

## XVI. DISCLOSURE OF BUDGET INFORMATION ON THE INTELLIGENCE COMMUNITY

At the present time the aggregate amount spent for the intelligence activities of the United States Government is classified. The individual budgets for the Central Intelligence Agency, the National Security Agency, and certain other units within the Department of Defense which gather national intelligence are likewise classified.

The budgets for these agencies—which spend billions of dollars annually—are kept not only from the American people but also from most Members of Congress. This secrecy prevents the public and most Members of Congress from knowing how much is spent on national intelligence and from determining whether that amount is consistent with other national needs and priorities. It prevents the public and most Members of Congress from knowing how much is spent by each of the national intelligence agencies and from determining whether that allocation among agencies is appropriate. Because funds for these agencies are concealed in the budgets of other agencies, the public and most Members of Congress cannot be certain that funds in the open appropriations are used for the purposes for which they were appropriated. No item in the overall federal budget is above suspicion as a hiding place for intelligence agency funds.<sup>1</sup> Finally, and most seriously, the present system of secrecy is inconsistent with the constitutional provision which states:

No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.<sup>2</sup>

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<sup>1</sup> During the recent debate in the House of Representatives on the publication of the CIA's budget Congressman Koch described an encounter with DCI Helms, in which Congressman Koch asked about the size of the CIA budget and the number of CIA employees, questions that DCI Helms told Congressman Koch "we don't answer." As Congressman Koch described it, he then asked Mr. Helms "Are you telling me that I, a Member of Congress, do not have the right to know what the budget is, so that when I vote, I do not know what I am voting on?" DCI Helms said, "Yes . . . The item is placed in some other larger item, and you do not know." Congressman Koch then asked, "Do you mean that it might be included under Social Security?", to which DCI Helms replied, "We have not used that one yet, but that is not a bad idea." Cong. Rec. H9359, daily ed., 10/1/75, remarks of Rep. Koch.)

<sup>2</sup> U.S. Const. Art. I, Sec. 9, Cl. 7. For a fuller discussion of the constitutional and policy issues involved, see "The CIA's Secret Funding and the Constitution," 84 *Yale Law Journal* 608 (1975), "Fiscal Oversight of the Central Intelligence Agency: Can Accountability and Confidentiality Coexist?" 7 *New York University Journal of International Law and Politics* 493 (1974), and "Cloak and Ledger: Is CIA Funding Constitutional?" 2 *Hastings Constitutional Law Quarterly* 717 (1975).

## A. THE PRESENT BUDGETARY PROCESS FOR INTELLIGENCE COMMUNITY AGENCIES AND ITS CONSEQUENCES

At present, the Director of Central Intelligence submits to the President recommendations for a consolidated national intelligence program budget. The consolidated national intelligence budget, as well as the budget requests from the various agencies within the intelligence community, are reviewed by the Office of Management and Budget (OMB) in the "same detail that [OMB] reviews the budget requests of any other executive branch agency."<sup>3</sup> As former OMB Director Roy Ash described it:

The specific amounts of the CIA's approved appropriations request and the identification of the appropriation estimates in the President's annual Budget, within which these amounts are included, are formally provided by the Director of OMB to the chairmen of the Senate and House Appropriations Committees.<sup>4</sup>

In the past, special subcommittees of the House and Senate Appropriations Committees have considered the CIA budget in closed session; the chairman of the House Appropriations Committee noted that his subcommittee "tried and tried and tried to hold the secrecy of these matters as closely as we could."<sup>5</sup>

These practices have been changing. The entire House Defense Appropriation Subcommittee now scrutinizes the CIA budget. In September of 1975 the Chairman of the House Appropriations Committee invited all the Members of the House of Representatives to review the executive session hearings of the Defense Appropriations Subcommittee on the CIA's budget, although Members had to agree not to remove any documents from the room, not to take notes, and not to reveal the classified information to "unauthorized persons." While the Chairman invited this review by the Members, the full House Appropriations Committee voted not to receive figures on the CIA's budget from the Defense Appropriations Subcommittee.

Neither the Senate Appropriations Committee as a whole nor the Senate as a whole is informed, even in secret session, of the budget figures for the CIA, NSA or certain other intelligence units.

Once the subcommittees of the Appropriations Committee, agree upon the level of funding for the intelligence agencies, these funds are concealed in appropriation requests for other agencies on which the full Appropriations Committees and Senate and House of Representatives vote.

After congressional approval of these appropriations, the chairmen of the Senate and House Appropriations Committees notify the Office of Management and Budget of the size and true location of intelligence agency funds. Funds for the CIA are then transferred

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<sup>3</sup> Letter from Roy Ash to Senator Proxmire, 4/29/74, quoted in Cong. Rec. S9604, daily ed., 6/4/74, remarks of Sen. Proxmire. It might be argued that the intelligence budgets should be reviewed in even greater detail by OMB as neither the Congress as a whole nor the public can presently participate in the process of reviewing and debating the budget requests in this area.

<sup>4</sup> Ash letter, 4/29/74.

<sup>5</sup> Cong. Rec. H9363, daily ed., 10/1/75, remarks of Rep. Mahon. Until 1974, even the names of members of these special subcommittees were withheld from the public.

to the CIA from these appropriations.<sup>6</sup> Former OMB Director Ash noted:

The transfer of funds to CIA . . . is accomplished by the issuance of Treasury documents routinely used for the transfer of funds from one government agency to another. The amount and timing of these transfers, . . . are approved by OMB.<sup>7</sup>

This whole process treats the CIA and other intelligence agencies in a manner radically different from other highly sensitive agencies of the United States Government, such as the Atomic Energy Commission and the Department of Defense. While intelligence agency budgets may require somewhat different handling, it is important that any special approach reflect real needs justifying departure from the careful processes which Congress has developed over the years for maintaining its power over the purse.

