounted for on President's certificates. In no nation is the application of such sums ever made public. In time of war or impending danger the

situation of the country may make it necessary to employ individuals for the purpose of obtaining information or rendering other important services who could never be prevailed upon to act if they entertained the least apprehension that their names or their agency would in any contingency be divulged. So it may often become necessary to incur an expenditure for an object highly useful to the country; for example, the conclusion of a treaty with a barbarian power whose customs require on such occasions the use of presents. But this object might be altogether defeated by the intrigues of other powers if our purposes were to be made known by the exhibition of the original papers and vouchers to the accounting officers of the Treasury. It would be easy to specify other cases other cases (sic) which may occur in the history of a great nation, in its intercourse with other nations, wherein it might become absolutely necessary to incur expenditures for objects which could never be accomplished if it were suspected in advance that the items of expenditure and the agencies employed would be made public." 4 Richardson, Messages and Papers of Presidents, 431, 435 (April 20, 1846)

**Extract of House Appropriations Committee Report
on the Fiscal 1976 Defense Appropriations Bill
Concerning Intelligence Budget Secrecy**

**BASIS FOR COMMITTEE DECISION NOT TO PUBLISH THE INTELLIGENCE
COMMUNITY BUDGET**

The Committee considered at length the desirability of publishing in some fashion the total budget figures for the intelligence community. It also considered separately the question of publishing just the Central Intelligence Agency budget total. The Committee decided that publication of the intelligence budget totals would be injurious to the security of the United States.

The Committee had the benefit of a very detailed legal brief which discusses the legality of maintaining a secret intelligence budget. The brief considers the debate of the Constitutional Convention and cites various examples of secretly funded activities throughout the history of the United States, beginning with George Washington and proceeding to the present day. After considering all of this constitutional, legal, and political history, the brief concludes that it is constitutionally permissible to continue the practice of not publicly disclosing the intelligence community budget.

Intelligence operations must remain secret in order to be successful. The disclosure of the budget and appropriation amounts related to intelligence functions or organizations might well lead to demands for the publication of ever-increasing data and could prove harmful to our intelligence efforts. The publication of even total budget amounts from year to year would give some indication of trends or emphasis in this area which would be helpful to the counterintelligence efforts of our potential opponents. The Committee is fully aware of the difficulties in supporting secret operations in an open society, but believes that adequate intelligence is an essential ingredient of national security and that the public disclosure of information about our intelligence efforts makes it less likely that adequate intelligence can be obtained.

ALL OF THE INTELLIGENCE COMMUNITY BUDGET IS IN THIS BILL

The Committee does believe that it can safely be revealed that all funds for the Central Intelligence Agency, the National Security Agency, and the Defense Intelligence Agency are included in the Department of Defense appropriations covered by this bill and report.

Positions of Schlesinger and Colby

Former Director Schlesinger and present Director Colby are quoted as having stated they would have no objection to the publication of a total figure of the intelligence community budget. This statement takes out of context the specific statements made by Schlesinger and Colby.

Schlesinger

In his confirmation hearings as Secretary of Defense on 18 June 1973, Schlesinger clarified his position by saying, "I think that it might be an acceptable procedure, Senator, to indicate the total figure of the national intelligence programs. I would not personally advocate it, but it may be an acceptable procedure. I think, as you well know, that this has been discussed not only with the Armed Services Committees in the two Houses but also with the Appropriation Committees. There is the feeling that it might be wise to give the gross figure. I have come to share that feeling at least in this time frame but that does not say that it is not a possibility. " "...I would lean against it. But I think that it could be done. The problem that you get into, you see, as you well know, Senator, is that it would be a freefloating figure, unsupported and unsupportable in public, with nobody except the members of the Oversight Committees or members of the Armed Services Committee and Appropriation Committees who would know the details. Those are circumstances which under certain conditions would elicit the strong tendency for a flat 10 percent, 20 percent, 30 percent, 100 percent, cut in intelligence activities because there is an identifiable target with no broad understanding of what the components are and it is that aspect that concerns me."

Colby

In his confirmation hearings as Director of Central Intelligence on July 2, 20, and 25, 1973, Director Colby stated "While I believe that disclosure of the total figure of the intelligence community budget would not present a security problem at this time, it is likely to stimulate requests for additional detail. There is a danger to national security in the release or leakage of such detail; there is also a potential danger to national security in the revelation of trends of different details of the budget over several years even though any one year's figures would not present a major problem." (See also Director Colby's letter of 25 June 1975 to Chairman Mahon).

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

25 JUN 1975

Honorable George H. Mahon, Chairman
Subcommittee on Defense
Committee on Appropriations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I understand the Committee is considering the possibility of providing some form of open appropriation for the Central Intelligence Agency.

I am strongly opposed to the public disclosure of the Central Intelligence Agency's budget or of a total budget figure for the intelligence community. While I recognize that, in the final analysis, this is a matter for determination by the Congress, I believe disclosure would do a disservice to our foreign intelligence efforts and therefore would not be in the national interest.

I am convinced that once an intelligence budget figure is made public, it will be impossible to prevent the disclosure of many sensitive and critically important intelligence programs and activities. Whether the published figure represents the Agency or intelligence community budget, whether it reveals intelligence budgets in whole or in part, I believe the ultimate effect would be the same.

Disclosure of intelligence budgets could provide potential adversaries with significant insight into the nature and scope of our national foreign intelligence effort, particularly where analysis of year-to-year fluctuations in the budget are possible. Publication of part of the intelligence budget would raise debate over what matters were included and what matters were not included in the published totals, leading to rapid erosion of the secrecy of the portions withheld. The same problems would result from the publication of the total Agency budget, a total Community budget, or any other figure covering "intelligence." An immediate requirement would be levied to explain precisely which of our intelligence activities were covered by the figure and which were not. Definitional questions over where "intelligence" expenditures stop and operational expenditures begin would necessarily lead to public discussion of sensitive intelligence programs and techniques.

Publication of intelligence budget figures would result in debate on changes or trends developed in succeeding year figures, and fluctuations in the figure would generate demands for explanations which in turn would reveal the component parts of the figure and the programs supported by it. The history of disclosure of Atomic Energy Commission budget materials and related information by both the Executive Branch and the Congress indicates that publication of any figure with respect to intelligence would quickly stimulate pressures for further disclosure and probes by various sectors into the nature of the figure and its component elements.

Attacks have been made on the constitutionality of the present financial processes for protecting our national foreign intelligence effort. I believe the present procedures are fully in accord with the Constitution. Agency appropriations are an integral part of appropriations made by law and are reflected in the Treasury's Statement and Account of Receipts and Expenditures in compliance with Article I, Section 9, clause 7 of the Constitution. Moreover, there is considerable historical precedent for budgetary secrecy, going back to debates in Constitutional Conventions and the use of a secret fund during the administrations of Washington and Madison, and a secret appropriations act in 1811. Congress most recently endorsed secrecy of intelligence budgets in June 1974 when the Senate rejected an amendment to the Department of Defense Appropriations Act of 1975 which would have required that the total budget figure for intelligence purposes be made public.

Sincerely,

SIGNED

W. E. Colby
Director

APPENDIX XI

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

'The Central Intelligence Agency: Oversight and Accountability,

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and THE COMMITTEE ON INTERNATIONAL HUMAN RIGHTS

IV. BUDGETARY PROCEDURE AND ITS STATUTORY BASIS

A. Funding Arrangements: The Present Process of Appropriation

The question persists why Congress has not acted sooner to present the CIA from carrying out foreign policy abuses. Part of the answer lies in the fact that by enacting and implementing unique budgetary procedures which allow the Congress to vote on the CIA budget without knowing its contents, the Congress has abandoned its most effective method of controlling the activities of the CIA. An understanding of these procedures is essential to any evaluation of Congress' present role in overseeing the Agency.

The CIA budget process begins like that of any other executive agency, with a budget request to the Office of Management and Budget (OMB).¹³⁵ This request is supposedly reviewed by the Intelligence Resources Advisory Committee (IRAC) chaired by the Director of Central Intelligence (DCI) and consisting of representatives from the Departments of State, Defense and the OMB, and coordinated with the intelligence requests of other agencies before it is formally submitted to the OMB, but such review is reportedly sketchy.¹³⁶ The OMB then conducts a detailed review of the CIA budget request, consisting of a written justification for the request, written responses to detailed questions posed by OMB staff and oral hearings.¹³⁷ During the review process, the CIA budget is coordinated with those of the other foreign intelligence agencies and the total intelligence budget is then forwarded to the President for submission to Congress.

However, the Congress never sees the actual CIA budget, nor do the Appropriations Committees of the House and Senate. Rather, the budget is reviewed and approved only by the Intelligence Subcommittee of the Appropriations Committee of each house.¹³⁸ Until the present Congress, the Intelligence Subcommittees have been composed of the chairmen of the full Appropriation Committees, the ranking minority member of the full committees and senior members of the Appropriations Subcommittees on Defense.¹³⁹ They are said to conduct extensive budget hearings attended by staff members of the Intelligence Subcommittees and representatives of the CIA.¹⁴⁰ In the House, a complete stenographic record is made of these proceedings, which is then stored at the CIA and delivered to the Capitol on request; in the Senate, no record of CIA budget hearings is made.¹⁴¹ Once the Subcommittee decides what the CIA budget will be, it then divides up and disguises it in various appropriations of the Defense Department and other agencies.

Congress then votes on appropriations inflated by sums destined for the

CIA without knowing either that they are doing so or the dollar amount earmarked for the CIA. Even if a Congressman suspects that an appropriation contains CIA funds, he has no means of discovering how much CIA money is entailed. Once the bills are enacted, the Appropriations Committee Chairmen supply the OMB with instructions as to which funds are to be transferred to the CIA, and the OMB carries out these instructions.¹⁴²

B. *Statutory Basis and Constitutionality of Appropriations Process*

The legal authority for these extraordinary procedures is found in the Central Intelligence Agency Act of 1949.¹⁴³ Section 6 of the Act provides:

"In the performance of its functions, the Central Intelligence Agency is authorized to:

- (a) Transfer to and receive from other Government agencies such sums as may be approved by the Bureau of the Budget, for the performance of any of the functions or activities authorized under sections 403 and 405 of this title, and any other Government agency is authorized to transfer to or receive from the Agency such sums without regard to any provisions of law limiting or prohibiting transfers between appropriations. Sums transferred to the Agency in accordance with this paragraph may be expended for the purposes and under the authority of this Act without regard to limitations of appropriations from which transferred."¹⁴⁴

Section 10(a) provides:

Notwithstanding any other provisions of law, sums made available to the Agency by appropriation or otherwise may be expended for purposes necessary to carry out its functions. . .¹⁴⁵

The language in these sections allowing transfers of money to the CIA "without regard to any provisions of law limiting or prohibiting transfers between appropriations" and providing for expenditure of "sums made available to the Agency by appropriation or otherwise" (emphasis added) and "without regard to limitations of appropriations from which transferred" seems difficult to reconcile with the constitutional requirement contained in Article I Sec. 9, Cl. 7 that "[n]o money shall be drawn from the Treasury, but in consequence of Appropriations made by Law."¹⁴⁶ A transfer of money to the CIA despite a prohibition against such transfer and the expenditure of that money in a manner forbidden by the appropriation legislation would not be "in consequence of appropriations made by law," but rather would be in derogation of such appropriations.

It has been convincingly argued that in passing the 1949 Act, Congress did not intend to exempt the CIA from substantive limitations on expenditures enacted by subsequent Congresses, but only to free it from compliance with technical funding limitations. Support for this argument can be found in the

fact that Section 6(n) quoted above, is followed by several sections exempting the CIA from other territorial limitations, such as prohibitions on the exchange of appropriated funds other than for silver, gold, United States notes and national bank notes, restrictions on using personnel of other government agencies, and limitations on the payment of rent and leasing of improvements to leased premises.¹⁴⁷ Similarly, Section 16(a) contains a long list of housekeeping purposes for which sums may be expended, including "purchase, maintenance, and cleaning of firearms," "practicing and landing," "association and library dues" and "repair, rent, operation and maintenance of buildings, utilities, facilities and accommodations."

Further support for the view that the 1949 Congress did not intend to exempt the CIA from future substantive limitations on expenditures is found in the legislative history of the 1949 Act. Former CIA Director Rear Admiral Hillenkoetter, in a letter to Senator Millard E. Tydings, assured Congress that:

"In almost all instances, the power and authorities contained in the bill already exist for some other branch of the Government, and the bill merely extends similar authorities to the Central Intelligence Agency."¹⁴⁸

An identical assurance was given to the House of Representatives by the sponsor of the bill, Representative Sasser.¹⁴⁹

Thus the authority in the 1949 Act for the CIA to spend money "[n]otwithstanding any other provisions of law" does not free the CIA from compliance with later substantive restrictions on spending, such as those contained in the Foreign Assistance Act of 1974. Moreover, the existence of such restrictions, while providing a check on CIA expenditures, does not resolve the conflict between the present practice of concealing the CIA budget from the legislature and the constitutional requirement that money may not be disbursed except "in consequence of appropriations made by law." That requirement would be met only if Congress knowingly voted on the total budget amount.¹⁵⁰

C. *The Present Accounting Procedure*

Once the money for the CIA has been appropriated and transferred, there is no way under present arrangements for Congress, much less the public, to know how it has been spent. In order to assure that CIA activities will remain secret, the four subcommittees charged with oversight of the CIA meet in executive session and are not required to report to Congress as a whole.¹⁵¹ No agency within the executive branch has a statutory duty to audit CIA expenditures, and although OMB performs some budgetary oversight, it relies on financial data supplied by the CIA, which it does not check independently.¹⁵² As a result of the hidden appropriations procedure described above, the annual "Combined Statement of Receipts, Expenditures and Balances of the United States Government" (Combined Statement) published by the Secretary of the Treasury pursuant to 31 U.S.C. §1029 and Article I, Section

9, Clause 7, of the Constitution, contains no mention of monies received and expended by the CIA.¹⁵³

Neither of these provisions expressly exempts the CIA from its coverage, however. The relevant part of Article I, Section 9, clause 7, the Statements and Accounts Clause, requires that:

"a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

The legislation implementing this requirement, 31 U.S.C. §1029, states:

"It shall be the duty of the Secretary of the Treasury annually to lay before Congress, on the first day of the regular session thereof, an accurate, combined statement of the receipts and expenditures during the last preceding fiscal year of all public moneys, including those of the Post-Office Department, designating the amount of the receipts, whenever practicable, by ports, districts, and States, and the expenditures, by each separate head of appropriation."¹⁵⁴

Read alone, these provisions would seem to require an accounting of CIA receipts and expenditures along with those of all other executive agencies. However, the argument is generally made that the 1949 Act provides an exception to these requirements in the case of the CIA.

D. Statutory Basis for the Present Accounting Procedure

The language of the 1949 Act does not seem to free the CIA entirely from any duty to account to Congress or the public. The relevant provision states:

"The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds; and for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified."¹⁵⁵

Logic dictates that "the provisions of law and regulations relating to the expenditure of Government funds" referred to in the first half of subsection (b) must be provisions other than those relating strictly to accounting requirements. If accounting requirements were included among such "provisions" then the CIA would be exempted from them by this language, and the second half of the sentence would be rendered either superfluous or meaningless. Although it is addressed solely to the question of accounting, the second half of the sentence does not exempt the CIA from all accounting requirements, but only from accounting for expenditures made "for objects of a confidential, extraordinary, or emergency nature." Thus Congress seems to have expected that the CIA's expenditures for compiling and analyzing, if not gathering, intelligence would be publicly accounted for. If no accounting from the CIA were mandated, there would have been no need to define the particular types of expenditures for which the Director was not required to account.

E. *The Constitutionality of the Accounting Procedure: The Richardson Case*

The failure of the CIA to account publicly for its receipts and expenditures was recently challenged as unconstitutional in a suit brought under the Mandamus and Venue Statute, 28 U.S.C. §1361, to compel the Secretary of the Treasury to publish a complete Combined Statement. The district court dismissed the complaint for lack of standing and justiciability, but the Court of Appeals reversed, finding that the plaintiff had standing as a taxpayer to raise the claim that insofar as the 1949 Act excused the CIA from reporting its receipts and expenditures it was unconstitutional, and that he had raised a justiciable question. *Richardson v. United States*, 465 F.2d 841 (3d Cir. 1972). The Supreme Court granted certiorari on the question of taxpayer's standing and reversed 5-4, holding that the requirements of *Frost v. Cohen*, 392 U.S. 83 (1968) had not been met. *United States v. Richardson*, —U.S.—, 41 L.Ed.2d 678 (1974).

Although the merits of Richardson's claim were never decided, they were discussed briefly by the Third Circuit in the course of its determination that a substantial constitutional question had been raised, and were again argued by both parties in their briefs to the Supreme Court. The Government maintained that the Statements and Accounts Clause had been intended by the Framers to allow the Congress to decide which Government expenditures should be made public. It noted that Mason, the author of the clause, had originally proposed an annual statement of account but that Madison's amendment had substituted the words "from time to time." Mason had opposed this amendment on the ground that it might allow too much secrecy by not requiring a report at regular intervals.¹⁵⁶

In its brief, the Government urged the Supreme Court to infer from the fact that Madison's language was accepted despite these fears, that a certain latitude in the reporting requirement must have been intended.

Richardson, on the other hand, pointed out that the reason for Madison's amendment was his belief that to require reporting at regular intervals might lead to no reporting at all. This, Madison noted, was what had happened under the Articles of Confederation, which required semi-annual reporting: "a punctual compliance being often impossible, the practice has ceased altogether."¹⁵⁷ Richardson also pointed to the Virginia debates on the Constitution where Mason again objected to the words "from time to time" as being too "loose," and Lee replied that Mason's concern was "trivial," that the phrase "must be supposed to mean, in the common acceptance of language, short, convenient periods," and that [t]hese who would neglect this provision would disobey the most pointed directions."¹⁵⁸ To this Madison added that:

"[he] thought it much better than if it had mentioned any specified period; because, if the accounts of the public receipts and expenditures were to be published at short, stated periods, they would not be so full and connected as would be necessary for a thorough comprehension of them, and detection of any errors. But by giving them an op-

portunity of publishing them from time to time, as might be found easy and convenient, they would be more full and satisfactory to the public, and would be sufficiently frequent."¹⁰⁰

Based on this statement, Richardson argued that Madison and Mason were in wholehearted agreement as to the desirability of full disclosure and differed only in their views as to how best to achieve it.¹⁰⁰

Both Richardson and the Government drew the Court's attention to the language of Article I Section 5 Clause 3, which states "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy." The Government argued that it would be illogical to allow the Legislature an exception for matters requiring secrecy while not allowing the Executive Branch such an exception. Richardson maintained that the difference in language was intended to reflect the Framers' belief that while some matters may require secrecy, the receipts and expenditures of public money should never be concealed.¹⁰¹

The Government further bolstered its interpretation of the Statements and Accounts Clause by citing two instances in which Congress enacted secret appropriations bills prior to its passage of the 1919 Act. The first occurred in 1811 when President Madison requested of Congress a secret appropriation to be used in purchasing parts of Spanish Florida. This was not made public until 1818. The second instance consisted of the secret \$2 billion appropriated for the Manhattan Project to develop the atomic bomb during World War II. It should be noted, however, that each of these examples involved one appropriation or series of appropriations for one specific purpose, not an entire system of appropriating money to be used on an annual basis for a particular agency regardless of the goals for which the money will be used. It should also be noted that at least in the case of the Florida appropriations bill, the entire Congress was aware of the acquisition plan, which is not the case when money is appropriated for the CIA.

As its final argument on the merits, the Government cited three other statutes which authorize Congress to exempt certain appropriated funds from the public accounting requirement. The oldest of the statutes, dating from 1793, is 31 U.S.C. §107, which states:

"Whenever any sum of money has been or shall be issued, from the Treasury, for the purposes of intercourse or treaty with foreign nations, in pursuance of any law, the President is authorized to cause the same to be duly settled annually with the General Accounting Office, by causing the same to be accounted for, specifically, if the expenditure may, in his judgment, be made public; and by making or causing the Secretary of State to make a certificate of the amount of such expenditure, as he may think it advisable not to specify; and every such certificate shall be deemed a sufficient voucher for the sum therein expressed to have been expended."

