

A need to know



WHERE SECRECY IS ESSENTIAL

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In this year of celebrating the 200th anniversary of the signing of the Constitution by the delegates at the Philadelphia Convention, it seems appropriate for the intelligence profession to examine the question of "secrecy of intelligence and the Constitution." There are many who assert that in our democratic form of government and under our Constitution the people have a right to know. Or to phrase it another way, it is asserted the First Amendment creates a right under which secrets are inherently wrong. Let us remember, however, that at the Constitutional Convention in 1787 one of the first matters settled was a strict rule of secrecy. So for some four months, the debates and agreed-upon matters were not disclosed until adjournment on 17 September 1787.

We have all seen news articles and editorials that deplore secrecy in any governmental actions. In some cases we have seen articles purporting to contain secret intelligence information including names of agents, dates, and places of active operations. Some of these have been written with considerable relish. Without dignifying any of the more recent items by identifying them, it is instructive to point to an early example of the press deploring secrecy. In the *Columbian Centinel/Massachusetts Federalist* [courtesy of Walter L. Pforzheimer], there appears an editorial headed "Secret Service Money." The editor complains of the secrecy surrounding congressional action approving \$2,500 to be used by President Jefferson in his sole discretion. He states that whenever a subject comes before the democrats where they are "ashamed of exposing their wretched inferiority . . . the constant trick is for some fellow more silly and impudent than the rest, to rise and move that the doors should be closed." The editor states, "To this subject we now return, and we shall return to it again and again in company with our brother editors. . . ." (Not much change in almost 200 years, except for style and phraseology.)

Just a few examples will be sufficient to demonstrate that in our society there are many areas where secrecy (or confidentiality) is universally accepted as essential:

- a. Lawyer-client
- b. Doctor-patient
- c. Reporter-informant
- d. Most mark-up sessions of congressional committees
- e. Husband-wife
- f. Deliberations of the nine Supreme Court Justices.

This listing could go on, but these instances will suffice. (In the index to the annotated edition of the United States Code, there are 76 entries under the

Essential

heading of Confidentiality.) In any event, we will deal here only with the issue of intelligence secrecy under the Constitution. Specifically, is it constitutional to keep intelligence sources and methods secret? May intelligence constitutionally keep secret its funds, how and on what it expends them, and to whom payments are made?

A careful reading of the Constitution, a review of the relevant portions of the history of the framing of the Constitution, and a review of the pertinent decisions of the US Supreme Court provide a clear and unequivocal affirmative answer to the questions. Such research covers a broad range of evidence from our nation's history, focusing on whether the Statement and Account Clause (Article I, Section 9, Clause 7) was intended to provide secrecy for intelligence expenditures. Relevant are statements by the framers of the clause, statements reflecting a contemporaneous understanding of the framers' intent, and governmental practices with regard to secrecy of information both before and after the enactment of the Constitution. In this connection, we shall examine subsequent congressional enactments and judicial decisions.

I.

Intelligence and Secrecy of Funding During the Revolutionary War

The Continental Congress very early recognized the need for a means to conduct intelligence activities. For this purpose, it created on 29 November 1775 the Committee of Secret Correspondence to "correspond with our friends in Great Britain, Ireland and other parts of the world," and Congress resolved to provide for expenses incurred by the Committee in sending agents" for this purpose. [*Journals of the Continental Congress*, III 392 (1905)].

One of the Committee's first actions was to write to Arthur Lee, a well-connected American living in England. By letter of 12 December 1775, the Committee wrote:

"It would be agreeable to Congress to know the disposition of foreign powers toward us, and we hope this object will engage your attention. We need not hint that great circumspection and impenetrable secrecy are necessary. The Congress rely on your zeal and ability to serve them, and will readily compensate you for whatever trouble and expense compliance with their desire may occasion. We remit you for the present 200 pounds." [*The Revolutionary Diplomatic Correspondence of the United States* (Wharton, ed II, 63-64 (1889))]

The stress of secrecy displayed in this letter to Arthur Lee by the Committee is equaled when the Committee considered the information sent to it by Lee concerning French plans to send arms and ammunition to the Continental Army. Speaking of this information, the Committee stated:

"Considering the nature and importance of it, we agree in opinion, that it is our indispensable (sic) duty to keep it a secret, even from Congress. . . . We find by fatal experience, the Congress consists of too many members to keep secrets." [*American Archives*, Fifth

Essential

Series (Force) II, 818. Statement of Committee Members Benjamin Franklin and Robert Morris, concurred in by Richard Henry Lee and William Hooper.]

The Committee's devotion to secrecy is especially noteworthy when looked at against the background of the strict injunction of secrecy under which Congress itself operated. On 9 November 1775 the Continental Congress had adopted the "Resolution of Secrecy" under which any member who disclosed a matter that the majority had determined should be kept secret was to be expelled "and deemed an enemy to the liberties of America."

Throughout its existence the Committee exercised full discretionary power to conduct intelligence activities independent of the Continental Congress and to protect the secrecy of matters concerning its agents. The Committee was able to maintain such secrecy even as to Congress, which functioned both as the legislative and the executive power at this time and exercised control over foreign affairs. When the Congress instructed the Committee on 10 May 1776 to "lay their proceedings before Congress," it authorized the Committee to withhold "the names of the persons they have employed or with whom they have corresponded." [*Journals of the Continental Congress*, IV 345 (1906)]

The importance of total secrecy in intelligence matters was widely accepted during this period. In an increasingly well-known letter of 26 July 1777, George Washington wrote to Colonel Elias Dayton issuing orders for an intelligence mission:

"The necessity of procuring good intelligence is apparent & need not be further urged—All that remains for me to add is, that you keep the whole matter as secret as possible. For upon Secrecy, success depends in most Enterprizes of the kind, and for want of it, they are generally defeated." [*The Writings of George Washington* (J. Fitzpatrick, ed.) VIII 478-479 (1933)] (Note: The original of this letter is in the Walter Pforzheimer Collection on Intelligence Service.)

