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**Black Budgets:  
The U.S. Government's Secret Military and Intelligence  
Expenditures**

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## **Note on Research Methods**

By their nature, "Black Budgets" remain an issue of difficulty to discuss in specificity due to classification, complexity and the arcane nature of the topic. The research for this paper included a comprehensive literature review, data analysis, and elite interviews and correspondence with senior U.S. government experts, and Cabinet-level officials. Any errors remain the author's responsibility alone.

## **Abstract**

This Briefing Paper seeks to inform readers on the definitions, history, process, oversight and legal debates concerning "Black Budgets." The intent is to provide information to help students, policymakers, and scholars make sense of classified budgets. Thus, this Briefing Paper should be examined as a starting point for further research. Part I concerns the definitions of "Black Budgets." Part II engages in a historical analysis of issue rhetoric on the classified budget. Part III examines the process by which classified funding works its way through Congress and the Executive Branch. Part IV examines the contemporary debate on transparency of the classified budget. Part V lays out normative arguments surrounding classified budget transparency. From the Church Committee, to the Stinger missile program in Afghanistan, to the recent global surveillance disclosures by Edward Snowden and Chelsea Manning, this paper aims to debunk myths, recalibrate misperceptions, and uncover truths about the law and policy behind classified spending.

## **Black Budgets: The U.S. Government's Secret Military and Intelligence Expenditures**

### **Introduction**

On March 18, 2019 the Office the Director of National Intelligence (DNI), announced its request for the largest sum ever, \$62.8 billion, for funding U.S. intelligence operations in Fiscal Year (FY) 2020.<sup>1</sup> This request spans the classified funding from more than a dozen agencies that make up the National Intelligence Program (NIP).<sup>2</sup> The U.S. Government spends these funds on data collection, counterintelligence, and covert action.<sup>3</sup> The DNI also requested \$21.2 billion for FY 2019 for the Military Intelligence Program (MIP) devoted to intelligence activity in support of U.S. military operations.<sup>4</sup> For FY2020, it is likely to request a similar figure, for a total estimated request of approximately \$85 billion for the “Black Budget,” the U.S. Government’s secret military and intelligence expenditures.

The “Black Budget” serves as an illustrative yet informal term that can mean different things to different audiences. For clarity, this paper will use this term as a proxy for NIP and MIP funding. Overall, within the U.S. Government, classified budgets encompass more than just these two intelligence categories, including acquisition and operational activities. Still, the “Black Budget” term remains useful to debunk myths, recalibrate misperceptions, and uncover truths associated with classified spending.

The history, process, and transparency concerns of the “Black Budget” remain a particularly provocative field of study in federal budget policy. The 2013 global surveillance disclosures leaked by Edward Snowden, a Central Intelligence Agency (CIA) contractor, attracted massive media attention to the issue.<sup>5</sup> Oversight reform remains a defining issue in discussing “Black Budgets.” Few people in the U.S. population will ever see the line-item budgets for intelligence programs. However, calls for reform are not a new phenomenon. The modern debate originates in the 1976 Church Committee report on intelligence

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<sup>1</sup> OFFICE OF THE DIR. OF NAT. INTELLIGENCE, *DNI Releases Budget Figure for FY 2020 Appropriations Requested for the National Intelligence Program*, ODNI News Release No. 10-19 (Mar. 18, 2019).

<sup>2</sup> DNI.GOV, *U.S. Intelligence Community Budget*. Available at <https://www.dni.gov/index.php/what-we-do/ic-budget>

<sup>3</sup> See Wilson Andrews and Todd Lindeman, *The Black Budget*, WASH. POST, (Aug. 29, 2013).

<sup>4</sup> DNI.GOV, *supra* note 2.