Although this statute allows the President or Secretary of State to certify

expenditures without specifying their purposes, it does not become effective until Congress has appropriated money "for the purposes of intercourse or treaty with foreign nations." It does not permit a practice of concealing both receipts and expenditures regardless of the purpose for which they were appropriated, as is done by the CIA.¹⁶²

A second statute cited by the Government was 28 U.S.C. §537, covering expenditures by the Federal Bureau of Investigation for unforeseen emergencies of a confidential character. It provides as follows:

"Appropriations for the Federal Bureau of Investigation are available for expenses of unforeseen emergencies of a confidential character, when so specified in the appropriation concerned, to be spent under the direction of the Attorney General. The Attorney General shall certify the amount spent that he considers advisable not to specify, and his certification is a sufficient voucher for the amount therein expressed to have been spent."

This statute, even more clearly than the previous one, limits the Executive's authority to spend money secretly to cases where Congress has specifically provided for it in a separate appropriations act. This is also true of the third statute relied on by the Government, 42 U.S.C. §2017 (b), regarding appropriations for the Atomic Energy Commission, which states simply:

"(b) Any Act appropriating funds to the Commission may appropriate specified portions thereof to be accounted for upon the certification of the Commission only."

In contrast to the Government's interpretation of the 1919 Act, neither of these statutes purports to confer blanket authority on an Executive agency to ignore the requirements of the Statements and Accounts Clause and the statutes implementing it.¹⁶³

In examining the scope of the Director's authority not to account for sums expended under the 1919 Act, it is important to view this authority in the context of a unique appropriations process applicable to no other agency. When other agency heads give special certification instead of accounting for their expenditures, the public can at least determine the amount secretly spent because the agency's total budget is listed in the Combined Statement, and its normal expenditures are accounted for. In the case of the CIA, its total budget is never known even to Congress, and no receipts or expenditures are listed in the Combined Statement. Thus the 1919 Act as presently applied allows the Director of Central Intelligence far more authority to operate secretly than any other agency head.

This degree of secrecy conflicts with the constitutional mandate of the Statements and Accounts Clause. That Clause requires that at least the total amounts actually spent by the CIA be published in the Combined Statement.¹⁶⁴ Whether greater detail is mandated and, if so, what degree of specificity, are more difficult questions requiring a balance between the interests of national security and the right of the public to know.¹⁶⁵

5. The funding process for the CIA is unique, in that the annual budget is discussed and voted upon only by one intelligent subcommittee of the Appropriations Committee in each house and is then divided up by the committee chairmen and disguised in various other appropriations so that the Appropriations Committee and the Congress as a whole do not know when, much less what total amount, they are voting for the CIA budget. However, the Constitution requires that at least the total budget must be separately and knowingly appropriated by Congress. The Constitution further requires the Executive to make a regular statement of account of all public money spent; thus, the total sum actually disbursed by the CIA should be published in the Combined Statement.¹⁷⁷

The entire CIA budget should be reviewed by the joint congressional committee responsible for CIA oversight. This committee should be equipped with an adequate information-gathering staff and with enough professional accountants to allow it to perform meaningful budgetary review, and should require regular and special reports from the CIA. Budget oversight by this committee should include serious study of the CIA's proprietary corporations.

135 The following description is adapted from Robin Schwartzman, *Fiscal Oversight of the CIA*, 7 N.Y.U. J. Int'l L. & Pol. 493 (1971).

136 Schwartzman, *supra*, at 495-96.

137 *Id.* at 496-97.

138 *Id.* at 497. In the House of Representatives this Subcommittee is called a Special Group, rather than a Subcommittee, because each Appropriations Subcommittee is responsible for a particular appropriations bill, and there is no separate appropriations bill for intelligence services. *Id.* at 497.

139 *Id.*

¹⁴⁰ *Id.* at 497-500. The House subcommittee apparently conducts a more thorough review than the Senate Subcommittee.

¹⁴¹ *Id.* at 497-98.

¹⁴² *Id.* at 501.

¹⁴³ 50 U.S.C. §§ 403a-403j (1964).

¹⁴⁴ 50 U.S.C. § 403f.

¹⁴⁵ 50 U.S.C. § 403j(a).

¹⁴⁶ Several legislative corollaries to this constitutional requirement are found in Title 31 of the United States Code.

Section 529, for example, provides:

"No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law."

Section 628 similarly states:

"Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

A third provision which the 1949 Act appears to make inapplicable is § 627:

"No Act of Congress passed after June 30, 1906, shall be construed to make an appropriation out of the Treasury of the United States, or authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such Act shall in specific terms declare an appropriation to be made or that a contract may be executed."

¹⁴⁷ Stanley Futerma, *Toward Legislative Control of the CIA*, 4 N.Y.U. J. Int'l. L. & Pol. 431 (1971), at 431.

¹⁴⁸ Letter to Hon. Millard E. Tydings, Feb. 11, 1949, printed in S. Rep. No. 106, 81st Cong. 1st Sess. (1949), 2 U.S. Code Cong. and Adm. News 1399 (1949), as quoted in Futerma, *supra*, at 432.

¹⁴⁹ 95 Cong. Rec. 1914 (1949) as quoted in Futerma, *supra*, at 432.

¹⁵⁰ See Note "The CIA's Secret Funding and the Constitution" 84 Yale L.J. 608 (1973) at 619.

¹⁵¹ Schwarzman, *supra* at n.135, at 507. Both the intelligence subcommittee of the Senate Armed Services Committee and that of the House Armed Services Committee, which are composed of senior members of the full committees and which together perform most of the oversight function, have become increasingly active since 1971. In that year the House subcommittee was disbanded and the Senate subcommittee did not meet. After the House subcommittee was reconstituted under the chairmanship of Rep. Lucien Nedzi, Ms. Schwarzman reports, based on information received from counsel to the committee, that it met nine times in 1972, 24 times in 1973, and 17 times in 1974. The Senate subcommittee on the other hand, held only two formal meetings during the 93rd Congress, although it met informally a number of other times, and occasionally reviewed CIA spending in great detail, according to a committee staff member. See Schwarzman, *supra* at 508-509.

¹⁵² Schwarzman, *supra*, at 502-507.

¹⁵³ Items in the Combined Statement are listed by appropriation heading and there is no item for the CIA. Money transferred to the CIA is listed the same way as money routinely transferred between agencies—i.e. listed as a transfer without specifying the destination.

¹⁵⁴ This section was enacted in 1894. A 1950 statute, 31 U.S.C. § 66h(a), provides for cooperation by all executive agencies in the preparation of the Secretary's report:

(a) The Secretary of the Treasury shall prepare such reports for the information of the President, the Congress, and the public as will present the re-

sults of the financial operations of the Government: *Provided*, That there shall be included such financial data as the Director of the Bureau of the Budget may require in connection with the preparation of the Budget or for other purposes of the Bureau. Each executive agency shall furnish the Secretary of the Treasury such reports and information relating to its financial condition and operations as the Secretary, by rules and regulations, may require for the effective performance of his responsibilities under this section.

155 50 U.S.C. § 303(j)(4).

156 2 Farrand, ed., "The Records of the Federal Convention of 1787" (1911) (hereafter Farrand) at 618-19; see also C. Hunt and J.B. Scott, eds., "The Debates in the Federal Convention of 1787, Reported by James Madison" (1929) (hereafter Hunt and Scott) at 566-67. Mason's fear was shared by Patrick Henry who argued at the Virginia debates for the Constitution that the Statements and Accounts Clause did not provide sufficient protection against government secrecy, and urged the adoption of a bill of rights. 3 J. ELLIOT, *DEBATES IN THE FEDERAL CONSTITUTION* (1839) (hereafter Elliot) at 362.

157 2 Farrand at 619; Hunt and Scott at 566.

158 3 Elliot at 459.

159 *Id.* at 360.

160 At least two commentators have also reached this conclusion. See Schwartzman, *supra*, at 322; Note, *The CIA's Secret Funding and the Constitution*, *supra* at n.150, at 611-15 and 622-23.

161 3 Elliot at 459.

162 The "Historical Note" accompanying this statute remarks that Congress in several years prior to and including 1926 appropriated money specifically to be used pursuant to the requirements of this section.

163 A statute more broadly framed but not cited by the Government is 31 U.S.C. § 529(d) which provides:

"A certificate by the Commissioner of Customs stating the amount of an expenditure made from funds advanced and certifying that the confidential nature of the transaction involved renders it inadvisable to specify the details thereof or impracticable to furnish the payer's receipt shall be a sufficient voucher for the sum expressed to have been expended."

Even this statute, however, requires a separate certificate and explanation for each expenditure, whereas 50 U.S.C. § 303(j) is framed in the plural and does not require a written explanation by the Director, thus allowing him to include a number of expenditures in one certificate.

164 Note, *The CIA's Secret Funding and the Constitution*, *supra* at n.150, at 633.

165 The Atomic Energy Commission is an example of an agency related to the national security whose budget is made public, in some detail, including the amount spent on "objets of a confidential nature." See Note, *The CIA's Secret Funding and the Constitution*, *supra*, at 618. Whether the CIA budget should be published in the same manner is a question for Congress to consider. However, Mr. Colby has stated that publication of the total CIA budget would not threaten the national security, except insofar as trends in intelligence expenditures discernible after several years might reveal changes in priorities. Testimony, *Panel for Peace Conference*, September 13, 1971, at 47.

166 See Note, *Standing to Sue for Members of Congress*, 83 Yale L. J. 667 (1971) at 684.

167 These bases were not considered sufficient by the Second Circuit, however, in a suit to challenge the United States involvement in Cambodia. *Haltzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973).

168 Report of the Civil Rights Committee, *Military Surveillance of Civilian Political Activities: Report and Recommendations for Congressional Action*, 28 Record of the Association of the Bar of the City of New York 651 (October, 1973).

169 The decision in *United States v. Richardson*,—U.S.—, 41 L. Ed.2d 678 (1974), holding that plaintiff taxpayer lacked standing to challenge that provision of the statutes regulating the CIA which allows the Agency to account for expenditures solely on the certificate of the Director, indicates the difficulty which private citizens will have in questioning other activities of the CIA.

170 A prerequisite to imposition of sanctions on CIA employees who violate the law would be a clearly drawn statute setting out precisely the actions prohibited. Such sanctions under other statutes relating to government employees have included the imposition of fines, 18 U.S.C. §§209, 219, 432, 433-437, 755, 1385, 1901-1913, 2075; removal from office, 18 U.S.C. §§137, 1901, 1906, 1908, 1912, 1913; 31 U.S.C. 665; forfeiture of pension benefits, 5 U.S.C. §§8312-8315; and disciplinary action, 5 U.S.C. §552.

171 These provisions appear in the Freedom of Information Act, 5 U.S.C. §552, as recently amended over President Ford's veto.

172 93d Congress, 1st Sess. (1973): H.R. 2486, 2572, 7596, 9347, 9370, 9511, 9688, 10,363, 11,054, 93rd Cong., 2nd Sess. (1974): H.R. 13,798, 15,235, 15,815, 16,388, 93rd Cong., 2nd Sess., (1974): S. 1547, 2597, 3767, 4019; H. Res. 1231, 1232, 1441, 93rd Cong., 1st Sess. (1973); S. Con. Res. 23.

173 In H.R. 9511, the CIA is prevented from engaging in police type of law enforcement or internal security operations; and from providing assistance to any Federal, State or police agencies unless written approval of an oversight subcommittee of Congress (Appropriations and Armed Services) is given.

174 This bill provides for rather widespread dissemination of data to congressional committees, but without adequate safeguards as to security information.

175 *Colby Report*, *supra*, at p. 31.

176 Pub. Law 93-579, 93rd Cong., Dec. 31, 1974, 43 U.S.L.W. 148 (Jan. 21, 1975). Under this statute, the Executive must order that CIA files relating to the national defense be treated as exceptions. Thus, the separate exemption for all CIA files appears unnecessary, and should be given careful reconsideration.

177 The CIA's charter exempts from this requirement only expenditures for "objects of a confidential, extraordinary or emergency nature," 50 U.S.C. §1603(h). See discussion in Point IV, *supra*.

MATERIAL SUBMITTED FOR THE RECORD

618. RECORDS OF THE FEDERAL CONVENTION

Friday

MADISON

September 14

Col. Mason moved a clause requiring "that an Account of the public expenditures should be annually published" Mr Gerry 2ded. the motion

Mr Govr. Morris urged that this wd. be impossible in many cases.

Mr. King remarked, that the term expenditures went to every minute shilling. This would be impracticable. Congs. might indeed make a monthly publication, but it would be in such general Statements as would afford no satisfactory information.

Mr. Madison proposed to strike out "annually" from the

Friday

MADISON

September 14

motion & insert "from time to time". which would enjoin the duty of frequent publications and leave enough to the discretion of the Legislature. Require too much and the difficulty will beget a habit of doing nothing. The articles of Confederation require half-yearly publications on this subject— A punctual compliance being often impossible, the practice has ceased altogether—

Mr Wilson 2ded. & supported the motion— Many operations of finance cannot be properly published at certain times.

Mr, Pinkney was in favor of the motion.

Mr. Fitzimmons— It is absolutely impossible to publish expenditures in the full extent of the term.

Mr. Sherman thought "from time to time" the best rule to be given.

"Annual" was struck out — & those words — inserted
nem: con:

The motion of Col. Mason so amended was then agreed to
nem: con: and added after — "appropriations by law as follows— "And a regular statement and account of the receipts & expenditures of all public money shall be published from time to time."¹⁷

¹⁷ This paragraph is possibly a later insertion. If so it was taken from *Journal*. See above note 2.

[From the New York Times, Apr. 1, 1977]

INTELLIGENCE BUDGET TOTALING \$6.2 BILLION IS REPORTED SOUGHT

(By Wendell Rawls, Jr.)

WASHINGTON, March 31—The Carter Administration has requested \$6.2 billion for the nation's intelligence operations in the budget for the fiscal year 1978, according to sources close to the Senate Intelligence Committee.

Tentative approval of the \$6.2 billion figure apparently was given by the committee when it met its legal mandate to provide to the Senate Budget Committee by March 15 its "views and estimates" of the intelligence budget.

That figure was arrived at by totaling requests made by individual intelligence agency heads to the committee's budget authorization subcommittee in closed hearings. It was not clear whether the figure also included all the intelligence support facilities used by the various agencies.

NEW ROLE FOR SENATE

This is the first year that the Senate has had the responsibility for authorizing an intelligence budget. In the past, the various intelligence operations have been funded from appropriations hidden throughout the Federal budget so that there was no way to know how much the Administration had sought nor how much Congress had approved.

The Central Intelligence Agency, for example, reportedly received \$750 million in 1975 from a \$2.1 billion budget item identified only as "other procurement, Air Force."

The intelligence budget figures were described as "the most closely guarded of any figures up here" by Capitol Hill sources.

HEARINGS DUE ON DISCLOSURE

The budget authorization subcommittee has tentatively scheduled public hearings for the week of April 18 to determine whether disclosure of the total intelligence budget "is in the public's best interest." Some of the witnesses at those hearings are scheduled to be the same agency heads who appeared before the subcommittee to submit their budget requests.

"Sentiment on the question of public disclosure of the total intelligence figure is a mixed bag," one committee member said. "And I'm not sure all the senators have made up their minds completely about how they stand."

The \$6.2 billion figure, which is subject to some alterations before it reaches the floor of the Senate, appears to be only slightly higher than the total intelligence budget for the current fiscal year and perhaps \$200 million higher than the budget for the fiscal year 1976.

In late 1975, Congressional sources placed the total intelligence budget at "about \$4 billion," but that figure did not include \$2 billion additional for what was referred to as tactical intelligence spending by the Army, Navy and Air Force.

Last year, the House Intelligence Committee released a report that put total intelligence spending at about \$10 billion a year. But observers said that report included any expenditure that could be remotely identified with intelligence operations.

Senator Daniel K. Inouye, Democrat of Hawaii, who is chairman of the Intelligence Committee, has said that this year, with the benefit of the new budget authorization process, the Senate would be able to determine, "perhaps for the first time, exactly how much the United States is spending for its intelligence activities." But he maintains that there may be a problem in determining precisely what should be included as intelligence.

He was on his way to Hawaii today and was not available for comment on the budget question, but his staff said that he had not decided whether he favored making the total figure public.

Senator Gary Hart, Democrat of Colorado, who is a member of the budget authorization subcommittee, said that he was not sure of the total intelligence budget figure, but added, "If I knew I would not say." Other members interviewed said either that they did not know the figure or that they could not disclose it.

Senator Hart said, as did others privately, that cooperation with the committee by members of the intelligence community had been "better than anticipated."

CONCERN OVER 2 OPERATIONS

"The oversight function seems to be working to some degree," said one Senator. "The agency [C.I.A.] told us about two operations that concerned us enough that we raised serious questions about them. They have been terminated, we understand. If they are holding back from us anything than those two, they must really be something."

He would not disclose the nature of the operations.

The committee has formed an investigative subcommittee whose chairman is Senator Robert Morgan, Democrat of North Carolina, with Senator Inouye and Senator Barry Goldwater, Republican of Arizona, as the other members.

Senator Morgan said that the subcommittee would hire two staff investigators to look into alleged abuses committed by the intelligence community. "We want to have an in-depth and independent investigation of alleged abuses," he said. "We don't want to have to take the word of the agencies. As it is now, whenever we hear about something wrong going on all we can do is ask the agency if they did it. We are going to try to find the answers for ourselves."

[From the New York Times, Nov. 19, 1975]

U.S. INTELLIGENCE COST IS PUT AT \$4 BILLION

(By Leslie H. Gelb)

WASHINGTON, Nov. 18—The developing debate over the national intelligence community has forced disclosure for the first time of total appropriations for the "national intelligence program." This year's figure, knowledgeable officials said, is \$4 billion—hidden away in the \$90 billion Pentagon spending bill approved by the Senate today.

These officials said that it was covered by such specific budget titles as "other procurement, Air Force," "contingencies, defense," and "procurement, defense agencies."

Last September, Representative Robert N. Glalmo, Democrat of Connecticut, made the first move toward forcing disclosure of the real size and nature of these items. Senator Alan Cranston, Democrat of California, pressed the issue again in a Senate floor speech last Friday.

The knowledgeable officials who disclosed the overall intelligence total today for the first time said they had done so in the hope of forcing closer Congressional scrutiny of vaguely worded multimillion dollar budget titles and to bring about an open debate on the secret intelligence budget.

The \$4 billion figure, covering the "national intelligence program" and known only to a few dozen legislators, does not include \$2 billion additional for what is referred to as tactical intelligence spending by the Army, Navy and Air Force.

It has long been known that the national intelligence program—estimated in the past as running as high as \$8 billion—has been mixed in with the Pentagon budget without identification, but the specific hiding places in that budget have never been disclosed authoritatively.

While the House of Representatives trimmed the program budget this year by about \$250 million, it could not be ascertained whether the program ever reached \$8 billion or whether it has been reduced substantially in recent years.

The program, according to officials in Congress and the Administration, includes \$750 million for the Central Intelligence Agency tucked inside a \$2.1 billion budget item identified only as "other procurement, Air Force."

Other agencies included in this program and the funds designated are as follows:

The National Security Agency, a semi-autonomous communications and cryptological agency under the Pentagon's umbrella, budgeted for about \$1.2 billion.

The National Reconnaissance Office, another semi-autonomous unit under the Air Force that runs the satellite photography program, set to spend under \$2 billion.

The Defense Intelligence Agency, which pulls together intelligence for the armed services and the Secretary of Defense, scheduled to spend about \$100 million.

Since 1947, most Congressmen have been voting billions for intelligence each year, knowing only that they were approving military hardware described no more precisely than "electronic control equipment," "communications equipment" or "erection of structures and acquisition of land."