George Washington, as Commander in Chief of the colonial armies, made appropriate provision for intelligence activities and for secret funding. Such provision is exemplified by a letter to Washington from financier Robert Morris, member of the Committee of Secret Correspondence, dated 21 January 1783, in which Morris stated:

"I will give directions to the Paymaster General always to keep some money in the hands of his deputy, to answer your drafts for contingencies and secret service. I have, as you will see, taken methods to put the deputy in cash, and then your excellency will be relieved from any further care than the due application. I am, however, to pray, for the sake of regularity in accounts, that your excellency, in the warrants, would be so kind as to specify the particular service when on the contingent account, and draw in favor of one of your family on account of secret services, mentioning that it is for secret service. I shall direct Mr. Swanwick to endorse the bills on you in favor of Mr. Adams to the Paymaster General, whose

Essential

deputy will receive from your excellency the amount." [US Department of State, *Diplomatic Correspondence of the American Revolution* (Wharton, ed.) VI 428 (1889)]

This letter indicates that it was the practice to draw these funds in favor of a member of Washington's family, obviously to conceal the ultimate recipient. It is clear that the leadership in the Revolution viewed such an arrangement for maintenance of secrecy as entirely proper and essential to the success of their mission.

It can thus be seen that the highest officials in our War for Independence were fully alert to the necessity of obtaining intelligence. They organized mechanisms and procedures to maintain secrecy not only as to intelligence activities but also as to moneys to fund them.

II.

Framers' View

We now turn to what would today be called the legislative history of the Statement and Account Clause. We examine what the framers had in mind when considering the specific language and the amendments adopted. We must also realize that many of the framers were also leaders in the Continental Congress and were drawing on their experience in handling intelligence matters and secret funding in transforming the various concepts they had developed into the written phrases and wording of the proposed Constitution.

Article I, Section 9, Clause 7 of the Constitution provides:

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

George Mason moved on 14 September 1787 in the final week of the Constitutional Convention that a clause be adopted requiring "that an Account of the public expenditures should be annually published." In the debate on this proposal, Gouverneur Morris urged that such accounting would be "impossible in many cases," and Rufus King stated that it would be "impractical" to account for "every minute shilling." James Madison then proposed an amendment to require an accounting "from time to time" rather than annually.

Madison's notes indicate that he thought that the substitution of "from time to time" for "annually" would ensure frequent publication and "leave enough to the discretion of the Legislature." There is no further elaboration in the notes on the concept of legislative discretion, except to say that if too much is required "the difficulty will beget a habit of doing nothing."

Further light on the rationale behind Madison's amendment is apparent in the Virginia ratifying convention. On 12 June 1788, Madison stated that, under the Constitution as proposed, congressional proceedings were to be "occasionally published," and that this requirement included all receipts and expenditures of public money. In a sentence dealing with the degree of discretion to be allowed under Clause 7, he stated: "That part which authorizes the

Essential

government to withhold from the public knowledge what in their judgment may require secrecy, is imitated from the confederation. . . ." These statements by Madison strongly support the view that he believed the Statement and Account Clause, with his amendment, would allow government authorities ample discretion to withhold some expenditure items that required secrecy.

In a lengthy debate some days later (on 17 June 1788) between Madison and George Mason, there is further support for the Madison view. Mason criticized Madison's "from time to time" amendment as too loose an expression. Mason conceded that "In matters relative to military operations and foreign negotiations, secrecy was necessary sometimes." But, "he did not conceive that the receipts and expenditures . . . ought ever to be concealed." And "The people, he affirmed, had a right to know the expenditures of their money." In sum then, the opponents of the "from time to time" provision would concede the need for secrecy for operations and negotiations but not for receipts and expenditures of public money concerning them. The Clause as adopted and ratified, however, incorporates the view not of Mason, but rather of Madison and his supporters, who desired discretionary secrecy for the expenditures as well as the related military operations and foreign negotiations. This history and the various quotations are to be found in Volumes II and III of *The Records of the Federal Government* (M. Farrand) (rev. ed. 1966).

A statement supportive of Mason's view was made by Patrick Henry, who said in reference to the "from time to time" provision, "By that paper the national wealth is to be disposed of under the veil of secrecy, for the publication from time to time will amount to nothing, and they may conceal what they may think requires secrecy." Henry's statement further confirms the view that it was understood the Madison amendment would permit secrecy. [*The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (J. Elliot) III 464 (1836)]. Henry's statement vigorously supporting Mason's position was not enough, and the Madison amendment was adopted.

The comments of John Jay on the proposed Constitution are pertinent here since he had gained diplomatic experience in the service of the Continental Congress during the Revolution and of the Confederation afterwards. He stated:

"It seldom happens in the negotiation of treaties of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. The convention have done well therefor in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest." [*Federalist* No. 64 (J. Cooke, ed. 1961)]

It seems clear then that the framers of the Statement and Account Clause intended it to permit discretion to the Congress and the President to maintain secrecy for expenditures related to military operations and foreign negotiations and the intelligence activities inherently a part of such operations and negotiations. The opponents of the "from time to time" provision complained that this would be the result, but they did not prevail. Thus, the intent of the framers of the Clause is manifest and is supported by the historical evidence of government practices with regard to secrecy both before and after enactment of the Constitution.

