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THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

The Central Intelligence Agency: Oversight and Accountability

By THE COMMITTEE ON CIVIL RIGHTS
and THE COMMITTEE ON INTERNATIONAL HUMAN RIGHTS

INTRODUCTION

The Central Intelligence Agency, although created expressly for the purpose of gathering and coordinating intelligence, has also been used as a secret instrument of domestic and foreign policy. William E. Colby, Director of the CIA, stated in his January 15, 1975 report to the Senate Appropriations Committee that the domestic activities of the CIA have included the insertion of agents into "American dissident circles" in the late 1960's and early 1970's, and the compilation of dossiers on about 10,000 American citizens. Mr. Colby stated further that a "major" function of the CIA was to undertake, when directed, "covert foreign political or paramilitary operations."

These activities have been facilitated by the extraordinary statutory scheme under which the CIA operates. Its budget is exempt from legislative review, a privilege shared by no other federal agency, and its activities may be any that the National Security Council directs, as long as they concern in some fashion "the national security."

As the debate grows over the historical role of the CIA, more questions have been posed concerning the statutory and constitutional limits of the CIA's authority. The purpose of this report is to respond to these questions. The report will (1) summarize the creation and legal development of the CIA, (2) discuss the CIA's domestic activities and their relation to the laws governing the Agency and to the Constitution, (3) discuss the foreign activities of the CIA and the legislative and constitutional basis for these activities, (4) describe the present funding arrangements of the Agency and their legal basis, and (5) discuss possible remedies and make recommendations concerning regulation of the CIA's activities in the future.

I. *CREATION AND LEGAL DEVELOPMENT OF THE CENTRAL INTELLIGENCE AGENCY*

Pearl Harbor convinced the United States that the need for an intelligence organization was imperative.[1] On June 13, 1942 the Office of Strategic Services (OSS) was created, headed by Col. (later Major-General) William J. Donovan, and throughout the war it gathered intelligence and conducted activities of a paramilitary nature in support of the war effort.[2] In 1944, Donovan prepared a plan for President Roosevelt which would establish a central intelli-

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gence agency when the war was ended, but the plan was side-tracked by the Joint Chiefs of Staff,[3] and the OSS was disbanded on September 20, 1945.

On January 22, 1946, President Truman by Executive Order[4] established the National Intelligence Authority (NIA), composed of the Secretaries of State, War and Navy and a personal representative of the President, Admiral William Leahy, for the purpose of planning, developing and coordinating all federal foreign intelligence activities.[5] The operating arm of the NIA was a new organization called the Central Intelligence Group to be staffed with personnel from the Departments of the respective Secretaries.[6] The Group was to be headed by a Director of Central Intelligence who was also a non-voting member of the NIA.

The Central Intelligence Group was the first formal central organization in American history devoted to intelligence matters. Its duties included correlating and evaluating intelligence relating to the national security, disseminating the results thereof to interested government officials and coordinating the activities of the intelligence agencies throughout the government. One of the first tasks it undertook was to furnish the President with a daily report of intelligence information, a function which its successor continues to perform.[7]

Less than a year after the establishment of the Central Intelligence Group, the House Committee on Military Affairs issued a report recommending that instead of permitting the existence of the Group to remain dependent on an Executive Order, the Congress ought to enact enabling legislation giving the Group statutory authority and providing for its funding directly through congressional appropriations.[8] Accordingly, the National Security Act of 1947,[9] in addition to establishing the Department of Defense and unifying the armed services, created the National Security Council (NSC) and, under it, established the Central Intelligence Agency. The duties of the CIA were set forth in five short paragraphs, based very closely on the language contained in the NIA Executive Order. These duties were generally:

1. To advise the NSC in matters concerning such intelligence activities of the government departments and agencies as related to national security;

2. To make recommendations to the NSC for the coordination of such intelligence activities;

3. To correlate and evaluate intelligence relating to the national security, and to provide for the appropriate dissemination of such intelligence within the government, provided that the CIA was to have no police, subpoena, law-enforcement powers or internal security functions;

4. To perform, for the benefit of the existing intelligence agencies, such additional services of common concern as the NSC determined could be more efficiently accomplished centrally; and

5. To perform such other functions and duties related to intelligence affecting the national security as the NSC might from time to time direct. (50 U.S.C. §403(d)).

By this legislation, the CIA was removed from military control and placed solely under the direction of the NSC. Heading the newly-formed CIA was a Director of Central Intelligence appointed by the President with the advice and consent of the Senate.[10] The authority conferred upon him under the law was extensive. Subject to the recommendations of the NSC and the approval of the President, he was empowered to inspect all intelligence relating to national security gathered by any agency of the government, and all departments were directed to make available to him such intelligence gathered by them "for correlation, evaluation and dissemination."[11] Internally, the Director was empowered, in his personal discretion and notwithstanding any civil service statutes or regulations, to terminate the employment of any agency employee "whenever he shall deem such termination necessary or advisable in the interest of the United States."[12]

In 1949, even more specific powers were conferred upon the Director of the CIA by the passage of the Central Intelligence Agency Act.[13] This Act exempted the CIA from all federal laws which required the disclosure of the "functions, names, official titles, salaries or numbers of personnel employed by the Agency."[14] In addition, the Act gave the Director power to spend money "without regard to the provisions of law and regulations relating to the expenditure of government funds,"[15] and granted him the extraordinary right to spend money simply by signing his name, "such expenditures to be accounted for solely on the certificate of the Director without any further accounting therefor."[16] In addition, the 1949 Act allowed the Director, in collaboration with the Attorney General and the Commissioner of Immigration, to admit up to 100 persons into the United States each year secretly and without regard to immigration quotas.[17]

Neither of the foregoing Acts provided any explicit authority for the CIA to conduct so-called covert activities. All attempts to justify legally such activities, therefore, have had to rely upon the general catch all provision which makes it the CIA's duty "to perform such other functions and duties relating to intelligence affecting the national security as the NSC may from time to time direct."[18] Apparently relying upon this provision the NSC, in 1948, is said to have authorized the CIA to conduct such special operations, setting forth only two guidelines—first, that the operations be secret and second, that they be "plausably deniable" by the Government.[19] A section was thereupon created by President Truman within the CIA to conduct secret political operations,[20] and Frank G. Wisner, a former OSS man, was brought in from the State Department to head the section with the title of Assistant Director of the Office of Policy Coordination. In addition, the Office of Special Operations was created to conduct secret activities aimed solely at gathering intelligence. The machinery of both offices was in the CIA, but control was shared with the State Department and the Pentagon. On January 4, 1951, the Offices of Policy Coordination and Special Operations were merged into the Directorate of Plans, and thereafter the CIA had sole control over secret operations of all types. Allen Dulles was its first Chief; Frank Wisner was Deputy Chief.[21]

With its newly-formed Directorate of Plans and its involvement in the

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Korean War, the CIA expanded rapidly. From less than 5,000 employees in 1950, it grew to about 15,000 in 1955 not counting others recruited specially as contract employees and foreign agents. During this period, the Agency is estimated to have spent well over one billion dollars on its various overt and covert activities.[22] Although no information is publicly available, it is estimated that the CIA presently has an authorized manpower of 16,500 and an authorized budget of 750 million dollars,[23] and that approximately two-thirds of its funds and manpower are used for covert operations and supporting services, such as communications, logistics and trade which relate to its covert activities.[24]

II. *DOMESTIC ACTIVITIES AND THEIR LEGAL BASIS*

A. *Domestic Surveillance and Infiltration*

In December, 1974, it was reported that the CIA had been engaged in considerable surveillance of American citizens, including the opening of mail, tapping of telephones, physical break-ins and the maintenance of files on about 10,000 individuals.[25] William E. Colby, the Director of the CIA, confirmed to the Senate Appropriations Committee that the domestic activities of the CIA had included:

1) The recruiting or insertion into "American dissident circles" of at least 22 CIA agents as part of two separate programs by the Agency to monitor such activities in the late 1960s and early 1970s.

2) The establishment of files by the counterintelligence unit on about 10,000 citizens including members of Congress.

3) The authorization by Richard Helms of the establishment of a unit inside the Agency's counterintelligence division "to look into the possibility of foreign links to American dissident elements."

4) The conducting between 1953 and 1973 of "several programs" to survey surreptitiously and open the private mail of American citizens who had correspondents in certain communist countries.[26]

As a result of these and similar revelations the domestic activities of the CIA are currently being investigated by a 7-man Commission appointed by President Ford[27] and several congressional committees.

In addition to the CIA's domestic surveillance of dissident political organizations, it is also alleged to have participated in other kinds of domestic operations. These include the funding of special university programs, such as MIT's Center For International Studies, which was reported to have received $300,000 in 1950 and additional financing until 1966.[28] In 1967, following a series of disclosures, the CIA and other government agencies adopted a statement of principles providing that "the fact of government research support should always be acknowledged by sponsor, university and researcher."[29]

The CIA was also alleged to have infiltrated the National Student Association and other youth groups.[30] From 1952 to 1966, the CIA funnelled approximately $3.3 million to the National Student Association, providing in some years up to 80% of its budget.[31] Some of the money was used for schol-

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arships for students from South Africa, Mozambique and Angola. None but the top officials of the Association knew of the CIA connection, much less of the fact that CIA agents were posing as students and influencing the policies of the organization by arguing on issues involving socialism. At the same time some students were recruited by the CIA to act as spies abroad, making dossiers on foreign student leaders.

The consequences growing out of the CIA's relationship with the National Student Association were succinctly analyzed by Professor Jerrold L. Walden:

> "In the first place, the relationship constituted outright deception of the membership-at-large, which knew nothing about the CIA's affiliation with the NSA, and thereby violated their constitutional right to freedom of association. As one officer of the NSA observed after evidence of the longstanding relationship had come to light, 'Ninety per cent of them wouldn't have anything to do with the organization if they'd known about the CIA business before they joined.' Furthermore, the fact that the CIA financed and influenced the policies of the NSA abroad all but makes meaningless the concept of a free and independent student organization in international affairs."[32]

In 1967, after many of the CIA's domestic activities had been disclosed, President Johnson appointed a committee to examine the CIA's relationships with private organizations. The committee recommended unanimously and the President adopted as national policy, that: "No federal agency shall provide any covert financial assistance or support, direct or indirect, to any of the nation's educational or private voluntary organizations."[33] However CIA support to many domestic organizations apparently continued until new ways to finance them could be developed.[34] In some cases, such groups were supported for many years by CIA "severance payments."[35]

The Agency's covert activities in respect to private organizations and the surveillance of domestic political groups acknowledged in Mr. Colby's January, 1975 testimony raise serious questions as to the statutory boundaries of the CIA's authority to operate within the United States. The subsequent section will analyze these boundaries, as well as the CIA's own conception of them as set out in the statements of the Director of Central Intelligence.

B. *Statutory Limitations Upon CIA Activities in the United States*

The only express statutory limitations upon the activities of the CIA are those found in Section 102(d)(3) of the National Security Act of 1947 (50 U.S.C. 403[d][3]) which provides that it shall be the duty of the Agency

> "(3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: *Provided*, That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions . . . . *And provided further*, That the Director of Central

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Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;"

The language of the first *proviso* was derived from President Truman's Executive Order of January 22, 1946, establishing the Central Intelligence Group, the CIA's predecessor, which stated:

"4. No police, law enforcement, or internal security functions shall be exercised under this directive."

It was further provided:

"9. Nothing herein shall be construed to authorize the making of investigations inside the continental limits of the United States and its possessions, except as provided by law and Presidential directives."

The National Security Act of 1947 as originally proposed in Senate Bill 758 and House Resolution 2319 (80th Congress, 1st Session) did not expressly state either the powers and duties of the CIA or any limitations thereon. Instead, those bills in effect provided that the CIA would assume the responsibilities of the Central Intelligence Group as set forth in President Truman's Directive. As finally passed, however, the statute expressly adopted, generally verbatim, the powers and duties of the Agency and limitations thereon contained in the Order.[36]

That part of the *proviso* which states that the CIA shall have "no police, subpoena, [or] law-enforcement powers" is clear, and no serious difference of opinion as to what is meant by that phrase appears to have arisen. The term "internal security functions," however, has no well established meaning and is nowhere defined in the Act. Nonetheless, there was no doubt in the minds of the supporters of the National Security Act of 1947 that the Agency's primary concern is with foreign intelligence and that its activities in this country were to be strictly limited to those directly related to the correlation and evaluation of such intelligence.[37]

President Truman's Order dealt expressly with "Federal foreign intelli‹ gence activities," and it was clear to General Vandenberg, the Director of the Central Intelligence Group, that the CIA in assuming the responsibilities of the Central Intelligence Group would similarly be involved only in foreign intelligence.

Thus, he testified in Senate hearings that:

"The role of the Central Intelligence Group is to coordinate this collection of foreign intelligence information and avoid wasteful duplication . . ."[38]

* * *

"One final thought in connection with the President's directive: It includes an express provision that no police, law enforcement, or internal security functions shall be exercised. These provisions are important, for they draw the lines very sharply between the CIG and

the FBI. In addition, the prohibition against police powers or internal security functions will assure that the Central Intelligence Group can never become a Gestapo or security police."[39]

The House also held hearings with regard to the proposed National Security Act of 1947. Dr. Vannevar Bush, a witness in support of the Act, when asked whether there was any danger that the CIA might become a Gestapo, replied:

"I think there is no danger of that. The bill provides clearly that it is concerned with intelligence outside of this country, that it is not concerned with intelligence on internal affairs . . . .

"We already have, of course, the FBI in this country, concerned with internal matters, and the collection of intelligence in connection with law enforcement internally."[40]

Secretary of War Forrestal, also testifying in favor of the Act, similarly said:

"The purposes of the Central Intelligence Authority [sic] are limited definitely to purposes outside of this country, except the collation of information gathered by other Government agencies.

"Regarding domestic operations, the Federal Bureau of Investigation is working at all times in collaboration with General Vandenberg. He relies upon them for domestic activities."[41]

Official recognition of these limitations has also been expressed by top CIA officials. Testifying before the Senate Armed Services Committee in January, 1975, former Director Richard Helms stated:

"It so happens that the word 'foreign' does not appear in the act. Yet there never has been any question about the intent of the Congress to confine the agency's intelligence function to foreign matters. All the directors from the start—and Mr. Colby is the eighth in the succession—have operated on the clear understanding that the agency's reason for being was to collect intelligence abroad."[42]

William E. Colby, the present CIA Director, reported that he approved a proposed amendment to the National Security Act of 1947 to

". . . add the word 'foreign' before the word 'intelligence' wherever it appears in the act, to make crystal clear that the agency's purpose and authority lie in the field of foreign intelligence."[43]

There is general agreement, therefore, that the CIA's primary concern i[s] "foreign intelligence" and that it is to have no "internal security functions." What is not clear is the exact meaning of those terms and the extent to whic[h] the CIA is or should be authorized to operate domestically.

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We have found no source which defines the term "internal security func-
tions" as used in the National Security Act or even attempts a definition, and
there is nothing in the legislative history of the Act which provides any cer-
tainty as to exactly what Congress intended to prohibit.
Some limited assistance can be derived from judicial usage of the term in
related areas. In *United States* v. *United States District Court*, 407 U.S. 297
(1971) (the so-called "Keith" case), the Supreme Court held that the Fourth
Amendment prohibits warrantless electronic surveillance in cases involving
"domestic security," a term which the Court used interchangeably with "in-
ternal security." The Court spoke of the difficulty of defining "the domestic
security interest" and the "inherent vagueness of the domestic security con-
cept" and never provided a complete definition. It did, however, indicate
that in so far as the question related to electronic surveillance, "domestic
security" was not involved where the activities were those of a foreign power
or its agents, whether within or without the country, and, as a corollary, that
"domestic security" was involved where the activities were those of American
citizens who had no significant connection with a foreign power, its agents
or agencies.
The Keith case notwithstanding, however, Messrs. Helms and Colby ap-
pear to have adopted a different definition of the term "internal security"
based solely on whether or not the intelligence activities are conducted in
this country. Thus according to Mr. Helms:

"... The F.B.I. handles the counterintelligence function inside our
shores. The C.I.A. does the job abroad ...."[44]

and as stated by Mr. Colby:

"Counterintelligence activities in this country, for our internal
security, are the responsibility of the F.B.I.
"However, the National Security Council has directed the C.I.A.
to conduct 'clandestine counterintelligence outside the United
States.' ..."[45]

The limitations on the CIA's authority to act domestically have been con-
fused by its power to protect "intelligence sources and methods from un-
authorized disclosure" [§ 403(d)(3)]. The extent to which this is used to
justify domestic operations is reflected in the one federal court opinion in-
volving domestic CIA activities. In *Heine* v. *Raus*, 261 F. Supp. 570 (D. Md.
1966), vacated and remanded 399 F. 2d 785 (4th Cir. 1968), an employee of
the CIA asserted a defense of absolute privilege against a charge of slander,
on the ground that he had been instructed by his CIA superior to warn the
members of an Estonian emigre group in the United States that plaintiff was
a Soviet agent and that when he did so he was acting within the scope of his
employment and authority.
Plaintiff contended that the statements made by defendant were actions
beyond the statutory power of the CIA because 50 U.S.C. 403(d)(3) provides
that the Agency shall have no internal security functions. Plaintiff argued

that agencies such as the FBI "must deal with security matters arising within
the borders of the United States." The court noted, however, that one of the
functions entrusted to the CIA was the protection of intelligence sources and
methods, and cited the affidavit filed by Richard Helms stating that the de-
fendant had been instructed to inform the emigre group about the plaintiff
"to protect the integrity of the Agency's foreign intelligence sources." The
court concluded (p. 576):

"It is reasonable that emigre groups from nations behind the Iron
Curtain would be a valuable source of intelligence information as to
what goes on in their old homeland. The fact that the immediate in-
telligence source is located in the United States does not make it an
"internal-security function," over which the CIA has no authority.
The Court concludes that activities by the CIA to protect its foreign
intelligence sources located in the United States are within the power
granted by Congress to the CIA."

In attempting to define the appropriate limits of CIA domestic activity, it
is instructive to review the perimeters established by the CIA itself. For this
purpose, we set forth below an analysis of the public statements of Messrs.
Colby and Helms regarding permissible activities of the CIA.

DOMESTIC ACTIVITIES VIEWED AS PERMISSIBLE BY THE CIA

1. Recruiting, screening, training and investigating employees.[46]
2. Investigating Americans with whom the CIA "anticipates some rela-
tionship—employment, contractual, informational or operational." These
include actual or potential contacts of the Agency, consultants and inde-
pendent contractors, and individuals employed by contractors.[47]
3. Identifying "individuals who might be of assistance to agency intelli-
gence operations abroad."[48]
4. "Interviewing American citizens who knowingly and willingly share
their information about foreign subjects with their government."[49]
5. "Contracting for supplies essential to foreign intelligence operations."[50]
6. Contracting with U.S. industrial firms or research institutes for research
and development of technical intelligence devices and enlisting the capabili-
ties of the American scientific, technical and other research communities to
assist in research and analysis. This includes, in some cases, the establishment
of separate organizations "under a cover story of commercial justification."[51]
7. Collecting foreign intelligence from foreigners in the United States;
developing relationships with foreigners in the United States who might be
of assistance to the collection of intelligence abroad.[52]
8. Resettling foreign defectors who take up residence in the United
States.[53]
9. Establishing support structures in the United States to permit CIA
operations abroad.[54]

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10. Providing training to foreigners in the United States.[65]
11. Carrying on ostensibly private commercial and funding activities to
support CIA operations, and in that connection negotiating with cooperat-
ing United States business firms and others on private cover arrangements.[66]
12. Carrying on investigations within the Government of unauthorized
disclosures of classified intelligence.[67]
13. Protecting intelligence sources and methods within the Agency.[68]
14. Disseminating to responsible United States agencies information on
the foreign aspects of the anti-war, youth and similar movements, and their
possible links to American counterparts; also supplying information to a
Government committee on the foreign aspects of civil disorders.[69]
15. Passing on to the FBI "information on foreign connections with
Americans"; advising the FBI of "possible foreign links with domestic organ-
izations"; providing at the request of the FBI coverage of foreign travel of
FBI suspects.[60]
16. Contributing to a "joint effort" to cover domestic unrest by increasing
its coverage of American students and others involved with foreign subver-
sive elements while travelling or living abroad.[61]
17. Passing the results of foreign intelligence operations to appropriate
U.S. agencies having a legitimate interest therein, e.g. advising the FBI of the
imminent arrival in the U.S. of a foreign terrorist, advising the Drug Enforce-
ment Administration regarding details of the drug traffic and appropriate
authorities regarding the evasion of U.S. export controls, etc.[62]
18. Supplying equipment and "safe houses" to other government officials
if to be used for a legitimate purpose.[63]

DOMESTIC ACTIVITIES VIEWED AS PROHIBITED BY THE CIA

1. Identifying and countering foreigners working within the United States
against our internal security (this, Mr. Colby says, is a function of the FBI).[64]
2. Helping to make policy regarding the collection of intelligence on
domestic groups.
3. Collecting, or providing the support necessary for collecting, intelli-
gence within the United States on domestic groups.[65]
4. Collecting intelligence on U.S. citizens abroad who do not appear to be
involved with the activities of foreign governments or foreign institutions.[66]

DOMESTIC ACTIVITIES OF THE CIA IN "GRAY AREA"

1. Preparing a psychological profile on a U.S. citizen such as Daniel
Ellsberg.[67]
2. Providing covert assistance to American educational or voluntary or-
ganizations.[68]
3. Inserting agents "into American dissident circles in order to establish
their credentials for operations abroad."[69]
4. Inserting agents into American dissident organizations to gather infor-

mation relating to plans for demonstrations, pickets, pro[illegible] or break-ins
that might endanger CIA personnel, facilities and information.[70]
5. Training local police personnel.[71]
6. Making a vulnerability study of a foreign embassy in Washington.[72]
7. Surreptitious entry into homes of employees and former employees;
physical surveillance and wiretapping of some persons who were not employ-
ees or former employees; opening the mail of attorney Bella Abzug and other
persons, and maintaining counter-intelligence files on her activities and those
of three other members of Congress.[73]

What conclusions can be drawn from the foregoing listings and the state-
ments of Messrs. Helms and Colby?

1. To the Agency, the term "foreign intelligence" means "information
associated with foreign happenings"[74] or "intelligence pertaining to foreign
areas and developments."[75] Nonetheless, although in Mr. Helms' words,
"the agency's reason for being . . . [is] to collect intelligence abroad,"[76] it is
evident from the activities listed above that much of its work is done in this
country and that the support structure in the United States which the Agency
believes is necessary to carry out its intelligence function now permeates our
national life and society to a very substantial extent. It is also apparent that
the operation of such a structure and the "need" to protect it have resulted
in, and served as a justification for, the Agency's intrusion into domestic
areas only distantly related to the field of foreign intelligence.

2. It is evident from the foregoing tabulation of permissible and prohib-
ited powers, as well as other statements of Messrs. Helms and Colby, that they
have had no consistent and common understanding of the activities pro-
hibited to the Agency by statute.

How is it that the Agency has become involved in "internal security" mat-
ters, despite its public position that subversive activities carried on within the
United States, whether by a foreign power or an American citizen, are not
within its jurisdiction?

One answer is that even though the Agency appears to have developed its
own working definition of "internal security functions," the lack of a sta-
tutory definition permits the Agency to adjust its meaning or to carve out
exceptions to it to fit the circumstances. As experience has shown, this is
particularly likely to occur when the Agency is under pressure from others
in the Executive Branch to provide information or assistance or when the
Agency believes one of its activities requires "protection."

Another answer in many cases seems to be that in the Agency's view, the
responsibility put upon the Director by the National Security Act to protect
"intelligence" sources and methods from unauthorized disclosure constitutes
authority to protect not only CIA files and sources, but all government docu-
ments and sources. There is no legislative history regarding Congress' inten-
tion in giving the Director this responsibility. Even Mr. Helms and Mr. Colby
appear not to agree as to the interpretation of the provision.[77] However in-
terpreted, the provision has been used to justify CIA domestic activity which
in our view involves the exercise by the CIA of internal security functions,
and thus to nullify the statutory prohibition against such activity.[78]

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III. *FOREIGN INVOLVEMENTS AND THEIR LEGAL AND CONSTITUTIONAL BASIS*

A. *Foreign Activities*

That the Central Intelligence Agency conducts disruptive political operations abroad that are not directly related to the gathering of information is not disputed. CIA Director William E. Colby, in his January 15, 1975 report to the Senate Appropriations Committee, described the third of the CIA's "three major functions" as being

> "To conduct clandestine operations to collect foreign intelligence, carry out counterintelligence responsibilities abroad, *and undertake —when directed—covert foreign political or paramilitary operations.*" (Emphasis added)[79]

One such paramilitary operation was the armed invasion of Cuba at the Bay of Pigs by a small army organized, paid and equipped by the CIA in April, 1961.[80] Another was the war in Laos, where from 1963 to 1973 the CIA with financial assistance from AID and the Defense Department, paid, equipped and directed an armed force of irregulars to fight the Pathet Lao and North Vietnamese Communists in Laos.[81] In fiscal 1973 the United States spent $353 million on military activities in Laos.[82] In discussing these involvements Mr. Colby has emphasized that they were directed by the National Security Council[83] and that the appropriate congressional committees were informed of the war in Laos.[84] However Senator Symington, Chairman of the Senate Armed Services Committee, has stated that he was not informed until long after the fact.[85] And Senator Ellender, then a member of the Senate Appropriations Intelligence Subcommittee charged with CIA oversight, stated in 1971 that he had not been informed of CIA plans to spend money on an army of 36,000 in Laos.[86]

The CIA has also acknowledged its covert political operations in Chile. In September, 1974 Representative Harrington made public the substance of testimony by Mr. Colby to the Intelligence Subcommittee of the House' Armed Services Committee regarding political activities in Chile by the CIA from 1970 to 1973.[87] According to this account, the Nixon Administration authorized a total of $8 million for expenditure on such activities as campaigns of anti-Allende candidates, subsidy of an anti-Allende newspaper, purchase of a radio station and other projects, although a lesser amount was actually disbursed.[88] President Ford subsequently stated that the covert funds had been spent in Chile to "preserve opposition political parties," but said that he would take no position on whether such CIA activities were permitted by international law.[89]

B. *Statutory Framework for CIA Covert Political Operations*

Serious questions have been raised regarding the legal justification for and the political wisdom of the CIA's foreign political operations. Since this re-

port is concerned solely with the constitutional and statutory issues affecting the CIA, it will not focus on any of the political issues but rather will be limited to a review of the legal authority upon which the CIA's foreign covert operations are said to be based.

Prior to the passage of the Foreign Assistance Act of 1974 which was signed into law on December 31, foreign covert operations not directly linked to the gathering of intelligence were justified under the fifth and last of the duties established for the CIA under the National Security Act of 1947. Pursuant to that provision it was the CIA's duty "to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from to time direct."[90] Richard Helms, while Director of the CIA, took this approach in a speech delivered on April 14, 1971 in which he said that the language of this provision

> "was designed to enable us to conduct such foreign activities as the national government may find it convenient to assign to a 'secret service'."[91]

Director Colby also implied as much in his nomination hearings when he referred to that provision as "the authority under which a lot of the Agency's activities are conducted."[92]

Upon careful analysis of the provision's language, however, the interpretation forwarded by Messrs. Helms and Colby does not appear to be warranted. Not only must the "other functions and duties" be "related to intelligence," they must also be performed only upon the direction of the National Security Council. The authority of the National Security Council is therefore the key issue and the limitations upon the NSC's authority are clear. The NSC is not an action agency. Its primary function is

> "To *advise* the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security." (Emphasis added)[93]

The NSC was also given certain "additional functions," none of which gave it any more operational responsibility than its primary function. These additional functions were

(a) to perform "such other functions as the President may direct, for the purpose of more effectively *coordinating* the policies and functions of the departments and agencies of the Government relating to the national security . . .";[94]

(b) "*to assess and appraise* the objectives, commitments, and risks of the United States in relation to our actual and potential military power, in the interest of national security, for the purpose of making recommendations to the President in connection therewith";[95]

(c) "to *consider* policies on matters of common interest to the de-

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partments and agencies of the Government concerned with the na-
tional security, and to make *recommendations* to the President in
connection therewith;"[96] and

(d) "to make such *recommendations, and such other reports* to the
President as it deems appropriate or as the President may require."[97]
(Emphasis added)

The powers given to the National Security Council by Congress, therefore,
were either of an advisory nature or were related to the coordination of the
policies and functions of the other agencies in the national security area.
Nowhere is the NSC directly given the power to conduct political operations.
It is therefore difficult to maintain that the CIA can define its covert activi-
ties as a delegation of power from the National Security Council, since the
NSC has no such power to delegate.