<sup>5</sup> *Id.*

abuses, and subsequent reforms. This long-standing desire for scrutiny took form in the 116<sup>th</sup> Congress, when a bipartisan group of lawmakers, called for disclosure of agency top-line budget requests.<sup>6</sup>

## I. Defining the “Black Budget”

In the U.S. context, the “Black Budget” primarily refers to any budgetary expenditure that the U.S. Government does not disclose publicly. The disclosure of budgetary figures for classified programs is punishable under 18 U.S.C. § 798 if it benefits a foreign government, or if the disclosure is deemed by a court of law to be to the detriment of the U.S. Government.<sup>7</sup> Budgetary numbers qualify as classified information because U.S. government agencies determine the limitations of the dissemination of such information.<sup>8</sup> Only after 2007, due to an act of Congress, did the Office of the DNI publish the top-line intelligence budget number.<sup>9</sup> Prior to this law, overall total spending on intelligence remained shrouded in secrecy. Today, the overall total of intelligence spending per year continues to be made public in accordance with law, but the process of authorizing and appropriating intelligence funds within Congress remains “complicated and not well understood.”<sup>10</sup> The “Black Budget” can be split into two separate categories. First, the National Intelligence Program (NIP) budget, which concerns the intelligence budget and the “strategic needs of decision makers.”<sup>11</sup> Second, the Military Intelligence Program (MIP), which falls under the authority of the U.S. Secretary of Defense, and general concerns funding for military intelligence operations.<sup>12</sup> While NIP funding falls under the *control* of the Office of the DNI, 90 percent of *its budget falls within* the Department of Defense (DOD) budget.<sup>13</sup> What this implies is that the portion

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<sup>6</sup> Katie Bo Williams, *Lawmakers Renew Call for End to 'Black Budget' Secrecy*, THE HILL, (Mar. 23, 2018).

<sup>7</sup> 18 U.S.C. § 798(a)

<sup>8</sup> 18 U.S.C. § 798(b): “The term ‘classified information’ means information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution.”

<sup>9</sup> See *DNI Releases Budget Figure for National Intelligence Program*, ODNI News Release No. 22-07, Federation of American Scientists (Oct. 30, 2007).

<sup>10</sup> Marshall C. Erwin and Amy Belasco, *Intelligence Spending and Appropriations: Issues for Congress*, CONG. RESEARCH SERV., R42061 (Sept. 18, 2013).

<sup>11</sup> Anne Daugherty Miles, *Intelligence Community Spending: Trends and Issues*, CONG. RESEARCH SERV., R44381 (Nov. 8, 2016).

<sup>12</sup> Marshall C. Erwin and Amy Belasco, *supra* note 10.

<sup>13</sup> *Id.*

of the NIP that is carried in the DOD budget cannot be used for other purposes in DOD.<sup>14</sup> The administration of President Donald Trump outlined its intelligence operations priorities in the 2017 National Security Strategy, calling for understanding of the economic priorities of adversaries, and fusing information and analysis to “compete more effectively on the geopolitical stage.”<sup>15</sup>