III.

Congressional Enactments

A. *Secrecy of Expenditures*

When the Constitution became effective in 1789, secret funding for foreign intelligence activities was formalized in the form of a "contingent fund" or "secret service fund" for use by the President. In a speech to both Houses of Congress on 8 January 1790, the forerunner to the annual "State of the Union" message, President Washington requested "a competent fund designated for defraying the expenses incident to the conduct of our foreign affairs." [*Annals of Congress*, 969-70 (1834)]. By the Act of 1 July 1790 (1 Stat. 128), Congress appropriated funds for "persons to serve the United States in foreign parts." That Act required of the President a regular statement and account of the expenditures, but provision was made for "such expenditures as he may think inadvisable to specify." This statute, reenacted by the Congress on 9 February 1793 (1 Stat. 299), authorized funds for the financing of foreign intelligence and negotiations. While the President was required to report expenses of "intercourse or treaty" with foreign powers, the statute provided that the President or the Secretary of State could make secret expenditures without specification upon execution of a certificate for the amount of the expenditure, and such certificates were to be deemed a "sufficient voucher" for the sums expended. Such authority has continued to exist by enactments of the Congress in one form or another throughout the existence of our nation.

When James Madison became President, he sent a confidential message to Congress requesting secret funding for contingency plans to take possession of parts of Spanish Florida. In response Congress passed a secret Act appropriating \$100,000 for such expenses as the President might deem necessary. [*Secret Statutes of the United States* (D. Miller) VI (1918)]. That Act was enacted on 15 January 1811 but was not published until 1818 [3 Stat. 471 (1811)].

Enactment of these secret funding statutes at the request of the President so soon after adoption of the Constitution is a clear indicator of the understanding of the framers of Clause 7 that it did not intend to require disclosure of all expenditures for foreign diplomacy and intelligence matters. President Washington, who presided over the Constitutional Convention, initially requested the contingent fund, and President Madison, the author of the "from time to time" amendment, requested an additional secret funding statute.

Essential

Several examples will illustrate the nature of the contingent fund and its historical acceptance under the Constitution. During a congressional debate on 25 February 1831 on a treaty between the United States and Turkey, Senator John Forsyth stated:

"The experience of the Confederation having shown the necessity of secret confidential agencies in foreign countries, very early in the progress of the Federal Government, a fund was set apart, to be expended at the discretion of the President of the United States on his responsibility only, called the contingent fund of foreign intercourse. . . . It was given for all purposes to which a secret service fund should or could be applied for the public benefit. For spies, if the gentlemen please; for persons sent publicly and secretly to search for important information, political, or commercial; . . . for agents to feel the pulse of foreign governments. . . ." [*Congressional Debates*, VII 295 (1831)]

In 1844 the Senate inquired of President Tyler concerning the employment of a Mr. Duff Green in England. After the agent's mission was completed, President Tyler replied:

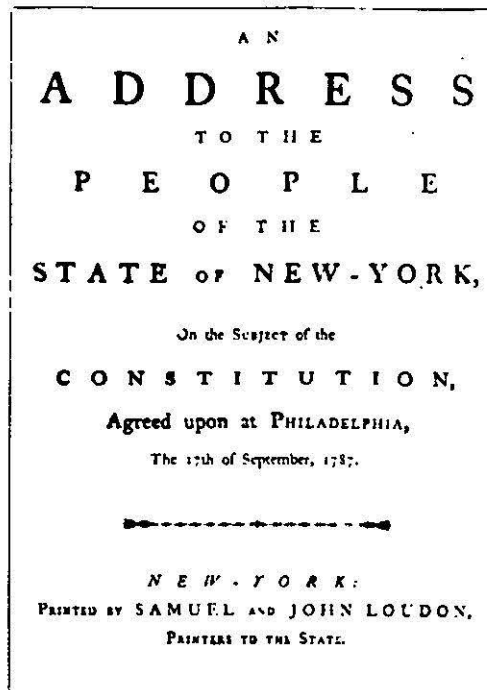
"Although the contingent fund for foreign intercourse has for all time been placed at the disposal of the President, to be expended for the purposes contemplated by the fund without any requisition upon him for a disclosure of the names of persons employed by him, the objects of their employment, or the amount paid to any particular person, and although any such disclosures might in many cases disappoint the objects contemplated by the appropriation of that fund, yet in this particular instance I feel no desire to withhold the fact that Mr. Duff Green was employed by the Executive to collect such information, from private or other sources, as was deemed important to assist the Executive in undertaking a negotiation then contemplated, but afterwards abandoned, upon an important subject, and that there was paid to him through the hands of the Secretary of State \$1,000, in full for all such service." [*Messages and Papers of the Presidents* (J. Richardson) IV 328 (1897)]

Contrast Tyler's response with President Polk's reply to a request by the House of Representatives for disclosure of expenditures from the contingent fund. Polk stated on 20 April 1846:

"The expenditures of this confidential character, it is believed, were never before sought to be made public, and I should greatly apprehend the consequences of establishing a precedent which would render such disclosures hereafter inevitable. . . . The experience of every nation on earth has demonstrated that emergencies may arise in which it becomes absolutely necessary for the public safety or the public good to make expenditures the very object of which would be defeated by publicity." [*Messages and Papers of the Presidents* (J. Richardson) IV 434 (1897)]

In the debates surrounding the responses by Presidents Polk and Tyler, no one expressed a view that maintenance of secrecy of intelligence expenditures

Essential



violated the Constitution. Nor, until the last 10 or 15 years, has there been any significant constitutional challenge. These will be discussed later.