It is also interesting to note that in the provision of the National Security
Act of 1947 headed "Protection of Nature of Agency's Functions," which
section exempts the CIA from the provisions of any law requiring the publi-
cation or disclosure of organizational information, justification for the ex-
emption is based solely upon "the interests of the security of the foreign
intelligence activities of the United States" and the protection of "intelli-
gence sources and methods from unauthorized disclosure."[98] This means
either that nonintelligence covert activities were not contemplated by Con-
gress or that such activities were not intended to be exempted from the dis-
closure laws,[99] an interpretation which is unlikely since it would render any
such activities ineffective.

On a more general level, the CIA's covert activities not directly related to
the gathering of intelligence are in some instances inconsistent with its basic
purpose, that of gathering sufficiently detailed and accurate information to
enable our Government to formulate foreign policy. To the extent that the
CIA's activities conflict with rather than assist in the formulation of foreign
policy, congressional purpose would appear to have been thwarted.

Prof. Jerrold L. Walden has concluded as the result of a detailed analysis
of the congressional debates establishing the CIA that "at no place in the
legislative history of the C.I.A. is it apparent that Congress intended the
Agency to engage in subliminal warfare. The C.I.A. was touted as being ex-
clusively an intelligence coordinating body, and it was created as such."[100]
Walden points out that what few recommendations there were that such
activities be allowed were not adopted.[101] Other participants favorable to
such operations explicitly acknowledged their exclusion from the coverage
of the legislation. For example, Representative Patterson (R. Conn.) stated
in the debate leading to enactment of the 1947 law that while he clearly
wanted "an independent intelligence agency working without direction by
our armed services, with full authority in operation procedures," he recog-
nized that it was "impossible to incorporate such broad authority in the bill
now before us . . ."[102]

That the CIA was intended for intelligence gathering purposes only is also
reflected in the relevant House and Senate committee reports. According to

one House report the CIA was created in order that the [National] Security
Council "in its deliberations and advice to the President, may have available
adequate information," the CIA to "furnish such information."[103] The Sen-
ate Armed Services Committee's report set out in its statement of basic ob-
jectives that ". . . we must make certain . . . that a central intelligence agency
collects and analyzes that mass of information without which the Govern-
ment cannot either maintain peace or wage war successfully . . ."[104] Nowhere
in any report is any reference made to activities other than those of an in-
telligence-gathering nature.

Ironically, the only clear congressional authorization for the CIA to con-
duct covert activities resulted from an attempt to limit those activities. The
authorization is contained in Section 663 of the recently enacted Foreign As-
sistance Act of 1974 which amends the Foreign Assistance Act of 1961 to
add the following new section:

> "Sec. 663. Limitation on Intelligence Activities.—(a) No funds
> appropriated under the authority of this or any other Act may be
> expended by or on behalf of the Central Intelligence Agency for oper-
> ations 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, in-
> cluding the Committee on Foreign Relations of the United States
> Senate and the Committee on Foreign Affairs of the United States
> House of Representatives. (emphasis added)
>
> "(b) The provisions of subsection (a) of this section shall not apply
> during military operations initiated by the United States under a
> declaration of war approved by the President under the War Powers
> Resolution."[105]

Under this provision no covert activity is permitted until (a) the President
makes a finding that such an operation is important to the national security
of the United States, *and* (b) the President reports "in a timely fashion" to
the appropriate congressional committee. While this provision makes it
clear that such a Presidential finding and report is a prerequisite to any CIA
covert operation, it provides no guidance as to what the report should
contain.

As will be shown in greater detail in a subsequent section, both Congress
and the Executive have constitutionally-based responsibilities in the estab-
lishment of foreign policy. Congressional supervision of CIA foreign politi-
cal activities is possible only if Congress is sufficiently informed; the report
required under the Foreign Assistance Act of 1974 could provide the neces-
sary information.

To assure the usefulness of the report, however, further guidelines should
be established by Congress, such as a set of basic questions to be answered by
each such report. At a minimum, Congress should require legislatively that

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each such report be accompanied by a proposed budget to be followed up, as promptly as possible, by a statement of the funds actually expended for the operation. The proposed budget would give the legislators an idea of the scope of the program intended, enabling them to focus more clearly on the plan, and the follow-up budget would serve as a check on the accuracy of the initial report. Such a requirement would be a logical addition to Section 663, the basic concern of which is the expenditure of funds by the CIA.

B. *Imposition of Substantive Standards in Foreign Political Activities*

Professor Stanley Futterman suggests that if the CIA is to be allowed to continue to conduct political activities abroad, some standards should be established to place limits on these activities. Futterman, *Toward Legislative Control of the CIA*, 4 Int'l Law & Pol. 431, 446 (1971). For example, Professor Futterman urges that the CIA "should never torture holders of information, or, at least short of a war situation, engage in political assassination." Others, including Rep. Michael Harrington, have suggested that the CIA should be limited to gathering intelligence, purportedly the intention of Congress in 1947 in establishing the Agency, and prohibited from conducting any clandestine political activities.[100]

Establishment of standards is related to the basic question of what role the United States should play in international affairs—i.e., should a nation engage in espionage and undeclared wars—and of what role Congress should play vis-a-vis the President in directing the foreign affairs of our country.

These issues can be raised but not answered within the scope of this report. However, they are appropriate, and indeed vital, for congressional consideration.

C. *International Law*

In order to assess whether or not the activities of the CIA have violated international law, one must recognize that international law itself is a continually evolving area. As one commentator has explained, "the emphasis nations currently place on political and ideological warfare has, as a matter of necessity, resulted in the creation of new forms of 'indirect' or 'subversive' intelligence that are not amenable to traditional criteria and definitions [of international law]." Comment, *The Dominican Crisis*, 4 Duquesne Univ. L.R. 547, 556 (1965–6).

It has been urged that direct military intervention, such as the Bay of Pigs incident in 1961, is clearly an interference in the internal affairs of another state. Friedman, *United States Policy and the Crisis of International Law*, 59 A.J.I.L. 857, 865 (1965). It has also been argued that international law precludes the more indirect CIA operations, such as the alleged funding and other assistance provided various political groups in Latin America.[107] Professor Quincy Wright suggests that as a basic proposition of international law, every state has the right to enact within its territory any legislation whatever (except an abridgment of diplomatic immunities), and that such legis-

lation must be respected by other states in time of peace. He therefore concludes that all espionage activities authorized by a government which violate the internal law of the target country (which would presumably include bribery, riots, and disruptive activity, along with murder, theft and other violent actions) are in violation of international law. *The Pueblo Seizure, Facts, Law, Policy*, 69 Proc. Am. Soc. Int. L.2, at 8–9 (1969). The Universal Declaration of Human Rights and the Covenants also contain standards which guarantee to the citizens of all states the fundamental right of self-determination and the right to govern their own affairs.

On the other hand, it has been asserted that since the communist countries take the position that wars of "national liberation" are valid under international law, see Reisman, *Private Armies in a Global War System: Prologue to Decision* 14 Va.J. Int. Law 1 at 4–5 (1973), the actions taken by the West to anticipate, counteract and otherwise prevent such communist activities prior to the full outbreak of war are lawful either as legitimate means of self-defense or otherwise.[108] As State Department Legal Advisor Leonard Meeker stated with regard to United States intervention in the Dominican Republic:

> ". . . [R]eliance on absolutes for judging and evaluating the events of our time is artificial, . . . black and white alone are inadequate to portray the actuality of a particular situation in world politics, and . . . fundamentalist views on the nature of international legal obligations are not very useful as a means to achieving practical and just solutions to difficult political, economic, and social problems. . . . It does not seem to me that law and other human institutions should be treated as abstract imperatives which must be followed for the sake of obeisance to some supernatural power or for the sake of some supposed symmetry that is enjoined upon the human race by external forces. Rather, it seems to me that law and other institutions of society should be seen as deliberate and hopefully rational efforts to order the lives of human communities—from small to great—in such a way as to permit realization by all members of a community of the full range of whatever creative powers they may possess. . . . We recognize that, regardless of any fundamentalist view of international law, the situation then existing required us to take action to remove the threat and at the same time to avoid nuclear war. In the tradition of the common law we did not pursue some particular legal analysis or code, but instead sought a practical and satisfactory solution to a pressing problem."[109]

Greater guidance can be found in the treaties into which the United States has entered and to which it is bound. Because of the large number of treaties to which the United States is a party, we have limited our review to the countries of Latin America. Despite the small size of this sampling, several interesting points emerge.

In the additional Protocol Relative to Non-Intervention, signed in 1936 by Argentina, Paraguay, Honduras, Costa Rica, Venezuela, Peru, El Salvador,

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Mexico, Brazil, Uruguay, Guatemala, Nicaragua, Dominican Republic, Colombia, Panama, Chile, Ecuador, Bolivia, Haiti, Cuba and the U.S.A.,[110] the parties "declare inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties" (Article 1). Similarly, the "Convention on Rights and Duties of States," proclaimed Jan. 18, 1935,[111] provides in Article 8: "No state has the right to intervene in the internal or external affairs of another."[112] Article 11 asserts:

> ". . . The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily."

In the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), proclaimed in December, 1948,[113] the parties "undertake to submit every controversy which may arise between them to methods of peaceful settlement." (Article 2). In Article 6, the treaty sets forth that if "the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is *not* an armed attack . . . the Organ of Consultation shall meet immediately in order to agree on measures which must be taken to assist the victim of aggression" (emphasis added).

Finally, in the Charter of the Organization of American States,[114] the signatories affirm that "International order consists essentially of respect for the personality, sovereignty and independence of States . . ." (Article 5[b]), that "Every American State has the duty to respect the rights enjoyed by every other State in accordance with international law" (Article 7) and that "No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind." (Article 16).

Thus, although some questions may exist under the principles of international law, the obligations of the United States under its treaties are clear. To the extent that the activities of the CIA violate these treaties, the Executive is abrogating policy established through the advice and consent of the Senate as the foreign policy of the United States and international obligations of our Government.

D. *Constitutional Issues Regarding Foreign Covert Political Activities*

The Constitution draws no clear boundaries between the foreign affairs responsibilities of Congress on the one hand and those of the President on the other. No cut-off point exists where the powers of one end and those of the other begin. Certain limited powers are assigned to both but an enumeration of those powers provides little help in defining the relative jurisdictions of the two branches of Government. What remains is a broad area in which either branch is able to operate subject only to its own limitations and to any

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counter-efforts which might be undertaken by the other. Differences in this area are resolved not by the courts but through intra-governmental conflict, each branch making such use as it is able of its unique powers and its ability to gather support in the political arena.

As far as Congress is concerned, it was expressly vested by the Constitution with the general "power to provide for the common Defence . . . of the United States,"[115] supported by the more specific powers to "declare War,"[116] "raise and support Armies . . . ,"[117] "provide and maintain a Navy,"[118] "make rules for the Government and Regulation of the land and naval Forces"[119] and "provide for calling forth the Militia."[120]

By giving Congress the power to declare war, the framers of the Constitution were attempting to make certain that no such action would be taken without broad and meaningful public debate. James Wilson, one of the most active participants in the drafting and passage of the Constitution, expressed this attitude when he told the Convention that the power to "declare" war was lodged in Congress as a guard against being "hurried" into war, so that no "single man [can] . . . involve us in such distress."[121] Congress' power to declare war is limited only by the power of the President to repel sudden attacks without congressional authorization.[122] Such an exception, which recognizes that Congress as a deliberative body might not be able to respond sufficiently quickly to an attack, was the express intent of James Madison and Elbridge Gerry during the drafting of the Constitution when they moved to replace the phrase "make war" with the ultimately adopted "declare war."[123]

Whatever might have been the intentions of the framers, however, it is clearly unrealistic to believe that the power to declare war, taken literally, automatically gives Congress control over the country's military involvement. Only the Executive Branch is structured to deal with the complexities of foreign affairs on a daily basis, and whether the President's power to do so is founded solely in the powers enumerated in the Constitution or derives in bulk through his duty to "take Care that the Laws be faithfully executed,"[124] his power in conducting foreign affairs cannot be seriously questioned.[125] While this power relates basically to the execution of our foreign policy, however, left unchecked by a benign Congress it becomes the force which dictates what our foreign policy is to be.

The President's role in foreign affairs has explicit limits. The ultimate policy decision to engage in war can be made only by Congress; a formal declaration is not required, any action from which congressional consent or ratification might be clearly inferred being constitutionally sufficient.[126] Armed forces and the militia can be raised and supported only by Congress. Treaties can be entered into only with the concurrence of two-thirds of the Senators present.[127]

Many aspects of the CIA's covert political activities abroad remain unclear or unverified. However, certain CIA operations which have been acknowledged by the Agency appear to be patently unconstitutional. The Bay of Pigs invasion, for example, was a usurpation by the Executive of Congress' power to raise and support Armies . . ."[128] and to "declare

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War."[129] Similarly unconstitutional was the recruiting and supporting over a period of years of a large army in Laos without congressional knowledge.[130] Both the Cuban and Laotian operations might have been justifiable had they involved the need to act promptly to repel sudden attacks upon the United States. The planning of both operations, however, took sufficiently long as to eliminate any reason for not involving Congress.

In still other actions, such as those in Chile,[131] the CIA conducted activities which apparently breached treaties ratified by the Senate. In ratifying these treaties, the Senate was exercising its constitutional power to set the standards which guide the President in the conduct of foreign policy. The CIA's violation of these treaties contravened the standards established by the Senate and undermined its constitutional role.

It is the opinion of some that many of these abuses result from improper internal controls or lack of accountability. It is thought, therefore, that organizational reform could be used to create an effective deterrent to further illegal activities. Among the steps recommended are a limit on the Director's term of office, clearly designated channels of responsibility, an internal "Inspector General" with the right to take administrative action against individuals, and the mandatory rotation of senior officials. We believe that these and similar reforms should be given serious consideration.

By failing to provide proper review of CIA operations, Congress has relinquished to the CIA its own constitutionally-based responsibility in the formulation of our foreign policy.

Under such circumstances, a President acting entirely within his constitutional prerogatives could lead the country to a point where Congress could do nothing but support the *status quo*, thus effectively "declaring" war. To the extent that Congress by its inaction allows such a situation to arise, it is violating its constitutional trust as seriously as if it were affirmatively passing legislation unconstitutional on its face.

Congress has not necessarily met its constitutional obligations with the passage of the CIA amendment to the Foreign Assistance Act of 1974. If this provision serves merely to perpetuate the past practice of providing limited information to a few sympathetic senior committee members,[132] the new law will provide no effective means for congressional assertion of its constitutional role. Only by subjecting the CIA to a continual and meaningful review process and by promptly challenging any activities which are contrary to its own general foreign policy objectives will Congress be realizing this duty.

Mr. Colby has referred to the Agency's need to protect "intelligence secrets" as in "obvious potential conflict . . . with the right of citizens in a democracy to know what their Government is doing in their name (and with their money)."[133] It should be recognized that Congress has in the past worked out a variety of procedures for safeguarding information while continuing to exercise oversight of Executive actions. Former Attorney General Elliot Richardson has testified that classified and other sensitive information is "constantly" made available to congressional committees in executive session or otherwise under terms and conditions limiting or prohibiting disclosure to the public.[134] However, if the ultimate choice in balancing these interests

were between the constitutional requirement of effective control of American foreign policy by our elected representatives on the one hand and the clandestine foreign political activities of a small number of unaccountable bureaucrats on the other, we would opt for congressional control.

IV. *BUDGETARY PROCEDURE AND ITS STATUTORY BASIS*

A. *Funding Arrangements: The Present Process of Appropriation*

The question persists why Congress has not acted sooner to prevent the CIA from carrying out foreign policy abuses. Part of the answer lies in the fact that by enacting and implementing unique budgetary procedures which allow the Congress to vote on the CIA budget without knowing its contents, the Congress has abandoned its most effective method of controlling the activities of the CIA. An understanding of these procedures is essential to an evaluation of Congress' present role in overseeing the Agency.

The CIA budget process begins like that of any other executive agency with a budget request to the Office of Management and Budget (OMB).[135] This request is supposedly reviewed by the Intelligence Resources Advisory Committee (IRAC) chaired by the Director of Central Intelligence (DCI) and consisting of representatives from the Departments of State, Defense and the OMB, and coordinated with the intelligence requests of other agencies before it is formally submitted to the OMB, but such review is reportedly sketchy.[136] The OMB then conducts a detailed review of the CIA budget request, consisting of a written justification for the request, written responses to detailed questions posed by OMB staff and oral hearings.[137] During the review process, the CIA budget is coordinated with those of the other foreign intelligence agencies and the total intelligence budget is then forwarded by the President for submission to Congress.

However, the Congress never sees the actual CIA budget, nor do the Appropriations Committees of the House and Senate. Rather, the budget is reviewed and approved only by the Intelligence Subcommittee of the Appropriations Committee of each house.[138] Until the present Congress, the Intelligence Subcommittees have been composed of the chairmen of the full Appropriation Committees, the ranking minority member of the full committees and senior members of the Appropriations Subcommittees on Defense.[139] They are said to conduct extensive budget hearings attended by staff members of the Intelligence Subcommittees and representatives of the CIA.[140] In the House, a complete stenographic record is made of these proceedings, which is then stored at the CIA and delivered to the Capitol on request; in the Senate, no record of CIA budget hearings is made.[141] Once the Subcommittee decides what the CIA budget will be, it then divides up and disguises it in various appropriations of the Defense Department and other agencies.

Congress then votes on appropriations inflated by sums destined for the

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CIA without knowing either that they are doing so or the dollar amount earmarked for the CIA. Even if a Congressman suspects that an appropriation contains CIA funds, he has no means of discovering how much CIA money is entailed. Once the bills are enacted, the Appropriations Committee Chairmen supply the OMB with instructions as to which funds are to be transferred to the CIA, and the OMB carries out these instructions.[142]

B. *Statutory Basis and Constitutionality of Appropriations Process*

The legal authority for these extraordinary procedures is found in the Central Intelligence Agency Act of 1949.[143] Section 6 of the Act provides:

"In the performance of its functions, the Central Intelligence Agency is authorized to:

> (a) Transfer to and receive from other Government agencies such sums as may be approved by the Bureau of the Budget, for the performance of any of the functions or activities authorized under sections 403 and 405 of this title, and any other Government agency is authorized to transfer to or receive from the Agency such sums without regard to any provisions of law limiting or prohibiting transfers between appropriations. Sums transferred to the Agency in accordance with this paragraph may be expended for the purposes and under the authority of this Act without regard to limitations of appropriations from which transferred."[144]

Section 10(a) provides:

> Notwithstanding any other provisions of law, sums made available to the Agency by appropriation or otherwise may be expended for purposes necessary to carry out its functions . . .[145]

The language in these sections allowing transfers of money to the CIA "without regard to any provisions of law limiting or prohibiting transfers between appropriations" and providing for expenditure of "sums made available to the Agency by appropriation *or otherwise*" (emphasis added) and "without regard to limitations of appropriations from which transferred" seems difficult to reconcile with the *constitutional* requirement contained in Article I Sec. 9, Cl. 7 that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[146] A transfer of money to the CIA despite a prohibition against such transfer and the expenditure of that money in a manner forbidden by the appropriation legislation would not be "in consequence of appropriations made by law," but rather would be in derogation of such appropriations.

It has been convincingly argued that in passing the 1949 Act, Congress did not intend to exempt the CIA from substantive limitations on expenditures enacted by subsequent Congresses, but only to free it from compliance with technical funding limitations. Support for this argument can be found in the

fact that Section 6(a) quoted above, is followed by several sections exempting the CIA from other technical limitations, such as prohibitions on the exchange of appropriated funds other than for silver, gold, United States notes and national bank notes, restrictions on using personnel of other government agencies, and limitations on the payment of rent and making of improvements to leased premises.[147] Similarly, Section 10(a) contains a long list of housekeeping purposes for which sums may be expended, including "purchase, maintenance, and cleaning of firearms," "printing and binding," "association and library dues" and "repair, rental, operation and maintenance of buildings, utilities, facilities and appurtenances."

Further support for the view that the 1949 Congress did not intend to exempt the CIA from future substantive limitations on expenditures is found in the legislative history of the 1949 Act. Former CIA Director Rear Admiral Hillenkoeter, in a letter to Senator Millard E. Tydings, assured Congress that:

> "In almost all instances, the power and authorities contained in the bill already exist for some other branch of the Government, and the bill merely extends similar authorities to the Central Intelligence Agency."[148]

An identical assurance was given to the House of Representatives by the sponsor of the bill, Representative Sasscer.[149]

Thus the authority in the 1949 Act for the CIA to spend money "[n]otwithstanding any other provisions of law" does not free the CIA from compliance with later substantive restrictions on spending, such as those contained in the Foreign Assistance Act of 1974. Moreover, the existence of such restrictions, while providing a check on CIA expenditures, does not resolve the conflict between the present practice of concealing the CIA budget from the legislature and the constitutional requirement that money may not be disbursed except "in consequence of appropriations made by law." That requirement would be met only if Congress knowingly voted on the total budget amount.[150]

C. *The Present Accounting Procedure*

Once the money for the CIA has been appropriated and transferred, there is no way under present arrangements for Congress, much less the public to know how it has been spent. In order to assure that CIA activities will remain secret, the four subcommittees charged with oversight of the CIA meet in executive session and are not required to report to Congress as a whole.[151] No agency within the executive branch has a statutory duty to audit CIA expenditures, and although OMB performs some budgetary oversight, it relies on financial data supplied by the CIA, which it does not check independently.[152] As a result of the hidden appropriations procedure described above, the annual "Combined Statement of Receipts, Expenditures and Balances of the United States Government" (Combined Statement) published by the Secretary of the Treasury pursuant to 31 U.S.C. §1029 and Article I, Section

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9, Clause 7, of the Constitution, contains no mention of monies received and expended by the CIA.[153]

Neither of these provisions expressly exempts the CIA from its coverage, however. The relevant part of Article I, Section 9, clause 7, the Statements and Accounts Clause, requires that:

> "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

The legislation implementing this requirement, 31 U.S.C. §1029, states:

> "It shall be the duty of the Secretary of the Treasury annually to lay before Congress, on the first day of the regular session thereof, an accurate, combined statement of the receipts and expenditures during the last preceding fiscal year of all public moneys, including those of the Post-Office Department, designating the amount of the receipts, whenever practicable, by ports, districts, and States, and the expenditures, by each separate head of appropriation."[154]

Read alone, these provisions would seem to require an accounting of CIA receipts and expenditures along with those of all other executive agencies. However, the argument is generally made that the 1949 Act provides an exception to these requirements in the case of the CIA.

D. *Statutory Basis for the Present Accounting Procedure*

The language of the 1949 Act does not seem to free the CIA entirely from any duty to account to Congress or the public. The relevant provision states:

> "The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds; and for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified."[155]

Logic dictates that "the provisions of law and regulations relating to the expenditure of Government funds" referred to in the first half of subsection (b) must be provisions other than those relating strictly to accounting requirements. If accounting requirements were included among such "provisions" then the CIA would be exempted from them by this language, and the second half of the sentence would be rendered either superfluous or meaningless. Although it is addressed solely to the question of accounting, the second half of the sentence does not exempt the CIA from all accounting requirements, but only from accounting for expenditures made "for objects of a confidential, extraordinary, or emergency nature." Thus Congress seems to have expected that the CIA's expenditures for compiling and analyzing, if not gathering, intelligence would be publicly accounted for. If no accounting from the CIA were mandated, there would have been no need to define the particular types of expenditures for which the Director was not required to account.

E. *The Constitutionality of the Accounting Procedure: The Richardson Case*

The failure of the CIA to account publicly for its receipts and expenditures was recently challenged as unconstitutional in a suit brought under the Mandamus and Venue Statute, 28 U.S.C. §1361, to compel the Secretary of the Treasury to publish a complete Combined Statement. The district court dismissed the complaint for lack of standing and justiciability, but the Court of Appeals reversed, finding that the plaintiff had standing as a taxpayer to raise the claim that insofar as the 1949 Act excused the CIA from reporting its receipts and expenditures it was unconstitutional, and that he had raised a justiciable question. *Richardson* v. *United States*, 465 F.2d 844 (3d Cir. 1972). The Supreme Court granted certiorari on the question of taxpayer's standing and reversed 5-4, holding that the requirements of *Flast* v. *Cohen*, 392 U.S. 83(1968) had not been met. *United States* v. *Richardson*, —U.S.—, 41 L.Ed.2d678(1974).

Although the merits of Richardson's claim were never decided, they were discussed briefly by the Third Circuit in the course of its determination that a substantial constitutional question had been raised, and were again argued by both parties in their briefs to the Supreme Court. The Government maintained that the Statements and Accounts Clause had been intended by the Framers to allow the Congress to decide which Government expenditures should be made public. It noted that Mason, the author of the clause, had originally proposed an *annual* statement of account but that Madison's amendment had substituted the words "from time to time." Mason had opposed this amendment on the ground that it might allow too much secrecy by not requiring a report at regular intervals.[156]

In its brief, the Government urged the Supreme Court to infer from the fact that Madison's language was accepted despite these fears, that a certain latitude in the reporting requirement must have been intended.

Richardson, on the other hand, pointed out that the reason for Madison's amendment was his belief that to require reporting at regular intervals might lead to no reporting at all. This, Madison noted, was what had happened under the Articles of Confederation, which required semi-annual reporting; "a punctual compliance being often impossible, the practice has ceased altogether."[157] Richardson also pointed to the Virginia debates on the Constitution where Mason again objected to the words "from time to time" as being too "loose," and Lee replied that Mason's concern was "trivial," that the phrase "must be supposed to mean, in the common acceptation of language, short, convenient periods," and that [t]hese who would neglect this provision would disobey the most pointed directions."[158] To this Madison added that:

> "[he] thought it much better than if it had mentioned any specified period; because, if the accounts of the public receipts and expenditures were to be published at short, stated periods, they would not be so full and connected as would be necessary for a thorough comprehension of them, and detection of any errors. But by giving them an op-

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portunity of publishing them from time to time, as might be found easy and convenient, they would be more full and satisfactory to the public, and would be sufficiently frequent."[159]

Based on this statement, Richardson argued that Madison and Mason were in wholehearted agreement as to the desirability of full disclosure and differed only in their views as to how best to achieve it.[160]

Both Richardson and the Government drew the Court's attention to the language of Article I Section 5 Clause 3, which states "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy." The Government argued that it would be illogical to allow the Legislature an exception for matters requiring secrecy while not allowing the Executive Branch such an exception. Richardson maintained that the difference in language was intended to reflect the Framers' belief that while some matters may require secrecy, the receipts and expenditures of public money should never be concealed.[161]

The Government further bolstered its interpretation of the Statements and Accounts Clause by citing two instances in which Congress enacted secret appropriations bills prior to its passage of the 1949 Act. The first occurred in 1811 when President Madison requested of Congress a secret appropriation to be used in purchasing parts of Spanish Florida. This was not made public until 1818. The second instance consisted of the secret $2 billion appropriated for the Manhattan Project to develop the atomic bomb during World War II. It should be noted, however, that each of these examples involved one appropriation or series of appropriations for one specific purpose, not an entire system of appropriating money to be used on an annual basis for a particular agency regardless of the goals for which the money will be used. It should also be noted that at least in the case of the Florida appropriations bill, the entire Congress was aware of the acquisition plan, which is not the case when money is appropriated for the CIA.