#### B. THE CONSTITUTIONAL REQUIREMENT

The present budgetary process apparently violates Article 1, Section 9, Clause 7 of the Constitution, which reads:

No Money shall be drawn from the Treasury, but in Consequence of Appropriations, made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

This constitutional provision was intended to insure that Congress would control the governmental purse and that the public would be informed of how Congress and the Executive spend public funds.<sup>8</sup>

In keeping with this constitutional mandate, Congress enacted 31 U.S.C. 66b(a), which provides that:

the Secretary of the Treasury shall prepare such reports for the information of the President, the Congress, and the public, as will present the results of the financial operations of the Government.

<sup>6</sup> This is done pursuant to 50 U.S.C. 403f which authorizes the CIA to transfer to and receive from other government agencies funds as approved by the OMB.

<sup>7</sup> Ash letter, 4/29/74. Under established procedures, funds approved by OMB for transfer to the CIA are limited to the amounts which the chairmen of the Senate and House Appropriations Committees specified to OMB.

<sup>8</sup> See D. Robertson, *Debates and Other Proceedings of the Convention of Virginia, 1788* (Richmond, 1805), p. 326. The Chancellor of New York asked if the public were more anxious about any thing under heaven than the expenditure of their money?" 2 J. Elliot, *Debates in the Several States' Conventions on the Adoption of the Federal Constitution*, (Philadelphia: J. B. Lippencott, 1836), p. 347.

The clause was implemented during the first Congress. The act creating the Treasury Department required the Treasurer to annually present each House of Congress with "fair and accurate copies of all accounts" and a "true and perfect account of the state of the Treasury." Act of Sept. 2, 1789, Chapter 12, Section I, I Statute 65.

This Act was replaced by 31 U.S.C. 1029, which provides, "It shall be the duty of the Secretary of the Treasury annually to lay before Congress . . . an accurate, combined statement of the receipts and expenditures during the last preceding fiscal year of all public monies." The receipts, wherever practicable, were to be divided by ports, districts, and states, and the expenditures by each separate head of appropriation.

Fulfilling its charge, the Treasury Department publishes a *Combined Statement of Receipts, Expenditures, and Balances of the United States Government*, which

is recognized as the official publication of the details of receipt and outlay data with which all other reports containing similar data must be in agreement. In addition to serving the needs of Congress, [*the report is used by*] *the general public in its continuing review of the operations of Government.* [Emphasis added.]<sup>9</sup>

The *Combined Statement*, however, contains no entry for the Central Intelligence Agency, the National Security Agency or certain other intelligence units within the Department of Defense. While the figure for total funds received and expended by the United States Government is accurate, some funds listed as expended by particular agencies are, in fact, merely transferred from them to the Central Intelligence Agency.

William Colby, former Director of the CIA, has argued that the present practice is constitutional, maintaining that the Constitution permits concealment of funds for agencies such as the CIA. Not only does this position ignore the plain text of the Clause, but it is not supported by the debates, either at the Constitutional Convention or in the ratifying conventions in the various States.

Mr. Colby's argument relies chiefly on the fact that when the Statement and Account Clause was introduced it provided for annual publication of the account, but it was subsequently amended to allow congressional discretion over timing.<sup>10</sup>

The amendment was intended, however, not to permit concealment of expenditures from the full Congress and the American people, but rather to insure that the information would be made available in a fashion permitting its thorough comprehension.<sup>11</sup> Neither proponents nor opponents of the amendment argued against the assertion

<sup>9</sup> U.S. Dep't of Treasury, *Combined Statement of Receipts, Expenditures and Balance of the United States Government* (1973), p. 1.

<sup>10</sup> William E. Colby testimony, House Select Committee on Intelligence Hearings, 8/4/75, p. 120. Mr. Colby argued as follows:

"The so-called 'Statement and Account' clause . . . was not part of the initial draft [of the Constitution]. The language first suggested by George Mason would have required an annual account of public expenditures. James Madison, however, argued for making a change to require reporting 'from time to time,' Madison explained that the intent of his amendment was to 'leave enough to the discretion of the Legislature.' Patrick Henry opposed the Madison language because it made concealment possible. But when the debate was over, it was the Madison view that prevailed."

Mr. Colby also argued that the provision allowing Congress to keep their proceedings secret demonstrated the intent of the Framers to provide for concealment. That provision, unlike the Statement and Account Clause explicitly provides for secrecy; moreover, the Statement and Account Clause guarantees an accounting for *all* public money. For a fuller treatment of this argument, see "The CIA's Secret Funding and the Constitution," *Yale L.J.* 608 (1975).

It could be argued that the constitutional requirement is not violated as the *Combined Statement* provides an accurate total for receipts and expenditures. Under this theory all government funds could be appropriated to one government agency and secretly transferred to the other agencies. As long as the total appropriated and expended were published, the constitutional requirement would be fulfilled.