Now, however, some Congressional and Administration officials are so convinced that the intelligence budget—at least, in one overall total—should be subject to a debate on national priorities, that they are providing this information to the press.

Others, including Representative Glalmo and Senator Cranston, are using various legislation techniques to get these intelligence expenditures into the open without technically violating Congressional rules on secrecy.

The general rule is that classified information can be made public only by vote of either the Senate or the House of Representatives. Certain committees,

however, have officially disclosed classified material by a majority vote of their own members. Individual legislators who take this responsibility on themselves face censure.

The Administration has opposed any budget disclosures on the ground that other nations then would be more able to counteract American programs.

Those pressing for disclosure know that the sentiment is decidedly against them. In September, the House Appropriations Committee voted, 30 to 19, not even to receive Intelligence budget figures from its own subcommittee, and the whole House voted, 267 to 147, not to make the budget public.

This has led to situations like the House vote to back the recommendation of the Appropriations Subcommittee on Intelligence to cut \$263.2 million from intelligence activities in the current Intelligence budget, without knowing what the total budget was or what activities were being curtailed.

Mr. Giaimo began the move toward disclosure last month when he offered an amendment to the Pentagon appropriations bill that would have prohibited C.I.A. spending under the title "other procurement, Air Force." If that amendment passed, Mr. Giaimo would have moved to restore C.I.A. funding under the title of "related agency" spending and to increase that title by \$750 million.

Thus, Mr. Cranston noted in his Senate floor speech on Friday, members were told where the C.I.A. budget was buried and how much it was.

The official sources said that the major portions of the national intelligence program were included as parts of the following titles:

"Contingencies, defense," a \$2.5 million item described as financing "unforeseeable emergency and extraordinary expenses for confidential military purposes."

"Worldwide military command and control system," with an annual operating cost of between \$1.5 billion and \$3 billion, is said to operate "large numbers of varied elements and subsystems that are supposed to provide commanders and managers with the data they need to operate the military establishment during war or peacetime conditions."

"Procurement, defense agencies," a \$120 million item that does not describe the activities involved.

"Special activities," a \$92.5 million item for "procurement of equipment to support a number of special activities of the Department of Defense."

"Research, development, test, and evaluation, defense agencies," a \$557 million item for a variety of activities, some of which are classified.

Senator William Proxmire, Democrat of Wisconsin, has advanced another argument for disclosure—the section of the Constitution that states that "expenditures of all public money shall be published from time to time."

UNIVERSITY of PENNSYLVANIA

PHILADELPHIA, 19174

The Law School
3400 Chestnut Street 14

MAY 9 1 52 PM '77

May 6, 1977

Elliot E. Maxwell, Esq.
United States Senate
Select Committee on Intelligence
Washington, D.C. 20510

Re: R#7738

Dear Mr. Maxwell:

I address my comments to the section of the bill pertaining to appropriations for intelligence activities -- the subject concerning which I recently testified. Certainly, I regard the proposed approach as an improvement over present practice. It puts an end to mislabeling and thus makes available to the public the total devoted to all intelligence activities.

There remains the question whether it achieves full compliance with the constitutional requirement of a "regular Statement and Account of the Receipts and Expenditure of all public Money" merely to disclose a total made available to the Director of National Intelligence and thereafter allocated, without further disclosure, to the various entities that engage in intelligence activities. One would normally expect a meaningful accounting to go at least so far as to identify each organ of government responsible for the administration of public money and the amount received and expended by it. To lump together, for purposes of accounting to the public, the amounts appropriated to and expended by a collection of departments and agencies for intelligence purposes gives information of extremely limited utility. The most extreme example of aggregation would be if all public money was appropriated to the President without any announcement of allocation and he simply reported to the public the total expended by the entire Executive Branch. In that event, the electorate obviously would be in no position to make meaningful judgments as to whether, in its view, appropriate amounts were being expended for particular purposes.

The instant proposal, of course, is not that extreme. However, by lumping together the amounts expended for intelligence by the State Department, the defense establishment, the CIA, the

Elliot E. Maxwell, Esq. - 2.


May 6, 1977

FBI Intelligence Division, and numerous other entities, it holds much from public view. If, for example, two billion dollars were to be appropriated for intelligence next year, the public would be unable to ascertain if the CIA share were one million or one billion. Granting the proposition that practical considerations may justify a lesser degree of disclosure of detail in the case of intelligence activities than in other areas, it seems clear to me nonetheless that there is a constitutional obligation to provide more meaningful disclosure. The principle of public accountability surely means that each entity that has the actual responsibility for administering appropriated funds shall disclose how much it has received and how much it has spent.

Some will argue, no doubt, that even that limited degree of disclosure involves a risk to security. I think that's a myth. In all events, the answer, I submit, is that the Framers regarded the risks incident to public accountability as less than those attendant upon undue secrecy. Such accountability, in their view, was an essential ingredient of a republican form of government.

I thank you for the opportunity to comment.

Sincerely,


Ralph S. Spritzer
Professor of Law

RSS:ld

**common cause**

2030 M STREET, N.W., WASHINGTON, D. C. 20036

John W. Gardner, Chairman

(202) 833-1200

APR 26 11 18 AM '77

April 22, 1977

The Honorable William Hathaway
Chairman
Budget Authorization Subcommittee
Senate Select Committee on
Intelligence Activities
G308 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Hathaway:

This is in response to your letter of April 6, 1977, asking for Common Cause's views on the question of whether disclosure of the funds authorized for government intelligence activities would be in the public interest. As you requested, I am enclosing a written statement for inclusion in the record of the upcoming hearings of the Senate Select Committee on Intelligence concerning such intelligence budget disclosure.

We are very pleased that the Select Committee has initiated these hearings and we stand ready to work with the members of the Committee as you deal with this important issue.

Sincerely,

David Cohen
President

Enclosure

STATEMENT OF COMMON CAUSE CONCERNING PUBLIC DISCLOSURE OF BUDGET
FIGURES FOR U.S. INTELLIGENCE ACTIVITIES

Common Cause commends the Senate Intelligence Committee and its Chairman, Senator Inouye, for beginning hearings early in the session on public disclosure of the budget figures for intelligence activities. Public disclosure of this information has been a matter of interest to Common Cause, and we are pleased that the issue has not been forgotten in the lull after the recent storm of revelations of CIA misdeeds.

The annual budget submitted by the President to Congress is absolutely uninformative regarding the total cost of intelligence operations as well as the cost of individual intelligence agencies and activities. A careful reading of the massive budget appendix would yield no indication of even the existence of the Central Intelligence Agency, Defense Intelligence Agency, National Security Agency or the Intelligence components of the Armed Services.

Common Cause strongly believes that the public deserves to know how many of its tax dollars are being spent on intelligence activities. The Constitution demands that much. Informed representative government demands that much.

Our position is not far from that of former CIA Directors Schlesinger, Helms and Colby, all of whom have stated that disclosure of a gross or total budget figure would not create a security risk. (Congressional Record, June 4, 1974, p. S9603)

At a minimum, we believe that there should be public disclosure of a total budget figure for overall intelligence and counterintelligence activities. We equally favor disclosure of separate budget figures for the CIA, DIA, NSA, and the various intelligence units within DoD.

We are aware of the argument raised by those who oppose disclosure even of an aggregate budget figure, viz., our enemies will be able to make accurate deductions about our intelligence capabilities from knowledge of a total budget figure. We reject that argument, for if it had any merit, it would apply with equal force to the Defense Department's budget.

Yet no one has suggested a secret Defense budget. In fact, every year the Armed Services Committees and Appropriations Committees hold detailed public hearings on military manpower and weaponry—on our missiles, submarines, our most advanced and complex planes, how well the volunteer army is working, and so on. The decision has been made that the American people and our form of government require that much of this information be public—that the people have a right to know in order to intelligently discuss and debate our military capabilities.

Those who argue against disclosure of any budget figures assert that once they are made public, further disclosure will also be demanded. Frankly, those who argue "creeping disclosure" underestimate the ability of Congress to say no to outside pressure. If Congress decides that more information should be put in the public domain, it will do so only after careful deliberation.

The greatest danger is not that disclosing these budget figures will provide our enemies with useful information. The greatest danger is of excessive secrecy and a consequent lack of accountability of the government to the people. Senator Harold Hughes stated this eloquently on the Senate floor during a debate on this precise issue in 1974:

"One of the greatest threats to any country, and particularly a country that has great military strength, is not from the outside or from its foreign enemies, it is from the inside, from secrecy and interior deterioration. The greatest threat of all is when we begin to lose control and not know what is happening * * *"
(Cong. Rec., June 4, 1974, S9607)

The Rockefeller Commission reached the same conclusion. Secrecy of the budget was listed by the Commission as one of the "underlying causes of the problems confronting the CIA." Not surprisingly, the Commission suggested that all or part of the CIA budget be made public. Similarly, the predecessor to your Com-

mittee recommended that at least an aggregate figure for national intelligence be published.

Your Committee charter recognizes the danger of excessive secrecy. You may release information entrusted to you except when the President certifies in writing that the need for secrecy outweighs the public interest in disclosure. In the choice between secrecy and disclosure, disclosure is preferred, and secrecy is no longer automatic as it applies to either the total budget of overall intelligence activities or the budgets of component units. In the case of the budget figures for intelligence activities, we believe that the public interest outweighs any claims for secrecy.

STATEMENT OF DOUGLAS PAUL ELLIOTT

I am grateful to Senator Hathaway and the Select Committee for affording me the privilege of submitting these remarks on the disclosure of intelligence budget information. I regard this as a critical issue with profound implications concerning the evolution of relationships between government and citizens, and between Congress and the Executive, as our Republic enters its third century.

These remarks are based primarily upon research I conducted in connection with my article, "Cloak and Ledger: Is CIA Funding Constitutional?", 2 *Hastings Constitutional Law Quarterly* 717 (1975). A copy of that article is attached hereto as Appendix A [II], and provides documentation for the comments made herein.

For the past three decades, budgetary practices pertaining to the American intelligence community have been characterized by secrecy and deception, and have consistently violated the United States Constitution.

Article I, Section 9, Clause 7 [hereinafter "Clause 7" or "the statement and account clause"] of the Constitution requires that:

"No money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

Monies to be expended by intelligence agencies, however, have been concealed within appropriations to other agencies, and no public accounting is made. Concerns over the constitutional violations inherent in this arrangement have been raised by authorities as diverse as the Rockefeller Commission, the Church Committee, the New York City Bar Association, and distinguished historian Henry Steele Commager.

What is lacking is a definitive decision on the matter by the United States Supreme Court. In *United States v. Richardson*, in a five-to-four decision, the Court held that a citizen-taxpayer did not have standing to challenge the constitutionality of CIA budgetary secrecy in federal court. In essence, the Court left it up to Congress to determine the constitutionality of present practices.

Congress, of course, already has an affirmative obligation to uphold the Constitution. In the wake of *Richardson*, it is especially important that the requirements of Clause 7 be given full consideration, since judicial review has been effectively precluded.

The question of intelligence budget secrecy has been debated in Congress on a number of occasions over the years. Until recently, however, debate has focused on questions of political philosophy, and virtually no attention has been directed to the requirements of the Constitution.

Fortunately, the Church Committee seriously studied the constitutional problems posed by the existing procedures, and recommended reforms. It is my hope that this is the beginning of a new trend, which will culminate in remedial legislation proposed by the Select Committee and enacted by Congress.

The plain meaning of the language of Clause 7 indicates the unconstitutionality of the present statutory scheme for funding and expenditures of the CIA and other intelligence agencies. Nonetheless, I and other researchers have found illuminating the intent of the framers revealed in the debates of the Constitutional Convention and the subsequent state ratification debates.

These debates reveal an intent to buttress the checks and balances system with a free flow of budgetary information which was necessary to make the power of the purse a meaningful reality. Clause 7 was designed to provide Congress with a safeguard against improper use of funds by the Executive, and to provide the public with the information necessary to determine whether the priorities of their elected officials coincided with their own.

The battle cry of the founding fathers had been "No taxation without representation." In order to transform this slogan into political reality, there had to be a mechanism by which the public could obtain information on how their tax money was being allocated by their representatives, and by which the

Executive could be prevented from expending funds without authorization by Congress. Clause 7 therefore was regarded by the framers as a necessary safeguard against tyranny in a democratic republic.

There has been considerable discussion in recent years, both in the courts and in the political arena, of the public's "right to know." It is interesting to note that this phrase was used by George Mason nearly two centuries ago in debate over the wording of Clause 7.

The defenders of the present secrecy in the intelligence budget have rarely addressed the constitutional issue directly. Generally they have confused their arguments to the advancement of the hypothesis that disclosure of any information regarding the intelligence budget somehow would be harmful to the national security. The implied premise is that the existence of such a possibility is sufficient to excuse compliance with the literal terms of the Constitution. This premise further implies that the founding fathers could not anticipate national security problems. Such is not the case.

At the time the Constitution was drafted, Americans had just won a long and brutal war of independence against British forces of vastly superior military strength. Intelligence played a significant role in that war, and Americans became well acquainted with the harms inflicted by British espionage. Following the Revolution, and for many years to come, America was a relatively weak military power whose vulnerability was mitigated only by the oceans which separated this continent from the military giants of Europe and Asia.

It was in this setting that the founding fathers drafted Clause 7. They saw fit to exempt confidential matters from the requirement of publication of a Congressional journal, and they could have included a similar exemption in Clause 7 if they had considered it desirable to do so. They apparently thought, however, that any potential risks from financial disclosure were outweighed by the importance of such disclosure to the form of government they established.

For the next century and a half, the American role in world affairs gradually increased. Victory in the Second World War brought the United States for the first time to a position of global military pre-eminence. It is ironic that this was also the point in our history at which a massive trend toward governmental secrecy began. As a part of this trend, information on the intelligence budget has been withheld from the public for the past three decades on national security grounds.

The shift in philosophy has been drastic. At the time the Constitution was written, the drafters believed that the free flow of information was necessary to the survival of a free society. Once that society had become the strongest nation in the world, a powerful member of the Senate sought to justify budgetary secrecy with the comment: "You have to make up your mind that you are going to have an intelligence agency and protect it and shut your eyes some and take what is coming."

The series of abuses of power within the Executive branch during the present decade has brought about a reawakening to the fact that such abuses flourish in secrecy. There is now a consciousness within both Congress and the country at large that our constitutional form of government must not be compromised whenever the phrase "national security" is uttered.

I do not mean to suggest that fidelity to the Constitution requires a disregard for national security. Rather, it is my position that the Select Committee should fashion remedial legislation which protects the legitimate intelligence objectives of the United States with the least practicable intrusion on the public's right to know. It is instructive in this regard to examine the Supreme Court's handling of the related issue of intrusion on First Amendment rights on national security grounds.

In his concurring opinion in the *Pentagon Papers* case, Justice Brennan took the position that even an interim order restraining publication protected by the First Amendment could not be justified without "governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea" Mere surmise or conjecture were insufficient to justify such restraint.

In *United States v. Robel*, the Supreme Court held that "when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms."

These excerpts suggest that in determining its policy on disclosure of intelligence budget information, Congress should ask two questions: (1) Would disclosure of intelligence appropriations and expenditures necessarily result in significant harm to the national security?; and (2) If so, by what means could such harm be avoided with the least drastic impact on the interests served by the statement and account clause? The various legislative alternatives should be viewed with these questions in mind.

Three basic reform proposals have been suggested. All of them would end the present practice of concealing intelligence monies within appropriations to other agencies, but they differ significantly with regard to the level of disclosure that would be provided. The most modest reform would entail appropriation and publication of a single aggregate amount for the entire intelligence community. The second proposal would involve appropriation and publication of a lump sum for each individual intelligence agency.

Either of these proposals would be a significant and desirable reform. Both would put an end to the deception inherent in the present procedure of concealing intelligence monies within appropriations to other agencies and then secretly transferring the funds to their real destination. Under these proposals, intelligence monies would be labeled as such, and non-intelligence appropriations would no longer be suspect. Honesty would be restored.

Both of the proposals, however, would permit a level of secrecy far beyond that of any other federal agency, including agencies concerned with sensitive military and foreign affairs matters. In my opinion, neither of these reforms would provide sufficient disclosure to cure fully the constitutional defect in the existing procedures.

The normal and traditional practice has been to disclose, with varying degrees of specificity, line item figures for the various agencies. Such a level of disclosure is necessary for meaningful discussion of the budgets of any but the smallest agencies. It would reveal little, for example, for the Congress to appropriate one hundred billion dollars to the Defense Department, with no further specificity or itemized accounting of how the appropriation is spent. Therefore, satisfaction of the intent of the "statement and account" clause requires some degree of line item disclosure, unless it can be proven that such disclosure would be harmful to the national security.

The proposal which I believe is capable of preserving the national security with the least drastic impact on the public's constitutional right to know is the third alternative: disclosure of line items for routine, non-sensitive matters, combined with a lump sum appropriation for all "confidential purposes." There is well-established precedent for this model. The State Department has used it since the eighteenth century, and the Federal Bureau of Investigation and the Atomic Energy Commission have functioned effectively with such a system for many years.

In considering partial line item disclosure of the intelligence budget, it should be remembered that the vast majority of intelligence gathering takes the form of conventional library-type research and the culling of data from sources that are readily available to the public. Moreover, an intelligence agency, as any other agency, must spend significant sums on such routine items as ordinary office supplies and equipment and clerical salaries. It is difficult to imagine how disclosure of such expenditures within the CIA would pose more of a threat to the national security than does disclosure of similar expenditures within the Pentagon. In fact, detailed budget information on sophisticated weapons systems is routinely disseminated without apparent harm to the national security.

In the agencies which have received appropriations according to the model I advocate, the sums designated for confidential expenditures have been relatively small. Thus, the budget for fiscal year 1975 included \$435 million for the FBI, of which a maximum of \$70,000 (0.0161%) was designated for confidential expenditures. The AEC budget for the same year was \$2.3 billion, of which a maximum of \$100,000 (0.0043%) was designated for confidential use. It seems probable that most intelligence agencies would require confidentiality in considerably higher proportions of their expenditures. Nonetheless, if agencies responsible for atomic secrets and internal security can withstand publication of nearly their entire budgets, it is difficult to see why the intelligence agencies could not survive disclosure of routine line items.

If it is concluded, however, that only aggregate figures should be made public, I would recommend a mechanism for delayed disclosure of more detailed information after a period of several years. While such delayed disclosure would entail a significant limitation on the public's right to know, I believe it would minimally comply with the constitutional requirement of disclosure of expenditures "from time to time." In drafting Clause 7, the framers disclosed an intent to provide temporal, rather than substantive, flexibility.

Regardless of the scope of disclosure Congress chooses to require, I believe that the reform legislation should include a provision conferring upon any interested person standing to sue in federal court to enforce the provisions of Clause 7, as they pertain to all federal spending. This is necessary to remedy the paradoxical situation that has existed since *Richardson* in which a citizen-taxpayer has standing to enforce a statutory governmental duty to disclose under the Freedom of Information Act, but lacks standing to enforce a constitutional obligation to disclose budgetary information. As Chief Justice Marshall observed in *Marbury v. Madison*: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." The people's constitutional right to know how their tax dollars are being spent should be enforceable, when necessary, by declaratory and injunctive relief.

At the beginning of this statement, I observed that the decision made by Congress on the disclosure of intelligence expenditures will have serious implications for the future of our society. Not the least of these is the balance between concerns for national security and principles of democratic government. The Select Committee may find it useful to consider discussions of this issue by the Supreme Court.

In *United States v. Robel*, Chief Justice Warren observed in the opinion of the Court that the "concept of 'national defense' cannot be deemed as an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this nation apart."

Similarly, in his concurring opinion in the *Pentagon Papers* case, Justice Black commented:

"The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of . . . governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged."

In the same case, Justice Stewart remarked:

"In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—which alone can protect the values of democratic government."