As its final argument on the merits, the Government cited three other statutes which authorize Congress to exempt certain appropriated funds from the public accounting requirement. The oldest of the statutes, dating from 1793, is 31 U.S.C. §107, which states:

> "Whenever any sum of money has been or shall be issued, from the Treasury, for the purposes of intercourse or treaty with foreign nations, in pursuance of any law, the President is authorized to cause the same to be duly settled annually with the General Accounting Office, by causing the same to be accounted for, specifically, if the expenditure may, in his judgment, be made public; and by making or causing the Secretary of State to make a certificate of the amount of such expenditure, as he may think it advisable not to specify; and every such certificate shall be deemed a sufficient voucher for the sum therein expressed to have been expended."

Although this statute allows the President or Secretary of State to certify

expenditures without specifying their purposes, it does not become effective until Congress has appropriated money "for the purposes of intercourse or treaty with foreign nations." It does not permit a practice of concealing both receipts and expenditures, regardless of the purpose for which they were appropriated, as is done by the CIA.[162]

A second statute cited by the Government was 28 U.S.C. §537, covering expenditures by the Federal Bureau of Investigation for unforeseen emergencies of a confidential character. It provides as follows:

> "Appropriations for the Federal Bureau of Investigation are available for expenses of unforeseen emergencies of a confidential character, when so specified in the appropriation concerned, to be spent under the direction of the Attorney General. The Attorney General shall certify the amount spent that he considers advisable not to specify, and his certification is a sufficient voucher for the amount therein expressed to have been spent."

This statute, even more clearly than the previous one, limits the Executive's authority to spend money secretly to cases where Congress has specifically provided for it in a separate appropriations act. This is also true of the third statute relied on by the Government, 42 U.S.C. §2017 (b), regarding appropriations for the Atomic Energy Commission, which states simply:

> "(b) Any Act appropriating funds to the Commission may appropriate specified portions thereof to be accounted for upon the certification of the Commission only."

In contrast to the Government's interpretation of the 1949 Act, neither of these statutes purports to confer blanket authority on an Executive agency to ignore the requirements of the Statements and Accounts Clause and the statutes implementing it.[163]

In examining the scope of the Director's authority not to account for sums expended under the 1949 Act, it is important to view this authority in the context of a unique appropriations process applicable to no other agency. When other agency heads give special certification instead of accounting for their expenditures, the public can at least determine the amount secretly spent because the agency's total budget is listed in the Combined Statement and its normal expenditures are accounted for. In the case of the CIA, its total budget is never known even to Congress, and no receipts or expenditures are listed in the Combined Statement. Thus the 1949 Act as presently applied allows the Director of Central Intelligence far more authority to operate secretly than any other agency head.

This degree of secrecy conflicts with the constitutional mandate of the Statements and Accounts Clause. That Clause requires that at least the total amounts actually spent by the CIA be published in the Combined Statement.[164] Whether greater detail is mandated and, if so, what degree of specificity, are more difficult questions requiring a balance between the interests of national security and the right of the public to know.[165]

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V. THE RANGE OF REMEDIES

A. *Suits Challenging CIA Activities*

Because of the sensitive nature of the CIA's legitimate functions the courts may be reluctant to entertain challenges to its other activities. If the courts are to provide redress, however, a threshold question to be resolved is that of standing to sue.

(1) TAXPAYER'S STANDING

Although the previously discussed decision of the Supreme Court that Richardson lacked standing rested on narrow grounds, it contained broad language to the effect that Richardson's complaint lay more properly within the province of Congress than of the courts. It has therefore been argued that the decision closed the door to any judicial enforcement of the Statements and Accounts Clause.

The majority opinion in *Richardson* held only that the first requirement of *Flast* v. *Cohen*, 392 U.S. 83 (1968) had not been met, in that the plaintiff had failed to establish a logical nexus between his status as a taxpayer and the statute he was attacking. To establish this nexus, a taxpayer must challenge an exercise of the taxing and spending power of Congress. Technically, the *Richardson* holding does not foreclose a plaintiff who seeks not only to enforce the Statements and Accounts Clause but also to enjoin the expenditure of money by the CIA unless openly appropriated and accounted for, from claiming taxpayer's standing.

However, in dictum the Court conceded the correctness of Richardson's argument that if he lacked standing then no one could bring such a suit. The Court stated:

> "It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a representative Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them."

In view of this language, it appears doubtful that another plaintiff would be held to have standing even on a more expertly pleaded complaint.

(2) CONGRESSMAN'S STANDING

To the extent that the activities engaged in by the CIA have exceeded the scope of its statutory authority, one possible remedy is a Congressman's lawsuit. Congressman's standing has been held to rest on a broader basis than taxpayer's standing and to include challenges to the conduct of foreign policy. *Mitchell* v. *Laird*, 488 F.2d 611 (D.C. Cir. 1973).

In *Coleman* v. *Miller*, 307 U.S. 433 (1939), a leading case on legislator's standing, the Supreme Court held that twenty members of the Kansas Senate had standing to challenge the casting of a deciding vote on the ratification of the Child Labor Amendment to the United States Constitution by the Lieutenant Governor of Kansas. The court noted that the twenty Senators had all voted against ratification of the amendment, and that it would not have been ratified but for the vote of the Lieutenant Governor. The basis for standing was the legislators' interest in protecting their votes. This interest was also found to constitute a basis for standing in a suit by Senator Kennedy challenging President Nixon's use of the pocket veto. *Kennedy* v. *Sampson*, 364 F. Supp. 1075 (D.D.C. 1973).

A broader basis for standing was found in *Trombetta* v. *State of Florida*, 353 F. Supp. 575 (M.D. Fla. 1973) where members of the Florida legislature sought a declaratory judgment as to whether a provision in the Florida Constitution governing ratification of amendments to the United States Constitution conflicted with Articles V and VI of the Constitution. There the legislators were attempting to protect votes as yet uncast, and the court based its finding of standing on the "unresolved constitutional dilemma" confronting them.[100]

Other grounds for findings of Congressmen's standing have included their duties to consider whether to impeach, to make appropriations for the Vietnam war, and to take other legislative actions.[167] *Mitchell* v. *Laird*, *supra*. However, even when the standing requirement is met, a Congressman's suit challenging the conduct of foreign policy may be dismissed as raising a nonjusticiable political question. *Holtzman* v. *Schlesinger*, 484 F. 2d 1307 (2d Cir. 1973).

The question of Congressmen's standing is currently being tested in a suit filed in December, 1974 by Congressman Michael Harrington against William E. Colby, Henry Kissinger and William E. Simon. The complaint seeks four types of declaratory and injunctive relief: 1) a declaration that the performance of any non-intelligence related foreign activities by the CIA or any domestic surveillance break-ins or wiretapping by the CIA is illegal and an injunction against all such activity; 2) a declaration that the expenditure of

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funds or use of services under the purported authority of the exemptions contained in the Act is illegal when used for any of the purposes set forth in (1) above and an injunction against such expenditures; 3) a declaration that the failure of the CIA to report the activities listed in (1) above in the Federal Register in compliance with the Freedom of Information Act (5 USC §552) is illegal and a mandatory injunction requiring such reporting; and 4) a declaration that the failure of defendants to report in the Combined Statement receipts and expenditures used for the activities listed in (1) above is illegal and a mandatory injunction requiring such reporting. The theory of the Harrington complaint is that the 1949 Act exempts from reporting only such expenditures by the CIA as are spent in intelligence-related activities and that any exemptions taken pursuant to the 1949 Act for purposes other than those specified therein are illegal and should be enjoined.

In order to establish standing, the complaint alleges that the plaintiff Congressman's interest in a declaratory judgment stems from his constitutional duties (1) to consider impeachment of Colby, Kissinger and other civil officers of the United States, (2) to consider and vote for legislation proscribing the activities of the CIA, (3) to consider and vote for legislation proscribing or limiting the use by the Agency of any public funds and (4) to take other legislative actions relative to the activities of the Agency. It further alleges that Congressman Harrington has an interest in preserving the constitutional powers and prerogatives of Congress and that he has an interest in insuring that the Executive seek and obtain express and specific appropriations from Congress for the Agency except as the Executive may have been constitutionally authorized by statute to do otherwise. Related to this interest is the right as a Congressman to be informed whether the funds appropriated by any given appropriations bill may be expended by the CIA, and to participate in the legislative process upon the basis of such knowledge. Similarly the complaint asserts Harrington's interest as a Congressman in having the CIA comply with reporting and transfer provisions except insofar as it is legally and constitutionally exempt from them. The care and specificity with which standing is pleaded reflects the concern of Harrington's counsel that standing will be an important threshold issue in the case. However, even if he is held to have standing, the case might nonetheless be dismissed on "political question" grounds.

(3) CONGRESSIONAL GRANT OF STANDING TO SUE

It seems clear that if there is to be effective control of domestic surveillance activities of the CIA, standing to sue will have to be given to individual citizens who have been the targets of such activity.

An analogy can be made to military surveillance of civilian political activities.[168] In our view, the domestic surveillance activities of the CIA, like those of the Army, exceeded its statutory authority. Some of the reported activities such as warrantless electronic surveillance would of course be unconstitutional even if not contrary to statute, if they involve domestic security. But the decision of the Supreme Court in *Laird* v. *Tatum*, 408 U.S. 1

(1972), requiring a showing of direct injury or the threat c[illegible] aminent injury, makes it difficult, if not impossible, effectively to control such surveillance activities under present law.[169]

The proposed Freedom From Surveillance Act of 1973 (S. 2318, 93rd Congress, 1st Session) which would prohibit surveillance by the military, serves as an excellent model of the type of legislation which appears to be needed with respect to CIA activities impinging upon the rights of individual citizens. The proposed statute first sets forth a broad, but nonetheless precise, description of the prohibited activities and the penalties imposed and then narrowly describes the exceptions to the general rule.

New legislation which would not only impose sanctions[170] but would give targeted citizens standing to sue is, therefore, clearly desirable. Such persons should be granted the following rights, at a minimum:

1. The right to bring a civil action for damages (including punitive damages) and/or for equitable relief regardless of the actual amount of pecuniary damage suffered.
2. The right to recover attorneys' fees if plaintiff substantially prevails.
3. The right to bring suit in the district where the violation occurs, where plaintiff resides or conducts his business, or in the District of Columbia.

Other provisions which might be considered would be: giving any case brought pursuant to the statute docket precedence and requiring the Government to answer the complaint within thirty rather than sixty days.[171] The proposed Freedom From Surveillance Act, *supra*, also includes a provision authorizing class actions to enjoin surveillance by the military, and such a provision would seem to be equally desirable in the case of the CIA.

Finally, in view of the trepidation with which the courts have habitually dealt with matters relating to national security and foreign relations, particularly where the CIA is involved, it might be desirable to include provisions expressly granting the trial court power to review *in camera* relevant documents as to which a privilege is claimed (this power is now granted under the Freedom of Information Act, as recently amended) and making clear plaintiff's right to ascertain through speedy and effective discovery procedures whether improper domestic surveillance has, in fact, occurred.

B. *Stricter Congressional Oversight*

As a result of disclosures concerning CIA domestic and foreign activities many bills and resolutions have been introduced in Congress to define and limit the CIA's functions, to restrict its domestic operations and to provide for more effective congressional oversight over its foreign political activities.[172]

It is easier to agree in principle that each of these is desirable than to put in statutory form a clear, workable application of the principle. We will discuss below some of the approaches presented.

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(1) DOMESTIC ACTIVITIES

A number of bills seek to eliminate domestic surveillance operations. In S. 3767, 93rd Cong., 2nd Sess. (1974), the CIA is specifically unauthorized to:

> "(1) carry out, directly or indirectly, within the United States, either on its own or in cooperation or conjunction with any other department, agency, organization, or individual any police or police-type operation or activity, any law enforcement operation or activity . . ."

In addition, the CIA would not be permitted to:

> "(2) participate, directly or indirectly, in any illegal activity within the United States.[173]

Others (e.g. S. 2597 93rd Cong., 1st Sess. [1973]) create exceptions for "carrying on within the United States activities necessary to support its foreign intelligence responsibilities." This would appear to provide a broad loophole which would not effectively bar such activities as opening the mail of Bella Abzug while she was a practicing attorney, and keeping counter-intelligence files on her activities and those of three other members of Congress (see Point IIB, *supra*).

Some members of the Committees preparing this report believe that such an exception would be appropriate if it were coupled with a *proviso* that internal security functions in support of foreign intelligence activities would be impermissible.

(2) CONGRESSIONAL REVIEW OF FOREIGN POLITICAL ACTIVITIES; PRIOR APPROVAL OR LATER DISCLOSURE

The amendment to the Foreign Assistance Act of 1961, enacted as Public Law 93-559, Dec. 30, 1974, adding Sec. 663, requires only a report by the President as to CIA foreign operations "other than activities intended solely for obtaining necessary intelligence," to the appropriate committees of Congress, including the Senate Foreign Relations and the House Foreign Relations Committees. This Act does not, however, mandate authorization by Congress or any committee.

Some of the proposed legislation goes farther. H.R. 9511, 93rd Cong., 1st Sess. (1973), would prevent "covert" action without written approval of an oversight committee of Congress. "Covert" action is inadequately defined as being "the commonly accepted understanding of that term within the intelligence community of the Federal Government."

In H.R. 16,905, 93rd Cong., 2d Sess. (1974), funds are not to be appropriated for intelligence activities unless such operations are authorized by further legislation. The approach of this bill is to set up a congressional council which would have powers somewhat similar to the National Security Council. The limitation imposed by requiring authorization of intelligence operations by legislation enacted after the date of this Act would have consequences perhaps unintended by the draftsmen. It would appear that the CIA cannot receive funds for any activity unless Congress as a whole so authorized by vote, which would in effect impair any secret operations including intelligence-gathering.

(3) COMPOSITION AND POWERS OF OVERSIGHT COMMITTEES

Many different approaches have been suggested as to the composition of a joint committee to oversee the Agency's operations. One bill seeks a fourteen member committee, seven from the House and seven from the Senate, each to be divided among the two parties (H.R. 16,905); another seeks twenty-five members (S. 1547, 93rd Cong., 2nd Sess. [1974]).

In H.R. 16,905, the joint committee is authorized to conduct continuing studies and investigations of all security agencies, namely, the CIA, FBI, Secret Service, Defense Intelligence Agency, the National Security Agency and all other intelligence departments and agencies of the Federal Government.

Other bills have sought (1) detailed and regular reports to congressional committees (H.R. 7596, 93rd Cong., 1st Sess. (1973)); (2) increased powers of congressional committees to obtain as a matter of law, further information from the CIA (H.R. 13,798, 93rd Cong., 2nd Sess. [1974]) "Central Intelligence Agency Disclosure Act");[174] and (3) further study and correlating of information available to Congress relating to intelligence (S. Con. Res. 23, 93rd Cong., 1st Sess. [1973]).

It is apparent that congressional oversight has many variations. Regular reporting and submission of a proposed budget to a carefully organized joint committee representing all segments of Congress, should be a minimum.

VI. *RECOMMENDATIONS*

1. Despite the present restriction of the CIA to the foreign intelligence field and despite the prohibition against its exercising any internal security functions, its domestic activities—viewed as legitimate by the Agency—so pervade our national life and society as to make such restriction and prohibition almost meaningless. A revision of the National Security Act so as to define more precisely both the authority of, and the restrictions on, the Agency is plainly necessary.

Legislation for this purpose referred to in CIA Director William E. Colby's report to the Senate Appropriations Committee as acceptable to the CIA is inadequate. This legislation would add the word "foreign" before the word "intelligence" wherever it appears in the Act, and would add a prohibition against "any domestic intelligence operation or activity" to the existing bar against the exercise of police, law-enforcement or internal security functions. However, this prohibition would be "supplemented" by an additional proviso preserving for the CIA the right to carry on within the United States any activity "in support of its foreign intelligence responsibilities . . ."[175] It is difficult to determine which of the domestic activities now regarded by the CIA as not prohibited even though they appear to involve internal security functions, would be curtailed under such a proviso.

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It is recommended that new legislation be formulated, which would (a) clearly define the terms "internal security operation" and "domestic intelligence operation" in accordance with Recommendations 2 and 3 below, and (b) permit no exceptions to the ban on such operations by the CIA.

2. In light of recent testimony about CIA domestic activities, special attention should be given in any new legislation to the protection of First and Fourth Amendment rights of speech, association and privacy. In our view, CIA surveillance within the United States of any person who is not an employee of the CIA constitutes an "internal security function" proscribed by its present charter. Equally unlawful is the CIA's maintenance and dissemination of information concerning individuals in this country with no clear and direct involvement with foreign powers. Such CIA activities have a serious potential for infringement of First Amendment rights and are not necessary to the Agency's authorized objectives.

In addition, the exemption of the CIA from the restrictions contained in the Privacy Act of 1974[176] should be revised. That Act provides that any *citizen* or *resident alien* about whom records are kept by a federal agency may inspect and make copies of such records, request corrections, and add to the records a statement of the reasons for his disagreement if the agency refuses to make such corrections. Exceptions to the requirement of allowing individuals to inspect and correct their own records are made, *inter alia,* for (a) investigative material compiled by a law enforcement agency; (b) information specifically authorized by Executive order to be kept secret in the interest of national defense or foreign policy; and (c) records maintained by the CIA. The total exemption for any records kept by the CIA constitutes a broad and unnecessary loophole which severely weakens the protection to individual privacy which the Act otherwise affords. This exemption should be limited to cases where the CIA can demonstrate that the individual making the request has a clear and direct connection with a foreign power.

3. The responsibility placed upon the Director to protect intelligence sources and methods from unauthorized disclosure should be eliminated. Mr. Helms and Mr. Colby disagree as to how the present provision is to be interpreted, but however interpreted, the provision has been used to justify CIA domestic activity—such as the Ellsberg profile, the insertion of CIA agents into domestic "dissident" groups, and CIA investigations within the Government of unauthorized disclosures of classified intelligence—which in our view conflicts with the prohibition against the exercise by the CIA of internal security functions. This domestic activity is premised on an overly broad definition of "intelligence" which encompasses not only CIA files and sources, but all Government documents and sources. Any protection of domestic sources and methods other than routine safety measures which may be necessary must be carried out by the FBI. With regard to sources and methods outside the United States, the authority to protect them is implied as part of the Agency's intelligence-gathering function.

4. Neither the National Security Act of 1947 nor the Central Intelligence Act of 1949 contains any express authority for the CIA to undertake foreign political operations. The amendment to the Foreign Assistance Act requir-

ing the President promptly to report any such operation to the appropriate congressional committees represents an attempt to increase the CIA's accountability to Congress for its overseas activities. Congress has a constitutionally-based responsibility as a partner with the Executive in the establishment of foreign policy; the oversight committee should therefore consider any CIA political operation in the light of the foreign policy goals of Congress. If the committee members find that a particular CIA activity may conflict with these goals, congressional policy should be ascertained without revelation of specific details to Congress as a whole.

In order for the appropriate congressional committee to exercise its oversight responsibilities effectively under the 1974 amendment to the Foreign Assistance Act, the Act should be amended to require that the President's report on any proposed foreign political activity be defined to include a detailed proposed budget to be followed at a later date by an account of actual expenditures. Such a budget could assist the committee members in analyzing the scope and objectives of the proposed operations.

5. The funding process for the CIA is unique, in that the annual budget is discussed and voted upon only by one intelligence sub-committee of the Appropriations Committee in each house and is then divided up by the committee chairmen and disguised in various other appropriations so that the Appropriations Committee and the Congress as a whole do not know when, much less what total amount, they are voting for the CIA budget. However, the Constitution requires that at least the total budget must be separately and knowingly appropriated by Congress. The Constitution further requires the Executive to make a regular statement of account of all public money spent; thus, the total sum actually disbursed by the CIA should be published in the Combined Statement.[177]

The entire CIA budget should be reviewed by the joint congressional committee responsible for CIA oversight. This committee should be equipped with an adequate information-gathering staff and with enough professional accountants to allow it to perform meaningful budgetary review, and should require regular and special reports from the CIA. Budget oversight by this committee should include serious study of the CIA's proprietary corporations.

6. The legislation required to implement the above recommendations should confer standing to sue on injured citizens, such as those who have been the objects of surveillance. The holding of the Supreme Court in *Laird v. Tatum* to the effect that Government surveillance does not in itself create a chilling effect on First Amendment rights, has diminished still further the likelihood that a citizen who has been the object of CIA surveillance would be accorded standing under current constitutional standards, and has augmented the need for a new statutory enactment. It should be understood, however, that such legislation must not be interpreted as detracting from any presently established substantive rights, whether statutory or constitutional.

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Dated: March, 1975

FOOTNOTES

1 See, *e.g.*, letter dated 4/25/47 from Allen Dulles to Chan Gurney, Chairman of the Committee on Armed Forces, reproduced in *National Defense Establishment (Unification of the Armed Services) Hearings before the Committee on Armed Services, United States Senate, 80th Cong., 1st Sess. on S.758*, at 524.

2 Wise & Ross, The Invisible Government (New York, Random House, 1964) at 91–93. With the creation of the OSS, the United States for the first time became engaged in intensive strategic intelligence research, and extensive and covert activity, on a world-wide scale. Ransom, Central Intelligence and National Security (Cambridge, Harvard Press, 1958) at 64.

3 Hilsman, Strategic Intelligence and National Decisions (1956) at 29. The Joint Chiefs of Staff are credited with developing the plan eventually adopted by President Truman in the Statement of Lt. Gen. Hoyt S. Vandenberg, Director of Central Intelligence, reproduced in *National Defense Establishment*, *supra* at n.1, at 491, 491.

4 Presidential Directive of 1/22/46, 3 C.F.R. 1080 (1943–48 Comp.). See 11 Fed. Reg. 1337, 1339 (2/5/46); Kirkpatrick, The Real CIA (1968) at 74; Ransom, *supra* at n.2, at 75.

5 Wise & Ross, *supra* at n.2, at 93; Walden, *The C.I.A.: A Study in the Arrogation of Administrative Powers*, 39 Geo. Wash. L.Rev. 66, 70 (1970).

6 Wise & Ross, *supra*, at 93; Walden, *supra* at n.5, at 70.

7 Walden, *supra*, at 71.

8 H.R. Rep. No. 2734, 79th Cong., 2d Sess. 4 (1946); see, Walden, *supra*, at 70–72.

9 50 U.S.C. §401 *et seq.*

10 Rear Admiral Roscoe H. Hillenkoeter became its first Director on September 15, 1947.

11 50 U.S.C. §403(e) (1964); Walden, *supra*, at 73.

12 50 U.S.C. §403(c) (1964); Ford, Donovan of OSS, (Boston, Little Brown & Co., 1970) at 316–17. Professor Walden notes that heads of other government agencies were authorized in 1950 to suspend any employee "when deemed necessary in the interest of national security," 5 U.S.C. §22–1 (1964), but the broad authority granted to the Director of Central Intelligence is paralleled only by that conferred upon the Secretary of Defense with respect to employees of the National Security Agency, 50 U.S.C. §833 (1964). Walden, *supra*, at 74.

13 50 U.S.C., §403a-§403j (1964).

14 *Id* at §403 g.

15 *Id* at §403 j (b).

16 In other words, the Director can spend money from the CIA's appropriations on his personal voucher. The CIA is said, however, to have taken administrative measures strictly to control its expenditures and to require a complete internal accounting for the use of all its funds, vouchered or unvouchered. Ransom, *supra* at n.2, at 81, 263, n.5. See Dulles, The Craft of Intelligence (New York, Harper & Row, 1963) at 259.

17 50 U.S.C. §403(h).

18 *Id.* at §403(d)(5). See e.g. *Hearing before the Committee on Armed Services, United States Senate, 93rd Cong., 1st Sess., on Nomination of William E. Colby to be D.C.I.*, at 14, 19.

19 Wise & Ross, *supra*, n.2 at 91–5; Marchetti & Marks, The C.I.A. and the Cult of Intelligence (New York, Knopf, 1974) at 22–23. According to one authority, the NSC gave the CIA responsibility for "political, psychological, economic and unconventional warfare operations." Harry Rositzke, "America's Secret Operations: A Perspective," 53 *Foreign Affairs* 331, 31[?] (1975). The CIA's real role is therefore spelled out in a series of top-secret NSC directives ("NSCIDs"). Marchetti & Marks, *supra*, at 323. The fact that the Director participates in NSC meetings suggests that the scope of Agency operations may be largely self-determined. Ransom, *supra* at n.2, at 82.

20 According to Marchetti & Marks, *supra*, at 22, this was accomplished by means of a secret National Security Council Directive, NSC 10, 2.

21 Marchetti & Marks, *supra*, at 23.

22 Id.

23 *Id.* at 58; see Schwartzman, *infra* at n.86, at 493 n.1.

24 *Id.* at 78–9.

25 New York Times, Dec. 22, 1974, p. 1, col. 8.

On December 29, 1974 an ex-agent was quoted as describing his infiltration of the Students For A Democratic Society as one of a number of CIA agents assigned to spy on anti-war groups in New York between 1968 and 1972. He stated that the Agency had supplied him with psychological assessments of more than forty individuals to be used in connection with this spying. New York Times, Dec. 29, p. 1, col. 1.

In San Diego a former CIA official, Dr. Melvin Crain, who resigned in 1959 and is now a professor of political science, recalled an Agency practice of opening the mail of American citizens who were corresponding with relatives or friends in Russia, a practice alleged to have started in the summer of 1953. New York Times, Jan. 8, 1975, p. 24, col. 1.

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A few days later Ralph Stein, an ex-Army Intelligence agent, described how he had briefed CIA officers on radical activities in 1967, and how they seemed already familiar with the literature and the personalities of the left-wing movement. New York Times, Jan. 11, 1975, p. 11, col. 4.

26 New York Times, Jan. 16, 1975, p. 1, col. 1.

27 New York Times, Jan. 5, 1975, p. 1, col. 8.

28 Jerrold L. Walden, *"Proselytes for Espionage—The CIA and Domestic Fronts,"* 19 J. Pub. L. 179, 183, (1970). Michigan State University was alleged to have received $5,351,352.75 for a public administration and law enforcement program for the Government of South Vietnam. Walden, *supra*, at 181–183.

29 As quoted in Walden, *supra* at n.28, at 185.

30 *Id.* at 185–188.

31 *Id.*

32 *Id.* at 185.

33 Marchetti and Marks, *supra*, at 50.

34 *Id.* at 51.

35 *Id.*

36 The House Committee on Expenditures in the Executive Departments reported that the provision "prohibiting the agency from having the power of subpoena and from exercising *internal police powers*, provisions not included in the original bill nor in S. 758, were added by your committee." H.R. Rep. No. 961, 80th Cong., 1st Sess. (1947), p. 4. (Emphasis supplied.) Still another version of the functions to be prohibited to the CIA was set forth in a suggested redraft of S. 758 offered by the Reserve Officers Association of the United States which provided that the CIA was to have "no police or law-enforcement functions and *no domestic counter-intelligence functions." Hearings on S. 758 before the Committee on the Armed Services, United States Senate, 80th Cong., 1st Sess. (1947), Pt. 3*, p. 555 (hereinafter cited as *"S. 758 Hearings"*) (Emphasis supplied).

37 One possible "gray area," however, which will be considered hereafter, is the question of Congress' intention in charging the Director of the CIA with responsibility for the protection of intelligence sources and methods from unauthorized disclosure.

38 Testimony of General Hoyt Vandenburg at *S. 758 Hearings*, p. 498.

39 *Id.* at 497.

40 *Hearings on H.R. 2319 before the Committee on Expenditures in the Executive Departments, United States House of Representatives, 80th Cong., 1st Sess. (1947)*, p. 559.

41 *Id.* at 127.

42 From the statement of Richard Helms before the Senate Armed Services Subcommittee on Central Intelligence on January 16, 1975, as reported in the New York Times, January 17, 1975. (hereinafter, *"Helms Statement"*).

43 From the report of William E. Colby submitted on January 15, 1975, to the Senate Appropriations Committee, as reported in the New York Times on January 16, 1975, pp. 30–31 (hereinafter, *"Colby Report"*).