<sup>11</sup> M. Farrand, *Records of the Federal Convention of 1787* New Haven: Yale University Press, 1966), pp. 618-19.

that the people had a "right to know" how their funds were being spent.<sup>12</sup>

It should also be noted that the proponents of congressional discretion did not argue that secrecy was needed. Rather they contended that leaving the interval of publication to be fixed by Congress would result in fuller disclosure, since no agency would be forced to publish an incomplete report to meet an inflexible and unrealistic deadline.<sup>13</sup> A fixed schedule would result in statements that would be "incomplete"<sup>14</sup> or "too general to be satisfactory."<sup>15</sup> The proponents of the amendment ridiculed the possibility that granting Congress discretion would mean that information would be concealed forever; Congress would publish the reports at regular, frequent intervals.<sup>16</sup>

It has been implied that the constitutional requirement has been met, at least in the House of Representatives, in that all Members can examine the Defense Appropriations Subcommittee's executive session hearings on the CIA budget.<sup>17</sup> As one Member of the House noted:

Secrecy in Government is distasteful to a free society, but preservation of our free society demands that we maintain a prudent cloak over vital intelligence operations, so long as the Representatives of the people have the right to examine what is covered—as they do in this situation.<sup>18</sup>

Knowledge on the part of *all* of Congress, would satisfy part of the constitutional requirement. As Justice Story noted, one of the purposes of the constitutional requirements is:

to secure regularity, punctuality and fidelity in the disbursements of the public money . . . it is highly proper, that Congress should possess the power to decide how and when any money should be applied for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation. . . . The power to control and direct the appropriations constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public speculation. . . . It is wise to interpose in a republic, every restraint, by which the public treasure, the common fund of all, should be applied with unshrinking honesty to such objects as legitimately belong to the common defense and the general welfare.<sup>19</sup>

But even if all of Congress had the information now held by the subcommittees of the Appropriations Committees, the Constitution would still be violated. The Constitution requires that the *public* know how its funds are being spent. The Constitution requires that the statement and account be made public "from time to time."<sup>20</sup> This re-

<sup>12</sup> D. Robertson, p. 326. See generally 3 M. Farrand, pp. 149-150.

<sup>13</sup> 2 M. Farrand, pp. 618-619.

<sup>14</sup> *Ibid.*, p. 618.

<sup>15</sup> *Ibid.*

<sup>16</sup> See D. Robertson, p. 326.

<sup>17</sup> As was noted above at n. 368 this is not the case in the Senate.

<sup>18</sup> Cong. Rec., H9360, daily ed., 10/1/75, remarks of Rep. Robinson.

<sup>19</sup> 2 J. Story, *Commentaries on the Constitution of the United States*, Sec. 1348, pp. 222-223 (5th ed., 1891).

<sup>20</sup> Article I, Section 9, Clause 7 provides for publication in contrast to Article 2, Section 3, which provides that the President "shall from time to time give to the Congress Information on the State of the Union."

quirement was imposed to make congressional responsibility "more perfect"<sup>21</sup> by allowing the people to check Congress and the executive through the publication of information on what "money is expended, for what purposes, and by what authority."<sup>22</sup> As Chancellor Livingston pointed out:

You will give up to your state legislature everything dear and valuable; but you will give no power to Congress, because it may be abused; you will give them no revenue, because the public treasures may be squandered. But do you not see here a capital check? Congress are to publish, from time to time, an account of their receipts and expenditures. These may be compared together; and if the former, year after year, exceed the latter, the corruption will be detected, and the people may use the constitutional mode of redress.<sup>23</sup>

The debates and later commentary indicate that the constitutional requirement was designed to allow citizens to chart the course of policy through an examination of governmental expenditures—to determine, for example, whether too much money is spent on defense and too little on education, or whether funds spent on bombers should be allocated to submarines. Publication of this information would also enable the people, with Congress, to determine whether expenditures by the executive conform to the intent of the appropriation. Publication of appropriations and expenditures would also provide an opportunity for the people to ascertain if both appropriations and expenditures were for constitutional purposes.<sup>24</sup>

It is, however, unclear how much information on appropriations and expenditures is required by the Constitution to be published. No one at the Constitutional Convention disagreed with the assertion that it would be impossible to account for "every minute shilling." Even in the present disclosures of appropriations and expenditures of nonsensitive governmental agencies, there is a limit to the amount of detail which can be published.<sup>25</sup>

The Supreme Court in *United States v. Robel*,<sup>25a</sup> suggested a standard which might be used to fix the constitutional requirement particularly when claims that publication of the budget would damage national security are raised against the Government's duty to its citizens to publish from time to time a regular statement and account of re-

<sup>21</sup> 2 J. Story, Sec. 1348, pp. 222-223.

<sup>22</sup> *Ibid.*

<sup>23</sup> 2 J. Elliot, p. 345.

<sup>24</sup> Rs David Ramsey, one of the early commentators on the Constitution wrote "If Congress applied any funds for purposes other than those set forth in the Constitution, they would have exceeded their powers. The Clause provides information so that "[t]he people of the United States who pay, are to be judges how far their money is properly applied."

"An address to the Freemen of South Carolina on the subject of the Federal Constitution," in Pamphlets on the Constitution of the United States, p. 374 (P. Ford, ed., 1888). See also *Flast v. Cohen*, 392 U.S. 83 (1968).

<sup>25</sup> Of course, a good deal more information, although not published, is available under the Freedom of Information Act.

<sup>25a</sup> 389 U.S. 258 (1967).

ceipts and expenditures of all public money. The Court held that "when legitimate concerns are expressed in a statute which imposes a substantial burden on First Amendment activities, Congress must achieve its goal by means which have the least drastic impact on the continued vitality of First Amendment freedoms."<sup>26</sup>

Under this test the constitutionality of a level of disclosure of information on expenditures depends on whether there is another system of greater disclosure which, without endangering national security, would have a "less drastic" impact on the public's right to know how its funds are being spent. It is clear, however, that the present secrecy surrounding the appropriations and expenditures for intelligence—particularly the inflation of unspecified appropriations in which funds for intelligence are concealed—vitiates the constitutional guarantee.<sup>27</sup> Under the present system neither the public nor the Congress as a whole knows how much is being spent on national intelligence or by each intelligence agency. In addition, both Congress as a whole and the public are "deceived", as one Senator put it,<sup>28</sup> about the "true" size of other agency budgets. As certain unspecified general appropriations contain funds which are secretly transferred to the CIA, it is impossible for most Members of Congress or the public to know the exact amount of money which actually is destined for any government agency.<sup>29</sup> Congress is thus unable to set priorities through the allocation of funds,<sup>30</sup> or to determine if expenditures by the executive conform to congressional intent and are being spent wisely and well. Members of the public cannot determine with any confidence whether they agree with Congress' allocation of resources and cannot monitor expenditures by the executive branch.