Perhaps the essential idea common to these judicial pronouncements was most simply and eloquently expressed by the folk singer who articulated this vision of America: "Her power shall rest on the strength of her freedom." An important aspect of that freedom is the public's right to know how tax dollars are spent. It is my hope that Congress will, as Jefferson wrote in the Declaration of Independence, "[l]et facts be submitted to a candid world."

WOULD THE DISCLOSURE OF ANY OF THE FUNDS AUTHORIZED FOR THE INTELLIGENCE ACTIVITIES OF THE UNITED STATES BE IN THE PUBLIC INTEREST?

(Views of Herbert L. Scoville, Jr., formerly Assistant Director for Scientific Intelligence and Deputy Director for Research, CIA—1955-63.)

Although information on the funds authorized for the U.S. intelligence community and for the individual intelligence agencies of the U.S. Government provide only a very limited basis for evaluating the effectiveness of intelligence operations. I still believe that it would be useful to make such information public. It would at least provide the American people and its representatives in Congress with an appreciation of the total cost of this important element of our national security establishment. It could be used for comparison with the overall funds allocated to other elements of the security program—such as armaments, military manpower, foreign affairs, and arms control.

The authorization of publicly known funds for intelligence will for the first time demonstrate that the American people and its designated representatives support the Government's intelligence activities; at the present time with no funds ever being disclosed, the claim can be made that such activities have no public approval. Thus, the disclosure could strengthen the backing of intelligence activities by the American people.

One bonus from the publication of the intelligence budget figures would be the halt of uninformed speculation on the expenditures for intelligence. These funds have, in recent years, become a symbol out of all proportion to their usefulness. Sometimes they are inflated and in others greatly underestimated. The availability of official figures would halt a lot of such nonsense and remove the uncalled-for aura that these figures have acquired. It would allow public attention to be focused on much more worthwhile issues relative to U.S. intelligence operations.

It would be a mistake, however, to give the impression that knowledge of such funds will permit any sound determination of whether this or that intelligence activity should be continued or stopped or whether the U.S. is getting its money's worth from such operations. Meaningful evaluations would require much more detailed data, since there is no easy way to equate the usefulness of information with the cost of acquiring it. Proper oversight can only be accomplished by thorough and continuous analyses of the information acquired, the methods, together with the costs involved in acquiring it, and the national security needs. Obviously, such work cannot be done with publicly available information and must be done by Congressional Committees with complete access.

Based on my experience, within the intelligence community and in recent years in the public sector, I am convinced that the disclosure of the overall funds authorized for intelligence would not prejudice any important security interest. The general values, and perhaps even the precise values, are already available to foreign intelligence organizations. The overall sums tell little or nothing about the nature of our intelligence operations. The Secretary of Defense's Annual Report has disclosed orders of magnitude more information on intelligence sources and capabilities than could possibly be gleaned from the overall budget figures. Congressional hearings, press conferences, and speeches continuously supplement the information publicly available on military, foreign affairs, and scientific developments. These in turn, provide a wealth of information of intelligence information, sources and methods.

I cannot agree with former CIA Director Colby's views that the annual variations in intelligence appropriations would provide significant additional information to that which is available from myriads of other sources. Intelligence activities and budgets have grown to such an extent in the last couple of decades that any new project could no longer be suddenly revealed by fluctuations in annual annual budgets.

In sum, my view is that the disclosure of the funds authorized for U.S. intelligence activities or even for the individual intelligence agencies would not have any significant effect on our security. Although it would only marginally improve the ability of the public and the Congress to evaluate our intelligence operations, such disclosure would provide the basis for at least a minimal understanding of the costs. When the authorizations are approved by the Congress, there will be for the first time a proof of public support or the overall intelligence activities of the U.S. Government.

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April 28, 1977

Senator William D. Hathaway, Chairman
Budget Authorization Subcommittee
Select Committee on Intelligence
U. S. Senate
Washington, D. C. 20510

Dear Senator Hathaway:

Enclosed is a brief statement I promised to send for your Hearings on whether intelligence budget sums should be disclosed.

I regret I was unable to appear in person but I trust my statement will be of some assistance in your Committee's deliberations.

With best wishes,

Sincerely,

Harry Howe Ransom
Professor

HHR:erm

enclosure

DISCLOSURE OF INTELLIGENCE BUDGETS

Written Statement of Dr. Harry Howe Ransom,
Professor of Political Science
Vanderbilt University

To: U. S. Senate Select Committee
on Intelligence, Hearings,
April 27-28, 1977

My advice to the United States Senate, through this Committee, is that the budget totals for the major agencies of foreign intelligence should be publicly disclosed annually.

This recommendation is based upon the assumption that our intelligence system has been in a crisis of legitimacy, beginning in the fall of 1974 when it became widely known that various units of the intelligence systems have been operating not only outside the law, but in some cases in direct violation of statutory prohibitions. I need not recount to this Committee the abuses and misuses of intelligence agencies that have been disclosed in sickening detail over the past three years.

If my assumption is valid, that Intelligence is in a legitimacy crisis, then national security is in jeopardy. Leaders of a system whose legitimacy is under a cloud, cannot function effectively in their vital role of keeping decision makers informed of significant events and trends in foreign affairs. And the greatest threat to national security would be a wrongly or ill-informed President of the United States.

Since the theme of my argument is legitimacy, let me explain: I use the term in its simple definition. Institutions are legitimate when they possess a quality of "oughtness" in the American political context, which must include the

Constitution, statutory law, and the less concrete political and moral ideals of our society. Our nation, by the way, cannot long withstand the charge of hypocrisy when our leaders speak out for "Human Rights" abroad while maintaining even a small semblance of a police state at home.

Consensus, as well as Constitutions and statutes, can convey legitimacy, yet a consensus that permanently defies law--or the Constitution--can be deficient in legitimacy. I mean by this that our nation can sometimes in time of all-out war or other such emergency, tolerate a high degree of censorship or secrecy for relatively short periods of time. But democracy cannot survive a permanent condition of secret warfare, waged through secret budgets, and absent the normal checks and balances of our Constitutional system.

No less than the conservatively-oriented Rockefeller Commission appointed by President Ford in 1975 to investigate CIA's illegal domestic activities suggested that concealment of the CIA budget may be in direct violation of the Constitution. For the Constitution requires, without qualification or exceptions that a "regular statement" of expenditures of "all public money" be published.

My argument is a simple one that intelligence agencies that are funded in violation of the unqualified Constitutional



244

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principle of budgetary disclosure cannot maintain their legitimacy over the long haul. I would further suggest that this problem comes to taint Congress as well. For Congress, in participating in the deception required for secret budgets, comes to share in the illegitimacy of the system. This occurs when Congress allows various parts of the budget which are used for "cover" or deception to become contaminated by secrecy. This means that Congress, in effect, is lied to annually and in the process the people are lied to by those, from the President down, who present budgets to Congress, and who appropriate money under false labels.

A government based upon deliberate, routine, annual lies cannot long survive with basic democratic values intact.

I will concede there may be some intelligence risks in meeting the disclosure requirements of the Constitution. But I urge the Senate to make the most careful calculation of risks and benefits. I believe the costs of too much secrecy are greater than the alleged national security benefits. Please keep in mind that national security should have no other purpose than to preserve American democratic values.

William B. RICHARDSON, Appellant,

v.

UNITED STATES of America et al.

No. 19277.

United States Court of Appeals,
Third Circuit.

Argued June 25, 1971.

Submitted En Banc May 11, 1972.

Decided July 20, 1972.

Action by taxpayer seeking writ of mandamus to compel Secretary of Treasury to publish an accounting of the receipts and expenditures of the CIA and to enjoin any further publication of Government's consolidated statement which did not reflect them. The United States District Court for the Western District of Pennsylvania, Joseph P. Willson, J., denied application for three-judge court and dismissed the complaint on grounds of standing and justiciability and taxpayer appealed. The Court of Appeals, Max Rosenn, Circuit Judge, held that duty of Secretary of Treasury arising under statute directing him annually to lay before Congress a statement designating amount of receipts and expenditures by each separate head of appropria-

tion could be enforced by mandamus; that taxpayer had standing to maintain action; and that complaint, although grounded solely on the mandamus statute, fell within terms of statute requiring that application for injunction restraining enforcement of any act of Congress not be granted unless heard by three-judge court.

Order vacated and cause remanded.

Adams, Circuit Judge, filed dissenting opinion joined in by Aldisert and Hunter, Circuit Judges.

I. Judgment \Rightarrow 570(9)

Dismissal of suit by taxpayer challenging CIA's accounting because taxpayer failed to show the matter in controversy exceeded the value of \$10,000, did not bar taxpayer from raising merits on action for writ of mandamus to compel Secretary of Treasury to publish an accounting of the receipts and expenditures of the CIA. 28 U.S.C.A. §§ 1291, 1331.

2. United States \Rightarrow 91 $\frac{1}{4}$

Taxpayer seeking to compel Secretary of Treasury to make public accounting of receipts and expenditures of the CIA could not predicate jurisdiction upon statute authorizing civil action against United States on claim not exceeding \$10,000 in amount where taxpayer alleged no monetary damages. 28 U.S.C.A. § 1346(a) (2).

3. United States \Rightarrow 91 $\frac{1}{4}$

Statute providing for judicial review of actions of administrative agencies could not form basis for jurisdiction of suit by taxpayer seeking to compel Secretary of Treasury to publish accounting of receipts and expenditures of the CIA. 5 U.S.C.A. §§ 701-704.

4. Records \Rightarrow 14

Statute requiring administrative agencies to make records available to public information did not apply to suit by taxpayer seeking to compel Secretary of Treasury to publish an accounting of the receipts and expenditures of the CIA. 5 U.S.C.A. § 552(a) (3), (b) (3).

RICHARDSON v. UNITED STATES

Cite as 465 F.2d 844 (1972)

845

5. Mandamus ⇨27

An act is ministerial within contemplation of mandamus statute only when its performance is positively commanded and so plainly prescribed as to be free from doubt. 28 U.S.C.A. § 1361.

6. Mandamus ⇨3(1)

To be entitled to relief under the mandamus statute, plaintiff must have exhausted all other available means of relief. 28 U.S.C.A. § 1361.

7. Mandamus ⇨12

For purpose of determining whether mandamus will lie against him in the federal courts, an officer of the Government cannot deprive the court of jurisdiction to compel performance of an otherwise clear statutory duty by invoking the authority of what is challenged as an unconstitutional law. 28 U.S.C.A. § 1361.

8. Officers ⇨110

Statutes ⇨63

If a law is unconstitutional, it is void and of no effect, and it cannot alter an otherwise valid obligation of a governmental officer to a citizen.

9. Mandamus ⇨82

In suit by taxpayer for writ of mandamus to compel Secretary of Treasury to publish accounting of receipts and expenditures of the CIA, Government could not rely on the CIA statute which was challenged as repugnant to the Constitution to preclude jurisdiction of the mandamus action. U.S.C.A.Const. art. 1, §§ 8, 9, cl. 7; Accounting and Auditing Act of 1950, § 114(a), 31 U.S.C.A. § 66b(a) and §§ 696, 1029; Central Intelligence Agency Act of 1949, §§ 1 et seq., 6(a), 7, 50 U.S.C.A. §§ 403a et seq., 403f(a), 403g.

10. Mandamus ⇨73(1)

United States ⇨44

In fulfilling duty of Secretary of Treasury arising under statute requiring him annually to lay before Congress a statement of receipts and expenditures by each separate head of appropriation, the Secretary had no discretion and mandamus was appropriate to compel performance of that duty. 31 U.S.C.A. § 1029.

11. United States ⇨44

Duty of Secretary of Treasury annually to lay before Congress a statement of receipts and expenditures of all public monies runs not only to the President and the Congress, but also to the public at large. Accounting and Auditing Act of 1950, § 114(a), 31 U.S.C.A. § 66b(a) and § 1029, U.S.C.A.Const. art. 1, § 9, cl. 7.

12. Mandamus ⇨10

Mandamus should be construed liberally in cases charging a violation of a constitutional right. 28 U.S.C.A. § 1361.

13. Courts ⇨300

When a plaintiff does not have a stake in the outcome of the litigation to assure a sufficient adverseness in the proceedings to make it a true "case" or "controversy," federal court has no jurisdiction to entertain his request. U.S.C.A.Const. art. 3, § 2.

14. United States ⇨91½

Test to ascertain whether taxpayer has requisite adversary interest to challenge government activity is whether there is a nexus between his status as a taxpayer and the challenged activity to give him a personal stake in the action and whether his claim relates to a specific constitutional prohibition so that the issues may be sharpened and focused sufficiently for proper judicial resolution.

15. Constitutional Law ⇨42

Mandamus ⇨23(2)

Taxpayer seeking writ of mandamus to compel Secretary of Treasury to publish an accounting of the receipts and expenditures of the CIA and arguing that he had a right under the Constitution to "a regular statement and account" but that he was being deprived of that right because of government's adherence to the allegedly unconstitutional CIA statute had sufficient personal stake in the litigation to have standing to maintain action. Accounting and Auditing Act of 1950, § 114(a), 31 U.S.C.A. § 66b(a) and § 1029; U.S.C.A.Const. art. 1, § 9, cl. 7.

16. Constitutional Law \Rightarrow 42

Nexus between a taxpayer and an allegedly unconstitutional act need not always be the appropriation and the spending of his money for an invalid purpose; the personal stake which confers standing on taxpayer to maintain action may come from any injury in fact even if it is not directly economic in nature. U.S.C.A. Const. art. 3, § 2.

17. Courts \Rightarrow 101

Three-judge court statute was enacted as a protective device to shield government from suits which might disrupt its operations; it was not intended for the convenience of the plaintiff. 28 U.S.C.A. § 2282.

18. Courts \Rightarrow 101

Action by taxpayer to compel Secretary of Treasury to publish accounting of receipts and expenditures of the CIA and to enjoin any further publication of Government's consolidated statement which did not reflect them, and challenging constitutionality of CIA statute, fell within terms of three-judge court statute even though action was based on the mandamus statute. 28 U.S.C.A. §§ 1361, 2282; Central Intelligence Agency Act of 1949, §§ 1 et seq., 6(a), 7, 50 U.S.C.A. §§ 403a et seq., 403f(a), 403g.

19. Mandamus \Rightarrow 186

Mandamus, when disobeyed, is punishable by contempt.

20. Courts \Rightarrow 101

Whether issue sought to be presented to three-judge court is insubstantial must be determined by the allegations of the bill of complaint. 28 U.S.C.A. § 2282.

21. Courts \Rightarrow 101

No question for a three-judge court exists if the allegations of the complaint reveal that the question may be plainly insubstantial, either because it is obviously without merit, or because its unsoundness so clearly results from previous decisions as to foreclose the subject and leave no room for the inference that the question sought to be raised can be

the subject of controversy. 28 U.S.C.A. § 2282.

22. Courts \Rightarrow 101

Question of constitutionality of CIA statute, as presented in suit by taxpayer for writ of mandamus to compel Secretary of Treasury to publish accounting of receipts and expenditures of the CIA, was not insubstantial and was proper for three-judge court. Central Intelligence Agency Act of 1949, § 1 et seq., 50 U.S.C.A. § 403a et seq.; 28 U.S.C.A. §§ 1361, 2282.

23. Courts \Rightarrow 101

Issue whether question posed by taxpayer seeking writ of mandamus to compel Secretary of Treasury to publish an accounting of receipts and expenditures of the CIA and challenging constitutionality of CIA statute was not justiciable because it was barred by the political question doctrine, being intertwined with the merit of the case, would be left for development at hearing before three-judge court. Central Intelligence Agency Act of 1949, § 1 et seq., 50 U.S.C.A. § 403 et seq.; 28 U.S.C.A. §§ 1361, 2282.

William B. Richardson, pro se.

John F. Dienelt, Department of Justice, Washington, D. C., for appellees.

Argued June 25, 1971.

Before VAN DUSEN and MAX ROSENN, Circuit Judges, and KRAFT, District Judge.

Submitted En Banc May 11, 1972.

Present SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, MAX ROSENN, JAMES ROSEN, and HUNTER, Circuit Judges, and KRAFT, District Judge.

OPINION OF THE COURT

MAX ROSENN, Circuit Judge.

[1] In contrast to the case frequently heard on appeal, in which the Government seeks an accounting from the taxpayer, here it is the taxpayer who seeks an accounting from the Govern-

RICHARDSON v. UNITED STATES

847

Cite as 465 F.2d 844 (1972)

ment. Appellant, acting *in propria persona*, complained that the Government's consolidated statement, entitled "Combined Statement of Receipts, Expenditures and Balances of the United States Government," fails to show monies received and expended by the Central Intelligence Agency (CIA). He alleged that the Central Intelligence Agency Act relieving the Secretary of the Treasury from publishing such figures was repugnant to the Constitution and void. He sought a writ of mandamus to compel the Secretary of the Treasury to publish

an accounting of the receipts and expenditures of the CIA and to enjoin any further publication of the Combined Statement which did not reflect them. His application for a three judge court was denied by the district court which subsequently dismissed the complaint on grounds of standing and justiciability.¹

We will vacate the order and remand.

After oral argument, this court deemed the issues raised by the case of sufficient importance to necessitate the appointment of *amicus curiae*, Professor

1. The procedural history of this case is confused. Appellant filed his complaint on January 8, 1970. Only eight days later his request for a three judge court was denied, and the case was ordered set down for assignment in the usual manner. Using hindsight, we can now see that the order of January 16, 1970, which presumably was based on a finding that there was no substantial constitutional question, *Majuri v. United States*, 431 F.2d 469, 472-473 (3d Cir.), cert. denied, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970), largely determined appellant's case and made any further relevant litigation on the merits unlikely. *Douvan v. Hayden Stone, Inc.*, 434 F.2d 619 (6th Cir. 1970). However, neither party nor the district judge so construed the action. On March 20, the Government filed a motion to dismiss and on April 22 filed a motion to deny convening a three judge court. On April 27 another district judge directed plaintiff to file a brief on the questions of dismissal and a three judge court, and on May 19, appellant filed a motion to convene a three judge court. On June 15 the hearing was held and on June 16 appellant's case was dismissed. A timely appeal was taken from that action. The January 16 order might have been appealable if it: (1) foreclosed future litigation and put him out of court, *Idlewild Bon Voyage Liquor Corp. v. Rohan*, 289 F.2d 426, 428 (2d Cir. 1961), modified on other grounds sub nom. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n. 2, 82 S.Ct. 1294, 8 L.Ed. 2d 794 (1962); (2) denied a preliminary injunction, *Majuri v. United States*, supra, or (3) dismissed the action at the same time. *Jones v. Brannigan*, 433 F.2d 578, 579 (6th Cir. 1970), cert. denied, *Jones v. Sullivan*, 401 U.S. 977, 91 S.Ct. 1205, 28 L.Ed.2d 327 (1971). That order would clearly not have been appealable if there were other claims that had

to be disposed of by the single judge district court to which the case had been assigned after denial of the three judge court. *Cancel v. Wyman*, 441 F.2d 553 (2d Cir. 1971); *Lyons v. Davoren*, 402 F.2d 890 (1st Cir. 1968), cert. denied, 393 U.S. 1081, 89 S.Ct. 861, 21 L.Ed.2d 774 (1969). This case is in between those two poles in that all parties believed there was further business for the district court, even though it is difficult for us to understand the basis for such a conclusion. In these circumstances we consider the order of January 16 interlocutory and not a final appealable order under 28 U.S.C. § 1291, and that the appeal from the order of June 16 properly raises the question of the denial of the three judge court. *Sackett v. Beamman*, 399 F.2d 884, 889 n. 6 (9th Cir. 1968). In any case, we note that a single judge court's actions after an improper denial of a three judge court are of no effect, for they are taken without jurisdiction. *Lyons v. Davoren*, supra, 402 F.2d at 892. Therefore, even though appellant did not raise the question of the propriety of the denial of the three judge court at an earlier stage, he can still raise the question here because it goes to the jurisdiction of the single judge court to enter its order of dismissal.