44 *Helms Statement*, New York Times, January 17, 1975, p. 10, col. 4.

45 *Colby Report*, New York Times, January 16, 1975, p. 30, col. 3.

46 *Hearing before the Committee on Armed Services, United States Senate, 93rd Cong., 1st Sess., on Nomination of William E. Colby to be Director of Central Intelligence, July 2, 20 and 25, 1973* (hereinafter *"Colby Hearing"*), at 157.

47 *Colby Report*, New York Times, January 16, 1975, p. 30, col. 4.

48 *Colby Report*, New York Times, January 16, 1975, p. 30, col. 3.

49 *Colby Hearing* at 157; see also *Colby Report, supra*, p. 30, col. 3.

50 *Colby Hearing*, at 157.

51 *Colby Report, supra*, p. 30, cols. 4 and 5.

52 *Colby Report, supra*, p. 30, col. 4. Cf. *Colby Hearing*, at 157, where the reference is to "foreigners temporarily within the U.S." The operation of CIA agents among emigre groups in this country has reportedly been terminated. *Hearings before the Committee on Foreign Relations, United States Senate, 93rd Cong., 1st Sess., on Nomination of Richard Helms to be Ambassador to Iran and CIA International and Domestic Activities, February 5 and 7 and May 21, 1973*, (hereinafter *"Helms Hearings"*), at 34.

53 *Colby Report, supra*, p. 30, col. 3.

54 *Colby Hearing* at 157. This, presumably, includes CIA "proprietaries" such as Pacific Corporation, Air America, Air Asia, etc. See Marchetti & Marks, *supra*, at 134–153.

55 *Id.*

56 *Colby Report, supra*, p. 30, col. 4.

57 *Id.* This function stems, Mr. Colby states, from the Director's responsibility to protect intelligence sources and methods.

58 *Colby Hearing* at 25.

59 *Colby Report, supra*, p. 30, col. 5. See also *Colby Hearing*, at 24. Cf. Helms statement that CIA was not involved in investigations of the anti-war movement because "it seemed to me that was a clear violation of what our charter was." *Helms Hearings* at 43.

60 *Colby Report, supra*, p. 30, col. 6. But at his confirmation hearing, Mr. Colby had said that the authority of the CIA did not extend to collecting intelligence on U.S. citizens abroad who do not appear to be involved with the activities of foreign governments or foreign institutions. *Colby Hearing* at 23.

61 *Colby Report, supra*, p. 30, col. 5. At his confirmation hearing, Mr. Colby referred to this area of activity in response to questions about the so-called Huston White House Plan. *Colby Hearing* at 157.

62 *Colby Hearing* at 157.

63 *Colby Hearing* at 22. Mr. Colby testified, however, that a mistake had been made in furnishing equipment to E. Howard Hunt.

64 *Colby Report, supra*, p. 30, col. 4. Mr. Helms agrees. *Helms Hearings* at 39.

65 *Colby Hearing* at 24–25. See also *Helms Hearings* at 34, where Mr. Helms states that surveillance in this country of people shuttling between here and Hanoi is not a function of the CIA.

66 *Colby Hearing* at 23. Cf. item 15 under Permissible Domestic Activities, *supra*. But information regarding improper conduct if obtained as a by-product of foreign intelligence activities is reported to the FBI. *Colby Report, supra*, p. 30, col. 6. *Colby Hearing* at 23.

67 This is not a function of the CIA in the view of Mr. Colby. *Colby Hearing* at 21. But Mr. Helms defended such profile as being authorized by the statutory provision making the Director responsible for protecting intelligence sources and methods from unauthorized disclosure since it is "difficult to protect sources and methods from disclosure unless you know who is doing the disclosing." *Helms Hearings* at 13.

68 *Colby Report, supra*, p. 31, col. 2. Such assistance has been banned by the CIA by internal regulations, but this may have occurred not because the activity was thought to be unlawful but as a matter of policy.

69 *Colby Report, supra*, p. 30, col. 6. Until 1973, Mr. Colby stated, some information on American dissidents collected in the United States by said agents was furnished to the FBI. In 1973, such information was limited to that collected abroad. In March, 1974, the program was terminated, and the Director issued specific guid-

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ance that any collection of counter-intelligence information on Americans would
take place only abroad and only in response to a request from the FBI. However,
Mr. Colby neither defends nor deprecates the practice of infiltrating "dissident"
organizations to provide CIA agents with cover.

70 *Colby Report, supra*, p. 30, col. 6. Mr. Colby reports that information acquired
was made available to the FBI, Secret Service and local police departments and that
this program was terminated in December, 1968. But, again, Mr. Colby does not
indicate whether in his view these activities were permissible or not. Cf. with Mr.
Helms' testimony (*Helms Hearings*, at 99) that attempts to involve the CIA in doing
something about leaks and demonstrations and trouble in the streets were totally
and 100 percent resisted.

71 *Colby Hearing*, at 27–28, where Mr. Colby states that the legality of such train-
ing by the CIA might be defended. But Mr. Helms disagrees. *Helms Hearings* at 23.

72 *Helms Hearings* at 100–101. Mr. Helms thought that since foreign embassies
are extraterritorial installations, this was a gray area and it was not clear whether
or not such a study was a "domestic activity." But based upon the relations of the
CIA and FBI over the years, he said, it would be an FBI function.

73 *Colby Report, supra*, p. 31, cols. 1 and 2; New York Times, March 6, 1975, p. 1,
col. 4. It is not clear whether Mr. Colby thought these activities were permitted or
prohibited.

74 *Helms Statement*, New York Times, January 17, 1975, p. 10, col. 1.

75 *Colby Report, supra*, p. 30, col. 1.

76 *Helms Statement, supra*, p. 10, col. 2. It is interesting to note, however, that as
originally envisioned, the CIA was to be, primarily, a correlator and evaluator of
intelligence gathered by others.

77 Mr. Helms does not know whether this responsibility conflicts with the prohi-
bition against the exercise by the CIA of internal security functions, but does be-
lieve that it creates a "gray area." *Helms Hearings* at 76–77. Mr. Colby believes that
the provision gives the Director only the job of identifying a problem but no au-
thority to deal with it and, hence, he sees less of a "gray area in that regard." *Colby
Hearing* at 25. A proposed amendment to Section 102(d)(3) of the National Security
Act (S. 2597, 93rd Cong., 1st Sess.) would give the Director only the responsibility of
developing plans, policies and regulation for the protection of intelligence sources
and would make it clear that such responsibility should not be construed as au-
thorizing the Agency to engage in any activity prohibited by the first proviso of
clause (3) (50 U.S.C. 403 (d)(3)).

78 E.g. the Ellsberg profile, the insertion of CIA agents into domestic "dissident"
groups, CIA investigations within the Government of unauthorized disclosures of
classified intelligence, the wiretapping of telephones of private American citizens.

79 *Colby Report, supra*, pps. 30–31.

80 *Colby Hearing* at 20; Address to the Fund for Peace Conference on CIA and
Covert Actions by William E. Colby, September 13, 1974 (hereinafter, "*Colby Ad-
dress*") at 8.

81 *Colby Address, supra*, at 7–8; See Wise & Ross, *supra*, at 147–54; Marchetti &
Marks, *supra*, at 31–32; *AID Activities in Laos, Hearing Before the Subcommittee
on U.S. Security Agreements and Commitments Abroad of the Committee on For-
eign Relations, United States Senate, 92nd Cong., 2nd Sess., April 13, 1972* at 3–4;
Staff report prepared for Subcommittee on U.S. Security Agreements and Commit-
ments Abroad of the Committee on Foreign Relations of the United States Senate,
92nd Cong., 1st Sess., April 1971.

82 *Hearings Before the Committee on Armed Services, United States Senate, 93rd
Cong., 1st Sess., on S.1263, June-August, 1973*, Pt. VIII at 5886–5887.

83 *Colby Hearing, supra*, at 19; *Colby Address, supra*, at 6.

84 *Colby Address, supra*, at 8.

85 *Helms Hearings, supra*, at 41.

86 117 Cong. Rec. 42,929–31 (1971) as quoted in Robin Schwartzman, *Fiscal Over-
sight of the CIA*, 7 N.Y.U. J. Int'l. Law and Pol. 493 (1974) at 499.

87 New York Times, Sept. 8, 1974, p. 1, col. 6.

88 *Id.* Former DCI Richard Helms also reportedly testified to the Senate Foreign
Relations Committee on January 22, 1973 that the Nixon Administration sought
ways to overthrow President Allende after his election in September, 1970. New
York Times, Feb. 10, p. 1, col. 7.

In March, 1973, William V. Broe, then in charge of Clandestine Operations for
the Western Hemisphere, testified that on the instructions of Richard Helms, then
DCI, he met with a Senior Vice President of International Telephone and Tele-
graph (ITT) on September 29 or 30, 1970, and suggested a series of possible actions
designed to put economic pressure on Chile. There was no evidence that these ac-
tions were implemented. However, the ITT Vice President summarized the sugges-
tions as follows:

"1. Banks should not renew credits or should delay in doing so.

2. Companies should drag their feet in sending money, in making deliver-
ies, in shipping spare parts, etc.

3. Savings and loan companies there are in trouble. If pressure were ap-
plied they would have to shut their doors, thereby creating stronger pressure.

4. We should withdraw all technical help and should not promise any
technical assistance in the future. Companies in a position to do so should
close their doors.

5. A list of companies was provided and it is suggested that we approach
them as indicated. I was told that of all the companies involved, ours alone
has been responsive and has understood the problem. The visitor added that
money was not a problem."

*Hearings on ITT and Chile 1970–71, Before the Subcommittee on Multinational
Corporations of the Committee on Foreign Relations, United States Senate, 93rd
Cong., 1st Sess., March-April, 1973*, Pt I, at 172.

89 As quoted in New York Times, Tuesday, Sept. 17, 1974, p. 1, col. 1. The Presi-
dent further stated:

"It's a recognized fact that historically as well as presently, such actions
are taken in the best interests of the countries involved."

Examples of such covert activities can be found in Wise and Ross, *supra*, at n.2
where the CIA is described as organizing a putsch in Iran in 1953 which overthrew
Premier Mohammed Mossadegh, arranging a coup in Guatemala in 1954 which re-
placed the government of Jacobo Arbenz Guzman with that of Colonel Elfego
Monzon, assisting the Diem regime to become established in South Vietnam and
supporting an attempt to overthrow President Sukarno of Indonesia in 1958.

The CIA is also depicted in Marchetti and Marks, *supra*, at n. 19 at 27–28 as hav-
ing assisted Magsaysay's election in the Philippines in 1953 and provided him with
help in fighting the Huks, including the use of psychological warfare.

In addition, the CIA allegedly carried on political activities in the 1960's in Ecua-
dor (1960–63), Brazil (1962–63), Zaire (1960–65), Somalia (1967–69) and Indonesia
(1965). Morris, "Reflections on Five Case Histories," unpublished paper presented
at Fund for Peace Conference on CIA and Covert Actions, September 12–13, 1974.

90 50 USC, §403(d)(5). Subsections (3) and (4) are sometimes also used to justify
the CIA's covert activities. Subsection (3) provides in part that "the director of Cen-

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tral Intelligence shall be responsible for protecting intelligence sources and methods
from unauthorized disclosure" and subsection (4) provides that it is the duty of the
CIA "to perform, for the benefit of the existing intelligence agencies, such addi-
tional services of common concern as the National Security Council determines can
be more efficiently accomplished centrally." Both these functions, however, are ex-
plicitly related to intelligence gathering and, as Director Colby noted in his Janu-
ary 15, 1975 report to the Senate Appropriations Committee, *supra*, the CIA itself
makes the distinction between "clandestine operations to collect foreign intelligence
and counterintelligence responsibilities" on the one hand and "covert foreign poli-
tical or paramilitary operations" on the other. *Colby Report, supra*, p. 30.

91 Address to the American Society of Newspaper Editors, April 14, 1971 (text
p. 5) (referred to in unpublished paper by David Wise entitled "Covert Operations
Abroad: An Overview," pp. 7–8).

92 *Colby Hearing*, at 13–14.

93 50 U.S.C. §402(a).

94 50 U.S.C. §402(b).

95 50 U.S.C. §402(b)(1).

96 50 U.S.C. §402(b)(2).

97 50 U.S.C. §502(d).

98 50 U.S.C. §403g.

99 The theory that such activities are not legally exempted from the disclosure
law is currently being advanced by Congressman Michael Harrington in a suit to
enjoin such activities discussed *infra* at Point V.

100 Walden, *supra* at n.5, at 84.

101 *Id.* at 82.

102 *Id.* at 83, n.88.

103 "National Security Act of 1947," Report of the Committee on Expenditures
in the Executive Department, to accompany H.R. 4214, p. 3, as quoted in Wise &
Rose, *supra*, at 10.

104 Senate Committee on Armed Services, Senate Report No. 239, June 5, 1947,
U.S. Code Cong. Serv., 80th Cong., 1st Sess., 1947, p. 1487.

105 Pub. L. 93-559, 93rd Cong., S. 3418, December 31, 1974, 88 Stat. 1795.

106 The Committee on International Human Rights of the Association of the Bar
of the City of New York, which assisted in the development of this report, believes
that Congress should take appropriate action to prevent the CIA from engaging in
foreign political operations and to assure that the CIA will confine its activities to
those intelligence-related activities permitted by its charter.

107 See notes 88 and 89, *supra*.

108 *The Dominican Crisis, supra*.

109 *Id.* at 550.

110 51 Stat. 41.

111 49 Stat. 3097. Signed by Honduras, El Salvador, Dominican Republic, Haiti,
Argentina, Venezuela, Uruguay, Paraguay, Mexico, Panama, Guatemala, Brazil,
Ecuador, Nicaragua, Columbia, Chile, Peru, Cuba and the United States.

112 United States bilateral treaties with Ecuador, Brazil, Chile and Guatemala,
signed during or shortly after World War I, make no reference to intervention but
provide that all disputes between them of whatever nature, will be referred to ar-
bitration. See, e.g., Treaty for Advancement of Peace (Ecuador-U.S.A.), proclaimed
Jan. 24, 1916; Treaty for Advancement of Peace (Brazil-U.S.A.), proclaimed Oct. 30,
1916; Treaty for the Settlement of Disputes (Chile-U.S.A.), proclaimed Jan. 19,
1916. It should be noted, of course, that to the extent the United States believes

that one of its treaty partners has taken actions which violate its [illegible]ties with the
United States (and such violations may consist of a number of ac[illegible]ivities, such as
expropriation of American property, making agreements with nations that pose a
threat to the security of the United States, etc.), the United States may well be free to
treat said treaty as abrogated and consider itself no longer bound by its provisions.

113 62 Stat. 1681. The Treaty was ratified by Brazil, Dominican Republic, Pan-
ama, Columbia, Honduras, Uruguay, Paraguay, Nicaragua, Mexico, and the United
States.

114 2 UST 2394. The Protocol of Amendment adopted in 1967, 21 UST 607, does
not make any substantive changes in regard to the matters discussed herein.

115 Article I, Sec. 8, Clause 1.

116 Article I, Sec. 8, Clause 11.

117 Article I, Sec. 8, Clause 12.

118 Article I, Sec. 8, Clause 13.

119 Article I, Sec. 8, Clause 14.

120 Article I, Sec. 8, Clause 15.

121 Prof. Raoul Berger, *War-Making by the President*, Cong. Rec., February 20,
1973, S 2783, S 2785, n. 62.

122 If "a war be made by invasion of a foreign nation, the President is not only au-
thorized but bound to resist by force." *The Prize Cases*, 2 Black 635, 668 (U.S. 1862);
see also *Martin v. Mott*, 12 Wheat. 19, 30 (U.S. 1827); *Mitchell v. Laird*, 488 F.2d
611, 613–614 (D.C. Cir. 1973).

123 *The Records of the Federal Convention of 1789*, at 318–319 (N. Farrand ed.
1911), (August 17, 1787), as reported in William Van Alstyne, *Congress, The Presi-
dent and the Power to Declare War: A Requiem for Viet Nam*, 121 Univ. of Pa. L.
Rev. 1, 6.

124 Article II, Sec. 3.

125 Louis Henkin, "Foreign Affairs and the Constitution," (New York, The
Foundation Press, 1972) Chapter II.

126 *Mitchell v. Laird, supra*, at 615; *Berk v. Laird*, 429 F.2d 302, 305 (2d Cir. 1970).

127 Article II, Sec. 2, Cl. 2.

128 See n.117, *supra*.

129 See n.116, *supra*.

130 See ns. 81–86, *supra*.

131 See ns. 88 and 89, *supra*.

132 For a detailed description of the present procedure, see Point IV, *infra*.

133 *Colby Report, supra*, p. 30.

134 *Joint Hearings before the Subcommittee on Intergovernmental Relations* [illegible]
the Committee on Government Operations and the Subcommittee on Separatio[illegible]
of Powers and Administrative Practice and Procedure of the Committee on the Ju[illegible]
diciary, United States Senate, 93rd Cong., 1st Sess., on S. 858, S. Con. Res. 30, S.[illegible]
Res. 72, S. 1106, S. 1112, S. 1520, S. 1923, and S. 2073, April 10, 11, 12, May 8,
10, and 16, 1973. Vol. 2 at 225.

135 The following description is adapted from Robin Schwartzman, *Fiscal Over-
sight of the CIA*, 7 N.Y.U.J. Int'l L. & Pol. 493 (1974).

136 Schwartzman, *supra*, at 495–96.

137 *Id.* at 496–97.

138 *Id.* at 497. In the House of Representatives this Subcommittee is called a Spe-
cial Group, rather than a Subcommittee, because each Appropriations Subcommit-
tee is responsible for a particular appropriations bill, and there is no separate
appropriations bill for intelligence services. *Id.* at 497.

139 *Id.*

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140 *Id.* at 497–500. The House subcommittee apparently conducts a more thorough
review than the Senate Subcommittee.
141 *Id.* at 497–98.
142 *Id.* at 501.
143 50 U.S.C. §§403a-403j (1964).
144 50 U.S.C. §403f.
145 50 U.S.C. §403j(a).
146 Several legislative corollaries to this constitutional requirement are found in
Title 31 of the United States Code.
Section 529, for example, provides:
"No advance of public money shall be made in any case unless authorized by
the appropriation concerned or other law."
Section 628 similarly states:
"Except as otherwise provided by law, sums appropriated for the various
branches of expenditure in the public service shall be applied solely to the
objects for which they are respectively made, and for no others."
A third provision which the 1949 Act appears to make inapplicable is §627:
"No Act of Congress passed after June 30, 1906, shall be construed to make an
appropriation out of the Treasury of the United States, or authorize the
execution of a contract involving the payment of money in excess of appro-
priations made by law, unless such Act shall in specific terms declare an ap-
propriation to be made or that a contract may be executed."
147 Stanley Futterman, *Toward Legislative Control of the CIA*, 4 N.Y.U. J. Int'l.
L. & Pol. 431 (1971), at 151.
148 Letter to Hon. Millard E. Tydings, Feb. 11, 1949, printed in S. Rep. No. 106,
81st Cong. 1st Sess. (1949), 2 U.S. Code Cong. and Adm. News 1399 (1949), as quoted
in Futterman, *supra*, at 152.
149 95 Cong. Rec. 1911 (1949) as quoted in Futterman, *supra*, at 452.
150 See Note "*The CIA's Secret Funding and the Constitution*" 84 Yale L.J. 608
(1975) at 619.
151 Schwartzman, *supra* at n.135, at 507. Both the intelligence subcommittee of the
Senate Armed Services Committee and that of the House Armed Services Commit-
tee, which are composed of senior members of the full committees and which to-
gether perform most of the oversight function, have become increasingly active
since 1971. In that year the House subcommittee was disbanded and the Senate
subcommittee did not meet. After the House subcommittee was reconstituted under
the chairmanship of Rep. Lucien Nedzi, Ms. Schwartzman reports, based on infor-
mation received from counsel to the committee, that it met nine times in 1972, 24
times in 1973, and 17 times in 1974. The Senate subcommittee on the other hand,
held only two formal meetings during the 93rd Congress, although it met informally
a number of other times, and occasionally reviewed CIA spending in great detail,
according to a committee staff member. See Schwartzman, *supra* at 508–509.
152 Schwartzman, *supra*, at 502–507.
153 Items in the Combined Statement are listed by appropriation heading and
there is no item for the CIA. Money transferred to the CIA is listed the same way
as money routinely transferred between agencies—i.e. listed as a transfer without
specifying the destination.
154 This section was enacted in 1891. A 1950 statute, 31 U.S.C. §66b(a), provides
for cooperation by all executive agencies in the preparation of the Secretary's
report:
(a) The Secretary of the Treasury shall prepare such reports for the infor-
mation of the President, the Congress, and the public as will present the re-

sults of the financial operations of the Government: *Provided*, There
shall be included such financial data as the Director of the Bureau of the
Budget may require in connection with the preparation of the Budget or
for other purposes of the Bureau. Each executive agency shall furnish the
Secretary of the Treasury such reports and information relating to its finan-
cial condition and operations as the Secretary, by rules and regulations, may
require for the effective performance of his responsibilities under this section.
155 50 U.S.C. §403j(b).
156 2 Farrand, ed., "The Records of the Federal Convention of 1787" (1911) (there-
after Farrand) at 618–19; see also G. Hunt and J.B. Scott, eds., "The Debates in the
Federal Convention of 1787, Reported by James Madison" (1920) (hereafter Hunt
and Scott) at 566–67. Mason's fear was shared by Patrick Henry who argued at the
Virginia debates on the Constitution that the Statements and Accounts Clause did
not provide sufficient protection against government secrecy, and urged the adop-
tion of a bill of rights. 3 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION (1836)
(hereafter Elliot) at 462.
157 2 Farrand at 619; Hunt and Scott at 566.
158 3 Elliot at 459.
159 *Id.* at 460.
160 At least two commentators have also reached this conclusion. See Schwartz-
man, *supra*, at 522; Note, *The CIA's Secret Funding and the Constitution*, *supra* at
n.150, at 611–15 and 622–23.
161 3 Elliot at 159.
162 The "Historical Note" accompanying this statute remarks that Congress in
several years prior to and including 1926 appropriated money specifically to be
used pursuant to the requirements of this section.
163 A statute more broadly framed but not cited by the Government is 31 U.S.C.
§529d which provides:
"A certificate by the Commissioner of Customs stating the amount of an ex-
penditure made from funds advanced and certifying that the confidential
nature of the transaction involved renders it inadvisable to specify the de-
tails thereof or impracticable to furnish the payee's receipt shall be a suffi-
cient voucher for the sum expressed to have been expended."
Even this statute, however, requires a separate certificate and explanation for each
expenditure, whereas 50 U.S.C. §403j(b) is framed in the plural and does not re-
quire a written explanation by the Director, thus allowing him to include a number
of expenditures in one certificate.
164 Note, *The CIA's Secret Funding and the Constitution*, *supra* at n.150, at 633.
165 The Atomic Energy Commission is an example of an agency related to the
national security whose budget is made public in some detail, including the amount
spent on "objects of a confidential nature." See Note, *The CIA's Secret Funding and
the Constitution*, *supra*, at 618. Whether the CIA budget should be published in
the same manner is a question for Congress to consider. However, Mr. Colby has
stated that publication of the total CIA budget would not threaten the national
security, except insofar as trends in intelligence expenditures discernible after
several years might reveal changes in priorities. Testimony, Fund for Peace Con-
ference, September 13, 1974, at 47.
166 See Note, *Standing to Sue for Members of Congress*, 83 Yale L. J. 1665 (1974)
at 1684.
167 These bases were not considered sufficient by the Second Circuit, however, in
a suit to challenge the United States involvement in Cambodia. *Holtzman v. Schles-
inger*, 484 F.2d 1307 (2d Cir. 1973).

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168 Report of the Civil Rights Committee, *Military Surveillance of Civilian Political Activities: Report and Recommendations for Congressional Action*, 28 Record of the Association of the Bar of the City of New York 651 (October, 1973).

169 The decision in *United States v. Richardson*,—U.S.—, 41 L Ed.2d 678 (1974), holding that plaintiff taxpayer lacked standing to challenge that provision of the statutes regulating the CIA which allows the Agency to account for expenditures solely on the certificate of the Director, indicates the difficulty which private citizens will have in questioning other activities of the CIA.

170 A prerequisite to imposition of sanctions on CIA employees who violate the law would be a clearly drawn statute setting out precisely the actions prohibited. Such sanctions under other statutes relating to government employees have included the imposition of fines, 18 U.S.C. §§209, 219, 432, 435–437, 755, 1385, 1901–1913, 2075; removal from office, 18 U.S.C. §§437, 1901, 1905, 1908, 1912, 1913; 31 U.S.C. 665; forfeiture of pension benefits, 5 U.S.C. §§8312–8315; and disciplinary action, 5 U.S.C.§552.

171 These provisions appear in the Freedom of Information Act, 5 U.S.C. §552, as recently amended over President Ford's veto.

172 93d Congress, 1st Sess. (1973): H.R. 2486, 2572, 7596, 9347, 9370, 9511, 9688, 10,363, 11,054. 93rd Cong., 2nd Sess. (1974): H.R. 13,798, 15,235, 15,845, 16,388. 93rd Cong., 2nd Sess., (1974): S. 1547, 2597, 3767, 4019; H. Res. 1231, 1232, 1441. 93rd Cong., 1st Sess. (1973): S. Con. Res. 23.

173 In H.R. 9511, the CIA is prevented from engaging in police type of law enforcement or internal security operations; and from providing assistance to any Federal, State or police agencies unless written approval of an oversight subcommittee of Congress (Appropriations and Armed Services) is given.

174 This bill provides for rather widespread dissemination of data to congressional committees, but without adequate safeguards as to security information.

175 *Colby Report*, *supra*, at p. 31.

176 Pub. Law 93–579, 93rd Cong., Dec. 31, 1974, 43 U.S.L.W. 148 (Jan. 21, 1975). Under this statute, the Executive could order that CIA files relating to the national defense be treated as exceptions. Thus, the separate exemption for all CIA files appears unnecessary, and should be given careful reconsideration.

177 The CIA's charter exempts from this requirement only expenditures for "objects of a confidential, extraordinary or emergency nature." 50 U.S.C. §403j(b). See discussion in Point IV, *supra*.

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FISCAL OVERSIGHT OF THE CENTRAL INTELLIGENCE AGENCY: CAN ACCOUNTABILITY AND CONFIDENTIALITY COEXIST?

I. Introduction

Recent revelations about Central Intelligence Agency [hereinafter "CIA" or "Agency"] activities in the U.S. and abroad have renewed public interest in the basic dilemma inherent in the position of a secret agency in a free society. On the one hand, there is a valid need for intelligence activities in today's international climate, and intelligence, by definition, must often be gathered clandestinely. On the other hand, our Constitutional system is based on checks and balances among the three branches of government. The traditional legislative check on executive agencies is provided through the funding process, by reviews of appropriation requests and agency expenditures. With respect to the CIA, such funding review is particularly important since secrecy may preclude review of the substance of specific ongoing projects.

Budgeting is Congress' definitive, practical expression of policy decisions—except in the case of intelligence agencies such as the CIA. The CIA budget, which has been estimated at between $750 million and $1 billion,[1] reflects only minimal congressional policy input. Ironically, however, it is precisely the intelligence area in which the consequences of poor judgment are potentially most serious: in an

1. The $750 million estimate was made by Sen. William Proxmire, 119 Cong. Rec. 6868 (daily ed. April 10, 1973). The same figure appears elsewhere, e.g. Miller, Book Review, N.Y. Times, April 18, 1974, § 7 (Book Review), at 6. The $1 billion figure appears in Walden, Restraining the CIA, in Surveillance and Espionage in a Free Society: A Report by the Planning Group on Intelligence and National Security to the Policy Council of the Democratic National Committee 219 (R. Blum ed. 1972) [hereinafter "Blum"]. Although Walden did not give the source of his estimate, his billion-dollar figure is consistent with estimates based on a total U.S. intelligence budget of approximately $6.2 billion. (Sen. Proxmire set the total at $6.208 billion. 119 Cong. Rec. 6863 [daily ed. Apr. 10, 1973].) At the Hearing on H.R. 6167 and S. 1494 before the Senate Comm. on Armed Services, 93d Cong., 1st Sess. 16 (1973) [hereinafter "Hearing on S. 1494"], Sen. Stuart Symington stated that the CIA represents about 17% of the total intelligence dollar. (17% of $6.2 billion equals $1.054 billion.)