*a. National Intelligence Program (NIP)*

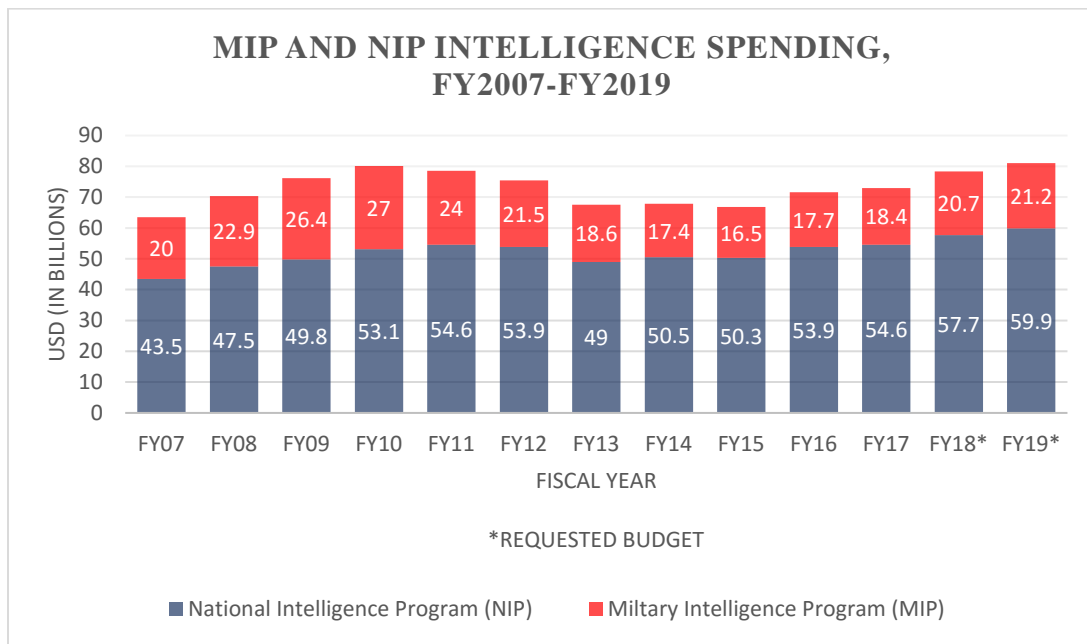
The NIP, previously known as the National Foreign Intelligence Program (NFIP), refers to the funding mechanism for the 17 agencies that make up the U.S. Intelligence Community (IC), including the Central Intelligence Agency (CIA). An estimated 1,271 government organizations and 1,931 private companies employ 845,000 people to work on federal programs related to counter-terrorism and intelligence, according to a two-year study from the *Washington Post*.<sup>16</sup> The real figure may be less, depending on which organizations are counted as most critically contributing to the collection and analysis of intelligence. Within the IC, the *Washington Post*'s estimate is criticized for inflating its definition of intelligence “organizations” to increase the total headcount figure.<sup>17</sup> This debate aside, the NIP experienced high growth after the 9/11 attacks, doubling in real terms between 2001 and 2012.<sup>18</sup>

<b>The U.S. Intelligence Community (2016)</b>	
<b>8 Department of Defense (DOD) Elements:</b>	
1.	Defense Intelligence Agency (DIA)
2.	National Geospatial-Intelligence Agency (NGA)
3.	National Reconnaissance Office (NRO)
4.	National Security Agency (NSA)
<i>Intelligence elements of the military services:</i>	
5.	U.S. Air Force Intelligence (USAF/IN)
6.	U.S. Army Intelligence (USA/IN)
7.	U.S. Marine Corps Intelligence (USMC/IN)
8.	U.S. Navy Intelligence (USN/IN)
<b>9 Non-DOD Elements:</b>	
1.	Office of the Director of National Intelligence (ODNI)
2.	Central Intelligence Agency (CIA)
<i>Department of Energy (DOE) intelligence element:</i>	
3.	Office of Intelligence and Counter-Intelligence (I&CI)
<i>Department of Homeland Security (DHS) intelligence elements:</i>	
4.	Office of Intelligence and Analysis (I&A)
5.	U.S. Coast Guard Intelligence (USCG/IN)
<i>Department of Justice (DOJ) intelligence elements:</i>	
6.	Drug Enforcement Agency's Office of National Security Intelligence (DEA/ONSI)
7.	Federal Bureau of Investigation's National Security Branch (FBI/NSB)
<i>Department of State (DOS) intelligence element:</i>	
8.	Bureau of Intelligence and Research (INR)
<i>Department of Treasury (Treasury) intelligence element:</i>	
9.	Office of Intelligence and Analysis (OIA)

*b. Military Intelligence Program (MIP)*

<sup>14</sup> Correspondence with senior intelligence official, April 25, 2019.  
<sup>15</sup> WHITEHOUSE.GOV, *National Security Strategy of the United States of America* (Dec. 2017) 32. Available at <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>  
<sup>16</sup> Dana Priest and William M. Arkin, *A Hidden World, Growing Beyond Control, The Black Budget*, WASH. POST, (July 19, 2010), A01. Note: The authors argue the NIP has grown “so massive that its effectiveness is impossible to determine.”  
<sup>17</sup> Correspondence with senior intelligence official, April 25, 2019.  
<sup>18</sup> Marshall C. Erwin and Amy Belasco, *supra* note 10 at 4.