Appellant brought an earlier suit challenging the CIA's accounting, alleging jurisdiction under 28 U.S.C. § 1331. That suit was dismissed because he failed to show the matter in controversy exceeded the value of \$10,000. *Richardson v. Sokol*, 409 F.2d 3 (3d Cir. 1969), cert. denied, 396 U.S. 949, 90 S.Ct. 379, 24 L.Ed. 2d 253 (1969). Because that decision was jurisdictional, he is not barred from raising the merits in this action. *Ettan v. Lovell Manufacturing Company*, 225 F.2d 844, 846 (3d Cir. 1955), cert. denied, 350 U.S. 968, 76 S.Ct. 435, 100 L.Ed. 839 (1956). 1B Moore's Federal Practice § 0.405 [5].

Ralph S. Spritzer of the University of Pennsylvania Law School, formerly Acting Solicitor General of the United States. He has submitted a thoughtful brief to which all parties have responded.

THE CONSTITUTIONAL AND STATUTORY CONTEXT

Because appellant sought to challenge the system by which the Federal Government accounts for funds spent by the Central Intelligence Agency, a brief explanation of that system is necessary to put his action in appropriate context.

The Federal Government's spending powers, enumerated in article I, section 8 of the Constitution, are regulated by article I, section 9, clause 7, which provides:

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

In accordance with this mandate, all federal agencies except the CIA receive an annual specific appropriation from the Congress. 31 U.S.C. § 696. The Secretary of the Treasury then prepares an annual statement by "head of appropriation" for the use of the Executive, the Congress and the public reflecting how much each agency has spent during the previous fiscal year. 31 U.S.C. §§ 66b(a), 1029. Since there is no specific appropriation for the CIA, its receipts and expenditures are not listed in the document.

The Central Intelligence Agency Act of 1949, 63 Stat. 208, 50 U.S.C. § 403a et seq. (1970), established a unique procedure for funding the CIA. Section 403f(a) permits the CIA to transfer and receive funds from other agencies with the approval of the Bureau of the Budget (now Office of Management and Budget) "without regard to any provisions of law limiting or prohibiting transfers between appropriations." Once the money has been spent, the CIA need

not disclose its functions or personnel, 50 U.S.C. § 403g, and:

[t]he sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds; and for objects of a confidential extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified. 50 U.S.C. § 403j(b).

This procedure creates a two-step system for disbursement of the Treasury's monies to the CIA. First, Congress appropriates money to some other agency, and then that agency transfers the funds to the CIA. The only accurate accounting for the funds is the certificate rendered by the Director of the CIA, but it does not appear that this certificate or its contents are made available to the public. Presumably the money actually spent is reflected in the Treasury Department's annual statement as a disbursement by the original agency to which Congress made the appropriation, although it may not be reflected at all.

Appellant Richardson, a citizen and taxpayer residing in Greensburg, Pennsylvania, wrote the Treasury Department, inquiring about the annual expenditures of the CIA. He was informed by defendant Sokol, the Treasury officer in charge of the publication of the annual statement, that the Treasury Department did not receive information on the CIA because of the congressional determination that such information should not be made public. He further stated that neither he nor the defendant Secretary of the Treasury had access to the information appellant desired. There was no further administrative relief available.

Appellant then brought this action alleging that the appellees have a constitutional and statutory obligation to set forth an accurate accounting of the expenditures of the United States. He contended that the Central Intelligence

RICHARDSON v. UNITED STATES

849

Cite as 465 F.2d 844 (1972)

Agency Act of 1949, which creates an exception for the CIA, is repugnant to the Constitution because its prohibition against reporting the CIA's expenditures contravenes the mandate of article I, section 9, clause 7. He asked that a three judge court be convened to determine the constitutionality of the Central Intelligence Agency Act, and that a mandamus issue against the defendants requiring them to publish a financial statement which complies with the commands of the Constitution and the remaining acts of Congress.

Appellant also alleged that the constitutional duty to provide a regular account of receipts and expenditures of public money is one owed to the citizen and taxpayer, for its obvious design is to provide members of the electorate with information lying at the core of public accountability in a democratic society.

JURISDICTION

[2-4] Appellant alleges several grounds for jurisdiction, only one of which is proper.² It is the relatively new Mandamus and Venue Act, 28 U.S.C.A. § 1361, which states:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

[5, 6] The legislative history of the mandamus statute reveals that the stat-

ute's construction turns upon traditional mandamus law. Davis, *Administrative Law Treatise* (1970 Supplement) § 23.10. In order for mandamus to issue, a plaintiff must allege that an officer of the Government owes him a legal duty which is a specific, plain ministerial act "devoid of the exercise of judgment or discretion." *Clackamas County, Or. v. McKay*, 94 U.S.App.D.C. 108, 219 F.2d 479, 489 (1954). *ICC v. New York, New Haven & Hartford R. R.*, 287 U.S. 178, 204, 53 S.Ct. 106, 77 L.Ed. 248 (1932); *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218, 50 S.Ct. 320, 74 L.Ed. 809 (1930); *United States v. Walker*, 409 F.2d 477, 481 (9th Cir. 1969). An act is ministerial only when its performance is positively commanded and so plainly prescribed as to be free from doubt. *United States v. Walker*, *supra*. Additionally, plaintiff must have exhausted all other available means of relief. *Carter v. Seamans*, 411 F.2d 767, 773 (5th Cir. 1969) cert. denied, 397 U.S. 941, 90 S.Ct. 953, 25 L.Ed.2d 121 (1970).

What is the nature of the duty which appellant charges was breached? The duty alleged here arises under article I, section 9, clause 7 as implemented by the Congress under 31 U.S.C. §§ 66b(a) and 1029.³ Appellant's position is that save for the existence of the Central Intelligence Agency Act, Congress would be required to appropriate money specifically for the CIA, and the Secretary of the Treasury would be required to give an accounting to the President, the Congress

2. None of the other bases of jurisdiction appellant alleges are applicable. Appellant may not predicate jurisdiction upon 28 U.S.C. § 1346(a) (2) since he has alleged no monetary damages. *Blanc v. United States*, 244 F.2d 708 (2d Cir.), cert. denied, 355 U.S. 874, 78 S.Ct. 126, 2 L.Ed.2d 79 (1957); *Universal Transistor Products Corp. v. United States*, 214 F. Supp. 486 (E.D.N.Y., 1963); nor can 5 U.S.C. §§ 701-704 form a basis for jurisdiction, since this circuit has held that the statute is not jurisdictional. *Zimmerman v. United States*, 422 F.2d 326 (3d Cir.), cert. denied, 399 U.S. 911, 90 S.Ct. 2200, 26 L.Ed.2d 585 (1970), and cases cited therein. Finally, 5 U.S.C. § 552(a) (3)

does not apply to "matters that are

(3) specifically exempted from disclosure by statute." 5 U.S.C. § 552(b) (3).

3. 31 U.S.C. § 1029 in pertinent part states: "It shall be the duty of the Secretary of the Treasury annually to lay before Congress, an accurate, combined statement of the receipts and expenditures during the last preceding fiscal year of all public moneys, designating the amount of the receipts, whenever practicable, by ports, district, and States, and the expenditures by each separate head of appropriation."

and the public for that agency's expenditures by that head of appropriation, as mandated by 31 U.S.C. § 1029.

The Government argues that no specific duty exists because the Congress has, by the Central Intelligence Agency Act, relieved the Secretary of the Treasury of the obligation to publish a statement pertaining to funds received and expended by the CIA. It also contends the Secretary cannot be under such an obligation because he does not possess the CIA's accounts.⁴

[7, 8] We do not decide the constitutionality of the Central Intelligence Agency Act. However, for the purpose of determining whether mandamus will lie against him in the federal courts, an officer of the Government cannot deprive the court of jurisdiction to compel performance of an otherwise clear statutory duty by invoking the authority of what is challenged as an unconstitutional law. In re Ayers, 123 U.S. 443, 506, 8 S.Ct. 164, 31 L.Ed. 216 (1887); Board of Liquidation v. McComb, 92 U.S. 531, 541, 23 L.Ed. 623 (1875); National Association of Government Employees v. White, 135 U.S.App.D.C. 290, 418 F.2d 1126, 1129 (1969); cf. Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 701-702, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). As a practical matter, this rule avoids the multiplicitous litigation that would arise if a party were first required to litigate the constitutionality of a statute in a separate action and then later secure specific relief in another proceeding by mandamus. More importantly, if a law is unconstitutional, it is void and of no effect, and it cannot alter

an otherwise valid obligation of a governmental officer to a citizen. To permit a defense based upon an unconstitutional law would prevent a plaintiff, such as appellant, from using the mandamus remedy to enforce his rights even though the Government has not otherwise shown the court a valid reason to deny the relief demanded. Such a defense would have the effect of sustaining the very statute which the court is asked to strike as unconstitutional.

[9] Therefore, the Government may not rely on the CIA Statute to preclude jurisdiction of this mandamus action.

[10] Except for the CIA Statute, the Secretary of the Treasury is under a clear command of Congress to account for all monies as they are actually expended by the different federal agencies. In fulfilling that duty, he has no discretion. 31 U.S.C. § 1029.

[11] Nor are we persuaded by the Government's argument that the duty of the Secretary of the Treasury is not specifically owed to the appellant. The debates at the Constitutional convention in 1787 and the state ratifying conventions reveal that those who proposed the present language of the clause believed that the citizenry should receive some form of accounting from the Government.⁵ The use of the word "published" in article I, section 9, clause 7 emphasizes that intention. Article II, section 3 requires the President "from time to time [to] give to the Congress Information on the State of the Union," and presumably the Framers could have utilized the same informal procedure with regard to the accounting if they had so wished. Instead, they

4. On remand, appellant may wish to consider whether any additional party should be added as a defendant.

5. When George Mason proposed the amendment that ultimately became the part of article I, section 9, clause 7 requiring the publication of a regular statement of receipts and expenditures, the only debate concerned the proper extent of the Government's obligation. At least inferentially, everyone seemed agreed on the need for some such statement. 2 Far-

rand, The Records of the Constitutional Convention (1927 ed.) 618-19. A year later during the Virginia Convention called to ratify the Constitution Mason and Madison defended the clause as the only way to assure some satisfactory reporting to the public. 3 Farrand 326. The same position was urged by James McHenry, a delegate to the Constitutional Convention, in the Maryland House of Delegates when they voted on ratification. 3 Farrand 149-50.

RICHARDSON v. UNITED STATES

851

Cite as 465 F.2d 844 (1972)

chose to have the statement "published," indicating that they wanted it to be more permanent and widely-circulated than the President's message. The connotation must be that the statement was for the benefit and education of the public as well as coordinate branches of the Government.

This constitutional obligation to account to the public is supported by the Congressional enactment of 31 U.S.C. § 66b(a), which provides:

The Secretary of the Treasury shall prepare such reports for the information of the President, the Congress, and the public as will present the results of the financial operations of the Government. . . . (emphasis supplied).

In furtherance of this general duty, Congress enacted 31 U.S.C. §§ 1027-1030,⁶ which provide for various specific reports, including the Combined Statement of Receipts and Expenditures provided for in Section 1029.

Thus Congress' own language indicates that the Secretary's duty to present financial reports runs not only to the President and the Congress, but also to the public at large. If these reports are misleading and inadequate, there is no reason why Richardson, as a taxpayer, should not be able to require the appropriate executive officer to perform his obligations. The right of the taxpayer to receive reasonably complete reports of governmental expenditures is within the "zone of interest[s] . . . protected . . . by the statute . . . in question" and one for which he may suffer a cognizable injury. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153,

90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970); accord, *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970).

Finally, appellant has exhausted his avenues for administrative relief, he has no other remedy, and his only recourse now is judicial redress.

[12] Appellant's case meets all the considerations required for mandamus. While mandamus should be construed liberally in cases charging a violation of a constitutional right, cf. *Fifth Avenue Peace Parade Committee v. Hoover*, 327 F.Supp. 238, 243 (S.D.N.Y.1971), even under principles of strict construction appellant has set forth a clear duty owed to him by the Secretary of the Treasury.

STANDING

[13] The appellant must also have sufficient standing in order to invoke the jurisdiction of a federal court.^{6A} Article III, section 2 limits the judicial power of federal courts to consideration of "cases" or "controversies." *Association of Data Processing Service Organizations, Inc. v. Camp*, supra, 397 U.S. at 151, 90 S.Ct. 827, *Flast v. Cohen*, 392 U.S. 83, 101-102, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). When a plaintiff does not have a stake in the outcome of the litigation to assure a sufficient adverse interest in the proceedings to make it a true "case" or "controversy," we have no jurisdiction to entertain his request. *Flast v. Cohen*, supra, at 101-102, 88 S.Ct. 1942.

[14] *Flast* established a two prong test to ascertain whether a plaintiff, such as appellant, who is a taxpayer, has the requisite adversary interest: (1) the plaintiff must establish a nexus between his status as a taxpayer and

6. 31 U.S.C. § 1029, dealing with the Post Office Department, was repealed August 12, 1970.

6A. In the normal procedure, once a district judge concludes that a three-judge court should be convened, it would appropriately consider, inter alia, the issue of standing. Since one of the grounds, however, for the dismissal of the case by the

district court was the lack of standing, that issue is properly before us on this appeal and, in the interest of judicial efficiency, a disposition of it may avoid the necessity of additional appeals to this court. See *Port of New York Authority v. United States*, 451 F.2d 783, 785, n. 4 (2d Cir. 1971). *Crossen v. Breckenridge*, 446 F.2d 833, 836 (6th Cir. 1971).

the challenged Government activity to give him a personal stake in the action; and (2) his claim must relate to a specific constitutional prohibition so that the issues may be sharpened and focused sufficiently for proper judicial resolution.

Although the district court did not specify its reasons for finding that appellant lacked standing, we assume that it applied *Flast* and found his case deficient thereunder. We cannot agree.

The decision in *Flast* breached the absolute barrier to taxpayer suits erected by an earlier Supreme Court decision. *Frothingham v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). *Frothingham* absolutely barred a taxpayer from objecting to a Government spending program as a violation of the tenth amendment and the due process clause of the fifth amendment, on the theory that taxpayer was affected by the law only to the extent that the public in general was affected by increased taxes. *Id.*, at 487, 43 S.Ct. 597. The Court feared a contrary decision would have opened the floodgates of litigation, and would have permitted people to litigate issues even though they did not have an adequate incentive for a vigorous prosecution because of the miniscule and remote nature of their interests. *Id.*

Flast did not completely overrule *Frothingham*. Chief Justice Warren's decision distinguished the latter case on the ground that a taxpayer could not properly object under the due process clause to general increases in his tax bill, but a taxpayer could object to any program provided under article I, section 8 that exceeded specific constitutional limitations on the taxing and spending powers of Congress. The Chief Justice believed that:

Under such circumstances, we feel confident that the questions will be framed with the necessary specificity, that the issues will be contested with the

necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution. We lack that confidence in cases such as *Frothingham* where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.

392 U.S. at 106, 88 S.Ct. at 1955.

[15] A taxpayer could object to such outlays because there was a sufficient link between his status as a taxpayer and the act to assure a personal stake in the outcome of the controversy. That stake would provide "the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)." 392 U.S. at 99, 88 S.Ct. at 1952. Although the connection in *Flast* is concededly different from the one at issue here, both taxpayers have sufficient personal stake in the litigation. Plaintiffs in *Flast* contended they were being taxed to support an unconstitutional program that was in violation of the first amendment's establishment clause. Appellant argues that he has a right under the Constitution to "a Regular Statement and Account," but that he is being deprived of that right because of the Government's adherence to the allegedly unconstitutional Central Intelligence Agency Act.

The Government argues that *Flast* must be limited to challenges to appropriations. That view attempts to confine the case to its facts without regard to its reasoning. *Flast* is concerned with adverseness and specificity of issues for "standing," not spending *per se*.⁷

7. *Velvel v. Nixon*, 415 F.2d 236, 239 (10th Cir. 1969), cert. denied, 396 U.S. 1042, 90 S.Ct. 684, 24 L.Ed.2d 686 (1970), held that a plaintiff had no standing to chal-

lenge expenditures for the Vietnam War. They reasoned that *Flast* permitted challenges only to spending under the "general welfare" clause of article I, section

Cite as 465 F.2d 844 (1972)

Even under the Government's argument, appellant's claim is still sufficient because it is integrally related to the appropriations process and the taxpayer's ability to challenge those appropriations. Although *Flast* recognizes standing of a taxpayer to challenge expenditures, how can a taxpayer make that challenge unless he knows how the money is being spent? Without accurate official information concerning the amount and purpose of the expenditures, there could be no basis for a taxpayer suit. It would be inconsistent to affirm the viability of taxpayers' suits on the one hand but take away a necessary precondition for those suits on the other.*

[16] The Government's position is not sound to us and we must reject it. We believe that the nexus between a taxpayer and an allegedly unconstitutional act need not always be the appropriation and the spending of his money for an invalid purpose. The personal stake may come from any injury in fact even if it is not directly economic in nature. *Association of Data Processing Service Organizations, Inc. v. Camp*, supra, 397 U.S. at 154, 90 S.Ct. 827, 25 L.Ed.2d 184. A responsible and intelligent taxpayer and citizen, of course, wants to know how his tax money is being spent. Without this information he cannot intelligently follow the actions of the Congress or of the Executive. Nor can he properly fulfill his obligations as a member of the electorate. The Framers of the Constitution deemed fiscal information essential if the electorate was to exercise any

control over its representatives and meet their new responsibilities as citizens of the Republic;* and they mandated publication, although stated in general terms, of the Government's receipts and expenditures. Whatever the ultimate scope and extent of that obligation, its elimination generates a sufficient, adverse interest in a taxpayer.

In the second prong of the *Flast* test the Court inquired whether there was a specific section in the Constitution which operated to limit the Congress' taxing and spending powers. It noted that whether there are limitations other than the establishment clause would have to be decided by future litigation. 392 U.S. at 105, 88 S.Ct. 1942. Appellant's claim raises such a limitation. While article I, section 9, clause 7 is procedural in nature, and while the establishment clause is substantive in nature, both are nonetheless limitations on the taxing and spending power. It would be difficult to fashion a requirement more clearly conveying the framers' intention to regularize expenditures and to require public accountability.

Article I, section 9, clause 7 relates exclusively to the taxpayer's interest in the expenditure of public monies. It is unlike the due process clause of the fifth amendment and the tenth amendment, raised in *Frothingham*, which are designed to check a much broader range of possible abuses of power. Appellant does not raise any generalized complaints about the operation of his Government. He does not even complain that the CIA

8 and not to exercises under the specific enumerated powers, such as the right to provide for Armies and a Navy. We fail to see anything in *Flast* which requires a limitation of taxpayer suits to the general welfare clause. Suits challenging exercises of specific powers can certainly have the adverseness required, and there is nothing more in the *Flast* opinion which evinces a limitation of the taxpayer suit to certain types of subject matter.

8. The interest of a citizen to compel disclosure of this information without reference to his taxpayer's status might be an acceptable basis for this challenge. *Atlee v. Laird*, 339 F.Supp. 1347 (E.D.Pa.

1972); *Reservists Committee to Stop War v. Laird*, 323 F.Supp. 833, 840 (D.D.C.1971). But we need not decide that issue. Whatever the interest of a citizen in knowing where his Government has spent its money, the interest of a taxpayer in knowing where his money has gone is more compelling and direct. Chief Judge Seitz is of the opinion that this plaintiff does not have standing as a taxpayer. See, *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). However, he does agree that standing exists by reason of plaintiff's status as a voter and citizen.

9. Supra, note 5.

should not receive the money it presently spends, provided this money is properly appropriated and reported. He only seeks an accurate statement of account for the tax money extracted from him and spent. He relies on a specific constitutional provision to protect him from what he alleges is a legislative abuse of power, the non-accounting features of the Central Intelligence Agency Act.

We note that if appellant, as a citizen, voter and taxpayer, is not entitled to maintain an action such as this to enforce the dictate of article I, section 9, clause 7, of the United States Constitution that the Federal Government provide an accounting of the expenditure of all public money, then it is difficult to see how this requirement, which the framers of the Constitution considered vital to the proper functioning of our democratic republic, may be enforced at all. A decision to deny standing to the appellant in these circumstances would not seem consistent with the limited scope of the standing requirement. See *Sierra Club v. Morton*, 405 U.S. 727, 740, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972):

The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.