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extreme case, the inopportune discovery or miscarriage of a covert CIA operation might threaten the nation's continued survival.

In addition, problems necessarily arise whenever large sums of money are not subject to regular congressional accounting. One such problem is duplication. For example, the U.S. intelligence community consists of several organizations: the CIA, the Defense Intelligence Agency, the National Security Agency, the Intelligence and Research Bureau of the State Department, the separate intelligence services of the Army, Navy and Air Force, the Federal Bureau of Investigation, the Atomic Energy Commission, the Treasury Department, and perhaps others.[2] Although there are executive bodies to coordinate the activities of these organizations, some duplication is inevitable. The redundancies are unlikely to be discovered and eliminated unless agency budgets are coordinated and their spending is closely monitored by Congress.[3] Also, in order to assign priorities intelligently, not only must Congress be informed as to the amount of funds earmarked for intelligence, but it must also have some means to determine whether the intelligence agencies are spending the funds in accordance with Congress' intent. At present, the CIA funding process does not permit these requirements to be adequately fulfilled.

This Note will examine the CIA funding process and explore means to increase congressional control over CIA funding—and

2. The named organizations are represented on the U.S. Intelligence Board (USIB). Hughes, The Power to Speak and the Power to Listen: Reflections on Bureaucratic Politics and a Recommendation on Information Flows, in Secrecy and Foreign Policy 15 (T. Franck and E. Weisband eds. 1974). The White House announcement of the reconstitution of the USIB did not list the Army, Navy, and Air Force intelligence services as members. 7 Weekly Compilation of Presidential Documents 1482 (1971), reprinted in 117 Cong. Rec. 40,284 (1971) [hereinafter "White House Announcement"].

3. Sen. Symington has pointed out that such waste is not only a theoretical possibility but a reality:

> We sent out some staff men, from Foreign Relations, good staff men. They turned up much information about intelligence that nobody had told us about, any committee. They said one of the greatest duplications they found anywhere with respect to unnecessary spending of the taxpayers' money was in the intelligence field.

Hearing on S. 1494, supra note 1, at 15.

> We had staff men go in certain areas of the world and they found great duplication. They found the intelligence units of the CIA, the Department of Defense, the Army, the Navy, and the Air Force all directed to particular intelligence, tremendous duplication, therefore waste.

117 Cong. Rec. 42,925 (1971). It should be noted that Sen. Symington's criticisms applied only to duplication in intelligence *collection*. This is to be distinguished from duplication in *analysis*, which is often justified.

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hence over Agency activities—without impairing the confidentiality necessary to some legitimate CIA functions. Specifically, it will first describe the CIA budgeting and appropriation process. It will then focus on the components of existing executive and legislative spending "oversight".[4] Finally, after reviewing the constitutionality of the present appropriation system, this Note will consider proposals whereby Congress might play a larger role in establishing the CIA budget and overseeing Agency spending.

II. Budgeting and Appropriation Procedures

The Central Intelligence Agency Act of 1949 [hereinafter the "1949 Act"][5] established a unique procedure for funding the Agency. Instead of seeking regular appropriations from Congress, the CIA has money transferred to it secretly from the appropriations of other agencies.[6] This is accomplished through an Office of Management and Budget [hereinafter "OMB"] administrative procedure in accordance with instructions from the chairmen of the House and Senate Appropriations Committees.[7] The process begins with the formulation of the President's annual budget proposal to Congress.

A. *Proposing the Budget to Congress: The Roles of Executive Agencies*

The budget proposed to Congress by the President is the product of OMB, which receives requests from the executive agencies,

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4. The word "oversight" connotes both monitoring and control, although the two functions are not always coextensive.

5. 50 U.S.C. §§ 403a-403j (1970).

6. Section 403f provides in part:

> In the performance of its functions, the Central Intelligence Agency is authorized to—
>
> (a) Transfer to and receive from other Government agencies such sums as may be approved by the Bureau of the Budget [now redesignated as the Office of Management and Budget, Reorganization Plan No. 2 of 1970, 5 U.S.C.A. App. II § 102a (1974 Supp)], for the performance of any functions or activities authorized under sections 403 and 405 of this title, and any other Government agency is authorized to transfer to or receive from the Agency such sums without regard to any provisions of law limiting or prohibiting transfers between appropriations. Sums transferred to the Agency in accordance with this paragraph may be expended for the purposes and under the authority of sections 403a-403j of this title without regard to limitations of appropriations from which transferred.

7. See text accompanying note 31 infra.

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including the intelligence agencies, coordinates the requests, and then produces one consolidated budget. Theoretically, at least, the budget requests of the intelligence agencies are coordinated before their submission to OMB by the Intelligence Resources Advisory Committee [hereinafter "IRAC"], which was created by an executive order of the President[8] to "advise the DCI [Director of Central Intelligence, the chief officer of the CIA] on the preparation of a consolidated intelligence program budget." The recommendations made by the DCI after consultation with IRAC are neither final nor binding. According to DCI William Colby:

> The DCI does not have full responsibility for the budget of the entire intelligence community. His responsibility . . . is to recommend to the President through [OMB] the general level and composition of the budget and the appropriate distribution of resources among the different programs. He does not "control" the defense intelligence community. Through a variety of mechanisms and authorities, however, he can exercise leadership with respect to it in the manner directed by the President.[9]

Thus, whatever advisory role IRAC may play in the DCI's recommendation, it is clear that the principal substantive responsibility for coordinating the intelligence agency budgets rests with OMB.

According to OMB Director Roy Ash, OMB reviews CIA funding "in the same detail that it reviews the budget requests of any other executive branch agency."[10] The OMB review comprises

8. White House Announcement, supra note 2. The DCI is Chairman of IRAC, whose members are senior representatives from the State Department, the Defense Department, OMB, and the CIA.

9. Hearings on the Nomination of William E. Colby to be Director of Central Intelligence before the Senate Comm. on Armed Services. United States Senate, 93d Cong., 1st Sess. 184 (1973) [hereinafter "Colby Hearings"]: see also id. at 11-12. Colby was the DCI-designate when this statement was made.

Compare the following Senate colloquy on the limited scope of the DCI's budgetary role:

> Mr. SYMINGTON. We were briefed by the Director of the Central Intelligence Agency [DCI] twice, the full committee, last January; and then again this morning.
>
> Mr. FULBRIGHT. Did he discuss how much was spent by the National Security Agency?
>
> Mr. SYMINGTON. I asked but he did not know.
>
> Mr. FULBRIGHT. He does not know?
>
> Mr. SYMINGTON. He does not know about the others, only his own in any detail.

117 Cong. Rec. 42,927 (1971).

10. Letter from Roy L. Ash, Director, OMB, to Sen. William Proxmire, April 29, 1974 [hereinafter "Ash letter"], published in 120 Cong. Rec. 9306 (daily ed. June 4, 1974).

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a detailed written justification by each agency for its budget request, written responses to detailed questions posed by OMB staff assigned to review individual agencies' requests, and oral hearings.[11] The CIA budget is reviewed within an OMB unit which considers and coordinates the budget requests of all foreign intelligence programs of the Government. OMB asserts that this approach reduces, while it may not entirely eliminate, redundancy in the funding of intelligence programs.[12] The budget thus formulated is forwarded by OMB to the President for submission to Congress.

B. *The Role of Congressional Appropriations Intelligence Subcommittees*

The amount and source of funds to be transferred to the CIA are neither discussed in nor announced to the full House and Senate Appropriations Committees. Rather, they are determined by the Appropriations Committee chairmen meeting in executive session with an appropriations intelligence subcommittee in each house. In addition to the chairman of the full committee, each subcommittee is composed of the ranking minority member of the full committee and senior members of the Appropriations Subcommittees on Defense.

The House Appropriations Intelligence "Special Group"[13] spends approximately four days each year reviewing the budget requests of the CIA and other intelligence services.[14] Meetings at which the CIA budget is considered are attended by members of the Special Group, representatives of the CIA, two Appropriations Committee professional staff members, and a House of Representa-

11. Letter from Joseph Laitin, Assistant to the Director for Public Affairs, OMB, to author, Oct. 3, 1974, on file in New York University Law Library [hereinafter "OMB Letter"].

12. Id.

13. Technically, this group is not a subcommittee. Each Appropriations Committee subcommittee is responsible for its own appropriations bill, e.g. defense, transportation, etc. Since there is no separate appropriation for the intelligence services, there is accordingly no intelligence subcommittee, but rather this "Special Group" which approves intelligence budgets for insertion into other appropriations. Telephone interview with Samuel Preston, Staff Assistant, House Appropriations Committee, Nov. 27, 1974 [hereinafter "Preston interview—Nov. 74"]. The names of the Special Group's members, which formerly were kept secret, 117 Cong. Rec. 29,672 (1971) (remarks of Rep. Harrington), were published in 1974. 120 Cong. Rec. 9609 (daily ed. June 4, 1974) (remarks of Sen. McClellan).

14. Preston interview—Nov. 74, supra note 13.

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tives stenographer who makes a complete record of the meeting.[15] This process is said to result in a review of the CIA budget which is as detailed as the subcommittee's review of the Defense Department budget.[16]

The Senate Appropriations Intelligence Subcommittee[17] is also said to conduct extensive formal budget hearings at which staff members are present and memoranda are prepared for future reference by subcommittee members and staff.[18] However, in June 1974 Senator John Pastore (D., R.I.), a member of the subcommittee, conceded that no record of its proceedings is kept.[19] Senator Pastore's statement is consistent with an earlier description of the subcommittee's *modus operandi* by Senator Allen Ellender (D., La.):

> We five who sit on this committee hear the testimony of those applying for funds. The funds are justified to us. We ask many questions. None of this information is in writing, nor is it recorded, but it is simply given to us and we weigh it and then recommend appropriations as is seen fitting.[20]

The public record contains indications which cast doubt on the intensity of the Senate subcommittee's CIA budget review. For example, Senator Ellender is reported to have said that he did not want to learn the details of the CIA budget for fear he might talk in his sleep[21]—a remark which, if true, indicates that a key figure in the intelligence budget review process preferred to remain less than fully informed as to the specifics of the CIA budget. This view is confirmed by a Senate colloquy which took place after it became public that the CIA had been secretly supporting a 36,000-man army in Laos:

---

15. For safekeeping, the record is stored at the CIA, which delivers it to the Capitol on request. Id.

16. Telephone interview with Samuel Preston, Staff Assistant, House Appropriations Committee, Aug. 30, 1974 [hereinafter "Preston interview—Aug. '74"].

17. The Senate Appropriations Intelligence Subcommittee was first included in the Appropriations Committee's published list of subcommittees in 1969. S. Horn, Unused Power: The Work of the Senate Committee on Appropriations 38, 40 (1970) [hereinafter "Horn"].

18. Telephone interview with a Senate Appropriations Committee staff member, Nov. 11, 1974 [hereinafter "Senate Appropriations staff interview"].

19. 120 Cong. Rec. 9606 (daily ed. June 4, 1974).

20. 117 Cong. Rec. 42,923 (1971). When he made this statement, Sen. Ellender was Chairman of the Appropriations Committee and its Intelligence Subcommittee.

21. 120 Cong. Rec. 9607 (daily ed. June 4, 1974) (remarks of Sen. Hughes); Colby Hearings, supra note 9, at 52.

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Mr. FULBRIGHT . . . It has been stated that the CIA has 36,000 there. It is no secret. Would the Senator say that before the creation of the army in Laos they came before the committee and the committee knew of it and approved it?

Mr. ELLENDER. Probably so.

Mr. FULBRIGHT. Did the Senator approve it?

Mr. ELLENDER. It was not—*I did not know anything about it*. . . . I never asked, to begin with, whether or not there were any funds to carry on the war in this sum the CIA asked for. It never dawned on me to ask about it. I did see it publicized in the newspapers some time ago. . . .

Mr. CRANSTON . . . . I would like to ask the Senator if, since then, he has inquired and now knows whether that is being done?

Mr. ELLENDER. I have not inquired.

Mr. CRANSTON. You do not know, in fact?

Mr. ELLENDER. No.

Mr. CRANSTON. As you are one of the five men privy to this information, in fact you are the No. 1 man of the five men who would know, then who would know what happened to this money?

The fact is, not even the five men, and you are the chief one of the five men, know the facts in the situation.

Mr. ELLENDER. *Probably not.*[22]

Senator Milton Young (R., N.D.), another member of the subcommittee, also admitted on the floor of the Senate that he had "read in the magazines and newspapers" about the CIA's army in Laos.[23] It has since been estimated that the CIA was spending more than $300 million annually on the secret army in Laos at the time these statements were made.[24]

Inasmuch as the subcommittee meets in executive session and

22. 117 Cong. Rec. 42,929-31 (1971) (emphasis added).

23. Id. at 42,930. A statement prepared by William Colby for the Senate Armed Services Committee's hearing on his nomination as CIA Director appears to conflict with the statements made by Sens. Ellender and Young. In response to a question posed by Sen. Hughes, DCI-designate Colby stated:

> The appropriate committees of the Congress and a number of individual senators and congressmen were briefed on CIA's activities in Laos during the period covered. In addition, *CIA's programs were described to the Appropriations Committees in our annual budget hearings.*

Colby Hearings, supra note 9, at 180 (emphasis added).

24. 119 Cong. Rec. 15,352 (daily ed. Aug. 1, 1973) (remarks of Sen. Proxmire).

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does not publish its proceedings it is difficult to determine whether the Senate Appropriations Subcommittee's involvement in the budgeting process has changed since 1971. The fact that the subcommittee has met with increased frequency during recent years may indicate that it is now taking a more active role.[25]

There are indications that the Armed Services Committees and their intelligence subcommittees may also have a part in the approval of the CIA budget. For example, in 1973 the Senate Armed Services Committee reportedly questioned DCI Colby and other members of the CIA staff in detail concerning the Agency budget.[26] In August 1974 DCI Colby stated to a House subcommittee: "We also fully brief the CIA oversight subcommittees of the Armed Services and Appropriations Committees on budget and operational matters."[27]

C. *The Role of Congress as a Whole*

The proposed appropriations as approved by the Appropriations Committees—with the CIA funds hidden within other categories—are debated on the floors of both houses of Congress. Since the Appropriations Committees' proposals do not reveal in which appropriations the CIA budget has been concealed, it is impossible for members of Congress to know which of the figures under consideration have been inflated by funds actually destined for administrative transfer to the CIA. For this reason, Congress as a whole plays only a mechanical role in approving the CIA budget.

This budgeting process is not likely to change significantly as a result of the new budgeting system enacted during the 1974

25. During 1973 the subcommittee held 8 meetings with CIA representatives; and by September 1974, 5 meetings had been held. This is compared with 2 meetings in 1972 and 1 in 1971. Telephone interview with a Senate Appropriations Committee staff member, Aug. 30, 1974. Sen. John McClellan (D., Ark.) became chairman of the subcommittee (and of the full Appropriations Committee) following Sen. Ellender's death in 1972.

26. 119 Cong. Rec. 15,361 (daily ed. Aug. 1, 1973) (remarks of Sen. Symington); 120 Cong. Rec. 9610 (daily ed. June 4, 1974) (remarks of Sen. Stennis). See also Colby Hearings, supra note 9, at 16, where Sen. Symington stated that the Senate Armed Services Committee "would appreciate reviewing what [the CIA] give[s] to the appropriations committees of the Senate and the House," and DCI Colby agreed to "report fully" to the Committee.

27. Statement of William E. Colby before House Foreign Operations and Government Information Subcomm. Aug. 1, 1974, at 5 (mimeographed text obtained from CIA).

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session.[28] The CIA budget can be as well hidden in other appropriations under the new system as it is under the present system. Therefore, until further legislation is passed, Congress' role with respect to the CIA budget will remain substantially as described above.

D. *Ministerial Functions of OMB and the Treasury Department*

Following congressional approval, the appropriations are forwarded to OMB together with instructions from the Appropriations Committee chairmen as to the amount and source of funds to be transferred to the CIA.[29] The budgeting process is complete when OMB in fact transfers[30] the funds. This step was recently described by Senator Proxmire (D., Wis.):

> . . . The transfer of funds to CIA under Section 6 of the CIA Act [50 U.S.C. § 403f (1970)] is accomplished by the issuance of Treasury documents routinely used for the transfer of funds from one Government agency to another. The amount and timing of these transfers are approved by OMB.
>
> The funds approved for transfer to CIA by OMB are limited to amounts notified to OMB by the chairmen of the Senate and House Appropriations Committees. The specific appropriations accounts from which the funds will be transferred are also determined by this process . . . .
>
> In other words, only two men in the entire Congress of the United States control the process by which the CIA is funded.[31]

---

28. The new congressional budgeting system, which will become fully operative when Congress considers the budget for fiscal 1977, establishes new congressional machinery to examine the budget as a whole and to determine spending priorities within overall spending and revenue targets. It will replace the present approach whereby Congress considers each appropriation bill without regard to the total budget or total available revenues. See N.Y. Times, Mar. 23, 1974, at 1; Wall St. J., June 6, 1974, at 2.

29. The CIA Act of 1949 does not expressly mention this role of the chairmen of the Appropriations Committees. However, when the floor manager described the proposed bill to the House of Representatives he stated:

> [W]e have provided the legal basis for the granting to the Agency authority for the spending of those unvouchered funds which the Appropriations Committee of the House will earmark. . . .

95 Cong. Rec. 1945 (1949) (remarks of Rep. Sasscer).

30. Transfers are used for many purposes in addition to concealing intelligence budgets. See generally Horn, supra note 17, at 192-95.

31. 120 Cong. Rec. 9502 (daily ed. June 4, 1974). See also Ash letter, supra note 10.

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It has been reported that the transfers are made in the Intelligence Community Branch of the OMB[32] and that they are known to only two or three high-ranking OMB employees.[33]

The Treasury Department records the transfers in the *Combined Statement of Receipts, Expenditures and Balances of the United States Government* [hereinafter the "*Combined Statement*"].[34] The *Combined Statement* is published in compliance with 31 U.S.C. § 1029, which directs "the Secretary of the Treasury annually to lay before Congress . . . the expenditures *by each separate head of appropriation*" (emphasis added). Since all CIA funds are transferred from other appropriations, there is no "head of appropriation" for the CIA. Therefore, this method of accounting does not make it possible to identify the location or amount of Agency funds.[35] Thus, the *Combined Statement* does not, except in the most technical sense, reflect CIA expenditures.[36]

III. Oversight of CIA Spending

With the foregoing outline of the budgeting process as background, the nature and extent of oversight of CIA expenditures can be examined. Congress, with its constitutional power of the purse,[37] has ultimate control over CIA spending; to a limited extent, however, the executive branch also monitors the CIA's expenditure of funds appropriated for its use.

A. *Executive Branch Oversight of CIA Spending*

1. *National Security Council Groups.* Most intelligence oversight by the executive branch is concerned with substantive, as dis-

32. D. Wise, The Politics of Lying 114 (1973).

33. Blum, supra note 1, at xxvi.

34. Apparently OMB does not report to the Treasury Department the real purposes for which these funds are transferred. "The [Treasury] Department has [stated] that it does not receive any records which show receipts and expenditures of the Central Intelligence Agency." Supplemental Brief for the Appellees at 2, n.1. Richardson v. United States, 465 F.2d 844 (3d Cir. 1972).

35. When Congress has specifically appropriated funds for the CIA, the *Combined Statement* has reported the appropriations and the expenditures thereunder. See, e.g., Military Construction Act of 1955, ch. 368, § 401, 69 Stat. 324, authorizing the appropriation of $55.5 million for acquisition of land and construction of a building for the CIA headquarters in Langley, Va. See also Supplemental Appropriation Act of 1957, ch. 748, subch. III, 70 Stat. 678.

36. See text accompanying notes 124-40 infra for a discussion of the constitutionality of this arrangement.

37. U.S. Const., art. I, § 8.

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tinct from budgetary, matters. In 1971, President Nixon announced the establishment or reconstitution of four intelligence oversight bodies—the National Security Council Intelligence Committee [hereinafter the "Forty Committee"], the Net Assessment Group within the National Security Council Staff, the United States Intelligence Board, and IRAC—all as arms of the National Security Council reporting to the President through his Special Assistant for National Security Affairs.[38]

Initially, the Forty Committee[39] was established to "give direction and guidance on national intelligence needs and provide for a continuing evaluation of intelligence products from the viewpoint of the intelligence user."[40] More recently, President Ford has indicated that its duties encompass the review of every covert activity undertaken by the Government.[41] Since the activities of the Forty Committee are not made public,[42] it is impossible to state with certainty that this group does not oversee the CIA budget. However, since the committee is not charged with budgetary oversight and does not include members who specialize in fiscal matters, this conclusion seems reasonable. The Net Assessment Group is "responsible for reviewing and evaluating all intelligence products and for

38. White House Announcement, supra note 2. The four groups consist largely of the same members. In the words of a former member of the groups: "at Kissinger meetings, at whatever group it is, they all have different names, but the same people sit there . . . ." Transcript of tape-recorded conversation between Gen. Robert E. Cushman, Jr. (a former Deputy DCI) and E. Howard Hunt, July 22, 1971, published in N.Y. Times, Aug. 3, 1973, at 10, col. 6. The reference to "Kissinger" refers to Dr. Henry Kissinger in his role as the Pesident's Special Assistant for National Security Affairs.

39. Members of the Forty Committee include the Special Assistant to the President for National Security Affairs, the Chairman of the Joint Chiefs of Staff, the Under Secretary of State for Political Affairs, the Deputy Secretary of Defense, and the DCI.

The Committee derives its name from National Security Council Intelligence Decision Memorandum No. 40, the classified directive which established it in its present form. See T. Szulc, How Kissinger Runs our 'Other Government', New York, Sept. 30, 1974, at 59. Earlier embodiments of the Forty Committee were named "the 54/12 Group," "the Special Group," and the "303 Committee." See Sperling, Central Intelligence and its Control: Curbing Secret Power in a Democratic Society, quoted in 112 Cong. Rec. 15,758, 15,763 (1966) and Walden, Restraining the CIA, in Blum, supra note 1, at 232.

40. White House Announcement, supra note 2.

41. N.Y. Times, Sept. 17, 1974, at 22, col. 4.

42. For example, at the hearing on his nomination, DCI-designate Colby indicated that due to the "classified" nature of the information, questions about the membership and function of the Forty Committee should preferably be deferred until the hearing was in executive session. Finally, Colby conceded in open session that the Chairman was indeed Dr. Kissinger, then Assistant to the President for National Security Affairs. Colby Hearings, supra note 9, at 14.

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producing net assessments,"[43] while the United States Intelligence Board likewise performs substantive intelligence functions which have no relation to budgetary oversight.[44]

Only IRAC, the fourth group, was given a function related to intelligence budgeting. But this function, as discussed above,[45] is limited to advising the DCI in the coordination of the various intelligence agency budget requests; it does not extend to assuring that budgets, once approved, are adhered to. Therefore, it appears that none of the groups created by the 1971 Presidential reorganization was intended to, or in fact does, fulfill an oversight function with respect to spending by the intelligence agencies.

2. *The President's Foreign Intelligence Advisory Board.* The President's Foreign Intelligence Advisory Board [hereinafter "PFIAB"] was re-established by executive order in 1969 as an intelligence oversight body within the Office of the Executive.[46] It was given a broad mandate to advise the President concerning the conduct of foreign intelligence activities by Government agencies.[47] PFIAB consists of 11 private citizens[48] assisted by a

43. White House Announcement, supra note 2.

44. The United States Intelligence Board was established to

> advise and assist the DCI with respect to the production of national intelligence, the establishment of national intelligence requirements and priorities, the supervision of the dissemination and security of intelligence material, and the protection of intelligence sources and methods.

Id.

45. See text accompanying notes 8-9 supra; see also White House Announcement, supra note 2.

46. Exec. Order No. 11,460, 34 Fed. Reg. 5539 (1969) [hereinafter "Exec. Order No. 11,460"]. Since 1956, PFIAB has existed under varying names with somewhat changing missions pursuant to previous executive orders. For a review of its history, see Announcement of Executive Order Reconstituting the Board, in 5 Weekly Compilation of Presidential Documents 44 (1969).

47. According to Exec. Order No. 11,460, § 1, supra note 46, PFIAB's duties are to:

> (1) advise the President concerning the objectives, conduct, management and coordination of the various activities making up the overall national intelligence effort;
>
> (2) conduct a continuing review and assessment of foreign intelligence and related activities in which the Central Intelligence Agency and other Government departments and agencies are engaged;
>
> (3) receive, consider and take appropriate action with respect to matters identified to the Board, by the [CIA] and other Government departments and agencies of the intelligence community, in which the support of the Board will further the effectiveness of the national intelligence effort; and
>
> (4) report to the President concerning the Board's findings and

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five-person staff. To assist PFIAB in carrying out its function, the executive order directs the intelligence agencies to "make available to the Board all information with respect to foreign intelligence and related matters which the Board may require."[49] This blanket grant of access to Agency data gives PFIAB at least the potential to conduct budgetary oversight. However, it concentrates mainly on substantive issues relating to the intelligence community, with fiscal matters playing only a tangential role in its deliberations.[50]

In addition to the fact that PFIAB exists to advise the President, whose interests may not always coincide with those of Congress or the nation as a whole, there are a number of reasons why PFIAB cannot reasonably be expected to produce objective budgetary oversight. First, it lacks the manpower to oversee a billion-dollar budget, for its members work only part time on PFIAB matters[51] and its small staff includes no accountants.[52] Second, many of the members have held responsible positions in the intelligence community and may therefore share the contextual predispo-

appraisals, and make appropriate recommendations for actions to achieve increased effectiveness of the Government's foreign intelligence effort in meeting national intelligence needs.

48. As of Aug. 30, 1974, the members of the Board were: George W. Anderson (Chairman), Former Chief of Naval Operations; William O. Baker, Vice President, Research, Bell Telephone Laboratories, Inc.; Leo Cherne, Executive Director, Research Institute of America; John B. Connally, former Secretary of the Treasury; John S. Foster, Director of Defense Research and Engineering, Department of Defense; Robert W. Galvin, Chairman of the Board, Motorola, Inc.; Gordon Gray, former Special Assistant to the President for National Security Affairs; Edwin H. Land, President, Polaroid Corporation; Clare Booth Luce, former Congresswoman from Connecticut and former Ambassador to Italy; Nelson A. Rockefeller, former Governor of New York; and Dr. Edward Teller, Professor, University of California and Associate Director, Lawrence Radiation Laboratory. Colby Hearings, supra note 9, at 185; telephone interview with Wheaton Byers, PFIAB Executive Director, Aug. 30, 1974 [hereinafter "Byers interview"].

49. Id.

50. Interview with Leo Cherne, Member, PFIAB, New York City, Sept. 13, 1974 [hereinafter "Cherne interview"]. PFIAB's executive director has suggested that PFIAB is concerned with intelligence agency budgets only to the degree that it may feel they do not reflect the President's priorities. Byers interview, supra note 48.

51. The members meet formally for approximately two days every two or three months and work individually on PFIAB projects for varying amounts of time between meetings. Id.; Cherne interview, supra note 50.

52. In September 1974 the staff consisted of the executive director, a former foreign service officer; his assistant, an attorney; and three secretaries. Byers interview, supra note 48.

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sitions of the agencies whose programs they review.[53] Another problem originates from the fact that the Board's advice to the President is given in strict confidence and hence is not subject to the check of publicity.[54] In sum, PFIAB is a policy adviser to the President. It does not in fact and does not purport to exercise an intelligence-budget oversight function.