<sup>26</sup> 389 U.S. 258, 268. While the public's right to information on governmental expenditures has not been accorded the "preeminent" status of the First Amendment, the test is an appropriate place to begin an analysis.

<sup>27</sup> As Justice Black wrote, "The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our republic." *New York Times Co. v. United States*, 403 U.S. 713 at 719 (1971). In the same case, Justice Stewart wrote, "In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the area of national defense and international affairs may be in an enlightened citizenry." *Id.* at 728. Justice Stewart's remarks apply equally well to the exercises of power by the Congress.

<sup>28</sup> Cong. Rec. S9602, daily ed., 6/4/74, remarks of Sen. Proxmire.

<sup>29</sup> Cong. Rec., H9361, daily ed., 10/1/75, remarks of Rep. Evans. As Congressman Evans recently noted, the secrecy surrounding these funds for the intelligence community is infectious: "When we are tucking it away in another pocket in the budget, we are also making a secret of something else that should not be a secret."

<sup>30</sup> *See e.g.*, Cong. Rec., H9372, daily ed., 10/1/75, remarks of Rep. Leggett. Congressman Leggett noted, "How can we 'oversee' in any fashion if we have no knowledge of the Agency's command on our resources? How can we set budgetary priorities in a meaningful fashion, if we have no basis for comparing intelligence with unemployment, health, or other competing program areas?"

### C. ALTERNATIVES TO CONCEALING INTELLIGENCE BUDGETS FROM CONGRESS AND THE PUBLIC

Within certain limits, Congress has the power to determine how information about the receipts and expenditures of public moneys is made available to the public.<sup>31</sup>

Congress could choose to publish CIA or NSA budgets and expenditures, for example, in detail equal to those of nonsensitive agencies. This approach, however, might threaten the security of intelligence operations or agents. Congress has available another model for budget disclosure to protect the security of certain activities.

Since 1793, certain agencies, such as the AEC, the FBI, and the Department of State have been appropriated funds specifically for "confidential purposes," which for security reasons, are exempt from normal accounting procedures.<sup>32</sup> In each instance, however, Congress appropriates funds to the agency directly and publicly specifies the small percentage of the appropriation which is for "confidential purposes" and thus exempt from normal accounting procedures. Drawing on this practice, Congress obviously could publish detailed budgets for the intelligence agencies while providing a lump sum to each for "confidential purposes."

Congress could also devise other models. Congress could publish only the total appropriated to each intelligence agency.<sup>33</sup> As the Special Senate Committee To Study Questions Related to Secret and Confidential Documents<sup>34</sup> suggested in 1973, the publication

of such funds should provide members with the minimal information they should have about our intelligence operations. Such information would also end the practice of inflating certain budget figures for use to hide intelligence costs and would insure that all Members would know the true cost of each budget item they must vote upon.

<sup>31</sup> *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1936). In fixing the level of detail revealed, however, a congressional decision cannot override a constitutional requirement such as that of Article 1, Section 9, Clause 7, particularly as one purpose of that requirement was to serve as a check on Congress.

<sup>32</sup> The first such statute authorized special procedures for sums relating to foreign "intercourse or treaty." By the Act of February 9, 1793, Congress provided: "that in all cases, where any sum or sums of money have issued, or shall hereafter issue, from the treasury, for the purposes of intercourse or treaty, the President shall be, and he hereby is authorized to cause the same to be duly settled annually with the accounting officers of the Treasury in the manner following, that is to say; by causing the same to be accounted for, specifically in all instances wherein the expenditures thereof may, in his judgment be made public; and by making a certificate or certificates, or causing the Secretary of State to make a certificate or certificates of the amount of such expenditures as he may think it advisable not to specify; and every such certificate shall be deemed a sufficient voucher for the sum or sums therein expressed to have been expended." [Act of Feb. 9, 1793, ch. 4, sec. 2, 1 Stat. 300, codified as 31 U.S.C. 107 (1970).]

<sup>33</sup> When the AEC was first established only a one line entry in the weapons account was included in the 1947 budget, p. 382.

<sup>34</sup> S. Res. 93-466, 93rd Cong., 1st Sess., 10/12/73, p. 16.

The Special Committee recommended that the Appropriations Committee itemize the Defense Department appropriations bill in order that the "total sums proposed to be appropriated for intelligence activities by each of the following agencies: Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, National Reconnaissance Office, and any separate intelligence units within the Army, Navy, and Air Force" could be revealed.<sup>35</sup>

Finally, the Congress could decide that only the total budget figure for national intelligence be published. This would be the aggregate of funds provided to CIA, NSA, DIA, and the national intelligence components in the Departments of Defense, State, and Treasury. Although there may be problems defining what constitutes "national intelligence," the Director of Central Intelligence already prepares a national intelligence budget. The Director could, with the appropriate congressional committees determine what agencies or departments would be included.<sup>36</sup>

The secrecy presently surrounding intelligence expenditures vitiates the constitutional guarantee. Even publishing one figure—the total appropriations and expenses for national intelligence—would have a salutary effect. It would eliminate the inflation of figures presently in the Budget and in the Combined Statement resulting from the concealment of intelligence agency funds in other agency appropriations and expenditures. Congress would be able to establish its priorities by placing the amount appropriated for national intelligence activities against other claims on the public purse; the public could make its own independent judgment about priorities.<sup>37</sup>

As Senator Proxmire noted, publication of the aggregate budget for national intelligence might also have the effect of deterring potential adversaries by showing that the United States Government continues to spend sizeable amounts on intelligence.<sup>38</sup> As former DCI and Secretary of Defense Schlesinger noted, publication of this figure might also

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<sup>35</sup> The Committee specifically did not request that any line items be revealed, although they did recommend the publication of the total number of personnel employed by each agency.