(Footnote omitted.)

McGowan v. Maryland, 366 U.S. 420, 429-430, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 459, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958):

10. 28 U.S.C. § 2282 reads:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not

The [standing] principle is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court. See *Barrows v. Jackson*, 346 U.S. 249, 255-259, 73 S.Ct. 1031, 97 L.Ed. 1586; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 183-187, 71 S.Ct. 624, 95 L.Ed. 817 (concurring opinion.)

Reservists Committee to Stop War v. Laird, 323 F.Supp. 833, 841 (D.D.C. 1971):

It is not irrelevant [to the standing issue] to note that if these plaintiffs cannot obtain judicial review of defendants' action, then as a practical matter no one can.

(Footnote omitted.)

We have carefully avoided expressing any opinion on the merits of the appellant's claim. The complaint, however, contains sufficient allegations to give the appellant standing consistent with article III of the Constitution to invoke the court's jurisdiction for an adjudication on the merits.

THREE JUDGE COURT

We next consider whether a three judge court should have been convened to hear appellant's complaint. 28 U.S.C. § 2282¹⁰ provides that an application for an injunction restraining the enforcement, operation or execution of any act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court unless heard by three judges.

[17] The threshold question, therefore, is whether a complaint in which jurisdiction is grounded solely on the mandamus statute falls within the terms of this Act, independently of the additional prayer for injunctive relief which

be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. [June 25, 1948, c. 646, 62 Stat. 968.]"

Cite as 463 F.2d 844 (1972)

is stated in the complaint.¹¹ The Supreme Court has recently cautioned that the three judge court statute is not a "measure of broad social policy" [citation omitted], *Mitchell v. Donovan*, 398 U.S. 427, 431, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970), and that the term "injunction" as used in 28 U.S.C. § 1253, and presumably in 28 U.S.C. § 2282, is to be narrowly construed. *Id.* A sufficiently narrow construction might serve then to bar a three judge court from hearing a mandamus action, but such a result would not be faithful to the intent of Congress. Section 2282 was enacted as a protective device to shield the Government from suits which might disrupt its operations. It was not intended for the convenience of the plaintiff. The legislative history of this section reveals that it, and its complement, § 2281, "were enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme, either state or federal by issuance of a broad injunctive order."¹² *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154, 83 S.Ct. 554, 560, 9 L.Ed.2d 644 (1963).

[18, 19] This action, while based on the mandamus statute, in substance contemplates injunctive relief. It prays, inter alia, for a permanent injunction apparently in aid of the mandamus restraining publication of the Combined Statement of Receipts, Expenditures and Balances. Therefore, the action is for all practical purposes substantially similar to a mandatory injunction. In ascertaining the substance of the action we

are required to look beyond the prayer for relief to the substantive allegations of the complaint. *Majuri v. United States*, 431 F.2d 469, 473 (3d Cir.), cert. denied, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970). Since the merger of law and equity under the Federal Rules Enabling Act of 1934¹³ and the adoption of Rule 2 of the Fed.R. of Civil Proc. (28 U.S.C.A. Rule 2) providing for only one form of action, there is little difference in substance between a mandamus and a mandatory injunction. *Rolls-Royce, Inc. v. Stimson*, 56 F.Supp. 22, 23 (D.D.C. 1944). The Supreme Court, in discussing the distinction drawn by the Court more than a half century before, stated that "[t]he distinction between mandamus and a mandatory injunction seems formalistic in the present day and age," when rules of pleading are simplified "and, more importantly, before the merger of law and equity." *Stern v. South Chester Tube Co.*, 390 U.S. 606, 609, 88 S.Ct. 1332, 1334, 20 L.Ed.2d 177 (1967). Just as injunctions are effective immediately and are punishable by contempt when disobeyed, so is mandamus. See *Denver-Greeley Valley Water Users Association v. McNeil*, 131 F.2d 67 (10th Cir. 1942). Even prior to the Enabling Act of 1934, the Supreme Court observed that although the remedy by mandamus is at law, its allowance was controlled by equitable principles. *United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 359, 53 S.Ct. 614, 77 L.Ed. 1250 (1933).¹⁴

Unless we require that the instant action withstand the scrutiny of a three-

11. Jurisdiction was not predicated on the prayer for injunctive relief since appellant did not comply with 28 U.S.C. § 1346 (a) (2). See *infra*, n. 2, *supra*.

12. In extrapolating the substance of the Congressional debates, Mr. Justice Goldberg in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 155, 83 S.Ct. 554, 560, 9 L.Ed.2d 644 (1963), stated that "[r]epeatedly emphasized during the congressional debates on § 2282 were the heavy pecuniary costs of the unforeseen and debilitating interruptions in the administration of federal law which could be wrought by a single judge's order, and

the great burdens entailed in coping with harassing actions brought one after another to challenge the operation of an entire statutory scheme, wherever jurisdiction over government officials could be acquired, until a judge was ultimately found who would grant the desired injunction. 81 Cong.Rec. 479-481, 2142-2143 (1937)."

13. 28 U.S.C. § 2072 (1970 Ed.) (48 Stat. 1064).

14. See, also, *Virginia Ry. v. System Federation*, 300 U.S. 515, 551, 57 S.Ct. 502, 81 L.Ed. 789 (1937).

judge court under § 2282, the whole purpose and policy of the act can be aborted by allowing the appellant to initially seek only a declaration of invalidity of the CIA statute in the mandamus action before a single judge. Based on such a decision which has immediate effect, he can mount a subsequent request, if necessary, for an ancillary injunction.¹⁵ The ultimate effect of this action, if successful, will be to alter immediately the operation of critical features of the Central Intelligence Agency Act. Further, while based on the mandamus statute, this action contemplates injunctive relief in aid of the mandamus through restraining the publication of the Combined Statement of Receipts, Expenditures and Balances until it reflects the CIA's operations.

In these circumstances we hold that the district court was required to request the convening of a three judge court, unless it appears that the constitutional issue raised by appellant in this action is insubstantial.

[20, 21] Whether the issue is insubstantial must be determined by the allegations of the bill of complaint. *Mosher v. City of Phoenix*, 287 U.S. 29, 53 S.Ct. 67, 77 L.Ed. 148 (1932). No question for a three judge court exists if the allegations of the complaint reveal that the "question may be plainly insubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be

the subject of controversy.'" *Ex parte Poresky*, 290 U.S. 30, 32, 54 S.Ct. 3; 78 L.Ed. 152 (1933). See also, *Bailey v. Patterson*, 369 U.S. 31, 82 S.Ct. 549; 7 L.Ed.2d 512 (1962); *Local Union No. 300, Amal. Meat Cutters & B. Work. of North America A.F.L.-C.I.O. v. McCulloch*, 428 F.2d 396 (5th Cir. 1970).

[22] All parties to this litigation concede that there is no prior decision which directly controls the outcome of this case. Nevertheless, the Government would have us conclude that the question raised is plainly without merit. The face of the complaint reveals no such infirmity. The appellant seeks to void legislation allegedly repugnant to a specific constitutional mandate. The language of article I, section 9, clause 7 could be reasonably construed in appellant's favor, and there is nothing in prior decisions of the Supreme Court which forecloses such interpretation.

[23] An additional reason for dismissal of this action by the district court was that the question posed by appellant in his complaint was not justiciable because it was barred by the political question doctrine. We make no comment except to state that this issue is intertwined with the merits of the case, and it must be left for development at the subsequent hearing before the three judge court.¹⁶

We conclude, therefore, that the complaint presents a constitutional cause of action raising a substantial question¹⁷ which requires the convening of a three judge court.¹⁸ On remand, the district

15. As Professor Currie points out, "since the injunction will be sought on the ground that the statute is unconstitutional, what remains for the three judges to decide?" 32 U.Ch.L.Rev. 1, 17 (1964).

16. *Of. Land v. Dollar*, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947); *Continental Cas. Company v. Department of Highways State of La.*, 378 F.2d 673 (5th Cir. 1967); *Schramm v. Oakes*, 352 F.2d 143 (10th Cir. 1965); *Sunray DX Oil Co. v. Federal Power Comm.*, 351 F.2d 395, 400 (10th Cir. 1965); *Fireman's Fund Ins. Co. v. Railway Express Agency*, 253 F.2d 780 (6th Cir. 1958).

17. Chief Judge Seitz does not interpret the district court order of January 16, 1970, as a determination of the question of substantial federal question. Therefore, he views this issue as presently not before this Court and, on remand, would require the district court specifically to determine the existence of a substantial question before requesting that a three-judge court be convened.

18. Although appellant does not allege that his suit is a class action on behalf of all citizens, taxpayers, and people of the United States, his pro se complaint is replete with references to the effect of the

RICHARDSON v. UNITED STATES

Cite as 465 F.2d 844 (1972)

857

judge will take appropriate steps to request the Chief Judge of this Court to designate a statutory three-judge court. All remaining issues not resolved in this opinion shall be adjudicated by the court so convened.

The order of the district court will be vacated and the cause remanded for further proceedings consistent with this opinion.

ADAMS, Circuit Judge (dissenting).

The pivotal issue in this case, as I view it, is whether a citizen-taxpayer has the standing to obtain an injunction requiring the defendants to render an accounting of funds received and expended by the CIA.

Although there is considerable force to the position articulated by the majority, a review of the historical foundations for, and the development of, the standing doctrine leads ineluctably to the conclusion that the plaintiff here may not continue his action.¹ Accordingly, I respectfully dissent from the result reached by the majority.

The question of standing has confounded courts and commentators for many years. Although the Supreme Court has considered the problem in sev-

eral different contexts, and many learned and provocative articles have discussed the Supreme Court decisions, the law is still quite murky. This is particularly so here, since this case is essentially one of first impression.

By now it is clear that a person may not invoke the judicial process to secure the relief he demands unless he has standing to do so. But what combination of circumstances operate to confer standing on one plaintiff and not another? The answer to that question does not admit to easy analysis.

I. STANDING AND CONSTITUTIONAL REQUIREMENTS

The first point of reference in determining the parameters of standing is Article III, Section 2 of the Constitution, which provides, in part:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States

Secretary of the Treasury's allegedly unconstitutional failure to publish the receipts and expenditures of the CIA on "the People" and "Citizens" of the United States. See, e. g., paragraphs 16-c, 27, 36, 41, 45, 49 of the complaint. Because of the references and the intricate constitutional issues involved, we appointed amicus curiae to brief the issues raised by appellant's pro se complaint. For reasons best known to him, appellant opposed this effort by the court: indeed, on September 27, 1971, he attempted to secure review of his claims by the Supreme Court in advance of judgment, which review was denied. See *Richardson v. United States*, 404 U.S. 891, 92 S.Ct. 533, 30 L.Ed.2d 542.

We recognize a litigant's right to proceed in a civil action pro se. See 28 U.S.C. § 1654. However, the federal courts have authority under article III of the United States Constitution to hear only cases presented in a proper adversary manner with the issues framed

with the necessary specificity and the litigation appropriately pursued so that the "constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." *Flast v. Cohen*, supra, at 106. Since this matter will now require the convening of a district court of three judges, of whom one must be a circuit judge, it "involves a serious drain upon the federal judicial manpower." *Kesler v. Dept. of Public Safety*, 369 U.S. 153, 156, 82 S.Ct. 807, 810, 7 L.Ed.2d 641 (1961), which we can ill afford. In the circumstances of this case, the proper presentation of the issues to that court would clearly be facilitated if appellant were assisted by a member of the federal bar, acting either as his counsel or as amicus curiae.

1. In view of the position we take here, it is not necessary to discuss the political question issue which so often lurks in the background of suits of this nature.

shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States, —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

A careful reading of Article III, Section 2 reveals that the existence of a case or controversy is mandatory before a federal court has jurisdiction, but the concept of standing is not mentioned at all. Nevertheless, it has been suggested that standing is a jurisdictional doctrine with a basis in Article III.² To determine whether a standing requirement is subsumed in the language of Article III, it is helpful to examine the state of the law at the time the Constitution was ratified.

Professor Raoul Berger has analyzed the English and American law extant in 1787, when the Constitution was adopted, as well as the remarks of the various draftsmen and proponents of the Constitution. Based on such a review, he concluded that courts were incorrect when they relied on the practice in 1787 to read standing into the case or controversy limitation because English practice in the Eighteenth century encouraged suits by "strangers to attack unauthorized action." Berger, *Standing to Sue in Public Action: Is it a Constitutional Requirement?* 78 Yale L.S. 816, 827 (1969) (footnotes omitted).

From his examination of the view of the Framers, Berger determined that they assumed that the traditional English remedies would be available within the language of Article III to "curb [Congressional] excesses, particularly in light of their desire to leave all channels open for attacks on congressional self-aggrandizement." *Id.*, at 829-830 (foot-

notes omitted). Nevertheless, Professor Berger was frank to admit that the evidence supporting his view is "scanty" and that there may well be policy considerations which justify the standing doctrine.

Although the words "cases" and "controversies" and the phrase "of a judicial nature" (to use Madison's characterization) delimit the jurisdiction of the federal courts, they do not define nor are they synonymous with standing. In *Til-eston v. Ullman*, 318 U.S. 44, 46, 63 S. Ct. 493, 494, 87 L.Ed. 603 (1943), the Supreme Court stated that it would not determine "whether the record shows the existence of a genuine case or controversy" because "the appeal must be dismissed on the ground that appellant has no standing to litigate the constitutional question." And in *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 289, 48 S.Ct. 507, 509, 72 L.Ed. 880 (1928), the Supreme Court concluded that despite the plaintiff's standing, "still the proceeding is not a case or controversy within the meaning of Article 3 * * *". Indeed, the Supreme Court has explained that "[a]part from the jurisdictional requirement, [the] Court has developed a complementary rule of self-restraint for its own governance * * *", *Barrows v. Jackson*, 346 U.S. 249, 255, 73 S. Ct. 1031, 1034, 97 L.Ed. 1586 (1953), and that the standing requirements were "not principles ordained by the Constitution, but rather rules of practice * * *", *United States v. Raines*, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960).

II. SUPREME COURT CASES

Accordingly, to determine accurately the boundaries of the doctrine of standing, reference must be made, not only to the text of the Constitution, but to the Supreme Court decisions which have discussed the issue.

2. See *Adler v. Board of Educ.*, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 317 (1952) (Frankfurter, J., dissenting); *Coleman v. Miller*, 307 U.S. 433, 460-463, 59 S.Ct. 972, 985, 83 L.Ed. 1335 (1939) (Frankfurter, J., concurring).

3. See also, *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 92 S.Ct. 1716, 32 L.Ed.2d 317 (1972).

RICHARDSON v. UNITED STATES

859

Cite as 463 F.2d 844 (1972)

1. Frothingham v. Mellon

The first case in which the standing requirement was explored in any depth was *Frothingham v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). A taxpayer had sued to enjoin expenditures under the Maternity Act, alleging that "the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law." 262 U.S. at 486, 43 S.Ct. at 600. The Supreme Court affirmed lower court dismissals of the action, stating:

"The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained." *Id.*, at 487, 43 S.Ct. at 601.

After elucidating these policy considerations and the scope of the power of the judiciary to declare acts of Congress unconstitutional, the Supreme Court set forth the test of standing:

"The party who invokes the power [to declare an act of Congress unconstitutional] must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement,

and not merely that he suffers in some indefinite way in common with people generally." *Id.*, at 488, 43 S.Ct. at 601.

2. Significant Decisions Relating to Standing Subsequent to *Frothingham*

In *Ex parte Levitt*, 302 U.S. 633, 58 S.Ct. 1, 82 L.Ed. 493 (1937), the Supreme Court was faced with the issue of the standing of a citizen to challenge the constitutionality of the appointment and confirmation of an Associate Justice of the Supreme Court. In denying a motion for leave to file a petition for an order requiring the Justice to show cause why he should be permitted to serve, the Supreme Court stated:

"The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member of the bar of this Court. That is insufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as a result of that action and it is not sufficient that he has merely a general interest common to all members of the public. * * * *Id.* at 634, 58 S.Ct. at 1."

The next significant case is *Tileston v. Ullman*, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943). There, a physician sued in state court for a declaration that state statutes prohibiting the use of drugs or instruments to prevent conception and the rendering of assistance or counsel in their use are unconstitutional. The state court held the statutes were constitutional, and the Supreme Court, in a per curiam opinion, dismissed the appeal because of the appellant's lack of standing. The Court noted that Dr. Tileston was not asserting his own Constitu-

4. It is pertinent that the Supreme Court denied to leave to file the motion on the ground that the movant did not have

standing rather than on the basis that it lacked original jurisdiction to entertain the petition.

tional rights, but those of his patients, who were not parties to the action.⁵

In *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951), three organizations that had been branded as communist by the Attorney General sued for declaratory and injunctive relief, alleging that they had suffered both pecuniary damage and a chilling effect on their First Amendment rights as a result of the defamation. In considering whether the lower courts had properly dismissed the actions, the Supreme Court, speaking through Mr. Justice Burton, held:

"Finally, the standing of the petitioners to bring these suits is clear. The touchstone to justiciability is injury to a legally protected right and the right of a bona fide charitable organization to carry on its work, free from defamatory statements of the kind discussed, is such a right." *Id.* at 140-141, 71 S.Ct. at 632 (footnotes omitted).

Taxpayers in *Doremus v. Board of Education*, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952), sought a declaration in a state court that a statute providing for the reading of the Bible in the New Jersey public schools was unconstitutional. Although the case was clouded by elements of mootness (one of the plaintiffs was no longer in school), it turned squarely on the issue of standing, which was cast by the Supreme Court in terms of "case or controversy." * As to the facets of the case surviving the mootness question, the Court noted that "[n]o information is given as to what kind of taxes are paid by appellants and there is no averment that the Bible reading increases any tax they do pay or that as taxpayers they are, will,

or possibly can be out of pocket because of it." 342 U.S. at 433, 72 S.Ct. at 397. The Supreme Court's holding, dismissing the appeal, relied, at least in terms of the language employed, on the fact that no money was at stake. *Id.*, at 434-435, 72 S.Ct. 394.

One of the questions presented to the Supreme Court in *Chicago v. Atchison, T. & S. F. R. Co.*, 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1958), was whether an intervenor had standing to appeal a judgment of a court of appeals. There, various railroads servicing Chicago sought to employ a new motor carrier to transfer passengers between stations. The new carrier refused to apply for a certificate required by a city ordinance, and when threatened with arrest, sued in federal court to invalidate the ordinance. The old carrier, Parmelee Transportation Co., was granted permission to intervene. Although the district court dismissed the complaint, the court of appeals reversed, and both the city and the old carrier appealed. In considering whether Parmelee had standing to secure review of the judgment, the Supreme Court stated: "It is enough, for purposes of standing, that we have an actual controversy before us in which Parmelee has a direct and substantial personal interest in the outcome." *Id.* at 83, 78 S.Ct. at 1067. See also, *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1012-1014 (3d Cir. 1971).

Another aspect of standing was addressed by the Supreme Court in *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). There, the state had sued the NAACP for violation of its foreign corporation registration statute, and moved for discovery of the NAACP's membership list. Although the defendant was willing to apply for

5. In *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961), patients and a doctor both asserted that the state statutes were unconstitutional. The Supreme Court refused to decide the case, on the ground of lack of a justiciable controversy, because the complaints did not allege a threat of prosecution, because the state had initiated only one such prosecu-

tion in 82 years (to test the constitutionality of the statute), and because the doctor's constraint in not providing contraceptive devices was not reasonably related to a fear of prosecution. The issue of standing was not discussed in the main opinion.