3. *OMB as an Overseer of Spending.* OMB is not authorized to make independent audits of any government agency's expenditures[55] and does not attempt to perform such audits.[56] Nonetheless, in discharging its primary responsibility as the coordinator of agency budget requests, OMB also serves to a limited extent as an overseer of agency spending. Executive agencies, including the CIA, which submit budgets to OMB are required to report "as accurately as possible" fiscal data including "receipts, appropriations, transfers, outlays and balances for the past year."[57] The reports "must be on a firm accounting basis and consistent with law and regulations"[58] and are subject to the same review as any other part of the agencies' submissions.[59] Thus, to the extent that OMB requires the CIA to account for previously appropriated funds, it serves as a check on CIA spending.

53. Exec. Order No. 11,460, supra note 46, calls for the appointment of persons

> qualified on the basis of knowledge and experience in matters relating to the national defense and security, or possessing other knowledge and abilities which may be expected to contribute to the effective performance of the Board's duties.

54. Sen. Clifford Case (R., N.J.) described the disadvantages of confidential advice in the context of a discussion on executive privilege:

> [T]he Executive is going to get better advice from people who know that their opinions are going to be tested by exposure to public view than otherwise, and . . . the greatest problem of getting good advice from anybody, so far as the President is concerned, is the knowledge that his advisers want to please him, and . . . this is the geatest corrupter of true intelligence. . . . [I]f the people who surround the President know that they are not going to be subject later to an exposure of their views and their advice to the President, they are rather more likely not to give the best advice they can.

Hearings on S. 2224 Before the Senate Comm. on Foreign Relations, 92d Cong., 2d Sess., (1972) [hereinafter "Hearings on S. 2224"].

55. See United States Government Manual 80-81 (1973-74).

56. OMB Letter, supra note 11.

57. Executive Office of the President, Office of Management and Budget, Preparation and Submission of Budget Estimates, Circular No. A-11 § 11.6 (June 28, 1974).

58. Id.

59. See note 11 supra and accompanying text.

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4. *Audits within the CIA.* The only other executive branch review of CIA expenditures occurs within the CIA itself. According to DCI Colby, the Agency's methods of accounting "conform to auditing procedures used throughout the Government."[60] The CIA has an audit staff which reports to the DCI through the Inspector General, who audits all Agency accounts. Most CIA accounts are reviewed internally on an annual basis, with some smaller accounts being audited at less frequent intervals and some larger accounts audited continuously by a resident auditor. In some situations, audits are performed by outside audit firms or the Defense Contract Audit Agency; in addition, a specialized staff audits many of the Agency's industrial contracts.[61] It would appear from this description that in-house CIA budgetary oversight is thorough. However, as conscientious and competent as the Agency's in-house auditors may be, it is an administrative axiom that no organization can evaluate its own programs with complete objectivity.

Thus, all oversight of CIA spending performed within the executive branch—that by the CIA itself, OMB, and perhaps to a small extent PFIAB—is based on fiscal data supplied by the Agency. The task of performing an independent audit is left for the legislative branch.

B. *Congressional Oversight of CIA Spending*

Congress' method of overseeing CIA spending was developed in response to the special requirements of secrecy that accompany many of the activities—and consequently the expenditures—of the CIA and other intelligence services. When the congressional CIA oversight mechanism was established, it was thought that the need for secrecy rendered public hearings and other traditional methods of congressional oversight impracticable and that access to confidential inforamtion about the intelligence agencies and their activities should be denied to all but a few congressmen. Oversight of CIA spending and activities was therefore delegated to subcommittees which meet in executive session and report only the conclusions reached at their meetings, not the reasons underlying them, to Congress as a whole.[62] These subcommittees are in uniquely

60. Letter from William E. Colby, DCI, to author, Nov. 9, 1974, on file in New York University Law Library [hereinafter "Colby Letter"].

61. Colby Hearings, supra note 9, at 182.

62. This exemption from a requirement to justify their conclusions to Congress as a whole is unique to the intelligence subcommittees. Other subcommittees also customarily meet in executive session. Senate Appropriations staff interview, supra note 18.

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powerful positions both because they are not required to justify their conclusions to the full houses and because they are the only congressional bodies to which the CIA acknowledges its obligation to report.[63]

Oversight of CIA activities and spending is primarily the responsibility of subcommittees of the Armed Services Committees in both houses, although the Appropriations Intelligence Subcommittees also perform some spending oversight. The Senate Armed Services Subcommittee on Central Intelligence and the House Armed Services Special Subcommittee on Intelligence are composed of senior members, including the chairmen, of the full committees. Both subcommittees have taken an increasingly active role in intelligence oversight since 1971, a year when the House subcommittee had been disbanded entirely and the Senate subcommittee, although technically in existence, did not meet.[64]

The Senate Armed Services Subcommittee, chaired by Senator John Stennis (D., Miss.), appears to be the less active of the two subcommittees. By mid-September 1974, it had held only two formal meetings during the 93d Congress,[65] although it met informally on a number of other occasions.[66] The informal meetings reportedly did not always involve all subcommittee members and were sometimes, but not always, attended by one or two staff members and recorded in staff memoranda.[67] CIA spending was reportedly reviewed in great detail at some of these meetings.[68]

The House Armed Services subcommittee has taken a relative-

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63. According to DCI Colby,

> [T]here is no specific resolution of either the House or the Senate that sets up those particular committees, but in the early 1950s those subcommittees of the Appropriations Committee and the Armed Services Committee of the House and of the Senate were established as our proper oversight and review committees. And the practice grew up, over these 25 years, that we would only speak to those and not to the others.

Center for National Security Studies, Conference on the Central Intelligence Agency and Covert Actions, Washington, D.C. Sept. 13, 1974 (mimeo'd proceedings) [hereinafter "National Security Studies Conference"].

64. For a description of the oversight committees through mid-1971, see CIA: Congress in Dark About Activities, Spending, 21 Cong. Q. 1840-43 (Aug. 28, 1971) and id. at 1728-29 (Aug. 14, 1971). See also 120 Cong. Rec. 5929 (daily ed. April 11, 1974).

65. 120 Cong. Rec. 17,005 (daily ed. Sept. 19, 1974) (remarks of Sen. Baker, attributing the information to Senate Armed Services Committee staff).

66. Telephone interview with W. Clark McFadden II, Counsel, Senate Armed Services Committee, Nov. 8, 1974.

67. Id. McFadden was unwilling to state the extent to which the subcommittee's responsibilities might be carried out by the chairman alone.

68. Id.

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ly active role in CIA oversight since its reconstitution in 1971 under the chairmanship of Representative Lucien Nedzi (D., Mich.).[69] It met nine times in 1972, 24 times in 1973, and 17 times in 1974 through mid-November.[70] The subcommittee generally meets in executive session, usually with staff members and a stenographer present.[71] That the meetings have not focused on spending oversight is indicated by the fact that a staff member who has worked for the intelligence subcommittee since 1972 has "not been privy to any detailed budget discussions."[72]

The intelligence subcommittees of the House and Senate Appropriations Committees also perform some spending oversight. Staff members of the House "Special Group" are frequently in contact with the executive agencies they oversee; in addition, the Special Group informally monitors CIA spending both in the course of substantive briefings throughout the year concerning Agency programs and in its hearings on the Agency's appropriation requests.[73] The Senate Appropriations Intelligence Subcommittee reportedly also concerns itself with CIA spending both in its formal budget hearings and in its regular semi-monthly meetings.[74]

C. *The 1949 Act and Congressional Control Over CIA Spending*

The 1949 Act appears to limit traditional legislative control over executive agencies by providing that the CIA may expend its funds "without regard to limitations of appropriations from which [the funds are] transferred"[75] and "notwithstanding any other provisions of law."[76] If in these provisions Congress completely—

69. The chairman of the full committee, Rep. Edward Hébert (D., La.), is a member of the subcommittee.

70. Letter from William H. Hogan, Jr., Counsel, House of Representatives Comm. on Armed Services, to author, Nov. 18, 1974, on file in New York University Law Library [hereinafter "Hogan Letter"]. Many, but not all, of these meetings were devoted to hearings on CIA involvement in Watergate and retirement provisions for CIA employees. See, e.g., the list of subcommittee publications in Hearings Before and Special Reports Made By House Comm. on Armed Services on Subjects Affecting the Naval and Military Establishments 1973, 93d Cong., 1st Sess. at 24-25.

71. Hogan Letter, supra note 70.

72. Id.

73. Preston interview—Nov. '74, supra note 13. Although the subcommittee's reviews of CIA appropriation requests do not include a systematic justification of past-year spending, Agency representatives are called upon to justify specific items, e.g. a request for an increase in funds for a certain purpose. Id.

74. Senate Appropriations staff interview, supra note 18.

75. 50 U.S.C. § 403 f (a) (1970).

76. Id.

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even if not permanently[77]—relinquished its power to control CIA spending, attempts to utilize the congressional "plenary power to exact any reporting and accounting it considers appropriate in the public interest"[78] may be an exercise in futility. On the other hand, such a situation may increase the importance of congressional oversight in order to determine when new legislation, including modification of the 1949 Act, may be needed and to allow Congress to attempt to influence the CIA through informal means. In either case, it is useful to define the scope of the 1949 Act with respect to congressional control of CIA spending.

A concrete context in which this issue might arise would be the approval of an appropriation including funds destined for the CIA which contains a limitation on the purposes for which the funds may be spent but which does not expressly state whether the CIA is to be bound by the limitation.[79] In such a case the 1949 Act may reasonably be held to override the subsequent enactment only if Congress (1) intended in passing the 1949 Act to exempt the CIA from all subsequently enacted funding limitations; and (2) does not intend to disturb the CIA exemption in the subsequently passed funding limitation.[80]

The language of the 1949 Act suggests that Congress intended to exempt the CIA only from certain funding technicalities. Thus, for example, the subsection which exempts the CIA "from other provisions of law" arguably applies only to technical funding limitations such as those enumerated in that subsection, viz.,

> prohibitions on the exchange of appropriated funds other than for silver, gold, U.S. notes and national bank notes, restrictions on using personnel of other government agencies, and limitations on the payment of rent and making of improvements to leased premises.[81]

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77. Congress may, of course, reassert this power whenever it wishes by the passage of new legislation. See text accompanying notes 196-214 infra.

78. United States v. Richardson, 418 U.S. 166, 178, n. 11 (1974).

79. An example of such a limitation in an appropriation bill might state that "nothing in this appropriation shall be construed as authorizing the use of any such funds to provide military assistance to the Government of X." Cf. Pub. L. No. 91-668, § 838 (a), 2d proviso, 84 Stat. 2020 (1971), a provision in the 1971 Department of Defense Appropriation which prohibited the use of funds in the appropriation for support of allied forces assisting the government of Cambodia or Laos. This limitation is discussed in Futterman, Toward Legislative Control of the CIA, 4 N.Y.U. J. Int'l L. & Pol. 431, 450 (1971) [hereinafter "Futterman"].

80. Id. at 448-54.

81. 50 U.S.C. § 403f (1970). This interpretation involves application of the *ejusdem generis* maxim of statutory construction.

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Similarly, subsection 10 (a),[82] which allows the Agency to expend funds "notwithstanding any other provisions of law," arguably was intended to apply only to the housekeeping functions listed therein such as "rental and news-reporting services" and "association and library dues." Subsection 10 (b),[83] authorizing the CIA to spend its funds "without regard to the provisions of law and regulations relating to the expenditure of Government funds," may have been intended only to exempt the CIA from normal accounting procedures. Such an interpretation is indicated by the remainder of the sentence: "... and for objects of a confidential, extraordinary or emergency nature, such expenditures to be *accounted* for solely on the certificate of the Director. . . ." (Emphasis added.)

Congress' intent regarding CIA spending autonomy is not clarified by the legislative history of the 1949 Act. The Committees on Armed Services of both houses held hearings on the bill in executive session and released only skeleton reports stating that much of the testimony was confidential and that the legislation was justified.[84] The House passed the bill without clarification;[85] the Senate likewise passed an amended version of the House bill with the knowledge that it was not being given a full explanation.[86] The funding provisions of the Act were not discussed in either House.

Proponents of CIA autonomy may argue that Congress' passage of the 1949 Act without knowledge of its full implications re-

82. 50 U.S.C. § 403j (a) (1970).

83. 50 U.S.C. § 403j (b) (1970).

84. S. Rep. No. 1302, 80th Cong., 2d Sess. (1948); H.R. Rep. No. 160, 81st Cong., 1st Sess. (1949); S. Rep. No. 106, 81st Cong., 1st Sess. (1949). The House report stated:

> The report does not contain a full and detailed explanation of all the provisions of the proposed legislation in view of the fact that much of such information is of a highly confidential nature. However, the Committee on Armed Services received a complete explanation of all features of the proposed measure. The committee is satisfied that all sections of the proposed legislation are fully justified.

H.R. Rep. No. 160, 81st Cong., 1st Sess. 6 (1949).

85. When the House considered the committee report, some members objected to the committee's failure to inform the House of the full implications of the bill. Rep. Emanuel Celler (D., N.Y.) protested:

> Certainly if the members of the Armed Services Committee can hear the detailed information to support this bill, why cannot our entire membership? Are they the Brahmins and we the untouchables? Secrecy is the answer. What is secret about the membership of an entire committee hearing the lurid reasons? In Washington three men can keep a secret if two men die. It is like the old lady who said, "I can keep a secret but the people I tell it to cannot."

95 Cong. Rec. 1945 (1948).

86. 95 Cong. Rec. 6947-56 (1949).

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flects an intent to abdicate effective control. However, a contrary argument holding that the burden of proof falls on those who assert such an extraordinary abdication of legislative power is at least equally persuasive. In this view, the absence of explicit legislative direction should be interpreted as reflecting a congressional intent *not* to grant extraordinary powers to the CIA. If any such explicit grant is contained in the undisclosed portion of the Armed Services Committees' hearings, the burden is on those who assert it to produce the unpublished materials. Even if such materials were found to exist, the question would still remain as to whether they reflect the true intent of Congress since Congress as a whole was ignorant of them when it passed the legislation.[87]

Respect for the intent of post-1949 Congresses which have enacted appropriations limitations also dictates a restrictive construction of the 1949 Act's funding provisions. A total CIA exemption from funding limitations which do not expressly apply to it might frustrate the intent of subsequent Congresses enacting limitations on appropriations, for the executive could always evade the restrictions merely by transferring the funding and nominal control of the forbidden operation to the CIA. Therefore, when Congress passes a blanket restriction on an appropriation and is silent regarding its application to the CIA, the burden of persuasion should rest on those who would exempt the Agency rather than on those who would read the restriction literally. This view is particularly plausible since such restrictions are frequently added during rapid floor debate, when congressmen cannot be expected to have in mind all the other sections of the United States Code which might conceivably affect the matter at hand. Unless there is an express indication of congressional awareness of the 1949 Act's CIA exemption when a given funding restriction is passed, the axiom that Congress intends its legislation to be effective suggests that the 1949 Act should not be held to supersede a subsequently voted appropriation restriction.[88]

87. The position described here is put forth in Futterman, supra note 79, at 452-53.

88. Cf. Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1969), where the Supreme Court held that a statute prohibiting federal courts from granting injunctions against labor unions under any conditions [Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1932)] did not prevent a federal court from granting an injunction to enforce a provision of a more recent law [Labor Management Relations Act, 29 U.S.C. § 185 (1947)], despite the fact that the newer statute did not expressly supersede the older one and did not expressly authorize the granting of such an injunction. The Court stated:

The literal terms of . . . the Norris-LaGuardia Act must be accommo-

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Thus there is at least a colorable argument that the 1949 Act was not intended to and does not preclude control of CIA spending by subsequent Congresses. Otherwise, the 1949 Act would so limit the parameters of Congress' discretion that congressional oversight of CIA spending would be reduced to form without substance.

IV. Deficiencies In The Present System of Congressional Oversight

There is little disagreement that intelligence oversight—including oversight of intelligence spending—cannot be performed as openly as oversight of other government functions. An appropriate standard for congressional oversight of the CIA is that it be as thorough and as open as possible, consistent with the confidentiality required by the national security. With that standard in mind, this section will examine some possible weak points in the current system.

A. *Do the Subcommittees in Effect Shield the CIA from Congress?*

The secrecy that attends subcommittee oversight of CIA expenditures raises issues regarding the utility of oversight groups whose members cannot reveal the bases for their judgments even to their congressional colleagues. Under such conditions the oversight committees, far from being an instrument of congressional control over the intelligence agencies, may in effect shield the intelligence community from effective congressional scrutiny.[59]

So long as the oversight subcommittees continue to have jurisdiction over CIA activities, no other congressional bodies will be likely to monitor the Agency. Hence, by remaining ignorant of

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> dated to the subsequently enacted provisions of . . . the Labor Management Relations Act and [the latter Act's] purposes.

398 U.S. at 250.

59. For example, Sen. Proxmire, citing the repeated postponement of hearings on the CIA by the CIA subcommittees in both houses despite the referral of "several important bills" to them and despite DCI Colby's suggestion that changes be made in the CIA legislation, recently stated on the floor of the Senate:

> It has reached the point where the only conclusion that can be drawn is that the committees are trying to protect the CIA from the legitimate calls for change from the rest of Congress.

120 Cong. Rec. 5929 (daily ed. April 11, 1974). Sen. Case has also cautioned that oversight committees having access to classified information may in effect be "used as a means of conning us rather than informing us, as a body." Hearings on S. 2224, supra note 54.

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Agency activities, such as appears to have been the case regarding CIA involvement in Laos before 1971,[90] the subcommittees effectively cut off the access of the entire Congress to information, both fiscal and substantive, about these activities. The effect of any failure to oversee by the subcommittees is particularly severe in view of the fact that they are the only ones to whom the Agency recognizes an obligation to provide information.[91] A concrete example of this problem occurred recently in connection with an investigation of possible CIA involvement in the Watergate break-in and cover-up by the Senate Select Committee on Presidental Campaign Activities [hereinafter the "Select Committee"]. Senator Howard Baker (R., Tenn.) reported that the Select Committee had been confronted by a "stonewall" [*sic*] when it received a letter from DCI Colby

> stating that the Agency would make certain critical classified information "completely available to inspection by any member of the CIA Subcommittee of the Senate Armed Services Committee" but that he did not "think it appropriate to turn over to the Select Committee" any of this material.[92]

Thus, a properly authorized congressional committee was unable to investigate as fully as it deemed proper matters involving the CIA. The committee's inability appeared to result from a combination of the oversight subcommittees' failure to act and the CIA's reluctance to supply certain information to any congressional body other than the oversight subcommittees.

Another aspect of the problem arises from the Armed Services Committees' practice of referring bills concerning the CIA to the Agency for comment, which as applied sometimes appears to have the effect of giving the CIA a measure of control over legislation concerning it. Although it is regular congressional procedure to re-

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90. See text accompanying notes 22-23 supra.

91. DCI Colby recently stated:

> I am prepared to go into the CIA . . . in detail before the proper committees . . . . [or] before any other members who are brought into the matter by the proper committees. I am prepared to change our procedure if the Congress decides to set up the structure in another way. Until one of those happens, I respectfully must not get into a further discussion about the details of our activities . . . .

See note 63 supra and accompanying text.

92. 120 Cong. Rec. 17,004 (daily ed. Sept. 19, 1974). DCI Colby, while not denying Sen. Baker's assertions, states that the CIA "made available" to the Select Committee "26 witnesses, 700 documents, and 2,000 pages of testimony, much of it sensitive and of the type normally available only to the Agency's oversight committees." Colby letter, supra note 60.

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fer proposed legislation to the agencies concerned for comment,[93] bills referred to the CIA by the House Armed Services Committee frequently remain at the Agency for so long as effectively to cut off their chance for consideration by Congress.[94] This practice, whatever its purpose, serves to prevent the passage of legislation concerning the Agency rather than to facilitate it.

B. *Are the Subcommittees Representative of Congress as a Whole?*

The membership of the oversight subcommittees does not represent the full spectrum of congressional views. The seniority system creates one facet of this problem. As the system presently works, the chairman of each committee assigns the other members to subcommittees. The chairman of the Armed Services and Appropriations Committees in both houses have consistently chosen only relatively senior members for service on the intelligence subcommittees.[95] Younger congressmen and those who tend to be more critical of the CIA are not represented on the oversight subcommittees.

The second aspect of the problem is inherent in the secrecy which attends subcommittee deliberations. Representatives and senators face elections every two or six years, and intelligence oversight does not gain votes at home. Indeed, it may well cost votes. Based on what a subcommittee member has learned in confidential briefings, he may be moved to a vote on the floor of the House or Senate which he cannot justify publicly and which may appear ill-considered in light of the information available to the public.[96]

93. Hogan letter, supra note 70.

94. For example, among the bills awaiting CIA comment in August 1974 was one which had been referred to the Agency in May 1973 and two which had been referred in June 1973. Leg. Cal., H.R Comm. on Armed Services, 93d Cong., No. 8 (Aug. 23, 1974). Consideration of six bills similar to those submitted for CIA recommendation was meanwhile being held in abeyance pending receipt of the Agency reports on the three submitted bills. Id. All these bills died in committee when the 93d Congress adjourned Dec. 20, 1974.

95. See text preceding notes 13 and 64 supra.

96. Sen. George Aiken (R., Vt.) has aptly described this predicament:

> We all know that when the appropriations bill is pending the Russians in particular become extremely powerful. They are on the verge of producing weapons which could virtually exterminate us at one blow and we have to do something about that right away. Let's assume [the Defense Department] asks for a trillion dollars to continue [its] research . . . . But assume that the members of the committee entitled to the information from the CIA learn that this information, so-called, which has been spread across the front pages of the press to justify the

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Furthermore, since time and effort expended on intelligence oversight do not usually gain crucial home-town publicity, the congressmen who can best afford to participate in confidential oversight may be those senior members with "safe" seats.[97]

Since secrecy requires intelligence oversight committees to report their conclusions to the entire Congress without the underlying justifications—thereby precluding the members from making an independent informed judgment[98]—and since these conclusions are necessarily based on general policy judgments as well as on specific classified information, it is particularly unfortunate that the subcommittees do not comprise a philosophical cross-section of the full Congress.[99] This is a case in which national security, the political process, and the democratic ideal of fair representation are all at loggerheads.

C. *Exclusion of the House Foreign Affairs and Senate Foreign Relations Committees from CIA Oversight*

Another deficiency relates to the exclusion from the intelligence oversight process of congressional committees with jurisdiction over foreign affairs. The structural relationship between CIA

> demand for a trillion dollars, isn't so; that the Russians are nowhere near that point in their development of destructive weapons and that, say $500 billion would suffice to insure the security of the United States.
>
> What do we do then? Do we go on the floor and take the position against all this publicity which has been spread in public before the committees and spread before the United States and the press? Then to carry out our duties we vote against that trillion dollars . . . . and approve of only $500 billion. How do we justify that position with our constituents back home? Assuming we want to be reelected, it puts us in a bad spot. Can we say we got this information from the CIA? How do we justify our position after all this publicity has been made on the other side of it?
>
> . You know self-preservation is a very strong instinct among Members of Congress. .

Hearings on S. 2224, supra note 54, at 37-38.

97. But see text accompanying notes 145-46 infra.

98. Sen. Hughes has described Congress' position with regard to intelligence matters:

> We are uninformed . . . . We have not had the capacity or responsibility to know even when we were given information whether it was right or wrong, or what was happening.

120 Cong. Rec. 9507 (daily ed. June 4, 1974).

99. In the case of the Appropriations subcommittees the problem is most acute, since the CIA budget as approved by these subcommittees is concealed in other appropriations and is not even subject to the formality of a vote of the full House and the full Senate.

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activities and U.S. foreign policy supports the inclusion of these committees. As demonstrated by the recently disclosed Chilean operation, CIA activities can have a profound effect on U.S. foreign policy. Congress recognizes this: When a covert operation goes awry, it looks to the Foreign Affairs and Foreign Relations Committees, not to the Armed Services or Appropriations Subcommittees, for an explanation.[100]

Furthermore, the law restricting CIA operations (with very limited exceptions) to foreign countries[101] suggests that the House Foreign Affairs and Senate Foreign Relations Committees ought to be included in intelligence oversight. Another reason for their inclusion is the fact that CIA operatives abroad are responsible to the ambassadors in their respective countries; the ambassadors, in turn, are part of the State Department, which is within the exclusive congressional jurisdiction of the Committees on Foreign Affairs and Foreign Relations.[102] The Foreign Assistance Act of 1974[103] mandates the inclusion of the Foreign Affairs and Foreign Relations Committees in certain aspects of CIA oversight which have particular significance to the United States' international posture. However, an informal arrangement by which members of the Senate Foreign Relations Committee were accorded "observer" status at Senate Armed Services Intelligence Subcommittee meetings was discontinued in 1974.[104]

D. *Lack of Executive Cooperation*

The effectiveness of congressional oversight of the CIA is reduced by the failure of the executive branch either to consult with the subcommittees on policy matters or to cooperate fully in congressional investigations.[105] The 1971 White House reorganization of the intelligence community[106] is perhaps the most striking example of executive failure to consult with the intelligence oversight

100. F. Wilcox, Congress, the Executive, and Foreign Policy 87 (1971). Hearings about the U-2 incident in 1960 and the Bay of Pigs episode in 1961, for example, were both held by the Senate Foreign Relations Committee. Moreover, when the Foreign Relations Committee sought an explanation of the CIA's role in these events, it bypassed the Armed Services Committee and went directly to the CIA. Id.

101. 50 U.S.C. § 403d(3) (1970).

102. 117 Cong. Rec. 42,925 (1971) (remarks of Sen. Symington).

103. Pub. L. No. 93-559 (Dec. 30, 1974). See Editor's Note infra.

104. Telephone interview with Senate staff member, Aug. 30, 1974 [hereinafter "Senate staff interview"].

105. See, e.g., text accompanying note 92 supra.

106. See text accompanying note 33 supra.

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subcommittees. This action was taken without prior consultation with or even advance notice to the Senate Armed Services or Appropriations Committee.[107]

The Executive's attitude toward Congress in this matter was described by Senator Stuart Symington (D., Mo.), a member of the Armed Services Intelligence Subcommittee who had protested the Executive's bypassing of Congress:

> The Chairman of the newly formed White House Intelligence Committee, Dr. Kissinger, . . . said . . . that the change should have been discussed with the proper committees of Congress, that the organization details had been handled by Mr. George Shultz, and that he, Kissinger, would arrange for Mr. Shultz to come down and talk to me about it.
>
> I . . . said I felt any such a briefing should be given to the committees, not to an individual Member. *That is the last I have heard of it.*[108]

Congressional hearings to be held in 1975 on the CIA's alleged domestic activities and on its $11-million intervention in Chile may disclose whether the executive branch has since begun consulting with the congressional oversight committees.[109]

A particularly important instance of executive failure to cooperate with subcommittee investigations involves CIA's refusal to permit the General Accounting Office [hereinafter "GAO"], Congress' legal and accounting arm,[110] to conduct a comprehensive CIA audit. Since 1961, when GAO concluded that "under existing security restrictions" it could not perform useful audits,[111] GAO has "not conducted any reviews at the CIA nor any reviews which focus

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107. 117 Cong. Rec. 42,930 (1971) (remarks of Sen. Stennis). The record does not reveal whether the House oversight committees were consulted.

108. 117 Cong. Rec. 42,924 (1971) (emphasis added).

109. Sen. Symington stated that he had not been fully informed of the Chile operation. N.Y. Times, Sept. 17, 1974, at 11, col. 1. DCI Colby stated:

> I can't say that every dollar that CIA spent in Chile was individually approved by a chairman, but I can say that the major efforts were known to the senior officials of the Congress as stated.

National Security Studies Conference, supra note 63.

110. The GAO was established by the Budget and Accounting Act of 1921, 31 U.S.C. § 41 (1970), as an independent, nonpolitical investigative arm of Congress. See also the Budget and Accounting Procedures Act of 1950, 31 U.S.C. §§ 65-67 (1970), and the Legislative Reorganization Act of 1970, 31 U.S.C. §§ 1154, 1171-76 (1970).

111. Letter of May 10, 1974 from R. F. Keller, Acting Comptroller General of the United States, to Hon. William Proxmire 9 [hereinafter "GAO Letter"].