Current law provides permanent authorization for a "contingent fund" for Intelligence, 50 U.S.C.A. 403(j), (1949). The following wording is virtually a verbatim repeat of the several appropriation acts for the World War II Office of Strategic Services:

"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."

Similar authority exists with respect to other government officials. Section 107 of Title 31 of the US Code authorizes the Secretary of State to certify expenditures with respect to "intercourse or treaty with foreign nations." (This language is identical with the 1790 and 1793 statutes mentioned earlier.) Under 28 U.S.C.A. 537, the Attorney General may certify expenditures of the Federal Bureau of Investigation for "expenses of unforeseen emergencies of a confidential character." Section 2017(b) of Title 42 of the US Code authorizes similar certification of expenditures in the atomic energy area by the Department of Energy. Similar authority is vested in the Secretary of Defense and the Secretaries of the three military departments by U.S.C.A. 140.

B. Establishment of the Central Intelligence Agency

The lessons of history, particularly World War II and the Japanese attack on Pearl Harbor, created strong pressures for a permanent central intelligence

Essential

agency as a focal point for providing coordinated, quality intelligence to the President and the Congress. The National Security Act of 1947, 50 U.S.C.A. 402, was the response by Congress. It created the Central Intelligence Agency (CIA). The same Act created the office of Secretary of Defense and under him were included the Departments of the Army and the Navy and a new Department of the Air Force.

Both Houses of Congress saw fit to hold most of the hearings concerning the creation of CIA in closed, that is, in secret, sessions. The testimony of all witnesses, the questions directed to them by committee members, and the responses were classified. One provision of the Act is worthy of note in connection with congressional intent to keep intelligence matters secret. The Director of Central Intelligence was charged with the responsibility "for protecting intelligence sources and methods from unauthorized disclosure."

In what was originally a part of the National Security Act in its early drafts, the Congress in the Central Intelligence Agency Act of 1949, (50 U.S.C.A. 403(a)) included other provisions designed to ensure secrecy of intelligence matters.

1. To enable secret funding of its yearly appropriation, CIA was authorized to receive from other government agencies funds to perform its functions, and as to those funds transferred to CIA, such funds could be expended under CIA authorities. The principal such authority was the permanent contingent fund provision previously discussed. From that time up through the present, CIA is the only government agency that expends a major part of its funds under contingent fund provisions that provide for a simple certificate of the Director as to the amount of such expenditures without further detail. Thus, the Congress has provided that the amount of the CIA yearly budget remains a secret and as to those expenditures certified by the Director the purposes and recipients are kept secret.

2. In the same act Congress, in recognizing the necessity for secrecy in intelligence matters, provided:

"... in the interests of the security of the foreign intelligence activities of the United States and in order further to implement the ... [provision] that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the ... provisions of any other law which requires the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." (50 U.S.C.A. 403(g))

C. National Security Agency Legislation

Another example of congressional recognition of necessity for secrecy in intelligence matters concerns the National Security Agency. Although that Agency was not created by statute, but rather by a Top Secret Directive issued by President Truman on 24 October 1952, the Congress acted to grant its activities additional protection from public disclosure in the National Security Agency Act of 1959 by this provision:

Essential

"... nothing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such Agency." (50 U.S.C.A. 402 Note)

(This language closely parallels the CIA provision referred to earlier.)

D. 50 U.C.A.A. 783(b) and 18 U.S.C.A. 798

Two statutes enacted by the Congress in 1950 illustrate its concern that classified information be kept secret. 50 U.S.C.A. 783(b) makes it unlawful for an employee of the United States to disclose to a person whom such employee knows or has reason to believe to be an agent of a foreign government information of a kind which shall have been classified as affecting the security of the United States. [See *Scarbeck v. United States*, 317 F. 2d 546, (DC Cir. 1963), *cert. denied*, 83 S. Ct. 1897 (1963)]. Section 798 of Title 18 prohibited unauthorized disclosure of classified information pertaining to communications intelligence or cryptographic systems. [See *United States v. Boyce*, 594 F. 2d 1246 (9th Cir. 1979).]

In both cases the defendants asserted the documents involved were improperly classified, and that the court should hear evidence on such issue, and further that the burden was on the government to prove proper classification. In both cases this argument was rejected. In the *Scarbeck* case, the Court said:

"The factual determination required for purposes of Section 783(b) is whether the information has been classified. . . . Neither the employee nor the jury is permitted to ignore the classification given under Presidential authority."

In the *Boyce* case, the Court said:

"Under Section 798, the propriety of the classification is irrelevant. The fact of classification of a document . . . is enough to satisfy the classification element of the offense."

Here the Congress acted to protect secrecy of information that the President, under his constitutional powers, had authorized to be classified—in turn the Courts acted to protect such secrecy by their recognition that a determination of the need for secrecy was not a justiciable issue but, under the Constitution, was reserved to the President.

E. *The Freedom of Information Act*

The Freedom of Information Act, 5 U.S.C. 552 (FOIA), provided procedures for the public to request of government agencies all documents in their possession, with certain exceptions. One exception was an exemption from disclosure of matters "specifically required by an Executive Order to be kept secret in the interest of national defense or foreign policy." In *Environmental Protection Agency, et al v. Mink, et al*, 410 U.S. 73 (1973), Mink asserted that the Court had the right and duty to review security classifications that formed the basis for withholding documents under FOIA. The Court held:

Essential

"... but the legislative history of that Act disposes of any possible argument that Congress intended the Freedom of Information Act to subject executive security classification to judicial review at the insistence of anyone who might seek to question them."