6. But see *Barrows v. Jackson*, *supra*.

RICHARDSON v. UNITED STATES

861

Cite as 465 F.2d 844 (1972)

registration, it would not disclose its general membership. In an appeal from a contempt citation, the Court held that the Association had standing to assert the Constitutional rights of its members. The Court explained:

"To limit the breadth of issues which must be dealt with in particular litigation, this Court has generally insisted that parties rely only on constitutional rights which are personal to themselves. * * * This rule is related to the broader doctrine that constitutional adjudication should, where possible, be avoided. * * * The principle is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court. * * *

"* * * Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical." *Id.* at 459, 78 S.Ct. at 1170 (citations omitted).

Thus, the NAACP's standing was predicated on the factual peculiarity of the case: to require the members to assert their rights not to have their names divulged would have revealed their names.⁷ It is also significant that the NAACP was already in court as a defendant when it raised the issue.

McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1960).

7. The members of the NAACP would have had standing in their own behalf because disclosure of the membership list would have had a direct impact on each member. The Court also noted that the Association had standing in its own right because of the injury it would suffer as a result of the action being taken against it by the state. See also NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 406 (1963).

8. Because there were no allegations that the statutes infringed upon the beliefs of the store's patrons, the court did not decide if standing existed under *Pierce v. Society of the Sisters*, 268 U.S. 510, 535-536, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). But the Court did point out that such

presented two standing issues to the Supreme Court for resolution: (1) whether employees of a store who had been fined for violations of Sunday sales laws had standing to raise "free exercise" constitutional questions; and (2) whether the same persons could assert "establishment clause" rights as a defense to their prosecutions. With regard to the "free exercise question," the Court noted that appellants alleged only personal economic injury, not infringement of their religious freedoms, and held that they therefore had no standing to raise the issue of religious freedom.⁸ As to the "establishment clause" issue, the Court stated:

"Appellants here concededly have suffered direct economic injury, allegedly due to the imposition on them of the tenets of the Christian religion. We find that, in these circumstances, these appellants have standing to complain that the statutes are laws respecting an establishment of religion." *Id.* at 430-431, 81 S.Ct. at 1108 (footnote omitted).

The Court distinguished *Doremus, supra*, on the ground that the complainants there failed to show direct and particular economic detriment. As in NAACP v. Alabama, *supra*, the defendants in McGowan were already in court, and had not sued as plaintiffs to raise the underlying substantive constitutional issue.⁹

3. Baker v. Carr (Formulation of the test)

persons were not without effective ways to assert their rights, citing NAACP v. Alabama, *supra*; Barrows v. Jackson, *supra*, thus implying that they would have standing in an appropriate case.

9. See also, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). There, the Supreme Court distinguished *Tileston v. Ullman, supra*, on the ground that the doctor in *Griswold* was a defendant as opposed to a plaintiff, as in *Tileston*. The Court stated: "Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be a crime." 381 U.S. at 481, 85 S.Ct. at 1680.

Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), presented still another facet of the standing problem. There, qualified voters from certain Tennessee counties brought an individual and class action to invalidate the apportionment of the state general assembly. The Supreme Court first formulated the question:

"Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?" *Id.* at 204, 82 S.Ct. at 703.

In answering the question affirmatively, the Supreme Court noted that *Colegrove v. Green*, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946), "squarely held that voters who allege facts showing disadvantage to themselves have standing to sue." 369 U.S. at 206, 82 S.Ct. at 704.¹⁰ The injury asserted by the plaintiffs in *Baker v. Carr* was that the apportionment scheme then in effect "disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-à-vis* voters in irrationally favored counties." *Id.* at 207-208, 82 S.Ct. at 705. The Court continued:

"If such impairment does produce a legally cognizable injury, they are among those who have sustained it. They are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes," Coleman

v. Miller, 307 U.S. 433 at 438, 59 S.Ct. 972, 83 L.Ed. 1385, not merely a claim of 'the right, possessed by every citizen, to require that the Government be administered according to law. * * * Fairchild v. Hughes, 258 U.S. 126, 129, 42 S.Ct. 274, 66 L.Ed. 499 * * *," *Id.* at 208, 82 S.Ct. at 705.¹¹

Thus, the key to the decision in *Baker v. Carr* was the injury suffered by a voter whose vote was diluted by the unequal apportionment of election districts.¹²

The Court was able to reach the merits of the equal protection claim, over the objection that to do so would be to decide a political question, because plaintiffs are entitled to relief from discrimination despite the fact that the discrimination relates to political rights. *Id.* at 209, 82 S.Ct. 691.

4. School District of Abington Township, Pa. v. Schempp

Apparently, *Doremus*, *supra*, was overruled *sub-silentio* by *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963). *Schempp* was a taxpayer suit, brought in federal court, to enjoin the enforcement of a state Bible-reading statute. Chief Judge Biggs, writing for a three-judge court, held that the statute was violative of the First Amendment, that the school children had standing "similar to that of the minor plaintiffs in *Brown v. Board of Education*, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 * * *", and that the parents had standing "as the natural guardians of their children, having an immediate and

and for an injunction forbidding the Attorney General from enforcing the proposed act. The Supreme Court denied plaintiff standing because any wrongful acts of the named officials would be directed against election officers, not citizens, and that in any event, the plaintiff was a citizen of a state which had already amended its own constitution to permit women to vote and had ratified the amendment.

12. See Neal, *Baker v. Carr*: Politics in Search of Law, the Supreme Court Review, the University of Chicago Law School, 252; 274 (1962).

10. *Colegrove* was not a standing case, as such. The decision turned on the judgment that reapportionment of Congressional Districts was a political question. 328 U.S. at 552, 556, 66 S.Ct. 1198.

11. *Fairchild v. Hughes*, 258 U.S. 126, 42 S.Ct. 274, 66 L.Ed. 499 (1921), was a citizen-taxpayer suit in equity for a declaration that the Nineteenth Amendment was improperly ratified by the states, that a law enforcing the amendment, then pending in Congress, was unconstitutional; for an injunction prohibiting the Secretary of State from issuing a proclamation of adoption of the amendment:

Cite as 485 F.2d 844 (1972)

direct interest in their spiritual and religious development * * *." 177 F. Supp. 398 (E.D.Pa.1959).¹³ The Supreme Court affirmed the district court on the merits, but did not discuss the standing question at all.

6. *Flast v. Cohen* (Frothingham reconsidered)

Eventually, every discussion of standing must come to grips with *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Whether one wishes to read that case narrowly or expansively, it must still be recognized that the issue there was "whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment." *Id.* at 85, 88 S.Ct. at 1944. The Court undertook to re-examine *Frothingham* because that opinion was unclear whether the standing requirement there announced was a matter of policy or constitutional doctrine. After analyzing the issue in terms of justiciability, the Supreme Court concluded that there was "no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs." *Id.* at 101, 88 S.Ct. at 1953. Thus, the constitutional basis for *Frothingham*, if it ever existed, was undermined.

Nevertheless, the Supreme Court did not go so far in *Flast* as to suggest that the concept of standing, based upon policy considerations, was no longer viable. Rather, the Court stated the issue, albeit in general terms, "whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.* at 102, 88 S.Ct. at 1953.¹⁴ Turning then to the case before it, a challenge to an appropriations measure, the Court

set forth two rules governing its decision.

The first rule, or sub-test, is a part of the general standing requirement dealing with nexus, quoted above. In order to maintain a suit, a "taxpayer must establish a logical link between that status and the type of legislative enactment attacked." *Id.* "Thus," the Supreme Court explained, "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Id.*, (emphasis added).

The statement seems to make clear that taxpayer suits will be entertained only to enjoin expenditures under Article I, Section 8 of the Constitution, and that taxpayers as taxpayers will not have standing under any other circumstances.

The second part of the test set forth in *Flast* is that "the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.* The Court explained:

"Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8."

Id.

But, this sub-test is not too meaningful when applied to taxpayer suits not challenging appropriations, and therefore can properly apply only to suits seeking to enjoin the expenditure of appropriated moneys.

ously assumed with regard to standing. 201 F.Supp. 815, 818. (E.D.Pa.1962).

13. An appeal was taken to the Supreme Court, and the matter was remanded to consider the effect of an amendment to the statute, 384 U.S. 298, 81 S.Ct. 268, 5 L.Ed.2d 89 (1966). On remand, the district court adopted the position it previ-

14. The Supreme Court used as a paradigm the dichotomy formulated in its opinion in *McGowan v. Maryland*, *supra*.

Thus, the general rule of taxpayer standing promulgated by *Flast*, as applied to cases not involving appropriations, if such a generalization is valid at all, is that in order to satisfy the requirement, a taxpayer must show: (1) the connection between his status and the enactment, and (2) the connection between his status and the right he alleged was infringed. In other words, does the enactment challenged affect the taxpayer as a taxpayer? And, if so, does it infringe upon a specific constitutional right possessed by that taxpayer as an individual?¹⁵

As might be expected, *Flast* received extensive coverage by the commentators. The Harvard Supreme Court Review concluded:

"[t]he *Flast* criteria provide a workable scheme for ascertaining when federal taxpayers should be permitted to sue even though not congressionally designated as proper parties to represent the public interest, but the criteria are not constitutionally compelled. The only constitutional requirement spelled out in *Flast* is that litigants seeking judicial review of congressional action, but not alleging an injury to a legally protected interest, must present some rationale distinguishing their personal interest from that of the general citizenry; any special injury rationale would seem to fulfill this requirement." The Supreme Court, 1967 Term, 82 Harv.L. Rev. 63, 230 (1968).

Apparently, the author of the Harvard note analyzed *Flast* in Hohfeldian terms,

15. Mr. Justice Stewart, concurring in *Flast*, stated that he understood the case "to hold only that a federal taxpayer has standing to assert that a specific expenditure of federal funds violates the Establishment Clause of the First Amendment." 392 U.S. at 114, 88 S.Ct. at 1960. He considered that the Court otherwise reaffirmed the holding of *Frothingham*. Mr. Justice Fortas, also concurring, asserted: "The status of taxpayer should not be accepted as a launching pad for an attack upon any target other than legislation affecting the Establishment

i. e., the plaintiff must show that some right of his was violated and that he was injured thereby, although the approach of the majority opinion was not so cast.

Professor Jaffe did employ Hohfeldian theory¹⁶ in his analysis of *Flast*. He reasoned that courts, including the Supreme Court, have heard suits initiated by non-Hohfeldian plaintiffs—those not seeking a determination that they possess a right, privilege, immunity or power—and that the requirement of a Hohfeldian plaintiff is no longer justifiable from a policy point of view. See, Jaffe, *The Citizen as Litigant in Public Actions: The non-Hohfeldian Or Ideological Plaintiff*, 116 U.Pa.L.Rev. 1033 (1968).

Professor Kenneth Culp Davis criticized the reasoning of *Flast v. Cohen*. Davis, *Standing: Taxpayers and Others*, 35 U.Chi.L.Rev. 601 (1968). First, he argued that although nonconstitutional issues were before the Supreme Court, it decided neither the merits nor the standing question in terms of those issues. But more fundamentally, he controverted the statement by Mr. Justice Harlan that:

"This Court has previously held that individual litigants have standing to represent the public interest, despite their lack of economic or other personal interests, if Congress has appropriately authorized such suits." *Flast v. Cohen*, 392 U.S. at 131, 88 S.Ct. at 1969.

Rather, Professor Davis asserted:

"Even though the law of standing is so cluttered and confused that almost ev-

Clause." 392 U.S. at 116, 88 S.Ct. at 1961.

16. See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913).

Jaffe's article was written while the *Flast* case was pending in the Supreme Court. But Jaffe's analysis was not adopted by the majority decision in *Flast*, and it might be contended that the Court impliedly rejected it. See dissenting opinion of Justice Harlan, 392 U.S. at 119, 88 S.Ct. 1942.

Cite as 465 F.2d 844 (1972)

ery proposition has some exception, the federal courts have consistently adhered to one major proposition, without exception: One who has no interest of his own at stake always lacks standing." 35 U.Chi.L.Rev. at 617.^{10a}

Professors Lockhart, Kamisar and Choper suggest that *Flast* and *Frothingham* are distinguishable because Mrs. Frothingham was, in reality, attempting to assert her state's interest in maintaining its legislative prerogatives whereas Mrs. Flast was vindicating her personal constitutional right not to be taxed for the establishment or support of a religious institution. W. Lockhart, & Kamisar & J. Choper, Constitutional Law 65-66 (1970). This distinction implies that Mrs. Frothingham's right not to be taxed to support a federal program in derogation of a state's police power was not a meaningful personal right. It is apparently derived from the three holdings of *Frothingham* and the companion case of *Massachusetts v. Mellon*:

(1) The state's contention that the federal act in issue was an attempt to destroy its sovereignty was a non-justiciable political question because the state was under no compulsion to accept the benefits of the act;

(2) The state did not have *parens patrie* standing to assert the rights of a citizen against the United States because in a federal-state dispute, it is the United States and not any given state that stands in *parens patrie* with its citizens; and

16a. The unsatisfactory aspect of the federal law of standing is, according to Professor Davis, its inconsistency. However, the observation is put forth that: "The law of standing need not be either a 'complicated specialty of federal jurisdiction,' as the Supreme Court has called it, or a mass of confused logic-chopping about bewildering technicality. It can be much simpler and much clearer than it is. All that is necessary is to make some firm policy choices and then to apply them consistently." *Id.* at 623 (footnotes omitted).

Professor Davis then states a series of propositions, some affirmative and some negative, to govern the decision whether

(3) The increased burden of taxation is a public rather than a private concern, and thus a citizen would not suffer any direct personal injury from an increase in taxation.

Similarly, a citizen would suffer no direct personal injury if the federal government usurps the sovereignty of a state. On the other hand, a citizen apparently does suffer a sufficiently personal injury to confer standing when he is taxed to support a religious institution, since each citizen has a personal stake in ensuring that the Government not establish a religion.

Lockhart, Kamisar and Choper go on to suggest that the taxpayer standing limitation is a practical measure to prevent undue interference with sensitive federal appropriations, especially in the fields of defense and foreign aid, but that such a limitation is not appropriate in the domestic arena of the Establishment Clause. See W. Lockhart, Y. Kamisar & J. Choper, *supra*, at 68.

6. Cases after *Flast* (resurrection of the "case" or "controversy" Constitutional Consideration)

The Supreme Court's next foray into the morass may be found in a pair of cases decided in 1970: *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184; *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192. These cases involved the issue of standing to review administrative regulations.¹⁷

to grant standing in a particular case. The net effect of Professor Davis' propositions would be to ease the standing requirement necessary to attack legislative enactments.

Raoul Berger also criticized *Flast*, but from an historical basis. He examined the state of the law at the time the Constitution was adopted and concluded that our founding fathers may have contemplated that all citizens would have standing, in the constitutional sense, to attack congressional usurpations. See, Berger, *supra*, at 829-301.

17. These are not the first cases on the subject, but rather, represent the current cul-

Data Processing Service begins with the observations that: "Generalizations about standing to sue are largely worthless as such." 397 U.S. at 151, 90 S.Ct. at 829. Nevertheless, the Supreme Court stated that one generalization was necessary: "the question of standing in the federal courts is to be considered in the framework of Article III * * *." *Id.* This holds true whether the suit is by a taxpayer, as in *Flast*, or by a competitor, as in *Data Processing*. Mr. Justice Douglas, quoting from *Flast*, noted that the Article III requirement is met when the suit is "presented in an adversary context." He added that in a competitor's suit, the "first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." *Id.* at 152, 90 S.Ct. at 829.¹⁸ Second, where a party challenges regulatory actions, he will have standing to sue if he is arguably within the zone of interests protected by the statute. *Id.* at 155-156, 90 S.Ct. 827. If these two tests are met, a plaintiff will have standing to seek judicial review of an administrative determination only if Congress has not specifically forbidden such review. *Id.* at 156-158, 90 S.Ct. 827. *Barlow* restated and reinforced these tests. 397 U.S. at 164-165, 90 S.Ct. 832.¹⁹

7. *Sierra Club v. Morton* (The Personal Stake Requirement)

In *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), the Supreme Court considered whether a pri-

mination of the law of standing in the administrative law field as it has evolved over an extensive period. See, e.g., *Hardin v. Kentucky Utilities Co.*, 300 U.S. 1, 88 S.Ct. 651, 19 L.Ed.2d 737 (1967); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 479, 64-2, 60 S.Ct. 693, 84 L.Ed. 369 (1940); *Tennessee Power Co. v. TVA*, 306 U.S. 113, 59 S.Ct. 366, 83 L.Ed. 543 (1939). See also, *Chicago v. Atchison, T. & S. F. R. Co.*, *supra*.

18. The Court recognized that injury to non-economic interests reflecting "aesthetic, conservation, and recreational" * * * values as well as a "spiritual

vate organization had standing under the Administrative Procedure Act, 5 U.S.C. § 702 (1970), to obtain judicial review of a decision of the United States Forest Service allowing development of part of a National Forest and National Game Refuge as a resort. Early in the opinion, the Supreme Court noted:

"Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal' stake in the outcome of the controversy, *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663, as to ensure 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' *Flast v. Cohen*, 392 U.S. 83, 101, 88 S.Ct. 1942, 20 L.Ed.2d 947." 405 U.S. at 732, 92 S.Ct. at 1364.

Justice Stewart, speaking for the majority, stated that *Data Processing* and *Barlow* held that standing existed under the A.P.A. where the plaintiffs "alleged that the challenged action had caused them 'injury in fact,' and where the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated." *Id.* at 733, 92 S.Ct. at 1365.

It is clear that the "injury in fact" need not be economic injury, yet it must be an injury suffered by the plaintiff and not the public at large. See *id.* at

stake in First Amendment values [may be] sufficient to give standing * * *." 397 U.S. at 154, 90 S.Ct. at 830, citing *Seepie Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 616 (2d Cir. 1965); *Office of Communication of United Church of Christ v. FCC*, 123 U.S.App. D.C. 328, 359 F.2d 994, 1000-1006 (1966); *School District of Abington Tp. Pa. v. Schempp*, *supra*.

19. See also, *Investment Company Institute v. Camp*, 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 91 S.Ct. 158, 27 L.Ed.2d 179 (1970).

Cite as 405 F.2d 844 (1972)

734, 92 S.Ct. 1365.²⁰ Only after a party establishes his personal standing may he litigate issues affecting the public interest. *Id.* at 739, 92 S.Ct. 1368.

The policy reasons underpinning the *Sierra Club* holding, as expressed by the majority decision, indicate that the Supreme Court is not yet willing to allow "any individual citizen" to challenge executive or congressional action.

Mr. Justice Stewart went on to state: "The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." *Id.* at 740, 92 S.Ct. at 1368. (Footnote omitted.)

Because of the importance of environmental quality, Mr. Justice Blackmun would make an exception to this requirement. *Id.* at 741, 92 S.Ct. 1369 (Dissenting opinion).

The above catalog of authorities does not exhaust the list of cases in which standing was an issue. For example, as long ago as 1900 the Supreme Court insisted that only parties with an interest in the land could maintain an action bot-tomed on title to the land. See *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 21 S.Ct. 206, 45 L.Ed. 252. Standing requirements were somewhat relaxed in *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915), to allow an employee to assert his employer's right to be free of an unconstitutional

law restricting the employment of aliens. However, the plaintiff there was an alien employee, asserting rights under the Equal Protection Clause. In 1917, a Caucasian sued a Negro for specific performance of a real-estate contract; the Negro asserted a local ordinance restricting Negro residency; and the Caucasian was permitted to challenge the validity of the ordinance. *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917); accord, *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953). And in *Pierce v. Society of the Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L. Ed. 1070 (1925), private and parochial schools were allowed to argue that a state statute violated the rights of parents and guardians because the plaintiff schools themselves had property rights directly affected by the statute.

In *Ashwander v. TVA*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936), a preferred stockholder of a private power company sued to prevent the company from entering into a contract with the TVA on the ground that the TVA was unconstitutional. Although the Supreme Court reached the merits of the case, Justice Brandeis, joined by Justices Stone, Roberts and Cardozo dissented on the ground *Ashwander* did not have standing since he had not demonstrated that either he or his company would sustain loss because of the contract. And three years later, in a similar situation, a majority of the Supreme Court held that the plaintiff did not have standing to attack the constitutionality of the TVA because it suffered no loss that could be remedied since it did not have a right to be free of competition. *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939).²¹

20. The dismissal of the complaint was affirmed because the *Sierra Club* had failed to allege that either it or its members would be directly affected by the change in use to which the land would be subject.

