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. Douglas[1]

Introduction

The Central Intelligence Agency Act of 1949[2] 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 Rockfeller 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-

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* 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 suit 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,

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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

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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 case[45] 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:

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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 Government . . . .[50]

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. DEP'T 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 *unforseen 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]

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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 1949[63] 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]

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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 1949[82] 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]

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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]

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87. *Id.* at 1946 (remarks of Representative Marcatonio).
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.[95]

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."[96] 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-

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"'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 "watchdog" 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

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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

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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:

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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. WISE & 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 1975[117] 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:

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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 SenatorPastore), 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 case[133] 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 460, 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 salutory 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

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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" case[161] 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 wherever 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]

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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. Connecti-

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 interests[177] 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.

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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 by 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:

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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 activites 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]

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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 stategic 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.

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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 proposal[201] 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 anomoly 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:

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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 Constitutions 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

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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 Lévitt, 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 polical 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.

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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).