

AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 9: Divided Liberalism – Powers of the National Government

Congressional Hearings on Disclosure of Intelligence Budget (1978)¹

Over the course of the 1970s, the Central Intelligence Agency (CIA) and the various intelligence services of the federal government faced unprecedented challenges from Congress. In 1974, the New York Times reported that the CIA had been involved in a significant amount of domestic surveillance of anti-war activists. President Ford assembled a special executive commission to investigate the charges, and the House and Senate each created their own investigative committees (one led by Senator Frank Church and the other led by Representative Otis Pike). The committees exposed a wide range of covert operations and intelligence failures over the course of the Cold War, from assassination attempts on foreign leaders to political destabilization efforts in foreign countries to domestic spying. One response to such revelations was simply to increase legislative oversight and modify the goals of intelligence activities, but more radical responses ranged from eliminating covert operations to rendering the intelligence agencies more transparent to public scrutiny. In practice, a key reform was the creation of the permanent select intelligence committees in Congress.

President Jimmy Carter embraced the reformist spirit of the period and his CIA director, Stansfield Turner, tried to take a more conciliatory approach to Congress. Among Turner's initiatives was the agreement to publish a single overall budget figure for the federal government's intelligence community. All budget figures regarding U.S. intelligence had been treated as valuable secrets, and Turner refused calls to publish a more detailed accounting of intelligence expenditures. Article I, Section 9, of the U.S. Constitution stated that all government expenditures require congressional appropriations and that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." The Constitution explicitly recognizes the need for secrecy by qualifying its requirement that each chamber of Congress keep and publish a journal of its proceedings, "excepting such Parts as may in their Judgment require Secrecy."

Does the Constitution require that the intelligence budget be public information? How detailed must the accounting of government expenditures be to satisfy constitutional requirements? Should the public know what the budget for the National Security Agency, which conducts electronic surveillance, is each year? Should the public know how much is spent on data mining each year as opposed to satellite surveillance? Is it consistent with democracy for the government to engage in a significant amount of classified expenditures? Is it acceptable for some in Congress to know the extent of the intelligence budget, even if the general public and most of the members of Congress do not know? Is it acceptable for Congress to simply appropriate a lump sum to the intelligence agencies and have no detailed accounting of how those funds are spent?

ADMIRAL STANSFIELD TURNER, Director, Central Intelligence Agency

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

At the same time, as a free and open society, it is appropriate that the citizens, including the press, be kept as well informed as possible of the activities of their Government. They, in fact, are the best

¹*Disclosure of Funds for Intelligence Activities: Hearings before the Permanent Select Committee on Intelligence, 95th Cong., 2nd Sess. (1978).*

oversight we have for the prevention of possible excesses of Governmental activity. The public's right to understand the importance and cost of the intelligence process is part of their being adequately informed.

Some compromise then, is necessary between the risk of giving an enemy a unnecessary advantage over us, and of maintaining the basic openness of our society. Accordingly, the Administration does not object to your releasing to the public a single overall budget figure of the U.S. Intelligence Community.

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ANTHONY LAPHAM, General Counsel, Central Intelligence Agency

... [T]he arguments suggesting that the failure to release one or another of these figures is contrary to some constitutional requirement have been looked at by the Supreme Court. . . . They have been looked at closely by the Justice Department . . . , and in each of those contexts the conclusion reached has been that the withholding of this information, the failure to publish either the authorization or the appropriation figure, is perfectly consistent with the requirements stated in the Constitution.

WILLIAM J. ALLARD, Office of General Counsel, CIA

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

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The critical question thus becomes whether the power of the Congress to modify and specially tailor appropriations and accounting procedures under Article I, Section 9, Clause 7 of the Constitution extends to maintaining a degree of secrecy in Government operations in derogation of public disclosure. The Supreme Court in *United States v. Richardson* (1974) suggests that the Congress does have this power. . . .

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

The very wording of the clause exists as evidence of the fact that the framers of the Constitution desired to leave room for legislative discretion and some secrecy in fulfilling the requirement for an accounting of receipts and expenditures. . . . According to Farrand, [James Madison explained the inclusion of the phrase "from time to time" in the statement and account clause],

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

Patrick Henry also recognized Madison's language as a provision enabling secrecy when required and opposed it for that reason. . . .

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The history of congressional understanding of the Statement and Account Clause shows that it has not been interpreted as preventing Congress deciding . . . that certain classes of Federal expenditures should not be disclosed where delicate questions of foreign policy or national security were involved. Not long after the Constitution was adopted, Washington declined to make public the amount of money expended by General St. Clair in furtherance of a secret mission in the territory of Florida. . . . Shortly after the Constitution was adopted, President Madison . . . sent a confidential communication to Congress outlining his recommendation that he be authorized to take possession of parts of Spanish Florida. Congress then passed a Secret Appropriation Act appropriating \$100,000 for such occupation, and forbidding the publication of the appropriation law. . . . And almost from the foundation of the Government under the Constitution there was a fund, to be later denominated the Secret Fund, which was used by the President to finance the secret operations of the Government, including intelligence gathering. The legislation was passed in response to Washington's first annual message. . . .