This ruling appears to be fully consistent with the later rulings in the *Scarbeck* and *Boyce* cases discussed above.

However, the Congress promptly amended FOIA to overturn the thrust of *EPA v. Mink*. The amendment required exempt documents to be in fact properly classified, and provided further that any documents withheld may be examined by the Court *in camera* and such "court shall determine the matter *de novo*." This latter provision is clearly a transfer of a constitutional executive responsibility to the judiciary and not in conformance with the Constitution.

These provisions, as approved by the Congress, were vetoed by President Ford. His veto message of 17 October 1974 stated:

"... the Courts should not be forced to make what amounts to the initial classification decision in sensitive and complex areas where they have no particular expertise."

The President further stated that this provision "would violate constitutional principles ..." and "it is ... my conviction that the bill as enrolled is unconstitutional and unworkable. ..." How right he was as to "unworkable" is exemplified by Judge Gesell's comment quoted below in the *Agee* case.

In the hysteria of Watergate and the congressional investigations of intelligence during this period the Congress overrode President Ford's veto. I need not dwell on the resulting massive problems created for CIA and the Federal Bureau of Investigation, in particular, and including the court system. Consider the case of *Philip Agee v. Central Intelligence Agency*, decided in the District Court for the District of Columbia on 17 July 1981, 524 F. Supp. 1290. The Court conducted a random *in camera* review of the 8,669 CIA documents responsive to the Agee request. This review was done mainly at CIA headquarters "because of the volume and sensitivity of the material." In granting the CIA's motion for summary judgment, Judge Gerhard A. Gesell said:

"As far as can be determined this is the first FOIA case where an individual under well-founded suspicion of conduct detrimental to the security of the United States has invoked FOIA to ascertain the direction and effectiveness of his Government's legitimate efforts to ascertain and counteract his effort to subvert the country's foreign intelligence program. It is amazing that a rational society tolerates the expense, the waste of resources, the potential injury to its own security which this process necessarily entails."

In a footnote, Judge Gesell observed that, as of January 1981, CIA had expended on the request 25,000 man hours involving salaries of \$327,715 and computer costs of \$74,750, with present total costs far exceeding such sum, none of which can be charged to Agee under the statute.

In the hundreds of judicial cases brought under FOIA it should be noted that no documents withheld for classification reasons (or claimed as exempt

Essential

from disclosure under the CIA "sources and methods" provision) have been disclosed to requesters by virtue of court orders. What does this signify? All judges wish to avoid constitutional issues if possible, and in FOIA cases they have indeed shown great deference to Executive Branch expertise through affidavits and other testimony. In those few cases where judges have reviewed documents, they continue to defer to the constitutional responsibility of the executive while giving lipservice to the *de novo* provisions of the FOIA amendments. [Note: It is of interest that Robert Bork, then Solicitor General in the Department of Justice, advised the author (then General Counsel of CIA) in 1975 that he would not hesitate to test the constitutional issue in an appropriate case where a court had ordered disclosure over Executive Branch objections.]

After seeking relief for a number of years from the burdens of FOIA, and serious damage to CIA from FOIA, the Congress approved amendments to FOIA that substantially alleviate its effects on CIA activities. (50 U.S.C.A. 431, approved 15 October 1984)

F. *Intelligence Identities Protection Act of 1982*

Over a number of years, CIA had sought legislation that would more effectively provide secrecy for information identifying its personnel, agents, and informants through criminal sanctions for unauthorized disclosure. The result was the Intelligence Identities Protection Act of 1982, P.L. 97-200. Of particular interest is that section of the law that prohibits disclosure of such information by persons who did not have access to classified information. While there was some very vocal opposition to this provision as being unconstitutional, after many days of debate the Congress approved this legislation by substantial votes—in the House 354 to 56 and in the Senate 90 to 6. Here the Congress resoundingly affirmed the concept of secrecy for intelligence and its personnel with newly refined tools to penalize disclosure. Apparently, this legislation has been effective, since those publications and persons periodically addicted to publishing lists of CIA personnel no longer engage in that practice.

G. *Congressional Action on Disclosure of Intelligence Budgets*

That the Congress, as a body, concurs in the concept of secrecy of intelligence funding and details of expenditures is evidenced by the appropriations for intelligence since the establishment of CIA in 1947. Each year they have had the choice of making public the amount appropriated for intelligence and each year they have withheld such figures. Moreover, "contingent fund" authority has been a part of the statutory picture throughout the nearly 200 years of our Constitution. (See Part VI for a full discussion of consideration of disclosure by the Congress.)

IV.

Judicial Decisions

We next should examine how the courts have treated the issue of intelligence secrecy under the Constitution. While only a few cases are directly helpful to our purpose they are all landmark cases and should be studied carefully.

A. *Totten v. United States, 9 U.S.105 (1875)*

Essential

This is the earliest pertinent case. *Totten* involved a paid spy and the suit was for services rendered under an alleged contract with President Lincoln, made in July 1861. The Court said it had no difficulty as to the President's authority and that he was "authorized during the war, as Commander in Chief of the armies of the United States, to employ secret agents . . . and contracts to compensate such agents are so far binding upon the government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control."

The Court then ruled, however, that the case could not be maintained in Court. Its reasons were that the service under the contract was a secret service, with the information sought to be obtained clandestinely, and to be communicated privately. Further, the employment and the service were to be equally concealed and both employer and agent must have understood that the lips of the other were to be forever sealed. The Court stated:

"This condition . . . was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent."

Totten continues, "The secrecy which such contracts impose precludes any action for their enforcement." And " . . . public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."