<sup>36</sup> The Senate Select Committee has proposed an oversight committee which would have jurisdiction over authorization for national intelligence activities of the United States Government, S. 93-2893.

<sup>37</sup> Former Director Colby has argued that publication of the CIA budget would not aid the public in any way. As he put it, "Knowledge of the Agency budget would not enable the public to make a judgment on the appropriateness of the amount without the knowledge of the product and the ways it is obtained." (William Colby testimony, House Select Committee on Intelligence, 8/4/75, p. 123.)

<sup>38</sup> Cong. Rec. S9603, daily ed., 6/4/74, Remarks of Senator Proxmire. However, as Senator Pastore noted, if the public figure declined "then the Russians and the Chinese Communists know that we are doing less, and that might let them become more audacious." *Id.* at S9605.

decrease speculation about the budget and focus the debate on intelligence on more significant issues.<sup>39</sup>

Finally, the disclosure of any figures on intelligence expenditures might well increase the effectiveness of oversight of the intelligence agencies by both individual members of Congress and by the appropriately charged congressional committees. Members of the House might be encouraged to inspect executive session hearings on intelligence agency budgets; <sup>40</sup> members of the oversight committees of both houses might be spurred to review the proposed budgets more closely, in anticipation of a possible debate on the figures.<sup>41</sup>

#### D. THE EFFECT UPON NATIONAL SECURITY OF VARYING LEVELS OF BUDGET DISCLOSURE

Even given the constitutional requirement, any disclosure of budgetary information on agencies in the Intelligence Community has been strongly resisted. In responding to a proposal for the publication of the total sum budgeted for the national intelligence community, Senator Stennis noted that:

[I]f it becomes law and is carried out, [it] would, as its practical effect, virtually destroy 80 to 90 percent of the effectiveness of much of our most important work in the field of intelligence.<sup>42</sup>

And Congressman Burlison told the House that if an amendment which provided for publication of the total figure budgeted for the CIA were adopted, "i[t] will totally paralyze the intelligence community."<sup>43</sup>

An examination of the effect on national security of publication of *any* data on the intelligence community budgets is difficult, in part because the examination itself must not be allowed to jeopardize the national security. Given the constitutional guarantee, however, the burden of proof must fall on those who would deny this information to

<sup>39</sup> During testimony before the Senate Select Committee, Mr. Schlesinger was asked whether there was a good reason for actually publishing a budget figure. He replied: "Only in that the public debate at the present time covers so wide a range that if you had an official number, the debate would tend to die down and focus on something more significant than whether we're spending \$11 billion on intelligence." (James Schlesinger testimony, 2/2/76, p. 54.)

Mr. Schlesinger was later asked whether he thought there was any chance of convincing the American people or the enemy of the truthfulness of any figure that is published, to which Mr. Schlesinger replied: "I do not believe that you could persuade the Soviets that that is a truthful figure, but I am not sure that that is our objective. Whether or not you could persuade the American public, I think there is a large segment of the American public that would be persuaded. . . ." Schlesinger, 2/2/76, p. 56.)

<sup>40</sup> See e.g., Cong. Rec., H9361, daily ed., 10/1/75, remarks of Rep. Obey.

<sup>41</sup> See e.g., Cong. Rec., S9603, daily ed., 6/4/74, remarks of Sen. Proxmire.

<sup>42</sup> Cong. Rec. S9610-11, daily ed., 6/4/74, remarks of Sen. Stennis.

<sup>43</sup> Cong. Rec. H9366, daily ed., 10/1/75, remarks of Rep. Burlison.

the public. The possible effects on the national security of certain levels of budget disclosure are examined below.<sup>44</sup>

1. *The Effect on National Security of Publication of the National Intelligence Community Budget*

Many individuals familiar with the intelligence community agree that publication of a gross figure for national intelligence would not, in itself, damage the national security.

During his confirmation hearings as Director of Central Intelligence, James Schlesinger, former Secretary of Defense and past head of the OMB, told Senator Harry F. Byrd, Jr., in regard to the publication of the gross figure for national intelligence: "I think that the security concerns are minimal. The component figures, I would be more concerned about but for the gross national intelligence program figures, I think we could live with that on a security basis, yes."<sup>45</sup>

Former DCI Helms told the Senate Select Committee that because it was so large, publication of a single figure for national intelligence might be "satisfactory."<sup>46</sup>

While it has been suggested that the publication of even a total for the national intelligence budget would aid our enemies,<sup>47</sup> Mr. Schlesinger told the Senate Select Committee that our enemies "already know in the first place and it's broadly published. All that you would have is a confirmed official figure for information. That is

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<sup>44</sup> There are many possible variants of budget disclosure running from the full disclosure policy governing such government agencies as the Department of Agriculture, through the budget disclosure utilized by the FBI and AEC which provides for a specific appropriation of funds for "confidential" purposes which are exempted from normal accounting requirements, to the possible disclosure of an aggregate figure for each national intelligence agency or for national intelligence as a whole. The Committee has not attempted to analyze the constitutional implications and effect on national security of each, but has focused on the disclosure of the global sum for national intelligence and the aggregate budgets of each intelligence agency.

<sup>45</sup> Quoted in Cong. Rec., S9603, daily ed., 6/4/74, remarks of Sen. Proxmire.