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More recently, Congress has found secrecy to be in the national interest in several settings. For example, over \$2 billion was secretly expended on the Manhattan project to develop the atomic bomb during World War II. . . .

In light of the foregoing, it seems clear that Congress is authorized to exercise considerable flexibility in establishing procedures by which the requirement for maintaining accountability between the executive and legislative branches, as mandated by the statements and accounts clause, is to be fulfilled. . . .

ANTHONY LAPHAM, General Counsel, Central Intelligence Agency

. . . What the courts have had to say about [that clause] is that it does not define itself, it is not a self-executing clause. It means whatever the Congress says it means.

REPRESENTATIVE BILL BURLISON (Democrat, Missouri)

That is a change. I learned that the Supreme Court says the Constitution means what it says it means. That is a change if they are going to let us decide what the Constitution says.

ANTHONY LAPHAM, General Counsel, Central Intelligence Agency

I think in this area that is what the court is saying. . . .

REPRESENTATIVE ROBERT MCCLORY (Republican, Illinois)

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It is true, is it not, that if we were to publish appropriation items which would relate to an expansion of cover activities or which would relate to the development of some new or different mode of communications or might relate to payment to some other country which would be furnishing us with useful intelligence, if those items are included in a public budget, it could only damage our intelligence capability and aid our enemy and not really shed any light insofar as the American public is concerned?

ADMIRAL STANSFIELD TURNER, Director, Central Intelligence Agency

Yes, sir, I agree with that.

REPRESENTATIVE ROBERT MCCLORY (Republican, Illinois)

Nevertheless, those kinds of expenditures, just from a hypothetical sense, would be included within the information provided to this committee and to our counterpart in the Senate as well as, I believe, to appropriate subcommittees of the Appropriations Committee.

ADMIRAL STANSFIELD TURNER, Director, Central Intelligence Agency

Yes, sir, they are provided to the four committees.

REPRESENTATIVE ROBERT MCCLORY (Republican, Illinois)

I would conclude that in the representatives of the American public, personified by these members of the committees and the rather strict guidelines that are in place insofar as intelligence agencies are concerned, that the public interest is well served and the national security can be enhanced.

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WILLIAM E. COLBY, former Director, Central Intelligence Agency

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The presumption against secrecy in our Government activities requires that a good reason be found for maintaining the secrecy of the intelligence budget. The good reason here is that publication would assist foreign nations to identify and frustrate our intelligence activities. We would thus be kept in ignorance of what they want to keep secret from us.

This danger is not dissipated by the proposal to publish only a single overall figure, as that figure would inevitably start a chain of exposures. . . .

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Balanced against this risk, there would be little public benefit in the revelation of an overall figure. Public decisions about the level of effort of our intelligence community could not be made only on the basis of a general figure without some reference to the activities the figure pays for. And such a detailed review and discussion can and does take place both within the executive branch and the committees of the Congress who are fully informed of the figure as well as the programs they support.

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REPRESENTATIVE EDWARD BOLAND (Democrat, Massachusetts)

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Do you support Admiral Turner's position with respect to disclosing the national foreign intelligence program figure or how far do you actually go?

MORTON HALPERIN, American Civil Liberties Union

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I would go as far as you could go, using the standard [that the threat to the national security of the United States posed by such disclosure is of such gravity that it outweighs any public interest in the disclosure]. The committee ought to write a report on the budget and then go sentence by sentence and only exclude that information that it has to exclude to protect the national security.

I think the presumption ought to be the same as for the defense budget or atomic energy budget.

REPRESENTATIVE EDWARD BOLAND (Democrat, Massachusetts)

On that basis you would be getting some of the component figures, would you not?

MORTON HALPERIN, American Civil Liberties Union

In my judgment I think I probably would. I would say that you ought to ask that hard question about every number and every description in the report. Does this then qualify to be kept under the standard we operate under?

I expect if you apply that standard you will discover a great deal of information that is now kept secret can in fact be made public.

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REPRESENTATIVE EDWARD BOLAND (Democrat, Massachusetts)

You don't believe that the floodgates would be opened up?

MORTON HALPERIN, American Civil Liberties Union

I will resist saying I hope that is what happens.

....

I think that a very strong argument can be made that there is a constitutional requirement to release an expenditure figure. . . .

. . . . I think the wording of the Constitution is very clear, and the intent is very clear, namely when people vote their elected representatives, they know how they have appropriated money. When they vote for the President they know how he spent the money.

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