It is to be noted that no statutes are cited in the opinion. There is reference to the contingent fund and to the Constitution by implication in speaking of the role of the President as Commander in Chief. Here is Supreme Court recognition of the inherent power granted to the President to conduct intelligence activities and to do so secretly. Thus, *Totten* takes judicial notice, aided by the Constitution and provision of the contingent fund by the Congress, of the requirement of secrecy.

A somewhat similar case came before the Supreme Court in *De Arnaud v. United States*, 151 U.S. 48 (1894). The Court disposed of the case on the basis of operation of the statute of limitations; nevertheless it referred to *Totten* by stating it would be "difficult for us to point out any substantial differences between the services rendered by Lloyd [in *Totten*] and those rendered by De Arnaud."

Totten (and *De Arnaud*) has repeatedly been cited in cases up to modern times with no deviation in the basic thrust of its doctrine.

B. *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304 (1936)

There are some very interesting principles set forth by the Supreme Court in this case, which has been cited repeatedly in subsequent litigation. The Court proclaimed:

" . . . the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of

Essential

the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. . . . ”

In discussing presidential powers, the Court then said:

“ . . . the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution . . . [the President] has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. . . . ”

Here is continuing recognition by the highest Court in the land of the inherent right of the President, consistent with the Constitution, to collect intelligence and of the necessity for secrecy.

C. *Chicago and Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948)

The Court again had occasion to focus on the President's power to collect intelligence and the requirement for secrecy. The Court held:

“The President, both as Commander in Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world . . . the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. . . . They are decisions of a kind . . . which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.”

No question but that the President may conduct intelligence activities and that these must be secret.

D. *Halperin v. Central Intelligence Agency*, 629 F.2d 144, (D.C.Cir. 1980)

This is the only case that addresses directly and fully whether the provisions in the National Security Act of 1947, 403(d)(3), and in the Central Intelligence Agency Act of 1949, 403(g) and 403(j), which authorize secrecy for the expenditures of the CIA, are unconstitutional as violative of the Statement and Account Clause discussed earlier. An earlier case had raised the same issue [*United States v. Richardson*, 418 U.S. 166 (1974)] but the Supreme Court disposed of that case by holding that a federal taxpayer does not have standing to raise a constitutional challenge.

Essential

There was some dicta, however, in the *Richardson* case that has an important impact on the constitutional issue. In a footnote (note 11), the Court stated:

"Although we need not reach or decide precisely what is meant by 'a regular Statement and Account,' it is clear that Congress has plenary power to exact any reporting and accounting it considers in the public interest . . . historical analysis of the genesis of cl. 7 suggests that it was intended to permit some degree of secrecy of governmental operations. . . . Not controlling, but surely not unimportant, are nearly two centuries of acceptance of a reading of cl. 7 as vesting in Congress plenary power to spell out the details of precisely when and with what specificity Executive agencies must report the expenditure of appropriated funds and to exempt certain secret activities from comprehensive public reporting."

Here but for judicial concern for ruling on a constitutional issue only when necessary, is the precursor of the *Halperin* decision discussed below.

In *Halperin* the Court also held that the plaintiff lacked standing and it could have dismissed the appeal on those grounds. But Judge Malcolm Wilkey, one of the most respected federal appellate judges, decided to consider on the merits the claim of unconstitutionality. In a lengthy, well-researched opinion, Judge Wilkey reviewed the history of the Statement and Account Clause including statements reflecting the intent of the framers and governmental practices both before and after enactment of the Constitution.

The Court reviewed the debates concerning James Madison's proposed amendment to George Mason's proposal for a Statement and Account Clause, discussed more fully above in Part I. The opinion also discusses the handling of intelligence and expenditures therefor by the Committee on Secret Correspondence. Mentioned also is approval by the Congress of a contingent fund in 1790 for use by President Washington. In conclusion, the Court stated:

"We must conclude from the constitutional debates, from the apparent contemporaneous understanding of what the framers of Clause 7 intended, and from the continuous practice dating from the early years of the Republic, that a Statement and Account Clause does not create a judicially enforceable standard for the required disclosure of expenditures for intelligence activities . . . it appears that the framers of this clause intended Congress and the Executive to have discretion to decide whether, when, and in what detail intelligence expenditures should be disclosed to the public."

Thus, in holding that the Congress and the President have discretion, not reviewable by the courts, to require secrecy for intelligence expenditures, the court specifically held that the Congress constitutionally had authority to protect the secrecy of intelligence expenditures by means of section 403(d)(3) of the National Security Act of 1947 and sections 403(g) and 403(j) of Title 50 (The Central Intelligence Agency Act of 1949).

E. *Central Intelligence Agency v. Sims*, 105 S. Ct. 1881 (1985)

Essential

This case is worthy of mention because it is the only Supreme Court case directly and fully focusing on the meaning of the "sources and methods" proviso. The National Security Act of 1947, Section 102(d)(3) has a proviso as follows, "And provided further, that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure. . . ." (This proviso is derived from paragraph 10 of the Presidential Directive of 22 January 1946, which established the Central Intelligence Group and the position of Director of Central Intelligence. That paragraph states, ". . . the Director of Central Intelligence shall be responsible for fully protecting intelligence sources and methods.")

The Supreme Court, in reversing the decision of the lower court, reviewed the testimony of witnesses before the congressional committees considering the proposed legislation to establish CIA, and the Court stated, "Witnesses spoke of the extraordinary diversity of intelligence sources." The Court noted that such testimony made it clear that the typical intelligence source was not the secret agent. The Court then stated, "Congress was also well aware of the importance of secrecy in the intelligence field. . . . Congress was plainly alert to the need for maintaining confidentiality—both Houses went into executive session to consider the legislation creating the agency—a rare practice for congressional sessions." This rare practice is, of course, specifically authorized by the Constitution in Article I, Section 5, Clause 2 as follows: "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. . . ." Here again we see that the framers were acutely aware that at times there would be matters under consideration of such a sensitive nature as would necessitate secrecy.