The Military Intelligence Program (MIP) includes spending on intelligence activity in support of tactical U.S. military operations. MIP uses both base and Overseas Continuing Operations (OCO) funds.<sup>19</sup> First, MIP funds programs within the Defense Intelligence Agency (DIA), the National Geospatial Intelligence Agency (NGA), the National Security Agency (NSA), and National Reconnaissance Office (NRO), among others. Second, MIP funds go to the Army, Navy, Air Force, and Marine Corps in support of each of the armed services' intelligence activities. Funds also go to Special Operations Command (SOCOM), which includes funding for counter-terrorism, psychological warfare, and counter-narcotics operations.<sup>20</sup> Third, the MIP funding mechanism can be blended with NIP funds across several non-DOD elements of the IC, including among different civilian and intelligence agencies within the U.S. Government.<sup>21</sup>



Source: Congressional Research Service (CRS), and Office of the Director of National Intelligence (DNI)

MIP and NIP funding increased steadily in the post-9/11 period until Congress passed budgetary

<sup>19</sup> See OFFICE OF THE DIR. OF NAT. INTELLIGENCE, *DoD Releases Military Intelligence Program (MIP) Request for Fiscal Year 2019*, Press Operations Release NR-062-18 (Feb. 27, 2018).

<sup>20</sup> See, Linda Robinson, *The Future of U.S. Special Operations Forces*, COUNCIL ON FOREIGN RELATIONS, Council Special Report No. 66 (April 2013).

<sup>21</sup> Anne Daugherty Miles, *The U.S. Intelligence Community: Selected Cross-Cutting Issues*, CONG. RESEARCH SERV., R44455, (Apr. 12, 2016). Adapted from: 50 U.S.C. § 3003.

austerity and sequestration laws for FY2010 and FY2011. Since a low in the sequestration period, MIP and NIP funds steadily climbed higher over the past several fiscal years. The overall rate of spending remained relatively constant over this same period, at about eight to 10 percent of spending compared to the defense budget. However, NIP and MIP funding decreased as a share of GDP steadily during the same period as the U.S. economy grew after the Great Recession. Analysts project that U.S. intelligence spending peaked in 1989 at the 2018 equivalent of approximately \$76 billion per year.<sup>22</sup> The U.S. will be matching, then exceeding this same level of spending if the FY2020 requests are approved in full. This implies that the U.S. is now spending as much on intelligence operations on an inflation adjusted basis as it did in the final years of the Cold War. However, it is likely the spending is on intelligence focused on threats now in the form a resurgent Russia, China, Iran, North Korea, as well as non-state terrorist groups.

*c. Title 10 v. Title 50 Authorities*

To understand “Black Budgets” and the role of law in the use of NIP versus MIP funds within either Congress or the Executive, one must understand a larger national security law debate on Title 10 versus Title 50 authorities. This debate refers to specific chapters of the U.S. Code that specify the law concerning the use of classified funds. The debate essentially concerns the roles and missions of U.S. military forces and intelligence agencies.<sup>23</sup> Robert Chesney, a professor at the University of Texas School of Law, called the distinction a “shorthand” for understanding there are “distinct spheres of intelligence and military operations and that each is subject to a distinct set of standing statutory authorizations and constraints.”<sup>24</sup> Title 10 of the U.S. Code describes the structure of the DOD. Title 50 refers to general War and National Defense law, including a range of laws, only some of which cover intelligence

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<sup>22</sup> The Office of Senator Dianne Feinstein, “Senator Feinstein Vows to Cut Waste, Duplication from Intelligence Budget,” press release, October 28, 2010. U.S. Congress, Senate Select Committee on Intelligence, Confirmation Hearing on the Nomination of James R. Clapper to be Director of National Intelligence, 111th Congress, 1st sess., July 20, 2010, Barton Gellman and Greg Miller, “*Black Budget*” *Summary Details U.S. Spy Network’s Successes Failures and Objectives*, WASH. POST, (August 29, 2013).

<sup>23</sup> Andru E. Wall, *Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action*, 3 HARV. NAT. SEC. J., 87 (2011).