<sup>46</sup> Richard Helms testimony, 1/30/76, pp. 36, 37. Because the figure is so large, the introduction of expensive collection systems would not result in a "conspicuous bump" in the budget which would alert hostile powers to new activities by the United States. For a fuller discussion of this argument and its relationship to the publication of the CIA's aggregate budget, see pp. 378-381.

John Clarke, a former Comptroller of the CIA and an advisor to DCI Colby, was asked about the effects of publication of the total national intelligence budget and specifically whether publication of the figure would disclose the existence of, or the start of, a high-cost technical collection system. Mr. Clarke responded, "I have not run the studies on this, but I would be very hard pressed to find a case that I could support. The budget figures don't reflect that. They are down. Historically, at least they have been down inside of a larger figure and it doesn't really pop out in a big way. And it can be explained away." (John Clarke testimony, 2/5/76, p. 47.)

<sup>47</sup> See e.g. p. 376.

more or less in the public domain anyhow without public confirmation, without official confirmation.”<sup>48</sup>

Mr. Schlesinger described for the Select Committee the impact of publishing the total national intelligence budget:

I am not so concerned about that from the security aspect as some people are. I'm not sure I recommend it, but I'm not so concerned about it from the security aspect.

It could do some good in that there are some inflated notions around about how much the United States Government is actually spending on intelligence, and if you had an official statement, I think that would put the total amount of expenditures in better context for the public.<sup>48a</sup>

2. *The Effect on National Security of Disclosure of the Total Appropriated to or Expended by Each National Intelligence Agency*

Publication of the total of the CIA's budget or of the other agencies' budgets has also been opposed. In a Freedom of Information Act suit, DCI Colby argued against publication of the Agency's budget total, as follows:

Publication of either the CIA budget or the expenditures made by CIA for any given year would show the amounts planned to be expended or in fact expended for objects of a confidential, extraordinary or emergency nature. This information would be of considerable value to a potentially hostile foreign government. For example, if the total expenditures made by the Agency for any particular year were publicized, these disclosures, when taken with other information publicly available . . . would enable such governments to refine their estimates of the activities of a major component of the United States intelligence community, including specifically the personnel strength, technological capabilities, clandestine operational activities, and the extent of the United States Government intelligence analysis and dissemination machinery. . . . The subsequent publication of similar data for other fiscal years . . . would enable a potentially hostile power to refine its estimates of trends in the United States Government intelligence efforts.

He continued:

The business of intelligence is to a large extent a painstaking collection of data and the formation of conclusions utilizing a multitude of bits and pieces of information. The revelation of one such piece, which might not appear to be of significance to anyone not familiar with the process of intelligence analy-

<sup>48</sup> Schlesinger, 2/2/76, p. 52. Mr. Schlesinger noted that, as the Intelligence Community has “no constituency,” it tends to be “blamed for one thing or another,” and “if you had an openly published figure . . . there would be pressure within the Congress at budget mark-up time to take a 15 percent or 20 percent whack at it just for good measure and . . . there is no way of having a public debate about the merits of intelligence.” *Id.* at 51-52. Mr. Schlesinger's argument implies that Congress as a whole should not be given information because it should not be allowed to exercise its control over the purse.

sis (and which, therefore, might not arguably be said to be damaging to the national security) would, when combined with other similar data, make available . . . information of great use and which would result in significant damage to the national security of the United States.

He provided the following example of the impact on the nation's security of publication of the CIA's budget:

If it were learned that CIA expenditures have increased significantly in any one given year, but that there has been no increase in Agency personnel (apparent from traffic, cars in the parking lots, etc.) it would be possible to make some reasonable estimates and conclusions to the effect that, for example, CIA had developed a costly intelligence collection system which is technological rather than manpower intensive; and that such system is operational. Knowledge readily available at the time about reconnaissance aircraft photography, and other technology, can result in a more accurate analysis about a new collection system which would enable a potentially hostile power to take steps to counter its effectiveness . . . the development of the U-2 aircraft as an effective collection device would not have been possible if the CIA budget had been a matter of public knowledge. Our budget increased significantly during the development phase of that aircraft. That fact, if public, would have attracted attention. . . . If it had been supplemented by knowledge (available perhaps from technical magazines, industry rumor, or advanced espionage techniques) that funds were being committed to a major aircraft manufacturer and to a manufacturer of sophisticated mapping cameras, the correct conclusion would have been simple to draw. The U.S. manufacturers in question . . . would have become high priority intelligence targets. . . . And I'm sure that the Soviets would have taken steps earlier to acquire a capability to destroy very-high-altitude aircraft. They did indeed take these steps, with eventual success, but only sometime after the aircraft began operating over their territory—that is, once they had knowledge of a U.S. intelligence project.<sup>49</sup>

A close examination of Mr. Colby's statement raises a number of questions as to the effect of publication of the CIA's aggregate budget. Although Mr. Colby notes that the CIA's total budget figure would allow governments to "refine their estimates of the activities of a major component of the United States intelligence community," he provides no evidence of *how* the publication of this one figure would increase the other government's knowledge of, for example, the clan-

<sup>49</sup> Defendant's Answers to Plaintiff's Interrogatories, *Halperin v. Colby*, Civil Action No. 75-0676, United States District Court for the District of Columbia, pp. 3-5. Other knowledgeable figures have reached different conclusions about the effect of publishing the CIA's budget. For example, Elliot Richardson, presently Secretary of Commerce and formerly Secretary of Defense, has stated that publication of the amount of the CIA's expenditures would not be damaging to the national security.

destine operational activities of the CIA.<sup>50</sup> There would, of course, be some "refinement" if it were known that the CIA's budget was \$X millions rather than \$X + 1 millions. Such refinement goes on at all times, but the question is whether such a gain by hostile powers is sufficient to justify overriding the constitutional requirement that the American people be told how their funds are spent. Having an officially acknowledged budget total does not signal to a hostile power manpower levels in the Clandestine Service, let alone the number of deep cover agents. Having an officially acknowledged aggregate figure does not reveal the cost of a reconnaissance vehicle, let alone its technical capability.