After reviewing the statutory language in light of testimony of witnesses who testified before the congressional committees considering the proposed legislation, the Court concluded, "The plain meaning of the statutory language, as well as the legislative history of the National Security Act, however, indicates that Congress vested in the Director of Central Intelligence very broad authority to protect all sources of intelligence information from disclosure."

VI.

Congressional Action

Hearings before the Select Committee on Intelligence
of the United States Senate
Ninety-fifth Congress First Session
April 27 and 28, 1977

These hearings were conducted to determine "Whether Disclosure of Funds Authorized for Intelligence Activities is in the Public Interest." Members present were: Senators Inouye (Chairman), Hathaway, Huddleston, Biden, Morgan, Hart, Goldwater, Chafee, Lugar, and Wallop. In all likelihood this is the fullest authoritative discussion in print of the issue of secrecy for intelligence budgets and expenditures. There were full presentations on the basic constitutional issue as well as reasoned views, for and against, continuing the practice of not disclosing any figures for CIA budgets and expenditures.

The Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities on Intelligence (the Church Investigating

Essential.

Committee) in its final report in 1976 recommended that the overall budget for national intelligence activities be made public annually. It also encouraged the oversight committees to look into the possibility that the total expenditures for each of the intelligence agencies might be made public. Recommendation 77 also stated that Congress should annually authorize a "National Intelligence Budget." Although Congress did adopt the practice of annual authorizations, it did not include a specific figure but only made reference to such a figure in the oversight committee reports, which were classified. This is still the practice followed today.

In the 1977 hearings the lead-off witness was Admiral Stansfield Turner, then Director of Central Intelligence. His position was "... President Carter has directed that I not object to your releasing to the public a single overall budget figure of the US intelligence community." He acknowledged that this new policy was "a major break with tradition" and "not one without risk." Three former Directors, Richard Helms, William Colby, and George Bush, opposed such disclosure. Of all the witnesses who supported disclosure (with one exception), not one had held a position of responsibility in intelligence.

Contrast President Carter's position with that of President Ford just one year previously. On 21 April 1976, President Ford in a letter to Senator Frank Church, Chairman of the Senate Select Committee on Intelligence, stated he understood that the Select Committee expected to publish in its final report a budget figure for the intelligence community. Ford asked the committee to reconsider its position, stating "It is my belief that the net effect of such a disclosure could adversely affect our foreign intelligence efforts and therefore would not be in the public interest."

Several lengthy legal briefs were submitted dealing with the constitutional issue. About a half dozen concluded that the Constitution required at least some disclosure. Professor Gerhard Casper, Professor of Law, University of Chicago, and John S. Warner, the Legal Adviser to the Association of Former Intelligence Officers (AFIO) [and former General Counsel, CIA], both urged that there was no mandate from the Constitution that required disclosure and suggested strongly that this was a matter which the Congress could and should decide.

Worth noting is the testimony of Morton Halperin and John H. F. Shattuck of the American Civil Liberties Union (ACLU). Shattuck made the same tired old legal arguments that the Constitution required the disclosures that he had asserted as counsel in the *Richardson* case discussed earlier. He lost that case by a 6 to 3 decision of the Supreme Court, although the decision turned on the issue of standing. Shattuck then stated that ACLU had filed the suit for Morton Halperin against CIA seeking disclosure of expenditures, asserting again the constitutional issue. At the time, the District Court had denied disclosure and the appeal had not yet been decided. The Appellate Court decision, handed down some three years later, is discussed in some detail earlier since it tackles the constitutional issue head-on, rejecting the arguments by Halperin and Shattuck. So here we have Halperin and the ACLU waging a campaign for disclosure of CIA budgets and expenditures on two fronts—the courts and the Congress—and losing on both.

Essential

A somewhat similar campaign was waged by Halperin and the ACLU in connection with enactment of the Intelligence Identities Protection Act of 1982 (mentioned earlier). As introduced by Senator Chafee, the bill contained a provision that prohibited publication of agents' identities by a person who had not had access to classified information. While Halperin and the ACLU opposed the entire bill, it was this provision they attacked as being unconstitutional. At one point they offered a "minor" revision to supporters of the bill, including AFIO, and if it were accepted they would withdraw their objections to the entire bill. Their "minor" revision would have nullified this particular provision and it was not accepted. The bill as reported by both the Senate and House Committees, however, contained their revision—clear evidence of their influence on the committees and their staffs. The result was a debate that lasted many days on the floor of Congress. The revision was rejected and the original bill was approved by resounding majorities in roll call votes—House 354 to 56 and Senate 90 to 6. Halperin and ACLU won the battle on the constitutional issue in the two congressional committees, but lost the war on the floors of Congress.

A not unrelated campaign by Halperin and the ACLU was simultaneously being waged to force disclosures of information under the Freedom of Information Act. Numerous lawsuits were filed under FOIA by Halperin, and the ACLU was involved in a substantial number as plaintiff or counsel. The Agee case, discussed above, had a former ACLU lawyer acting as counsel for Agee. Their lawsuits have created significant work loads on various agencies in the national security arena, but no Court has yet issued a final order to disclose documents over Executive Branch objection. In this campaign, they have not yet won a battle, but they did win the first round by supporting the introduction and passage of the FOIA amendments vetoed by President Ford. Of course, these same elements worked vigorously to support the override by Congress of President Ford's veto.