<sup>24</sup> Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 14 J. OF NAT. SECURITY LAW & POLICY, 539 (Jan. 24, 2012).



authorities.<sup>25</sup> A given budget line item must thus go to a Congressional authorizing committee and conform with U.S. Code. The Title 10 versus Title 50 debate speaks to a larger divide between the authorities of the IC versus the military. The use of funds under different chapters of the U.S. Code typically involves the need for secrecy in the pursuit of national security goals, with the larger issue compliance with the law or congressional oversight.<sup>26</sup>

*d. Who Gets to See The “Black Budget”?*

The so-called “Super Users” have the ability to know about classified U.S. Government activities that the regular public does not.<sup>27</sup> Like the term “Black Budgets,” however, use of the term “Super Users” while evocative and illustrative, is also an informal term that is problematic for its imprecision. It is a phrase popularized by *Washington Post* journalists, but also known within the U.S. Government.<sup>28</sup> But a set of individuals who have the appropriate clearance and permission to see classified budget figures does exist. These classified defense and intelligence agency figures are only available to a select group of officials in the Executive Branch and Congress on a need-to-know basis. While this is a select group in relation to the U.S. population, it is relatively large within the national security space in Washington, D.C. Within particular agencies such as the Office of the Director of National Intelligence, top-line figures are available to the leaders of agencies as well as senior intelligence civil servants.<sup>29</sup> In addition, a stratum of Senior Executive Service (SES) officials, political appointees, and federal civil servants from agencies ranging from the Office of Management and Budget officials, to the Pentagon, to Congressional staffers have insight into different portions of the classified military and intelligence budget.

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<sup>25</sup> Note: Experts often use “Title 50 authority” as shorthand reference to solely to intelligence matters. However, Title 50 addresses topics such as including use of atomic weapons, wind tunnels, insurrection, war powers, and federal absentee voting in addition to the authorities of the intelligence community.

<sup>26</sup> *supra* note 22. at 54. The Title 10 versus Title 50 debate, “aims to reconcile the need for secrecy and discretion in the pursuit of national security aims, on one hand, with the need to subject the resulting powers as much as possible to mechanisms that enhance accountability and compliance with the rule of law, on the other.”

<sup>27</sup> See Dana Priest and William M. Arkin, *A Hidden World, Growing Beyond Control, The Black Budget*, WASH. POST, July 19, 2010. “only a handful of senior officials—called Super Users—have the ability to even know about all the department's activities.”

<sup>28</sup> *Ibid.*

<sup>29</sup> Correspondence with senior intelligence official, April 25, 2019.

There is no club or induction ceremony for “Super Users.” It is not a unified body. But instead the phrase is most helpful to understand that there is a set of individuals in government or the military with access to a specific type of national security information, including access to both compartmentalized intelligence and compartmented non-intelligence acquisition and operational activities.<sup>30</sup> This includes the President, Cabinet-level officials, and senior White House staffers. But it also includes congressional committee chairs and ranking members of oversight committees concerned with intelligence. Perhaps the most overlooked but significant “Super Users” are the staff directors and employees of the Senate Select Committee on Intelligence and House Permanent Select Intelligence Committee. Officials from the DOD or IC brief committee staff on line-item budget matters from when the new budget is being created in anticipation of the new fiscal year. The staff directors can rotate from Congress to Executive Branch roles, including to the Cabinet-level, over the course of a career.<sup>31</sup>

The role of lawmakers and their staff in the budget process remains complex. The 9/11 Commission specifically recommended Congress create a single committee in the House and Senate combining authorizing and appropriating authorities.<sup>32</sup> Ten years later, 9/11 Commission members noted “Congressional oversight for intelligence ... is now dysfunctional.”<sup>33</sup> This problem stems from overlapping jurisdictions on oversight, with many different lawmakers and staffs needing to be briefed on issues concerning classified budget policy.<sup>34</sup> The members of The 9/11 Commission noted oversight

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<sup>30</sup> Correspondence with former senior intelligence official, April 24, 2019.

<sup>31</sup> An example of this point is the career of George Tenet, who served as staff director of the Senate Select Committee on Intelligence (SSCI) from 1988 to 1993, then as a Senior Director on the National Security Council from 1993 to 1995, then Deputy Director of the CIA from 1995 to 1997, and finally as Director of Central Intelligence from 1996 to 2004. Another example is the career of David Grannis, who served as SSCI Staff Director from 2005 to 2009, and currently serves as Principal Deputy Under Secretary for Intelligence and Analysis at the Department of Homeland Security (DHS).