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specifically on CIA activities."[112] When GAO has contacted the CIA, directly or indirectly, in the context of broad reviews regarding other matters such as transfers of excess defense articles to foreign governments, it has experienced varying degrees of cooperation. In some cases the CIA has provided the information desired, but other attempts to obtain "information from the intelligence community must be characterized as border-line, at best."[113]

Since GAO provides the mechanism through which Congress normally audits the executive agencies whose budgets it authorizes, the failure of the CIA to cooperate with GAO auditors and investigators presents an extremely serious problem. The intelligence subcommittee staffs do not have the capacity to audit a billion-dollar budget such as the CIA's, while GAO was established precisely to perform such audits for Congress.[114] Thus, by not cooperating with GAO, the CIA effectively forecloses Congress from auditing its books.

E. *Concealment of the CIA Appropriation from Congress*

Perhaps the most critical shortcomings in congressional oversight of CIA funding are found in the appropriation system. Under the present scheme, only a few committee chairmen and subcommittee members know the amount of the CIA appropriation; the great majority of congressmen play no role in determining either the details of Agency spending or even the total amount of its budget.[115] This arrangement not only deprives Congress of an opportunity to express its funding priorities with respect to CIA activities but also affirmatively deceives Congress with regard to the level of funding being approved for other programs whose appropriations may contain funds actually destined for the CIA.

Through the annual appropriation process, Congress allocates the Government's available financial resources. Since these resources are limited, Congress in effect must choose among the several items in the budget supermarket, spending more on the items it judges to be most vital, economizing on others, and eliminating some altogether.[116] Since the CIA budget is unidentified, there is

112. Id. See note 151 infra.
113. Id. at 10-11.
114. See note 110 supra.
115. For a description of the appropriation process, see Section II supra.
116. Sen. McGovern first made the analogy of a supermarket of services. 117 Cong. Rec. 23,692 (1971).

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no opportunity for the members to weigh it against other programs which might compete with it for federal funds. At the same time, the CIA budget affects Congress' budgeting process in a particularly unfortunate way, by inflating the appropriations in which the CIA's budget is hidden.[117] Hence, Congress believes it is allocating a higher priority to the programs in whose appropriations CIA funds are concealed than is, in fact, the case.[118]

Even the chairmen of subcommittees concerned with non-intelligence matters sometimes are unaware that the appropriations for programs under their jurisdiction include funds earmarked for the CIA. For example, in 1971 Senator Edward Kennedy (D., Mass.), Chairman of the Senate Judiciary Committee's Subcommittee on Refugees and Escapees, made public receipts obtained from GAO which he said demonstrated that much of the money appropriated for refugee aid in Southeast Asia was in fact being spent to

117. Most but not all CIA funds are probably included in appropriations for the Department of Defense. Preston interview—Nov. '74, supra note 13. This is reflected in the fact that the appropriations intelligence subcommittees in both houses are largely composed of members of the Defense Department subcommittees. See text preceding note 13 supra. In 1971 Professor Futterman suggested that most CIA funds may be located in the $5+ billion "Intelligence and Communications" item in the Defense Program and Budget. Futterman, supra note 79, at 441. It has also been suggested that funds destined for the CIA may be hidden in appropriations for the Food for Peace program [117 Cong. Rec. 40,737 (1971)], domestic agricultural programs [117 Cong. Rec. 23,692 (1971)], and refugees in Southeast Asia (see text accompanying notes 119-20 infra).

118. This problem was discussed in the Senate in 1971:

> Mr. FULBRIGHT. [B]illions of dollars of intelligence funds are contained in this [Defense Department] appropriation. No one can tell where in this bill those funds are. When they read a line item and find that there is so much for aircraft, or for a carrier, those may or may not be the real amounts.
>
> This practice gives rise to questions about every item in the appropriation . . . .
>
> Mr. CRANSTON. Are there references in the appropriation bill to funds for intelligence uses?
>
> Mr. SYMINGTON. No.
>
> Mr. CRANSTON. How are they provided for; by padding other categories?
>
> Mr. SYMINGTON. I am not sure I have enough knowledge to answer. Presumably yes . . . .
>
> Mr. CRANSTON. When we run through the bill, we find that there is allocated money for pay and allowances, for individual clothing, for subsistence . . . Is the way these items are handled, inflated, or bloated, in fact—some of them, at least—that will cover up what is in this bill for intelligence?
>
> Mr. ELLENDER. Yes, the Senator is correct—some of it.

117 Cong. Rec. 42,927-31 (1971).

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support CIA-directed paramilitary operations in Laos.[119] Over a year later Senator Kennedy published reports which indicated that nearly half of the funds appropriated by the U.S. to aid victims of the war in southeast Asia were still being diverted to CIA projects, despite President Nixon's earlier assurances that the practice would be ended;[120] and the CIA was reported to be continuing to finance clandestine army operations through the Agency for International Development.[121]

It appears that subcommittee chairmen remain unaware of CIA funds in their appropriations. As recently as April 1974, Senator Proxmire asserted that "many subcommittee chairmen in Congress are not aware that they are approving appropriations for intelligence agencies under the slight-of-hand procedures in the [1949 Act]."[122] To help remedy this situation, Senator Proxmire stated that he would ask the floor manager of every appropriation bill whether intelligence funds were hidden in his bill.[123]

V. Does the Constitution Mandate Publication of the CIA Budget?

The question of whether the CIA budget should be hidden from all but a few members of Congress is one of constitutional significance. Not only may the Constitution mandate the reporting of CIA expenditures to Congress as a whole, but it may even require publication of the CIA budget. Article I, Section 9, Clause 7 of the Constitution provides: "[A] regular statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." This, the Statement and Account Clause, has never been interpreted by the Supreme Court.[124] The "legislative history" of the Clause, while not totally unambiguous, is compatible with the view that the Framers of the Constitution intended that public account should be made of all funds expended by the federal

119. N.Y. Times, Feb. 7, 1971, at 16, col. 3.
120. N.Y. Times, March 19, 1972, at 1, col. 8.
121. Id. at 2, cols. 1-4.
122. 120 Cong. Rec. 5929 (daily ed. April 11, 1974).
123. 120 Cong. Rec. 888 (daily ed. Jan. 31, 1974).
124. Recently, in United States v. Richardson, 418 U.S. 166 (1974), a citizen invoked the Clause in support of his petition for a writ of mandamus to compel the Secretary of the Treasury to publish the CIA's receipts and expenditures and to enjoin any further publication of the Treasury Department's *Combined Statement* which did not reflect such figures. The Supreme Court held that Richardson lacked standing to bring the action and issued no opinion on the merits of his case.

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government. At a minimum, the legislative history indicates an intent that Congress should be fully informed of all federal expenditures.

A. *Textual Analysis of the Statement and Account Clause*

The plain language of the Statement and Account Clause is unambiguous in its mandate that "a regular statement and Account . . . of *all* public money *shall* be published from time to time" (emphasis added). In contrast, Article I, Section 5, Clause 3, requiring each house to maintain and publish a journal of proceedings, expressly exempts from publication "such facts as may in their Judgment require Secrecy."[125] No Constitutional provision indicates that Congress itself is to have anything less than complete information about the receipt and expenditure of public funds.

B. *The Legislative History of the Statement and Account Clause*

The particular importance which the Framers attached to a public accounting is not difficult to understand: "A revolution had been fought largely because of popular resentment of a distant sovereign who taxed and spent without public accountability."[126]

Nothing analogous to the Statement and Account Clause had been contained in the Articles of Confederation[127] or in the original draft of the Constitution.[128] When the Clause was first proposed at the Constitutional Convention, only one representative questioned the addition of the full-accounting requirement; and he merely expressed doubt about the practicality of requiring the Government to report "every minute shilling."[129] No objection was

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125. The Statement and Account Clause has also been compared to Article II, Section 3, which requires the President "from time to time [to] give to the Congress Information on the State of the Union." This comparison is said to demonstrate that the Framers distinguished between "reporting" to Congress and "publishing" to the people. Brief of Ralph Spritzer as Amicus Curiae at 29-30, Richardson v. United States, 465 F.2d 844 (3d. Cir. 1972) [hereinafter "Amicus Brief"]. Regardless of whether the Statement and Account Clause creates a duty to the people, the Supreme Court's dictum that "the subject matter is committed to the surveillance of Congress," (418 U.S. at 179), indicates that at least Congress is entitled to receive complete information.

126. Amicus Brief, supra note 125, at 30.

127. The Articles of Confederation required only that Congress inform the states of its indebtedness. Articles of Confederation, Art. IX, ¶ 15.

128. Brief for the Petitioners at 23, United States v. Richardson, 418 U.S. 166 (1974).

129. Rufus King was the Framer who expressed this view. 2 The Records of the Federal Convention of 1787, at 618 (M. Farrand ed. 1911) [hereinafter "M. Farrand"].

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made to the principle of publishing the Government's accounts. Instead, the main question debated was the frequency with which accountings should be published. The original proposal was for annual publication, but James Madison's proposal, requiring publication "from time to time" in order to "leave enough to the discretion of the Legislature,"[130] prevailed. Madison, attempting not to weaken but to strengthen the Clause by his amendment,[131] noted that the practical effect of the fixed-interval reports required under the Articles of Confederation had been counterproductive: "[A] punctual compliance being often impossible, the practice had ceased altogether."[132] James Wilson, who seconded Madison's motion, added that "[m]any operations of finance cannot be properly published *at certain times*."[133] Wilson's statement must have been based on an assumption that full disclosure was to be required, for if full disclosure were not required, there would never be a necessity to delay reporting until the report could be "properly published." Statements made by the Framers at ratifying conventions in their home states also reflect their understanding that full accountings would be available both to Congress and to the people under the Statement and Account Clause.[134]

The only doubt about the Clause was expressed by Framers who feared that the "from time to time" requirement might later be

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130. Id. at 618-19.

131. That the Madison proposal was designed to strengthen the publication requirement is apparent from his explanation of the proposal at the 1787 Convention:

> [I]f the accounts of the public receipts and expenditures were to be published at short stated periods, they would not be so full and connected as would be necessary for a thorough comprehension of them and detection of any errors. But by giving them an opportunity of publishing them from time to time, as might be found easy and convenient, they would be more full and satisfactory to the public, and would be sufficiently frequent.

3 M. Farrand, supra note 129, at 326.

132. 2 M. Farrand, supra note 129, at 619.

133. Id. at 618-19 (emphasis added).

134. For example, George Mason, who drafted the Clause, told the Virginia Convention that while some matters might require secrecy, he

> did not conceive that the receipts and expenditures of the public money ought ever to be concealed. The people, he affirmed, had a right to know the expenditures of their money.

3 M. Farrand, supra note 129, at 326.

In Maryland, James McHenry stated: "[T]he people who give their money ought to know in what manner it is expended." 3 M. Farrand, supra note 129, at 150. In New York, Chancellor Livingston advocated the Clause as a check against corruption:

> Congress are to publish, from time to time, an account of their receipts and expenditures. These may be compared together; and if the former,

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construed in a way which would violate the Framers' intent of full publication.[135] Interestingly, however, none of the proponents of the "from time to time" phrase listed the need for some secrecy as an argument supporting their position.

C. *Subsequent Constructions of the Statement and Account Clause*

In practice, the Statement and Account Clause has been interpreted as permitting Congress to make secret appropriations under certain circumstances. In 1811, for example, President Madison, a Framer, confidentially asked Congress for authorization to take possession of parts of Spanish Florida. Congress responded by appropriating $100,000 for the occupation and by forbidding the publication of the appropriation.[136] However, that case differs in two important respects from that of the CIA budget: The entire Congress knew about the secret appropriation, and the appropriation was made public after the controversy over Florida had ended.

Only in relatively recent years has Congress permitted an entire agency—the CIA—to receive funds without the knowledge of all the members[137] and allowed the expenditure of significant sums of money to go unreported indefinitely.[138] Unfortunately, the statutes which waive the accounting requirement have not been tested in court, so it is impossible to determine how much significance should

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> year after year, exceed the latter, the corruption will be detected, and the people may use the constitutional mode of redress.

2 J. Elliot, Debates on the Federal Constitution 345 (1836) [hereinafter "Elliot"].

135. Patrick Henry cautioned:

> the national wealth is to be disposed of under the veil of secrecy; for [with] the publication from time to time . . . they may conceal what they may think requires secrecy.

3 Elliot, supra note 134, at 462. This statement reflects concern that such a construction of "from time to time" would abuse the clear mandate and intent of the Clause. George Mason's similar concern was dismissed by Lee of Westmoreland as "trivial." In Lee's view, the "from time to time" requirement referred to "short, convenient periods," and anyone neglecting that provision "would disobey the most pointed directions." 3 Elliot, supra note 134, at 459.

136. See Miller, Secret Statutes of the United States 10, cited in Supplemental Brief of Appellee, Richardson v. United States, 465 F.2d 844 (3rd. Cir. 1972); 3 Stat. §§ 471-72.

137. Statutes exempting executive agencies from congressional accounting requirements under specified circumstances include: 28 U.S.C. § 537 (1970) (certain Federal Bureau of Investigation expenditures), 31 U.S.C. § 107 (1970) (certain Presidential expenditures for foreign intercourse), and 42 U.S.C. § 2017(b) (1970) (certain Atomic Energy Commission expenditures).

138. For example, there has never been a public accounting for the $2 billion reportedly expended to develop the atomic bomb during World War II. Brief for Petitioners at 26, United States v. Richardson, 418 U.S. 166 (1974).

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be attached to them when interpreting the Statement and Account Clause.[139] The most that can be said, therefore, is that during the lifetime of the Framers the Constitution was not construed as permitting appropriations which were ever secret from the entire Congress or which were indefinitely secret from the people, while more recent statutes authorizing such secrecy remain untested.

The plain language and the legislative history of the Statement and Account Clause, as well as its subsequent construction with respect to the 1811 Florida appropriation, strongly suggest that the Clause was intended to require a full accounting of all public funds —at least to the Congress, and probably to the people as well. It therefore seems doubtful that the transfer method of financing the CIA, with its resulting distortion of appropriations and published accounts, meets the constitutional standard.[140]

VI. RECOMMENDATIONS

We may say that power to legislate . . . belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.[141]

History is not replete with examples of good sense holding sway for long periods. Therefore, Congress must act now to

139. It is conceivable that this problem will never be judicially resolved. The Supreme Court's *Richardson* decision raises the possibility that the Statement and Account Clause may be among the constitutional provisions that cannot be litigated. See United States v. Richardson, 418 U.S. at 179; Richardson v. United States, 465 F.2d at 873 (dissenting opinion of Judge Adams). On the other hand, it is possible that constitutional challenges based on the Clause will not be completely foreclosed by *Richardson*. A congressman's standing to sue in his official capacity has not yet been addressed by the Supreme Court. However, at least two lower federal courts have recently granted standing to congressmen. Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973); Holtzman v. Richardson, 361 F. Supp. 544 (E.D.N.Y. 1973), rev'd on other grounds sub nom. Holtzman v. Schlesinger, 484 F.2d 1307. See Special Committee to Study Questions Related to Secret and Confidential Government Documents, S. Rep. No. 93-466, 93d Cong., 1st Sess. 5-8 (1973) [hereinafter "Secret and Confidential Documents Report"].

140. See Amicus Brief, supra note 125, at 31, for one view of what that standard requires:

> Only an accurate and identifiable head of appropriation—one bearing the name and thus disclosing at a minimum the general purpose for which funds are being employed—can satisfy the constitutional obligation to account for the "Receipts and Expenditures of all Public Money . . ."

141. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

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close the loopholes and put teeth in the oversight functions.[142]

The Constitution may prohibit secret appropriations altogether, but at the very least it mandates that Congress be informed regarding the expenditure of federal funds.[143] That and other considerations call for revisions in the present congressional system of budgetary oversight of the CIA. This section will explore possible solutions to the problem of maximizing Congress' fiscal control of the Agency while preserving the necessary degree of confidentiality. The proposals will focus on ways in which oversight might be performed more effectively within the existing legislative framework.

A. *Necessary Attributes of Oversight Committees*

On several occasions Congress has debated whether intelligence oversight should remain in the hands of the present subcommittees or instead be vested in a joint committee or variously constituted committees in both houses.[144] The structure of the oversight group is not, however, the most important element. Rather, it is critical that the oversight body: (1) represent Congress as a whole; (2) have genuine investigative power and not be completely dependent on the Agency's voluntary submission of the requisite information; and (3) actively assert control over CIA policies and expenditures. None of these conditions is currently met.

1. *The Oversight Body Must Represent the Entire Membership.* If, as is likely, Congress should delegate the oversight function to a relatively small group of members, the designated body must be more representative of Congress as a whole than past and present oversight committees have been. Since the committee (or committees or subcommittees) may not be able to account to the entire Congress by reporting all the data on which its conclusions are based, its members must have the personal confidence of every member of Congress, including "dissidents." Although the oversight subcommittees have traditionally been composed of senior members

142. 120 Cong. Rec. 5929 (daily ed. April 11, 1974) (remarks of Sen. Proxmire).

143. See text accompanying notes 124-140 supra.

144. For a description of periodic unsuccessful efforts in the House and Senate to change the committee system of oversight, see H. Ransom, The Intelligence Establishment, 160-79 (1970) and L. Kirkpatrick, The U.S. Intelligence Community 60-67 (1973).

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of the parent committees, junior members could also be seated on the oversight body without doing violence to the committee system. Despite the possible political liabilities of membership on such a body to a junior congressman,[145] some junior members have in the past devoted considerable energy to solving the intelligence oversight problem.[146] Such members may be willing to risk the political handicaps of service on an oversight body. Further, should any doubt arise concerning the fitness of a representative or senator to serve on the oversight body, it would not be unreasonable to ask *all* prospective members, including those who have already served in similar capacities, to submit to a security clearance.[147]

2. *Resumption of GAO Audits.* For any body to be effective in CIA oversight, it must have independent authority to audit the Agency. The present system, whereby the oversight subcommittees depend on the CIA to supply information, weakens the oversight function. GAO, which provides Congress with the means to audit executive agencies,[148] should be utilized for this purpose.

The 1949 Act's provision that certain CIA expenditures are "to be accounted for solely on the certificate of the Director,"[149] does not entirely exempt the CIA from accounting to Congress. At a minimum, it leaves Congress with the power to perform a compliance audit of the CIA to assure that all expenditures are properly accounted for by certificates from the DCI. Additionally, the Agency can grant GAO more extensive accounting access than the 1949 Act may strictly require. This was in fact done during the period immediately following the passage of the 1949 Act when, at the DCI's request, GAO continued to make on-site audits as it had done for CIA's predecessor, the Central Intelligence Group.[150]

145. See text accompanying note 97 supra.

146. Among such members are Reps. Robert Drinan (D., Mass.), Michael Harrington (D., Mass.), and Paul McCloskey (R., Cal.) and Sen. Alan Cranston (D., Cal.)

147. According to DCI Colby, "security clearances do not enter into the picture in providing classified information to a member of Congress." Colby letter, supra note 60. However, the idea of subjecting members of Congress to security clearances is not a new one. According to Sen. Barry Goldwater (R., Ariz.), "[a]ny Senator can attend briefings by the CIA if he is cleared for top secret." 120 Cong. Rec. 9612 (daily ed. June 4, 1974).

148. See text accompanying note 110 supra.

149. 40 U.S.C. § 403j (1970). Cf. text accompanying note 83 supra.

150. GAO Letter, supra note 111, at 8. In view of the accounting provisions of the 1949 Act, however, GAO referred questionable payments to the CIA Comptroller's Office for corrective action and made no audit whatever of unvouchered expenditures. Id.

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However, GAO has not conducted any reviews at the CIA nor any reviews which focus specifically on CIA activities since 1962.[151] GAO's present position vis-a-vis the CIA was recently described by the Acting Comptroller General of the United States:

> From prior experience, it is our view that strong endorsement by the Congressional oversight committees will be necessary to open the doors to intelligence data wide enough to enable us to perform any really meaningful reviews of intelligence activities.[152]

The necessity for confidentiality does not foreclose the possibility for GAO audits of the CIA. GAO routinely audits the sensitive National Security Agency [hereinafter "NSA"].[153] Indeed, a recent GAO-NSA arrangement expands the scope of that audit.[154] The plans worked out with NSA could certainly be adapted for CIA audits. Under the plan which was in effect from 1955 through 1973, two or three GAO staff members who had special clearance were assigned permanently to NSA to perform compliance audits of NSA vouchers and accounts. These continuous audits were performed on NSA premises or at designated records storage sites where the confidentiality of NSA documents could be maintained.[155]

In late 1973 and early 1974, NSA and GAO discussed adding management-type review to the compliance audits already being done and agreed to increase the number of GAO staff members cleared for NSA audits from two to ten and to begin the enlarged

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151. In 1959 "comprehensive audits" covering not only the expenditure of funds but also the efficiency and economy of utilization of property and personnel were instituted. These audits continued until 1962, when GAO concluded (1) that under existing security restrictions it did not have sufficient access to make comprehensive reviews on a continuing basis which would produce evaluations helpful to Congress and (2) that the limited type of audit which it had conducted in the years prior to 1959 would not serve a worthwhile purpose. CIA concurred with the resultant GAO proposal to terminate all audit efforts in 1962. Id. at 9.

152. Id. at 13.

153. Id. at 11-13. NSA was established as an agency under the control of the Secretary of Defense by a classified executive order in November 1952. Walden, The C.I.A.: A Study in the Arrogation of Administrative Powers, 39 Geo. Wash. L. Rev. 66, 67 (1970). It performs technical functions in support of Government intelligence activities. United States Government Manual 209 (1973-74).

154. GAO Letter, supra note 111, at 13.

155. Id. at 11-12. GAO refrained from publishing the results of its NSA audits so as not to violate Pub. L. No. 86-36 (Act of May 29, 1959, 73 Stat. 63), which forbids disclosure of any information regarding NSA activities. However, it did hold informal discussions with NSA to review the audits and resolve problems. GAO Letter, supra note 111, at 13.

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The necessity for confidentiality does not foreclose the possibility for GAO audits of the CIA. GAO routinely audits the sensitive National Security Agency [hereinafter "NSA"].[153] Indeed, a recent GAO-NSA arrangement expands the scope of that audit.[154] The plans worked out with NSA could certainly be adapted for CIA audits. Under the plan which was in effect from 1955 through 1973, two or three GAO staff members who had special clearance were assigned permanently to NSA to perform compliance audits of NSA vouchers and accounts. These continuous audits were performed on NSA premises or at designated records storage sites where the confidentiality of NSA documents could be maintained.[155]

In late 1973 and early 1974, NSA and GAO discussed adding management-type review to the compliance audits already being done and agreed to increase the number of GAO staff members cleared for NSA audits from two to ten and to begin the enlarged

151. In 1959 "comprehensive audits" covering not only the expenditure of funds but also the efficiency and economy of utilization of property and personnel were instituted. These audits continued until 1962, when GAO concluded (1) that under existing security restrictions it did not have sufficient access to make comprehensive reviews on a continuing basis which would produce evaluations helpful to Congress and (2) that the limited type of audit which it had conducted in the years prior to 1959 would not serve a worthwhile purpose. CIA concurred with the resultant GAO proposal to terminate all audit efforts in 1962. Id. at 9.

152. Id. at 13.

153. Id. at 11-13. NSA was established as an agency under the control of the Secretary of Defense by a classified executive order in November 1952. Walden, The C.I.A.: A Study in the Arrogation of Administrative Powers, 39 Geo. Wash. L. Rev. 66, 67 (1970). It performs technical functions in support of Government Intelligence activities. United States Government Manual 209 (1973-74).

154. GAO Letter, supra note 111, at 13.

155. Id. at 11-12. GAO refrained from publishing the results of its NSA audits so as not to violate Pub. L. No. 86-36 (Act of May 29, 1959, 73 Stat. 63), which forbids disclosure of any information regarding NSA activities. However, it did hold informal discussions with NSA to review the audits and resolve problems. GAO Letter, supra note 111, at 13.

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review on selected parts of NSA's activities with fiscal year 1975.[156] By May 1974, seven GAO staff members had received the necessary clearance, and GAO had been advised that the clearance required for work at NSA would generally be acceptable for performing similar work at other organizations within the intelligence community with the exception of the CIA.[157] Research reveals no reported leaks by GAO personnel of confidential information concerning NSA, and there is no reason to believe that the chance of leaks concerning the CIA would be any greater. Nevertheless, the CIA has declined to grant GAO the access necessary for a competent audit.[158]

The CIA has an estimated 15,000 employees,[159] all of whom have security clearances. To add some eight or ten GAO employees to the number of persons cleared by CIA would not appear to be an insuperable burden. Congress, dependent solely on the CIA's own accountings since 1962, will not be able to fulfill an effective oversight function until it insists that the Agency grant GAO the access —including appropriate security clearances for several of its staff —necessary for comprehensive reviews on a continuing basis.

3. *The Oversight Body Must Assert Control.* To preclude the oversight groups from taking a passive role, they should be required to meet at least monthly and to issue detailed reports to Congress on CIA activities and expenditures.[160] The oversight bodies should either participate directly in the budget allocation process or have *ex officio* representation on the Appropriations Committees' intelligence subcommittees. Through the GAO, they should carry out a continuous, independent audit of Agency spending. Any oversight body should be well enough informed as to all aspects of the CIA that it can provide Congress with an explanation whenever a question about the Agency arises. To meet this standard, the oversight body needs the power not only to perform independent audits through

156. Id. GAO agreed on the new plan notwithstanding its recognition that the special clearances required for GAO staff members who would be involved in such an audit would be expensive, requiring at least six months to complete, that higher clearances might be necessary for some aspects of the audit, and that the results would be highly classified and strictly limited in their distribution. Id.

157. Id.

158. See text accompanying notes 111-13 supra.

159. 119 Cong. Rec. 6868 (1973) (remarks of Sen. Proxmire).

160. If necessary for security reasons, an oversight body might compile complete reports to be made available only to other congressmen who have submitted to security clearances. "Sanitized" versions of such reports might be prepared for the use of those members who had not been cleared. See text accompanying note 173 infra.

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the GAO but also to require the Agency to provide whatever additional information is needed.

Two bills attempting to meet this need were introduced in the 93d Congress and are likely to be reintroduced in the 94th Congress. The "Joint Committee on Intelligence Oversight Act of 1974,"[161] introduced by Senator Baker and eleven co-sponsors, would require the DCI and the heads of other intelligence organizations to keep a proposed Joint Intelligence Oversight Committee "fully and currently informed with respect to all of the activities of their respective organizations," and would give the Committee "authority to require from any department or agency of the Federal Government periodic written reports regarding activities and operations within [its] jurisdiction."[162] The bill would grant the Joint Committee subpoena power and provide that any witness failing to comply with a subpoena would be subject to punishment for contempt of Congress.[163] The other bill,[164] introduced in the House by Representative Ronald Dellums (D., Cal.), would require the DCI, at the request of a committee or subcommittee chairperson, to provide the oversight subcommittees with information sufficient to enable them to determine "whether the expenditure of funds by the Agency conforms to the authorized functions of the Agency and the congressional intent in establishing the Agency."[165] Although the bill does not specify any sanction, an oversight body which had subpoena power would be entitled to invoke the contempt statute,[166] a threat which may encourage the DCI to provide the requested information.[167]

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161. S. 4019, 93d Cong., 2d Sess. § 3(b) (1974) [hereinafter "S. 4019"]. Although Sen. Baker requested that the bill receive priority consideration, no hearings were held on it by the 93d Congress.

162. Id.

163. S. 4019, supra note 161, § 4(b). The penalty for contempt of Congress, a misdemeanor, is a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for 1-12 months. 2 U.S.C. § 192.

164. H.R. 13798, 93d Cong., 2d Sess. (1974). The House Armed Services Committee scheduled no action on the bill. Hogan letter, supra note 70.

165. H. R. 13798, supra note 164.

166. Although contempt of Congress is a severe sanction carrying a mandatory jail term, Congress has occasionally been willing to use it. See, e.g., House Comm. on Armed Services Proceedings Against George Gordon Liddy, H.R. Rep. No. 93-453, 93d Cong., 1st Sess. (1973) and cases enumerated therein.