As a result of these hearings, the longstanding practice of not disclosing the total intelligence community budget or the CIA budget has continued. The Congress, in effect, has decided each year since 1947 that the CIA budget is appropriately kept secret. On at least two occasions, there has been a recorded vote on retaining secrecy for the intelligence budget. The issue was squarely before the Senate on 4 June 1974 with three hours allotted for debate. The recorded vote to retain secrecy was 55 to 33. On 1 October 1975 there was extensive floor debate in the House resulting in a vote of 267 to 147 to retain secrecy. Clearly then, the Congress as a body concurs in the concept of secrecy of the intelligence budgets and expenditures.

Conclusion

This brief review of the concept of secrecy for intelligence activities and funding for such activities demonstrates a full understanding of the necessity for secrecy within the three branches of our Government. Our country was born with its leaders having a full comprehension of intelligence and requisite secrecy.

Some of those same leaders were involved in drafting the blueprint for our nation—the Constitution. In their deliberations, they considered and made

Essential

provision for secrecy in funding and expenditures for intelligence by the careful phrasing of the Statement and Accounts Clause of Article I, Section 9. The additional step was taken in Section 5 of Article I of authorizing Congress to make exceptions to publishing of a Journal of Proceedings "as may in their judgment require Secrecy."

Our first President has been shown to be very mindful of the need for secrecy in intelligence matters and in expenditures therefor. In his first "state of the Union" message to the Congress, on 8 January 1790, he requested a secret fund for expenses of intelligence activities. The Congress authorized such a fund by the Act of 1 July 1790 making provision for certification by the President for "such expenditures as he may think inadvisable to specify." Such authority for the President, and others, has continued to exist in one form or another throughout the existence of our nation. Similar authority was granted on a permanent basis to the Director of Central Intelligence in Section 403(j) of the CIA Act of 1949.



In that same Act, the Congress provided for transfer of funds from other government agencies to CIA, thus enabling the CIA budget to remain secret. In other provisions, it directed that no requirements of other laws as to publishing names, titles, and functions would be applicable to CIA. Later it made similar provisions for the National Security Agency. In the earlier Act establishing CIA, it specifically directed that the Director of Central Intelligence be responsible for protecting intelligence sources and methods from unauthorized disclosure.

As early as 1975, the Congress began considering legislation to prohibit unauthorized disclosure of information identifying intelligence personnel and to protect the secrecy of intelligence relationships. In the prolonged debate, the media universally opposed any legislation on this subject and were joined by various special interest groups. The Congress finally acted in 1982 with resounding majority votes to approve a measure to help in the protection of intelligence agents.

The Judiciary has fulfilled its function in considering questions of secrecy for intelligence. In *Totten* the US Supreme Court faced squarely Executive Branch use of secret agents, saying that the law itself regards such matters as confidential and the Judiciary could not take jurisdiction. The Court explicitly recognized the constitutional power of the President to utilize espionage agents and referred to the contingent fund established by Congress for just such matters and all to be done under a cloak of secrecy.

In *Curtiss Wright*, the Supreme Court discussed at some length the powers of the President in international relations. It stated that he has his confidential sources of information and that secrecy in respect of information gathered by

Essential

them may be highly necessary, with premature disclosure of it productive of harmful results. Similarly in *Chicago and Southern*, the Court referred to the availability to the President of intelligence services whose reports are not and ought not to be published to the world. The Court stated such "information is properly held secret."

While the US Supreme Court had the opportunity to rule on the constitutional issue of the CIA statutes providing for secrecy of expenditures in *U.S. v. Richardson*, it decided against Richardson solely on the basis that he did not have standing to bring the action, but its dicta pointed the way. However, the United States Court of Appeals for the District of Columbia in *Halperin v. Central Intelligence Agency*, judging that it best served judicial economy, addressed the constitutional issue as raised in *Richardson*. The opinion includes an exhaustive review of the framers' view of what was intended by the words of Clause 7 and the practice of the Congress and the Executive Branch. The Court ruled that the statutes were constitutional and that the framers of Clause 7 "intended Congress and the Executive to have discretion to decide whether, when, and in what detail intelligence expenditures should be disclosed to the public."

In addition to the various statutes passed by Congress to protect and enhance secrecy of intelligence matters, the Congress on many occasions has considered, in hearings and debates on the floor, the question of secrecy for intelligence budgets and expenditures. Even in the face of the startling position of President Carter that he would not object to releasing to the public a single overall budget figure for the intelligence community, the Congress decided against any such disclosure.

We have found that, under the Constitution, the Courts have upheld secrecy of intelligence activities and funding. The Congress for 200 years has provided secret funds for intelligence and in addition has enhanced necessary secrecy for intelligence with a number of statutes, including the establishment of the Central Intelligence Agency. We have seen organized assaults in the Courts and in the congressional process on secrecy for intelligence and funding. Those assaults have failed. For all of this, we must be thankful for the handful of men who forged our Constitution. Their wisdom, experience, and foresight created the means by which the Judiciary, and the Congress, could enable the Executive to fulfill its role in international affairs, utilizing an intelligence service protected with the necessary secrecy.

"We have established a common Government, which being free in its principles, being founded in our own choice, being intended as the guardian of our common rights and the patron of our common interests, and wisely containing within itself a provision for its own amendment, as experience may point out its errors, seems to promise everything that can be expected from such an institution; and if supported by wise councils, by virtuous conduct, and by mutual and friendly allowances, must approach as near to perfection as any human work can aspire, and nearer than any which the annals of mankind have recorded."

James Madison
21 June 1792