<sup>32</sup> See, *Report on the Status of 9/11 Commission Recommendations, Part II: Reforming the Institutions of Government* (Oct. 20, 2005). Available at [https://www.npr.org/documents/2005/dec/9-11\\_commission/2005-10-20\\_report.pdf](https://www.npr.org/documents/2005/dec/9-11_commission/2005-10-20_report.pdf)

<sup>33</sup> BIPARTISAN POLICY CENTER, *The Status of the 9/11 Commission Recommendations*, “Congressional Reform” (Sept. 2011), 16-17. Available at <http://bipartisanpolicy.org/wp-content/uploads/sites/default/files/CommissionRecommendations.pdf>

<sup>34</sup> The House Appropriations Select Intelligence Oversight Panel, a sub subcommittee of the House Committee on Appropriations existed from 2007 to 2011. It was designed as a “hybrid” committee of intelligence oversight and appropriations experts per the recommendations of the 9/11 Commission report. There was no Senate equivalent.

committees also have insufficient authority over the funding of the IC.<sup>35</sup> For example, the House Appropriations Subcommittee on Defense, a standing subcommittee of the larger House Committee on Appropriations, serves as the appropriations committee for CIA and IC staff funding (in addition to the work of appropriating DOD budgets).<sup>36</sup> However, the House Permanent Select Intelligence Committee serves as the authorizing committee for funding CIA programs excluding covert action.<sup>37</sup>

Committee chairs, ranking members, and staff directors from both committees may possess the required security clearances to view line-item classified programs. However, some of the Members of Congress on the committee may not have requisite clearance, and may not participate in briefings. In precise terms used in intelligence tradecraft, there is a distinction between Eligible (in access) and Eligible (not in access) for why they may not privy to certain pieces of classified information.<sup>38</sup>

A brief analysis on this issue reveals that in Congress, staffers granted high-level clearances on issues of the classified budget disproportionately have access to information within the legislative branch. Second, while the proportion of U.S. Government employees who are “Eligible (in access)” is quite small, the total population of U.S. Government employees who are “Eligible” is estimated to be more than 4 million.<sup>39</sup> In addition, to the restrictions of access is a problem surrounding the physical location of classified material in the U.S. Capitol Complex. Much of this information exists at the Top Secret / Sensitive Compartmented Information (TS/SCI) level of security clearance or higher. Therefore, the U.S. Capitol complex hosts committee Sensitive Compartmentalized Information Facilities (SCIFs) and

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<sup>35</sup> *supra* note 10 at 8.

<sup>36</sup> See U.S. HOUSE OF REPS., COMMITTEE ON APPROPRIATIONS, *Defense Subcommittee Jurisdiction*, (Accessed April 15, 2018), Available at <https://appropriations.house.gov/about/jurisdiction/defense.htm>

<sup>37</sup> See U.S. HOUSE OF REPS., PERMANENT SELECT COMMITTEE ON INTELLIGENCE, *CIA Subcommittee*. “This subcommittee is responsible for oversight of the policies, activities, and budgets of Central Intelligence Agency programs excluding covert action.”

<sup>38</sup> Note: Eligible (in access), refers to “individuals who were investigated and adjudicated favorably and were briefed into access to classified information.” Eligible (not in access), refers to “individuals, such as those supporting the military, that may be determined eligible due to the sensitivity of their positions and the potential need for immediate access to classified information, but may not have actual access to classified information until the need arises.” See OFFICE OF THE DIR. OF NAT. INTELLIGENCE, *Fiscal Year 2017 Annual Report on Security Clearance Determinations*, 4 (accessed May 11, 2019). Available at <https://www.dni.gov/files/NCSC/documents/features/20180827-security-clearance-determinations.pdf>

<sup>39</sup> *Ibid.*

general SCIF for Members of Congress to view classified budgets.<sup>40</sup> The walls of SCIFs must be constructed with specific acoustics and do not have windows.<sup>41</sup> Phones cannot be brought into the facilities, and note-taking is not allowed for the duration of time a Member of Congress remains inside the SCIF.<sup>42</sup> This implies members must leave their offices to read through classified budget materials.<sup>43</sup>