Mr. Colby has maintained that one-time publication of the total amount budgeted for the CIA would set a precedent and that information revealed through successive publication would provide hostile powers with insights into United States intelligence activities.

Of particular importance is Mr. Colby's claim that successive disclosures of the CIA's aggregate budget would eliminate the effectiveness of major technical collection systems like the U-2. A change in the CIA's total budget from one year to the next may be due to a number of factors: inflation, cutbacks in activities, a major reorganization, or long term gains in efficiency, for example. Assuming that an increase in the CIA's budget alerted hostile powers to some change in the Agency's activities, it would not in itself reveal what the new activity was—a new covert action project, more material procurement, or an increase in analytical capability through mechanization. For Mr. Colby's argument to be valid not only must the hostile power be able accurately to determine what the activity is—for instance, a new reconnaissance system—but that power would have to gain, covertly, an enormous amount of tightly guarded information, such as the technological capabilities of the vehicle and the surveillance systems which it contained.<sup>51</sup> It would seem that a hostile power able to gain that information would be able to discover the total of the CIA's budget, a much more widely known figure. The possibility that a hostile power may pierce all the barriers designed to limit dissemination of closely held information cannot be used to justify denying the American people information which the Constitution guarantees them, and which is widely published, and which must be assumed to be within the grasp of hostile powers.

It is far from clear, moreover, that the development and introduction of a major new system will be announced by a change in the Agency's total budget.

The CIA budget may be large enough not to change substantially when a new system comes on line. A preliminary analysis of past CIA budgets has indicated that major new activities have not always resulted in "bumps" and that some "bumps" in the budget still are not

<sup>50</sup> Mr. Colby's statement ignores the fact that figures for the CIA budget are already widely publicized, although not officially confirmed. In this regard, it is interesting to note that the Central Intelligence Agency withdrew its objection to the far more detailed budget disclosure in *The CIA and the Cult of Intelligence* by Victor Marchetti and John D. Marks.

<sup>51</sup> Beyond that, a hostile power would also have to have both a capability and an inclination to take those steps necessary to counter the system.

generally understood.<sup>52</sup> Because of the importance of expensive technical collection systems, however, the Select Committee believes that the "conspicuous bump" argument deserves fuller study by the future oversight committees,<sup>53</sup> particularly in light of the results of the publication of the aggregate figure for national intelligence recommended by the Committee.

Finally, the claims about damage to the national security resulting from publication of the aggregate figure for each intelligence agency must be viewed in the light of far more detailed, and continuing, exposure of the budgets of other agencies vital to the national security. Enormous amounts of information have been provided to the public, for instance, about the work of the Department of Defense and the Atomic Energy Commission. Yet disclosure of funds appropriated and expended by these agencies did not and does not reveal vital national secrets. As Senator Symington noted, "There's nothing secret about the . . . cost of a nuclear aircraft carrier or the cost of the C-5A." But "knowledge of the cost does not equal knowledge of how the weapons operate or how they would be utilized." Similarly, knowledge "of the overall cost of intelligence does not in any way entail the release of information about how the various intelligence groups function, or plan to function."<sup>54</sup>

#### E. THE ARGUMENT THAT PUBLICATION OF ANY INFORMATION WILL INEVITABLY RESULT IN DEMANDS FOR FURTHER INFORMATION

Some opponents of budget disclosure, while admitting that publishing aggregate figures for the intelligence community or intelligence agencies will not harm national security, have argued that publication of such figures will inevitably lead to demands for ever more detail. As Director Colby told the House Select Committee on Intelligence:

Moreover, once the budget total is revealed, the demand for details probably would grow. What does it include? What does it exclude? Why did it go up? Why did it go down? Is it worth it? How does it work?

<sup>52</sup> One series of activities which did cause a bump in the CIA's budget was the Agency's activities in Laos, which were clearly known to powers hostile to the U.S. but were kept secret from the American people for many years.

<sup>53</sup> If new systems would be revealed by "bumps" in the CIA's budget a solution other than denying all information on CIA expenditures to the American people might be found. James Schlesinger has suggested that the published figure could be based on actual dollars spent by the CIA rather than on the dollars which could be spent; while obligations may fluctuate dramatically over the years, actual outlays "tend to move smoothly over a period of years." (Schlesinger, 2/2/76, p. 55.)

<sup>54</sup> 117 Cong. Rec., p. S42925, remarks of Sen. Symington. As Congressman Leggett of the House Armed Services Committee noted: "We have a book here, the Committee Report of about 4000 secrets of the Department of Defense in which they talk about the money for the SAM-D but yet do we know how the SAM-D works? The answer is: no.

"We have the details of the money for Thailand, and it is spelled out. But do we know what the money is actually used for? No.

"We can go through the FBI budget. Does that tell us what they are doing? The answer is: no." (Cong. Rec., H9371, daily ed., 10/1/75, remarks of Rep. Leggett.)

There would be revelations . . . which would gradually reduce the unknown to a smaller and smaller part of the total, permitting foreign intelligence services to concentrate their efforts in the areas where we would least like to attract their attention.

We—and I specifically mean in this instance both intelligence professionals and Members of Congress—would have an acute problem when the matter of our budget arose in the floor of the House or Senate. Those who knew the facts would have two unpleasant choices—to remain silent in the face of all questions and allegations, however inaccurate, or to attempt to keep the debate on accurate grounds by at least hinting at the full story.