167. The DCI might claim executive privilege in such a situation. For an argument that executive privilege is not applicable in this context, see Hearings on S. 2224, supra note 54, 112-31 (testimony of Raoul Berger). See generally Executive Privilege in III Executive Privilege, Secrecy in Government, Freedom of Information, Hearings before the . . . Committee on Government Operations and . . . Committee on the Judiciary, U.S. Senate, 93d Cong., 1st Sess. (1973).

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These bills, combined with the contempt power, would facilitate the flow of information from the CIA to Congress. However, an even more effective measure would provide for regular, perhaps monthly, CIA reports to the oversight body which would enumerate the Agency's activities and their costs. The contempt power would assure that the monthly reports were in fact made. In addition, Agency funding for the ensuing year might be conditioned on a detailed justification of current expenditures. Such legislation, coupled with a congressional mandate requiring the oversight body to meet frequently, to use its independent investigative authority, and to report regularly to Congress, would help assure that the oversight body actually performed its duties and made full use of its expanded staff and its investigative powers.

4. *The Form of the Oversight Body.* Although the above considerations are important regardless of the form the congressional oversight body takes, some of the weaknesses of the present system are directly related to the fact that oversight is the responsibility of subcommittees. Unlike full committees, subcommittees are not required to meet regularly and do not have their own staff.[168] In addition, when the subject matter covered by a subcommittee is tangential to the full committee's principal concern, as intelligence may be to the Armed Services Committees, it is likely that the ancillary matter receives less attention.[169]

Oversight by a full committee, either a joint committee as proposed by Senator Baker or by a committee of each house, would be a significant improvement over the present subcommittee system. Monthly meetings would be required,[170] a full-time professional staff would be available, and the interest and efforts of the members and staff would be focused on the CIA or, as is more likely, the entire intelligence community. Although a joint committee might appear to be more efficient in that it would avoid duplication of efforts, an autonomous committee in each house might better facilitate legislative, as opposed to purely consultative, functions.[171]

168. Under the present arrangement, staff support for each of the four intelligence subcommittees consists of part-time assistance from one or two professional members of the committee staff.

169. This possibility was raised by Sen. Lowell Weicker (R., Conn.), a co-sponsor of S. 4019, supra note 21, in remarks at The New York University School of Law, Oct. 31, 1974.

170. See, e.g., Rule 784 of the House of Representatives, which requires standing committees to meet not less than monthly. House Rules and Manual, H.R. Doc. 92-384.

171. See, e.g., 120 Cong. Rec. 6588 (daily ed. July 16, 1974) (remarks of Rep. Harrington).

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B. Participation by the Entire Congress in Intelligence Oversight

Participation by the entire Congress in the oversight process would be a more sweeping change and would have more radical consequences than a restructuring of the present subcommittee system. Although the daily work of oversight would continue to be done by committee, the committee would make complete reports to Congress, with decision-making reserved for the full House and Senate rather than effectively delegated to the oversight body. Under such an arrangement, "Committees on Intelligence" might have a relationship to Congress similar to that presently enjoyed by other standing committees, except that their reports would be discussed in secret session rather than publicly.[172] Alternatively, the oversight committees might report fully only to those members who have received security clearances or who specifically apply to the committees for information.[173] Because some of the problems presented by the various possible arrangements for plenary congressional oversight differ as between the House and the Senate, the two houses will at first be considered separately.

1. *The Senate.* The Senate presently utilizes a mechanism whereby the entire membership considers classified information in executive session. For many years, it held secret sessions whenever it considered a treaty, and it still holds occasional executive sessions to discuss classified or defense matters.[174] In most instances, it later issues a record of the secret session after deleting classified information.[175] A senator who releases confidential information obtained in

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172. H.R. Res. 1231, 93d Cong., 2d Sess. (1974), proposed by Rep. Harrington, contains a variant of this idea. The bill would require a new oversight committee in the House to keep complete records and transcripts of its hearings, which would be available to all members of Congress. 120 Cong. Rec. 6583 (daily ed. July 16, 1974).

173. For example, S. 2224, supra note 103, provided that oversight committees receiving information from the CIA should promulgate regulations under which classified information received by the committees might be given to congressmen and their staffs who requested it. It should be emphasized that such an arrangement would work only so long as the oversight body was truly representative and enjoyed the trust of all factions in Congress. Otherwise, the committee's power to promulgate regulations for access to CIA information would appear to be a smokescreen whereby the committee might restrict rather than facilitate the flow of information—precisely the appearance which has led to the current need for reform.

174. 29 Cong. Q. 1787 (1971). The Senate held 8 such meetings between the end of World War II and mid-1971.

175. See, e.g., 119 Cong. Rec. 15,358-71 (daily ed. Aug. 1, 1973), the expurgated record of a Senate executive session held to consider the nomination of William Colby as DCI.

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secret Senate proceedings may be expelled from the Senate,[176] but the severity of this penalty makes its use unlikely.[177] A sanction of exclusion from further executive proceedings might be more effective in that the Senate would be more willing to invoke it.[178] Another way to reduce the likelihood of leaks might be routinely to clear all senators and to exclude from executive sessions any senators who specifically asked not to be subjected to security clearances.[179] Since there are only 100 senators, each with a six-year term of office, routine clearance of all senators would not be an intolerable administrative burden.

2. *The House of Representatives.* The House of Representatives, by virtue of the large size of its membership and their brief term of office, presents more problems with regard to plenary oversight than does the Senate. Although it has not held a secret meeting in many years, the House has a procedure for executive sessions of the full membership which it could adapt to meet modern requirements.[180] Exclusion from future secret sessions could be a stronger sanction in the House than in the Senate, since representatives must face the electorate every two years and would have to explain their exclusion to the voters soon after the fact, while the issue was still "hot." The device of routine security clearances may be less practical for the House than for the Senate, since its 435 members serve two-year terms and processing a clearance requires at least six months.[181] On the other hand, however, the "numbers of Members of Congress are not very large by comparison to the numbers of people in the executive branch that get this kind of information,"[182] and the people deserve representatives who are entitled to know everything that occurs in government.[183]

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176. Senate Rule 35, S. Doc. 93-1.

177. See, e.g., Hearings on S. 2224, supra note 54, at 4-5, 89 (remarks of Sen. Cooper). The Senate did not invoke the expulsion sanction when Sen. Mike Gravel (D., Alas.) read classified information concerning the Vietnam war into the public record in 1972. See note 186 infra.

178. Such a sanction would not be an empty one, since the senator involved would have to justify his exclusion in a future campaign for re-election.

179. See note 147 supra.

180. House Rules and Manual, supra note 170, Rule 29.

181. GAO letter, supra note 111, at 12.

182. Hearings on S. 2224, supra note 54 at 55 (testimony of Herbert Scoville, Jr.).

183. Sen. Hughes (D., Iowa) has summarized this viewpoint:

> I personally feel that the people of Iowa elected me to represent their interests with the CIA as well as every other facet of Government, and that I have an entitlement to be informed. And if I am untrustworthy,

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An administratively practical compromise might be to clear only those representatives who specifically request clearance and to limit the oversight committee's dissemination of confidential information to the cleared representatives. In that way, the information would be available to congressmen who were sufficiently interested in the CIA and other intelligence organizations to request clearance, while time, money, and effort would not be expended clearing those members who lacked that interest.

3. *A Complication Common to Both Houses: Legislative Immunity.* The Speech or Debate Clause of the U.S. Constitution[184] creates an obstacle to broad congressional involvement in intelligence oversight by granting immunity from criminal prosecution to members of Congress who breach security by publishing classified information. This Clause has been held to provide immunity not only for statements made on the floor of either house, but also "against prosecutions that directly impinge upon or threaten the legislative process."[185] Although the Supreme Court has not defined the limits of the immunity conferred by the Clause, its decision in *Gravel v. United States*[186] indicates that at least the following types of conduct would be protected under the Clause in the case of a member or member's aide having possession of a classified document:

> then I feel the CIA ought to tell the people of Iowa and the country why I am untrustworthy and on what they base it.

Colby Hearings, supra note 9, at 53.

184. The Speech or Debate Clause reads as follows:

> The Senators and Representatives. . . . shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

U.S. Const. art 2, § 2. The Clause does not immunize members of Congress from arrest for violating the law by making classified information public, for that is a criminal violation, and the members' privilege from arrest has been held to extend only to civil arrests. See Gravel v. United States, 408 U.S. 606, 614-15 (1972). It does, however, effectively immunize members of Congress from prosecution for releasing classified information.

185. Gravel v. United States, 408 U.S. 606, 616 (1972).

186. The conduct held protected in *Gravel* was a reading of the classified "Pentagon Papers" into the public record at a midnight meeting of a subcommittee of the Senate Committee on Public Works. The Court held that the general rule restricting judicial inquiry into matters of legislative purpose and operations precluded it from questioning the "regularity" of the meeting when there was no suggestion that the subcommittee itself was unauthorized or that the war in Vietnam was an issue beyond the purview of congressional debate and action. 408 U.S. at 610, n. 6.

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Q-49.

1. Any speech or debate on the [House or] Senate floor concerning the classified document.
2. Any speech during a committee meeting, hearing, etc.
3. Any reading from the classified document either on the floor or in a committee meeting.
4. Any speech concerning the classified document in committee reports, hearings, or in resolutions.
5. Any placing of a classified document into the public record.
6. Any conduct at a committee meeting or on the [House or] Senate floor with respect to the classified document and any motive or purpose behind such conduct.
7. Any communications between a member and aide during the term of the aide's employment with respect to the classified document if related to a committee meeting or other legislative act of the member.[187]

This broad immunity prompts an argument that classified information concerning the CIA should not be shared with any more than an absolutely necessary small number of congressmen. In this connection there is perhaps less concern about disloyalty than the possibility that conscientious objection to certain CIA activities might lead a member to release classified information. Routine security clearances might identify the rare disloyal member and exclude him from receipt of classified information before he ever gained an opportunity to release it, but they probably would not identify and exclude the member whose release of secrets might be motivated by his very loyalty to his country. Perceiving this difficulty, Senator Javits has stated that "an exact corollary to immunity is our responsibility for our own members and our own security,"[188] apparently referring to the availability of the sanction of expulsion for releasing confidential information.[189] However, since the Senate has been unwilling to invoke this sanction in the past, it must either determine to use the sanction of expulsion or devise a lesser, but meaningful, sanction that it would be willing to invoke. The House must likewise agree on a suitable sanction.

4. *Physical Security Requirements.* In addition to the risk created—or exacerbated—by congressmen's constitutional immunity with respect to the information contained in classified documents,

187. Secret and Confidential Documents Report, supra note 139, at 10-11.
188. Hearings on S. 2224, supra note 54, at 51.
189. *See* note 176 supra and accompanying text.

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there is also some risk associated with the documents themselves. Unlike CIA headquarters, the Capitol and the Congressional Office Buildings are open to the public. How, then, can classified documents be kept secure and still be conveniently available to large numbers of senators and representatives?

The requirements for ensuring the physical security of classified documents in congressional buildings was discussed in detail during Senate hearings in 1972.[190] A management consultant on security and intelligence matters, a former CIA employee, described the basic requirements for a "secure area" in which classified documents would be stored and consulted and made the following recommendations:

> 1) An early start should be made for detailed security by planning so that the mechanism can be in place before the flow of material starts.
>
> 2) The security system should include a secure area which would include a vault and reading/conference room protected by a reception area and necessary alarms.
>
> 3) Provision should be made for control of the documents to include logs, rules for storage and removal, destruction, or return to the originating agency.
>
> 4) The responsibility for the security should be clearly placed and sufficient staff should be made available to establish, operate, and monitor the system.
>
> 5) Where problems arise, close liaison with the CIA will be helpful in finding solutions that are workable and safe.[191]

Admittance to the secure area would be limited to those named on a list held by a guard. Those few members who required continuous access would be permanently listed, while others with only occasional interest in the secure area could be specifically cleared for access at those times.[192] Removal of classified documents from the secure area would be permitted only when absolutely necessary; in such cases "there should be some means whereby it is taken out by

190. Hearings on S. 2224, supra note 54.

191. Id. at 95.

192. Witnesses at the hearings generally emphasized the importance of keeping the number of persons with access to the secure area as small as possible consistent with the principle of "need to know." See, e.g., id. at 19, 28, 51 (testimony of Herbert Scoville, Jr.) and at 93, 99-100 (testimony of Joseph Smith). But see the remarks of Sen. Javits to the effect that every member of Congress must vote, and therefore all have an equal need to know. Id. at 51.

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a courier and brought back the same day."[193] To prevent "technical penetration" or "bugging," it was suggested that conferences involving extensive discussion of CIA material should be held only in the secure area, which could periodically be "swept" to minimize the possibility that sensitive conversations might be overheard.[194] This testimony indicates that physical security for classified documents can be compatible with procedures whereby oversight committees in both houses might make available to other members of Congress the classified information on which their recommendations are based.[195]

C. *Reforming the Appropriation Process*

A flaw in the oversight of CIA funding which urgently requires attention is the present appropriation system, whereby CIA funds are hidden in other appropriations and are never considered by, or identified to, Congress as a whole.

1. *The Baker-Weicker Proposal.* The "Joint Committee on Intelligence Oversight Act of 1974,"[196] contains the following provision:

> No funds may be appropriated for the purpose of carrying out any intelligence or surveillance activity or operation by any office, or any department or agency of the Federal Government, unless such funds for such activity or operation have been specifically authorized by legislation enacted after the date of enactment of this Act.

Senator Weicker (R., Conn., a co-sponsor of the bill) has stated that this provision would give the joint committee total control of the intelligence agencies' budgets.[197] The purpose of the bill may indeed be to supersede the funding provisions of the 1949 Act, but the bill would not, in fact, have that effect. It would only restrict the use of funds *appropriated* for the CIA—of which there are none presently—while the practice of financing the CIA through se-

193. Id. at 93. Cf. H.R. Comm. on Armed Services, Rules Governing Procedure, Leg. Cal. of H.R. Comm. on Armed Services, 93d Cong., No. 8 (Aug. 23, 1974), at viii.

194. Hearings on S. 2224, supra note 54, at 93, 100-01.

195. Id. at 95 (testimony of Joseph Smith); see also id. at 17, 24-27 (testimony of Herbert Scoville, Jr.).

196. S. 4019, supra note 161.

197. Remarks at The New York University School of Law, Oct. 31, 1974.

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cret *transfers* from other appropriations would continue. Thus, the Baker-Weicker bill illustrates the point that there can be no meaningful reform of the appropriation process without expressly amending or replacing the funding mechanism of the 1949 Act so as clearly and unequivocally to end—or limit—the practice of financing the Agency by secret transfers.

2. *Limitations on Funds Transferred to the CIA under the 1949 Act.* In order to assert control over the purposes for which the CIA spends its funds while continuing to finance the Agency through transfers, Congress might expressly apply to the CIA limitations included in other appropriations bills. Such an unequivocal expression of congressional intent would unquestionably prevail over the CIA's general exemption from appropriations limitations under the 1949 Act.[198] Congress passed such an express limitation for the first time in December 1974, as part of the Foreign Assistance Act of 1974.[199]

Congress might also combine a measure of congressional control with transfer funding by placing a ceiling on the amount of funds transferable under the 1949 Act without specific congressional approval.[200] Enactment of such a ceiling would limit the *amount* of funds available to the Agency, whereas appropriations limitations would limit the *purposes* for which Agency funds may be expended.

The enactment of express appropriations limitations or ceilings on Agency funding is not a political impossibility. Since such bills would not alter the basic transfer method of funding, they do not necessarily invite opposition from members who prefer that CIA appropriations remain secret. Indeed, in the political climate prevailing at the beginning of the 94th Congress,[201] it may not be entirely naive to propose that Congress reassert its power of the purse by expressly amending the 1949 Act.

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198. For a discussion of the disputed extent of the exemption mandated by the 1949 Act when appropriations limitations are not expressly applied to the CIA, see text accompanying notes 79-88 supra.

199. Pub. L. No. 93-559 (Dec. 30, 1974). See Editor's Note infra.

200. Sen. Symington made such a proposal in 1971 as an amendment to a Defense Department appropriation bill, 117 Cong. Rec. 42,923 (1971). The proposed amendment was rejected by a 56-31 vote. Id. at 42,932.

201. The "post-Watergate" reaction against secrecy within the executive branch and the fact that the 94th Congress includes several new members elected on "sweep-clean" platforms point toward congressional willingness to address the 1949 Act directly.

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3. *A One-Line Appropriation For the CIA.* Passage of a bill mandating a one-line, i.e., unitemized, appropriation for the CIA and terminating the transfer funding mechanism would reassert Congress' constitutional power to establish budgetary priorities and need not endanger the national security.[202] Such a proposal would not limit the Agency's use of appropriated funds. Under the proposed system, specific limitations would have to be imposed in the same way as under the present system, by prohibitions expressly applied to the Agency.

The principal arguments in favor of the single-line appropriation are that it would permit Congress to express its sense of priorities and that it would "allow Congress and the taxpayer to know the exact amount of money going into other Government programs"[203] by ending the artificial inflation of other appropriations with sums actually destined for the CIA. Other benefits would accrue as well. For example, if the amount of the CIA budget were known and discussed, congressmen might be motivated to ask more questions of their colleagues on the intelligence oversight bodies, thereby encouraging the conscientious performance of oversight du-

202. A model bill might read as follows:

A bill to require that appropriations be made specifically to the Central Intelligence Agency.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That commencing with the fiscal year beginning [date]—

(1) the Budget of the United States, submitted pursuant to section 201 of the Budget and Accounting Act, 1921, shall show proposed appropriations, estimated expenditures, and other related data for the Central Intelligence Agency, and

(2) appropriations shall be made to the Central Intelligence Agency in an appropriate appropriation Act.

For the purposes of this section, proposed appropriations, estimated expenditures, and other related data set forth in the Budget for the Central Intelligence Agency, and appropriations made to the Agency, may be shown as a single sum with respect to all functions and activities of the Agency.

Sec. 2. Commencing with the fiscal year beginning [date], no funds appropriated to any other Department or agency of the United States shall be made available for expenditures by the Central Intelligence Agency.

The proposed bill is identical to S. 2231, 92d Cong., 1st Sess. (1971), proposed by Sen. George McGovern (D., S.D.). See 117 Cong. Rec. 23,692 (1971). The bill died in the Senate Armed Services Committee. See also an amendment to the Fiscal Year 1975 military procurement bill proposed by Sen. William Proxmire (D., Wis.), which would have called for disclosure of the total amount requested in the budget for "the national intelligence program." 120 Cong. Rec. 9501 (daily ed. June 4, 1974). The amendment was rejected after extensive debate by a vote of 55-33. Id. at 9613.

203. 117 Cong. Rec. 23,692 (1971) (remarks of Sen. McGovern).

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ties. Such a development would improve not only fiscal but also substantive congressional oversight of the Agency.

Supporters of this budget reform contend that it would permit the proper exercise of congressional power over budgetary priorities without endangering the national security. This view was endorsed by the Senate Select Committee on Secret and Confidential Documents,[204] which recommended that the amount of the proposed allocation for each intelligence service be itemized in the Defense Department appropriation bill. The committee characterized the single-line budget as "the minimal information [Congress as a whole] should have about our intelligence operations."[205]

The publication of a single-line CIA budget has been attacked by some as a meaningless exercise of congressional power and by others as a serious national security risk. Those who regard it as an inadequate reform maintain that Congress will have difficulty deciding what level of funding is appropriate when it does not know the purposes for which the funds will be used.[206] Although such a criticism is well founded, it ignores the fact that the choice is between a one-line appropriation and no plenary congressional voice whatsoever. The budget would continue to be justified to the oversight committees in detail, but the single-line appropriation would at least enable Congress as a whole

> to judge if [it wants] to spend more on intelligence . . . and clandestine wars than on improvement of the environment or on education or even on other aspects of national defense.[207]

Furthermore, if the arrangements discussed above are adopted, members interested in receiving detailed CIA budget information could obtain it from the responsible committees.[208]

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204. The Chairman and Co-Chairman of the Confidential Documents Committee were the Majority Leader (Sen. Mansfield) and the Minority Leader (Sen. Scott), respectively. Other members of the Committee included Sens. Pastore, Hughes, Clark, Gravel, Javits, Hatfield, Gurney, and Cook.

205. Secret and Confidential Documents Report, supra note 159, at 16.

206. See, e.g., Futterman, supra note 79, at 440. See also the statement of Sen. McClellan in opposition to the proposed Proxmire amendment to the miliary procurement bill:

> First, the total amount. You want to end that ignorance? That is when you intend to put the camel's nose under the tent. That is the beginning. That is the wedge. . . . how can you . . . make an intelligent judgment on whether that is too much or too little, whether it is being expended wisely or unwisely, except when you can get the details?

120 Cong. Rec. 9609 (daily ed. June 4, 1974).

207. 117 Cong. Rec. 23,692 (1971) (remarks of Sen. McGovern).

208. See text accompanying note 173 supra.

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Some of those who oppose the one-line appropriation on security grounds argue that publication of the one-line budget would *ipso facto* injure the national security.[209] Others contend that such disclosure "is likely to stimulate requests for additional detail" and emphasize the potential national security danger in revealing the trends of various budgetary details over a period of years.[210] On the other hand, just as the oversight committees and the CIA itself have resisted pressures to make public the Agency budget, so they should be able to resist pressure to make public the details of the Agency budget after the gross figure is published. The suggestion that the one-line budget should not be revealed because it will result in congressional pressure to justify the budget would in effect deprive Congress of one of its most important functions, the allocation of public funds.

That publication of a single-line CIA budget would not create a security problem is perhaps best substantiated by analogy to the Defense Department budget, which is not only made public in the aggregate, but is also broken down in considerable detail. The one-line CIA budget is advocated on these grounds by Senator Symington, who speaks with special authority about national security matters.[211] Emphasizing the difference between intelligence or security *costs* and intelligence or security *plans*, Senator Symington has stated that publication of overall intelligence costs no more entails "the release of knowledge about how the various intelligence

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209. See, e.g., the view of Sen. John Stennis (D., Ala.), Chairman of the Senate Armed Services Committee and its Intelligence Subcommittee:

> [I]f we disclose the amount of money spent on this effort, which includes the CIA, then we give to our adversaries all over the world, present and future, a true index as to what our activities are. There are deductions that can be made from our figures which could lead them along the path of information which would be priceless to them to know.

120 Cong. Rec. 9602 (daily ed. June 4, 1974).

210. DCI-elect Colby's written answers to prepared questions submitted by Sen. Proxmire, Colby Hearings, supra note 9, at 181. See also the views of Sen. Humphrey:

> [J]ust as surely as we are in this body today debating whether or not we ought to have a release of the figure, next year it will be whether it is too big or too little, and then it will be what is in it. Then when we start to say what is in it, we are going to have to expose exactly what we have been doing in order to gain information. . . .

120 Cong. Rec. 9606 (daily ed. June 4, 1974).

211. Sen. Symington is a member of the Appropriations, Foreign Relations, and Armed Services Committees and a former Secretary of the Air Force and member of the National Security Council. 117 Cong. Rec. 42,926 (1971); 119 Cong. Rec. 15,359 (daily ed. Aug. 1, 1973).

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groups function, or plan to function" than publishing the cost of a nuclear aircraft carrier or a C-5A transport plane entails publication of plans for utilizing them in case of war.[212] According to Senator Proxmire, the publication of itemized defense figures may actually have a valuable deterrent effect on potential enemies:

> We break it down by component and by function. We then talk about each individual weapon. When will it be ready? How much will it cost? What does it look like in a technical sense? Of course, this detailed information is valuable to the U.S.S.R. But long ago, a decision was made that in our open society it was better to know the facts and ride herd on the Defense Department than to accept the intangible fear of enemy knowledge. In fact, many American strategists have argued that the size of the U.S. military budget and the characteristics of our overwhelming nuclear force should be made public in order to reinforce the psychology of deterrence. The enemy will not be deterred unless he truly believes the United States has these weapons.
>
> The same goes for the intelligence budget. It is a form of deterrence for the potential adversary to know that we will continue to spend sizeable [*sic*] funds for intelligence. They will be less inclined to spring some surprise.[213]

Senator Proxmire has also answered the charge that changes in the trend of U.S. intelligence spending which may become apparent over the years would be valuable to an enemy:

> There is no way the Soviet Union can interpret whether our overall figure indicates what we are doing within our intelligence community. Suppose we decrease the amount we are spending. That may mean that our satellites are more effective. That may mean we have found methods that are more efficient in gathering intelligence than relying on manpower. If we increase the amount we are spending, it may mean the reverse. It may not mean that we are making a greater intelligence effort.[214]

On balance, the proposal for a one-line CIA appropriation appears

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212. 117 Cong. Rec. 42,926 (1971).

213. 120 Cong. Rec. 9603 (daily ed. June 4, 1974).

214. Id. at 9609. Sen. Proxmire's arguments were made with regard to the publication of the gross intelligence budget, not the CIA appropriation. His arguments are equally applicable to the publication of a single-line CIA budget.

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to be at least a useful step forward, although it by no means solves all the problems inherent in congressional oversight of a secret agency.

VII. Conclusion

Experience indicates that the existing arrangement which vests both oversight and legislative power over the CIA in House and Senate subcommittees is not fully effective. Congress as a whole is largely ignorant of such basic matters as the amount of funds the Agency actually has at its disposal and how it expends those funds. The subcommittees sometimes appear to be perhaps too prone to defer to CIA determinations instead of making independent judgments regarding objective Agency needs and overall legislative priorities. The vulnerability of the transfer funding mechanism to constitutional attack also cannot be ignored.

At the same time, short of seeking to abolish the CIA altogether, it is difficult to argue seriously that all congressional oversight of the Agency can be done publicly. Therefore, this Note has sought to outline a middle course whereby the CIA's accountability to Congress might be increased without compromising the Agency's legitimate need for confidentiality. In this context, the Note has discussed such accommodations as broadening the spectrum of views represented on the subcommittees, renewing GAO audits of the Agency, and expressly applying appropriations limitations to the CIA which might be made without significantly disturbing the familiar forms. It has also discussed proposals for such structural changes as establishment of a joint intelligence oversight committee and the voting of a single-line CIA appropriation. The relative merits of these suggestions should be viewed in the context of the difficulties they would remedy and the new problems they might create, with deference to practical legislative conditions as well as to the standards of preserving justified confidentiality and strengthening legislative oversight.

It is unnecessary to determine whether total accountability is compatible with total confidentiality. What is important—and what this Note has attempted to demonstrate—is that the requisite confidentiality and a significant measure of legislative accountability can coexist in feasible oversight procedures.

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EDITOR's NOTE: As this Note goes to press, President Ford has signed the Foreign Assistance Act of 1974 [Pub. L. No. 93-559 (Dec. 30, 1974)]. In this Act Congress has for the first time expressly—if not unconditionally—applied to the CIA a spending limitation of the type discussed in the Note. Under this provision, the CIA may not expend funds for foreign "operations" (as distinguished from foreign "activities intended solely for obtaining necessary intelligence,") unless the President certifies such operations to be "important to the national security of the United States" and "in timely fashion" reports their "description and scope" to the "appropriate committees of the Congress." § 662 (b). See H. R. Rep. No. 1610, 93d Cong., 2d Sess. 12, 42-43 (Dec. 1974). Although possible loopholes in this provision are apparent, *e.g.*, its lack of standards for determining when activities are "solely for obtaining . . . intelligence" and when they are "operations" and its vagueness with respect to the definition of "in timely fashion," the enactment of the statute is itself a positive step toward the reassertion of congressional control over CIA spending.

A second important innovation which has relevance to this Note is the Act's inclusion of the Senate Foreign Relations and House Foreign Affairs Committees among the congressional committees to whom the President must report on CIA operations abroad. § 662 (b). The inclusion of the Foreign Relations and Foreign Affairs Committees in this limited area of fiscal oversight of the CIA may presage the inclusion of these committees in the broader congressional CIA oversight mechanism.

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