## II. A Historical Analysis of the “Black Budget”

### a. *United States v. Richardson* (1974)

The first major Supreme Court decision regarding the constitutionality of the use of “Black Budgets” emerged when the Court denied standing to a U.S. taxpayer in *United States v. Richardson*.<sup>44</sup> William B. Richardson, an insurance claims adjuster, challenged the CIA Act of 1949, which made disclosure of CIA funds secret.<sup>45</sup> This act states “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.”<sup>46</sup> It also states that for programs of a “confidential, extraordinary, or emergency nature” a certificate from the CIA Director acted as a sufficient accounting methods for the transaction, rather than a report to Congress.<sup>47</sup> Richardson sued the federal government arguing it ought to provide U.S. taxpayers the records detailing CIA expenditures.<sup>48</sup> Richardson argued U.S. taxpayers possessed a right to “a regular statement and account” of receipts and expenditures of public moneys from the CIA.<sup>49</sup> Richardson also argued that without information on the CIA's expenditures he could not properly follow legislative or

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<sup>40</sup> Daniel Newhauser, “The Rooms Where Congress Keeps Its Secrets,” THE ATLANTIC (May 28, 2015). Available at <https://www.theatlantic.com/politics/archive/2015/05/the-rooms-where-congress-keeps-its-secrets/451554/>

<sup>41</sup> See “Technical Specifications for Construction and Management of Sensitive Compartmented Information Facilities,” National Counterintelligence and Security Center (Sept. 28, 2017). Available at <https://www.dni.gov/files/NCSC/documents/Regulations/Technical-Specifications-SCIF-Construction.pdf>

<sup>42</sup> *supra* note 33.

<sup>43</sup> Interview with former Chair United States House Permanent Select Committee on Intelligence (Sept. 12, 2018), Cambridge, MA.

<sup>44</sup> *U.S. v. Richardson*, 418 U.S. 166 (1974).

<sup>45</sup> CIA Act of 1949, 50 U.S.C. 15 § 403(a), 63 Stat. 208.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *U.S. v. Richardson*, 418 U.S. 166, 417 (1974).

<sup>49</sup> *Id.*

executive action or fulfill his obligations as a voter.<sup>50</sup>

The crux of the case revolved around two issues. First, the interpretation of Article I, Sec. 9 of the U.S. Constitution regarding the justiciability of secret expenditures. Second, the Court decided on a more parochial concern regarding how to interpret a taxpayer standing using a two-part test from the precedent of *Flast v. Cohen*.<sup>51</sup> The U.S. 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 shall be published from time to time.”<sup>52</sup> The *Richardson* argument claimed the CIA Act of 1949 violated the Constitution by allowed for the taking money from the Treasury without a proper public statement of account.<sup>53</sup>

In the *Richardson* case, the Court remained deeply divided on this issue of standing and held in a 5-4 decision that Richardson ultimately did not have standing to sue on the basis of being a U.S. taxpayer.<sup>54</sup> Chief Justice Warren E. Burger cited the two-part “nexus test” from *Flast* to deny standing.<sup>55</sup> Burger stated a U.S. taxpayer was not the right type of person to bring such a suit to the Court, stating that a U.S. taxpayer is not “a proper and appropriate party to invoke federal judicial power.”<sup>56</sup>

Beyond the detailed debate on standing, the dissenting opinions in the *Richardson* case provide a helpful examination to understand the constitutional issues surrounding secret budget policy. Justice Potter Stewart dissented, saying the *Flast* test was barely relevant to the larger legal issues regarding budget transparency.<sup>57</sup> He also questioned whether the majority used the *Flast* test when they really did not wish to weigh the merits of the justiciability of secret budgets.<sup>58</sup> Stewart’s dissent critiques of the reasoning of the majority, stating “to say that he might ultimately lose his lawsuit certainly does not mean

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<sup>50</sup> *Id.* at 418.

<sup>51</sup> *Flast v. Cohen*, 392 U.S. 83 (1968). Note: The court previous decided on the issue of taxpayer standing to sue the federal government to prevent expenditures in *Massachusetts v. Mellon* 262 U.S. 447 (1923). The *Flast* case created a two-step “logical nexus” test to determine standing in future cases regarding taxpayer standing.