My concern that one revelation will lead to another is based on more than a “feeling.” The atomic weapons budget was considered very sensitive, and the Manhattan Project was concealed completely during World War II. With the establishment of the AEC, however, the decision was made to include in the 1947 budget a one-line item for the weapons account. That limitation was short-lived. By 1974, a 15-page breakout and discussion of the Atomic Weapons Program was being published. Were the intelligence budget to undergo a similar experience, major aspects of our intelligence strategy, capabilities and successes would be revealed.<sup>55</sup>

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<sup>55</sup> William Colby testimony, House Select Committee on Intelligence, 8/4/75, p. 122.

Senator McClellan described the consequences of publishing the total budget for national intelligence. “That is when you intend to put the camel’s nose under the tent. That is the beginning. That is the wedge. You say you do not want to know all the details and how the money is spent. But, if you get the overall figures of one billion dollars or half-a-billion dollars or five billion, or whatever, then how are you going to know, how can you evaluate, how can you judge or make an intelligent judgment on whether that is too much or too little, whether it is being expended wisely or unwisely, except when you can get the details?”

“How? You cannot know. And, if you receive these figures and if you end this ignorance as to the total amount, next you will want to end the ignorance as to the different agencies and how it is spent, and through whom it is spent. Next will want to end the ignorance of what it is spent for. Next you want to end the ignorance of how that intelligence is procured. There is no end to it.” (Cong Rec. S9609, daily ed., 6/4/74, remarks of Sen. McClellan.)

During the same debate Senator Humphrey noted that while he did not oppose the purpose of the disclosure of the total budget for national intelligence, “the problem is it is sort of like loose string or a ball of twine, so to speak, that starts to unravel.” (*Id.* at S9606, remarks of Sen. Humphrey.) During a more recent House debate on the publication of the CIA’s budget, Congressman Young described such publication as “the first baby step.” (Cong. Rec. H9376, daily ed., 10/1/75, remarks of Rep. Young.)

As James Schlesinger told the Select Committee, “But one of the problems here is the camel’s nose under the edge of the tent, and I think that that is the fundamental problem in the area. There are very few people who can articulately argue that the publication of those figures in and of themselves, if it stopped there, would be harmful. The argument is that then the pressure would build up to do something else, that once you have published for example the . . . budget, that the pressures would build up to reveal the kinds of systems that are being bought for that money, and it is regarded as the first step down a slippery slope for those who worry about those kinds of things.” (Schlesinger, 2/2/76, p. 53.)

There are several problems with this argument. While there obviously will be pressure, the problem as Mr. Helms agreed "is not insuperable."<sup>56</sup> For many years Congress has refused to reveal the figures for the national intelligence budget and the aggregate budgets of the intelligence agencies. It seems unlikely that given this past history, Congress will suddenly reverse itself and fail to protect information whose disclosure would harm the national security. Much more likely is that Congress will, as Senator Church proposed, "establish very stringent rules when it came to handling the money figures."<sup>57</sup>

More importantly, as Congressman Koch noted :

The real fear on both sides of the aisle that some have expressed is, "Gee, if we do that, that is the first step."

Maybe it is, but, whatever the second step is, it is what this House wants it to be, and if this House decides that this is the last step, so be it. If the House decides that it wants to have more information it will have to have a vote on it.

What is wrong with that? That is what is called the democratic system. We are sent here to be part of that system.<sup>58</sup>

It is instructive to note in this context the amount of budgetary information provided on the Atomic Energy Commission. That information has constantly increased. Yet each step of the way, Congress has had the opportunity to limit disclosure and chose not to. This experience confirms congressional control over the process. More importantly the national security was not harmed by disclosure of a substantial amount of budgetary information about an agency and a weapons program crucial to the defense of the United States.

Finally, the argument is without limits. It could be used to justify much greater secrecy. It could be used to justify the withholding of all information on the Defense Department because information which the Congress wishes to protect would be threatened by pressures caused by the publication of any information on that Department.

#### F. THE ARGUMENT THAT THE UNITED STATES SHOULD NOT PUBLISH INFORMATION OF ITS INTELLIGENCE BUDGET SINCE NO OTHER GOVERNMENT IN THE WORLD DOES

It has also been argued that the United States should not publish its intelligence budget when no other government in the world does.<sup>59</sup> Yet as Congressman Moss noted :

I point out to those Members who do not know the difference between this country and others, and the fact that we become unique in disclosing this that, thank God, we do become unique. We have grown great and maintained our strength as an open society and we should continue to be an open society to the maximum consistent with our true security requirements.

<sup>56</sup> Helms, 1/30/76, p. 39.

<sup>57</sup> *Ibid.*

<sup>58</sup> Cong. Rec. H9359, daily ed., 10/1/75, remarks of Rep. Koch.

<sup>59</sup> William Colby testimony, House Select Committee on Intelligence, 8/4/75, p. 120.

I do not want us to emulate the Russians or the Chinese or even our British brethren in the operation of the various agencies of their governments under their official secrets acts and other areas. I want us to realize the strength that we gain from an alert electorate and informed electorate.<sup>60</sup>

#### G. SUMMARY AND CONCLUSION

The budget procedures which presently govern the Central Intelligence Agency and other agencies of the intelligence community prevent most Members of Congress as well as the public from knowing how much money is spent by any of these agencies or even how much is spent on intelligence as a whole. In addition, most Members of Congress and the public are deceived about the appropriations and expenditures of other government agencies whose budgets are inflated to conceal funds for the intelligence community. The failure to provide this information to the public and to the Congress prevents either from effectively ordering priorities and violates Article 1, Section 9, Clause 7, which provides that :

No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

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

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<sup>60</sup> Cong. Rec. H9863, daily ed., 10/1/75, remarks of Rep. Moss.