

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVEN AFTERGOOD)	
)	
Plaintiff,)	
)	
v.)	Case No. 01-2524 (RMU)
)	
CENTRAL INTELLIGENCE AGENCY)	
)	
Defendant.)	
)	

DECLARATION OF LOUIS FISHER

I, Louis Fisher, hereby declare:

1. I am a Senior Specialist in the Government and Finance Division of the Congressional Research Service of the Library of Congress. I received my doctorate from the New School for Social Research in 1967 and have served on the staff of the Congressional Research Service since 1970. I am the author of *Constitutional Conflicts Between Congress and the President* (4th ed. 1997), *Presidential War Power* (2d ed., 2004), and numerous other books and publications on constitutional principles and public policy. The views expressed in this declaration are my own and are not attributable to the Congressional Research Service, the Library of Congress or any other organization.

2. In the course of my research over three decades I have studied the budgeting

processes of the United States government in depth. I wrote a book on the subject entitled *Presidential Spending Power* (Princeton University Press, 1975). I authored a related journal article entitled “Confidential Spending and Governmental Accountability,” *George Washington Law Review*, vol. 47, no. 2 (January 1979). And I was an invited witness at the most recent congressional hearing devoted to the question of whether or not to disclose the total intelligence budget (“Public Disclosure of the Aggregate Intelligence Budget Figure,” Permanent Select Committee on Intelligence, U.S. House of Representatives, 103rd Congress, February 22-23, 1994).

3. The purpose of this declaration is to explain how contemporary intelligence budget secrecy differs from previous instances of confidential government spending in American history and why it violates constitutional norms. I begin by noting the constitutionally distinctive character of budget information in American government.

The Statement and Account Clause

4. Budget information is one of only two categories of government information whose periodic disclosure in some form is required and guaranteed by the U.S. Constitution. (The other category is the Journal of the proceedings of Congress.) Specifically, the Constitution states in Article I, Section 9 that a “regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” The framers regarded the publication of national spending as fundamental to democratic accountability.

5. The fact that this publication requirement applies to “all” public money is especially noteworthy. There is no exception for intelligence appropriations or other moneys that are

“classified” or otherwise sensitive-- “all” of them must be published sooner or later. This point is highlighted by a comparison with the one other explicit requirement for publication of government information that appears in Article I, Section 5: “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.” While an exception for secret matters is provided in the latter, no such exception is included in the Statement and Account clause. This reflects and reinforces the fundamental importance of budget disclosure in American governance.

Confidential Spending and Secret Appropriations in the Past

6. There is nevertheless a history of budgeting practices in American government that permits confidential spending. Several early statutes authorized the President and executive officers to issue certificates instead of detailed vouchers when spending public money. Certificates did not disclose how the money was spent. Until modern times these were all isolated cases, few in number and limited in scope. In contrast, with few exceptions, post-World War II intelligence appropriations and expenditures have categorically and seemingly permanently escaped constitutionally-required disclosure.

7. Historical budget practices have included both confidential spending and secret appropriations: confidential spending refers to funds that are openly appropriated but whose disbursement is confidential and not accounted for; secret appropriations are monies that are secretly appropriated and expended without any trace in the public record.

8. In the long period from 1789 to 1935, there were no more than five instances of confidential spending. The first arose from a 1790 statute providing the President with \$40,000

“for the support of such persons as he shall commission to serve the United States in foreign parts.” 1 Stat. 128 (1790). It permitted the President to account for expenditures “as in his judgment may be made public.” Thus, the appropriation was public but the expenditure need not be.

9. Congress established the second such confidential spending precedent in 1899 by appropriating \$63,000 for emergencies arising in the diplomatic and consular service, to be expended pursuant to a section of the Revised Statutes that permitted the use of certificates in lieu of vouchers. (Act of Feb. 9, 1899, ch. 128, 30 Stat. 826). A third exception appeared in 1906 by creating a confidential travel fund for the President. (Act of June 23, 1906, ch. 3523, 34 Stat. 454.). The fourth exception to the normal accounting requirement appeared in 1916, when Congress authorized a confidential fund for the Secretary of the Navy. (Act of Aug. 29, 1916, ch. 417, 39 Stat. 557.). And the fifth, in 1935, was a confidential fund for the Federal Bureau of Investigation. (Act of March 22, 1935, ch. 39, 49 Stat. 78.)

10. The first documented case of secret spending occurred early in the nineteenth century. Voting in secret session in 1811, Congress provided President Madison \$100,000 to take temporary possession of certain territory south of Georgia. However, this secret appropriation was published in 1818. (Act of Jan. 15, 1811, published in 1818 at 3 Stat. 471-472). Since it was disclosed after several years, it did not violate the Constitution’s periodic (“from time to time”) disclosure requirement.

11. World War II marked a sharp decline in budget accountability, most notably in the Manhattan Project which involved secret expenditures of more than two billion dollars to develop the atomic bomb. The money was hidden within misleadingly named accounts in

appropriations bills. Confidential funds were also created for the President, the Secretary of War, the Attorney General, the U.S. Coast Guard, the U.S. Secret Service, and other agencies. These were relatively small amounts. By far the most significant exception to the Statement and Account Clause came with the Central Intelligence Act of 1949, which provided that sums made available to the CIA “may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds.” 63 Stat. 208 (1949). This entailed routine, continuing budget secrecy and unprecedented authority to transfer funds among agencies.

The Secrecy of Intelligence Spending is Anomalous

12. The categorical and open-ended secrecy of post-World War II intelligence spending is a marked departure from the previous practice of highly specific, limited and mostly temporary confidential and secret expenditures.

13. Classified intelligence spending is unlike past confidential and secret appropriations. Prior confidential spending was publicly and directly appropriated. Secret appropriations in 1811 were publicly acknowledged within seven years. The *amounts* allocated to intelligence are effectively obscured and kept secret from the public through erroneous or misleading publications of various appropriations accounts. Also, previous confidential and secret accounts were singly established to meet particular circumstances of the moment. The secrecy of intelligence spending has become institutionalized and seemingly permanent, a wholesale departure from constitutional norms.

14. Among constitutional scholars there is a school of thought that deems the classification of *current* intelligence spending levels on national security grounds to be entirely

consistent with the language “from time to time” in the Statement and Account clause. But I know of no constitutional scholar who defends the continued withholding of budget information that is several decades old.

“From Time to Time” Cannot Mean “Never”

17. Open-ended, indefinite budget secrecy that is applied to an entire category of government expenditures such as intelligence cannot possibly be consistent with the Constitution’s Statement and Account clause. “From time to time” cannot mean “never.”

18. Nor does the Director of Central Intelligence have the authority to cancel a constitutional requirement or to interpret it out of existence. National security classification authority cannot properly be invoked to permanently override the Constitution.

19. Intelligence budget secrecy can be reconciled with past practice and with constitutional publication requirements, but only if it culminates in a regular, periodic disclosure “from time to time” of the budget information that has been withheld.

I hereby certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this _6th_ day of July 2004

LOUIS FISHER