21. Professor Bickel advances the rationalization that if a plaintiff suffers no injury either to a material right or one

created by the law or the Constitution, then for a court to reach the merits of the controversy would be for it to render an advisory opinion. He concludes that this would be especially true in a taxpayer suit where the statute in question has no particular impact on the taxpayer. A. Bickel, *The Least Dangerous Branch* 121 (1962).

This past term, the Supreme Court, in *Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154, 1972, in deciding not to entertain the complaint of a citizen regarding claimed surveillance by Army authorities, stated:

"The decisions in these cases fully recognize that governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights. At the same time, however, these decisions have in no way eroded the 'established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action . . . Ex parte Levitt, 302 U.S. 633, 634, 58 S.Ct. 1, 82 L.Ed. 493 (1937).' 408 U.S. at 13, 92 S.Ct. at 2325.

III. LOWER COURT CASES ON STANDING

There are some recent court of appeals and district court decisions which, although not binding upon us, shed some light on the problem. In *Velvet v. Nixon*, 415 F.2d 236 (10th Cir. 1969), a taxpayer-citizen sued for a declaration that the Vietnam War was unconstitutional and for an order enjoining further American involvement in Vietnam. The district court dismissed the action and the court of appeals affirmed, holding that the plaintiff had not demonstrated the requisite personal stake in the outcome. The crux of the decision was that *Flast* was inapplicable because the plaintiff was not challenging a congressional expenditure under Article I, Section 8, and that even if *Flast* were applicable, no specific constitutional limitation had been violated.

In *Richardson v. Kennedy*, 313 F.Supp. 1282 (W.D.Pa.1970) (three-judge court), aff'd, 401 U.S. 901, 91 S.Ct. 868, 27 L. Ed.2d 800 (1971), plaintiff challenged as

unconstitutional the Congressional pay raise effected by the Postal Revenue and Federal Salary Act of 1967, 2 U.S.C. §§ 351-361 (1970). The Court dismissed the complaint on three grounds. First, the appropriation sought to be enjoined did not arise as in *Flast* under Article I, Section 8, but rather Article I, Section 6. Second, Article I, Section 6 "will not qualify as a Constitutional provision restricting the taxing and spending power * * * 313 F.Supp. at 1286. Third, the plaintiff did not "possess the necessary personal stake in the outcome of this controversy and therefore lacks standing to maintain this action." *Id.* (footnote omitted).

Reservists Committee to Stop War v. *Laird*, 323 F.Supp. 833 (D.D.C.1971), reached an opposite result.²² The plaintiffs, the Committee and individual reservists, sought an injunction ordering the executive to "take steps that will eliminate any office inconsistent with the constitutional mandate" of Article I, Section 6, clause 2, forbidding "Members of either House" from holding "any civil Office under the Authority of the United States." Specifically, it was alleged that 117 Senators and Representatives held commissions in the various military reserves, contrary to the Constitution. The court held that plaintiffs lacked standing as reservists, since they were unable to prove any direct injury, and as taxpayers, since they were not suing to enforce a limitation on the taxing and spending power of Congress. Nevertheless, Judge Gesell found that plaintiffs did have standing to sue as citizens for several reasons: (1) the Constitution was addressed "to the potential for undue influence rather than to its realization," 323 F.Supp. at 840; (2) the Constitutional clause sought to be enforced was a "precise self-operative provision," *id.*; (3) the Constitution intended to protect the interest shared by all citizens in maintaining independence among the branches of government, *id.* at 341; and (4) the adverse interests of the parties left no doubt as to the ex-

22. The order of the district court is presently pending appeal.

RICHARDSON v. UNITED STATES

869

Cite as 465 F.2d 844 (1972)

istence of a "case or controversy," *id.* Also important to the court was that if these plaintiffs could not obtain judicial review, "then as a practical matter no one can." *Id.*²³

The standing of a citizen to attack the constitutionality of the Vietnam War was found to exist in another recent case. *Atlee v. Laird*, 339 F.Supp. 1347 (E.D.Pa.1972). In *Atlee* the district court found that standing under the specific test of *Flast* was precluded because the war-making clause was not a "specific limitation on the manner in which Congress could make expenditures." However, the court did find standing under the more general tests of *Flast*, *Data Processing Service*, and *Barlow* in that the plaintiffs had alleged personal economic injury resulting from the inflation and recession caused by war spending. The court also found standing because of the non-economic aspects of the war, *viz.*, the toll of human life, the threat to the personal safety and security of all the citizens, and the diversion of available funds from domestic needs to the war effort.²⁴

IV. ANALYSIS OF DECISIONS

The principles to be distilled from all the many cases dealing with standing do not lead to the formulation of an easy set of guidelines by which standing may be determined, and indeed, Mr. Justice Douglas' comment in *Data Processing Service*, quoted *supra*, 397 U.S. at 151, 90 S.Ct. 829, is particularly apt. The problem is compounded, not only by the various contexts in which the cases

arose, but by their inconsistency with regard to their theoretical basis.²⁵ Nevertheless, some helpful guidelines do emerge from the mass of decisions.

The threshold rule in determining standing to litigate is that the party raising the issue must have been personally and directly injured or threatened with immediate injury by a violation of a statutory or constitutional right designed to protect that party. *See, e.g.*, *Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 38 L.Ed.2d 154 (1972); *Sierra Club v. Morton*, *supra*; *Association of Data Processing Service Organizations v. Camp*, *supra*; *Barlow v. Camp*, *supra*.

This element, however, is subject to certain exceptions or limitations. Thus, standing to litigate questions concerning the Establishment Clause might be found in the absence of direct injury.²⁶ *See e.g.*, *School District of Abington Township, Pa. v. Schempp*, *supra*; *McGowan v. Maryland*, *supra*. And slight injury may suffice to meet the test where other constitutional rights of paramount importance are at stake. *See Baker v. Carr*, *supra*; *Sierra Club v. Morton*, *supra* (Blackmun, J., dissenting); *cf.*, *Flast v. Cohen*, *supra*.

Another factor which becomes apparent is that standing requirements may be eased where the party asserting the constitutional right is a defendant in a criminal or civil action. *See Griswold v. Connecticut*, *supra*; *NAACP v. Alabama*, *supra*. The rationale for this approach appears to be three-fold; first, a defendant has been injured or threaten-

23. It is not without some significance that the district judge declined to grant injunctive relief and granted only a declaratory judgment. To our knowledge, the declaratory relief has never been implemented, which raises one of the problems that confronts a court in this type of a case.

24. Although Chief Judge Joseph Lord did not analyze the various cases involving suits by citizens attacking allegedly unconstitutional action, he did indicate that *Atlee* was alleging personal economic injury.

25. Of course it must be recognized that the doctrine of standing is properly a device by which courts avoid constitutional litigation when they deem it unnecessary or inappropriate to decide the underlying question. Thus, the inconsistencies can be explained in part by the fact that each standing decision is colored by unstated and perhaps undefinable premises.

26. The personal injury requirement is also relaxed in most cases involving free speech or expression. *See Note The Void for Vagueness Doctrine in the Supreme Court*, 109 U.Pa.L.Rev. 67, 102-103 (1960).

ed with injury because of the impact of the proceedings against him; second, a defendant is involuntarily in court, and thus the policy of discouraging litigation will not be furthered by preventing him from asserting the right; and third, for a court to convict or impose liability by virtue of an unconstitutional statute or action would be affirmatively to commit an unconstitutional act.

Next, suits designed to interfere with the orderly operation of the Government, particularly with regard to taxation and appropriations, will not be entertained except in narrowly-defined circumstances. See *Flast v. Cohen*, *supra*; *Frothingham v. Mellon*, *supra*; *W. Lockhart, Y. Kamisar & J. Choper* 68, *supra*.

Closely related to this principle is the admonition that a citizen who suffers equally with all other citizens will not be heard to raise generalized grievances about the conduct of the Government. See *Sierra Club v. Morton*, *supra*; *Flast v. Cohen*, *supra*; *Baker v. Carr*, *supra*; *Ex parte Levitt*, *supra*; *Frothingham v. Mellon*, *supra*; *Fairchild v. Hughes*, *supra*.

One district court found an exception to this precept where the constitutional provision asserted was addressed to the potential for abuse, and the provision was precise and self-operative. *Reservists Committee to Stop War v. Laird*, *supra*.

Finally, an important although not determinative factor in deciding whether standing exists is the availability of other modes of judicial review. See *NAACP v. Alabama*, *supra*; *Barrows v. Jackson*, *supra*; *Pierce v. Society of the Sisters*, *supra*; *Buchanan v. Warley*, *supra*; *Truax v. Raich*, *supra*. But see *Colgrove v. Green*, *supra*.

In the quest for standing in this litigation, another analysis of the major Supreme Court cases may be undertaken. If one accepts the limitations read into

Flast v. Cohen by Justices Stewart and Fortas, then *Frothingham v. Mellon* represents an absolute bar to predicated standing on plaintiff's status as a "taxpayer," absent allegations of expenditures in violation of the Establishment Clause, notwithstanding the somewhat broader language employed by the Court in *Flast*.

Thus, our inquiry here may be narrowly focused upon cases where "citizen" standing was asserted. This search can be further circumscribed by eliminating from consideration as inapposite cases brought under the Administrative Procedure Act, where Congress has authorized or at least not forbidden suits,²⁷ and cases in which standing was conferred upon *defendants*, where as noted above other factors apply.

By this process of elimination, there is left for consideration those cases dealing with the standing of "citizens" who have sued a Government official for the vindication of a constitutional right personal to such "citizen." These cases fall into two categories. In some, the Supreme Court reached the merits despite the lack of a substantial, direct, tangible personal injury. In others, the standing barrier was breached only after the plaintiff demonstrated that he, personally, had actually been harmed in some regard.

Representative of the first group of cases are *Baker v. Carr* and *School District of Abington Township, Pa. v. Schempp*. In *Baker v. Carr*, the basis of standing was that the constitutional right asserted—the integrity of the electoral process—was considered of such paramount importance that the deprivation of the right by dilution of voting strength through unequal apportionment was deemed a sufficient injury to permit the merits to be adjudicated. Similarly, the consideration that led the Court in *Schempp* to by-pass the standing problem was the high value placed upon the

27. Although Richardson claimed entitlement to relief under the A.P.A., this claim is without merit, since the Act confers standing only upon persons "ag-

grieved by agency action within the meaning of a relevant statute * * *

5 U.S.C. § 702.

rights encompassed by the Establishment Clause.

Cases representative of the second category—where plaintiff showed or failed to show harm in some regard—are *Fairchild v. Hughes*, *Ex parte Levitt*, *Chicago v. Atchison, T. & S.F.R. Co.*, *Laird v. Tatum*, and *Moose Lodge No. 107 v. Irvis*. In *Fairchild* the Court stated that a citizen had no standing to challenge the adoption of the Nineteenth Amendment because he could not demonstrate any particular injury he would suffer that would not be shared equally by all citizens. *Levitt* held that a citizen did not have standing to challenge the appointment and confirmation of a Supreme Court Justice. And in *Atchison*, *Parmelee* was permitted to intervene because of the economic harm suffered by it. In *Tatum*, citizens attacking surveillance techniques employed by the Army were held not to have standing because there was no indication that their First Amendment rights were chilled by the Army's practices. On the other hand, the Supreme Court permitted the parties to litigate at least some of the issues in *Irvis* because the plaintiff demonstrated personal impact or injury. *Irvis* is an excellent example of this dichotomy. There, the Court held that the plaintiff did not have standing to litigate questions involving the membership qualifications of the Moose Lodge because he had not even attempted to become a member, but that he did have standing to raise the issues surrounding the Lodge's guest policies since he was refused service while a guest.

Thus, through the use of this case-by-case evaluation, two criteria appear to be critical. Is the constitutional right asserted of such paramount importance so as to obviate the need to allege and prove direct, personal impact which is individualized as distinguished from an impact shared by every member of the body politic? If not, does the plaintiff allege a direct personal injury or impact caused by the violation of the asserted constitutional right?

V. APPLICATION OF PRINCIPLES TO THE PRESENT CASE

In this case, actual application of the precepts deduced from the various Supreme Court cases parallels the analysis undertaken above, and the same two questions must still be resolved.

We begin with the proposition that Richardson is a plaintiff, not a defendant, and therefore cases conferring standing upon defendants are somewhat inapplicable. Because expenditures are attacked, *Flast* and *Frothingham* would appear to create a barrier, at least insofar as Richardson's standing as a taxpayer is concerned. Third, the Administrative Procedure Act cases are not controlling because the challenged executive action is in full compliance with a Congressional enactment and there have been no administrative procedural irregularities pleaded. Finally, the plaintiff has not alleged that the Congressional and Executive action at issue has violated First Amendment rights or other rights previously assigned a position of paramount importance.

Accordingly, we are left with the questions of the relative importance of the asserted constitutional right and the nature of the injury suffered by the plaintiff.

1. Historical Background of Article I, Section 9, Clause 7.

The debates regarding Article I, Section 9, Clause 7, the provision relied upon by plaintiff here, that occurred during the Constitutional Convention, shed light on the relative importance of that stipulation. An authority on the debates, Max Farrand, indicates that the discussion began with a statement by George Mason that "he did not conceive that the receipts and expenditures of the public money ought ever to be concealed. The people, he affirmed, had a right to know the expenditures of their money." 3 Farrand, *The Records of the Federal Convention of 1787*, at 326 (Rev. ed. 1966). James Madison disagreed only with Mason's proposal of a fixed report-

ing period, stating that reports based on short periods:

"would not be so full and connected as would be necessary for a thorough comprehension of them and detection of any errors. But by giving them [the reporting officials] an opportunity of publishing them from time to time, as might be found easy and convenient; they would be more full and satisfactory to the public, and would be sufficiently frequent." *Id.*

Rufus King objected to a full accounting on the ground that it would be "impracticable" to report "every minute shilling." 2 Farrand 618.²⁸

The argument that the duty to report the accounting runs to the public is based on a comparison of Article I, Section 9, Clause 7 with Article II, Section 3. The language of Article I, Section 9, Clause 7 mandates that "a regular Statement and Account * * * shall be published * * *", whereas Article II, Section 3 requires that the President "shall from time to time give to the Congress information of the State of the Union * * *". Thus, the impact of the distinction between "shall be published" and "shall from time to time give to the Congress" becomes apparent. Furthermore, the Articles of Confederation, drafted by many of the same persons as the Constitution, required only that Congress inform the states of its indebtedness, as opposed to the requirement of publication of the receipt and expenditures of all public money. Compare U.S.Const. Art. I, § 9, cl. 7 with Articles of Confederation, Art. IX, § 5 (requiring Congress to account to the states for "sums of money * * * borrowed or emitted").

2. Evaluation of Article I, Section 9, Clause 7 with respect to other constitutional provisions.

Nevertheless, without denigrating the importance of Article I, Section 9, Clause 7, it would appear fair to conclude

that it does not rise to the paramount stature of other constitutional provisions, such as those contained in the Bill of Rights. History records that many of the early colonists came to the New World to avoid the inhibitions upon personal religious freedom which attend the establishment of a state church. Indeed, there is some doubt whether the Constitution would have been ratified at all without the promises of the draftsmen that it would be soon amended to provide for certain basic rights. It is no coincidence that the first clause of the First Amendment prohibits the establishment of a national religion.

The right of a citizen to have his vote count equally with those of other citizens is also basic to our system of Government. The "one-man-one-vote" principle is the very embodiment of the concept of a participatory democracy in which each citizen is considered the equal of every other.

Accordingly, the constitutional right presently asserted by the plaintiff would not appear to be, at least in the context of this case and at this point in the development of our history, of such preeminent importance that the traditional requirements of standing should be waived.

3. The nature of the injury.

Since the right asserted would appear to be not a paramount one, it is necessary to determine whether plaintiff has suffered a personal injury sufficient to enable him to litigate the underlying issue. Although the debates in the Constitutional Convention might suggest that the right conferred by Article I, Section 9, Clause 7 runs to each citizen individually, they also demonstrate that the Clause imposes a duty to report to the public generally. Because Richardson did not and could not allege that either he alone or some identifiable class of citizens has suffered an injury not

28. The importance of the accounting is emphasized when article I, Section 9, Clause 7, requiring disclosure of all receipts and expenditures, is compared with Article I,

Section 5, Clause 3, which allows each House of Congress to except from publication in its journal "such Parts as may in their Judgment require Secrecy."

RICHARDSON v. UNITED STATES

Cite as 463 F.2d 844 (1972)

873

suffered by everyone else, the conclusion would appear to follow that "he has merely a general interest common to all members of the public,"²⁹ and therefore is not endowed with standing to litigate this matter.

I recognize that if the view expressed herein were to be adopted by the majority, it would be difficult to perceive how a citizen would be able to litigate the constitutional provision asserted by Richardson. Nevertheless, the cumulative effect of the many cases denying standing in the face of this objection is persuasive authority that this consideration is not sufficient by itself, within the contours of this suit, to confer standing upon plaintiff.³⁰ See, e. g., *Frothingham v. Mellon*, *supra*; *Fairchild v. Hughes*, *supra*; *Ex parte Levitt*, *supra*; *Coleman v. Miller*, *supra* (Frankfurter, J., concurring).

Indeed, to create a deviation on this basis would risk impairment of a vital rule by the disintegrating erosion of particular exceptions.

VI. CONCLUSION

In recent years, the Supreme Court has had several opportunities to expand the concept of standing, but has declined to do so. I have serious reservations whether we ought to take this step in the absence of Congressional authorization or in the absence of some significant development in our national life clearly indicating the necessity for such movement.

The Constitution has been likened to a device designed "to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 4 Wheat, 316, 416, 4 L.Ed. 579 (1819). Constitutional litigation is the vehicle by which the Con-

stitution can be interpreted, when necessary, to insure that the practice of government comports with the ideals of the governed. The system works best and provides a solid basis for future adjustments when changes are brought about slowly in response to real need for the change.

The rule of self-restraint did not develop suddenly, and it is not a manifestation of the timorousness of judges. Rather, it reflects an approach to constitutional litigation designed to avoid division among the three branches of Government in their task of social problem-solving. Before the Constitution was adopted, Alexander Hamilton, in the 78th *Federalist*, recognized that the judiciary was the one branch without power to enforce its will on the other branches, and that it "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." The most respected jurists throughout our history have realized that rash decision-making by the courts could lead to the disregard of the judiciary as a decision-maker.

From *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), to *O'Brien v. Brown*, 409 U.S. 1, 92 S.Ct. 2718, 34 L.Ed.2d 1 (1972), major constitutional crises threatening important government concepts have been averted by the application of discreet judicial techniques of self-restraint. When courts exercise forbearance, they act, to use the parlance of our electronic age, as filter circuits, dampening and smoothing political oscillations, rather than as amplifiers, magnifying them out of proportion. It is this smoothing process that has enabled us, in the long run, to maintain our democratic ideals in a troubled world.

29. *Ex parte Levitt*, *supra*.

30. The impact of this impediment is substantially blunted when it is considered that there are a number of constitutional provisions that cannot be litigated for other reasons. For example, the duty of a state to extradite a prisoner cannot be judicially enforced, *Kentucky v. Den-*

nison, 24 How. 66, 16 L.Ed. 717; the duty to ensure that laws are faithfully executed may not be judicially compelled, *Mississippi v. Johnson*, 4 Wall. 475; and violations of the guaranty of a republican form of government in the states is not assailable in the courts, *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377.

But to allow the tool of constitutional litigation to be employed at the behest of every disgruntled citizen would dull its working edge and weaken its effectiveness. It is for this reason that the Supreme Court has adopted a rule of "self-restraint," and it is for this reason that we should not be quick to abandon that precept.

Accordingly, I would affirm the judgment of the district court dismissing this action.

Judges ALDISERT and HUNTER join in this opinion.

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