<sup>52</sup> U.S. CONST., Art. I, § 9, cl. 7.

<sup>53</sup> *U.S. v. Richardson*, 418 U.S. 166, 417 (1974).

<sup>54</sup> *U.S. v. Richardson*, 418 U.S. 166, 417 (1974).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

that he had no standing to bring it.”<sup>59</sup>

Similarly, Justice William O. Douglas passionately dissented from the majority opinion by invoking arguments made by Founding Fathers on regarding the drafting and approval of Article I, Sec. 9.<sup>60</sup> This included such figures as James Madison, as well as debates during the ratification process made by George Mason in Virginia and Patrick McHenry in Maryland.<sup>61</sup> Douglas argued these Founders intended for the clause regarding a regular statement regarding expenditures to act as a method for the government to supply the public with knowledge of the way public funds are expended.<sup>62</sup> Douglas stated, “The sovereign in this Nation is the people, not the bureaucracy. The statement of accounts of public expenditures goes to the heart of the problem of sovereignty. If taxpayers may not ask that rudimentary question, their sovereignty becomes an empty symbol and a secret bureaucracy is allowed to run our affairs.”<sup>63</sup> This idea of a “secret bureaucracy” would appear throughout the 1970s during a series of congressional hearings regarding “Black Budgets.” The phrase also reverberates in modern debates concerning the role of the NSA in the post-9/11 period.<sup>64</sup>

#### *b. The Church Committee Report*

In addition to the *Richardson* case, the modern transparency debate regarding classified intelligence budgets first entered the public consciousness in the debates surrounding the role of government in the post-Vietnam, post-Watergate period. Among the articles of impeachment the House Judiciary Committee drafted that provoked President Richard Nixon’s resignation included charges of the president “endeavoring to misuse the Central Intelligence Agency.”<sup>65</sup> Three months after Nixon’s resignation in 1974, the *New York Times* published an article detailing covertly funded CIA operations to

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 418.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See, e.g. Azmat Khan, “*Top Secret America*” *Price Tag at Record High*, PBS FRONTLINE (July 5, 2012). “The high price tag includes the cost of protecting secrets that date back to the Cold War, but much of it is also a result of the new secret bureaucracy that has emerged since 9/11.”

<sup>65</sup> See, Stanley I. Kutler, *Watergate: A Brief History with Documents*, Wiley-Blackwell (Dec. 14, 2009) 186.

gather domestic intelligence on U.S. citizens and to assassinate foreign leaders.<sup>66</sup> The *Times* accused the CIA of monitoring U.S. citizens and plotting to assassinate Rafael Trujillo, of the Dominican Republic, Patrice Lumumba, of the Democratic Republic of the Congo, and Fidel Castro of Cuba.<sup>67</sup>

A series of committees in both the Executive Branch and Congress sprang up to investigate alleged abuses of intelligence agencies.<sup>68</sup> The most noteworthy and comprehensive review of intelligence agency activities to this day remains the “Church Committee,” also known as the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities chaired by Senator Frank Church (D-Ida.). The Church Committee held 126 full committee meetings, interviewed some 800 witnesses and collected more than 110,000 documents.<sup>69</sup> The Church Committee raised questions regarding beyond just the political legitimacy of secret budgets, but into the more serious question of whether the “present system of complete secrecy” violated Art I. Sec. 9 of the Constitution.<sup>70</sup> Specifically, the Church Committee condemned the practice of permitting congressional subcommittees to vote on intelligence program appropriations, then adding them as concealed defense appropriation requests, on which the full Appropriations Committees, followed by the full House and Senate must vote.<sup>71</sup> The Church Committee report stated:

Congress as a body has never explicitly voted on a ‘budget’ for national intelligence activities ... The funding levels for these intelligence agencies are fixed by subcommittees of the Armed services and Appropriations Committees of both Houses. Funds for these agencies are then concealed in the budget of the Department of Defense. Since this Department budget is the one Congress approves, Congress as a whole, and the public have never known how much the intelligence agencies are spending or how much is spent on intelligence activities generally. Neither Congress as a whole, nor the public can determine whether the amount spent on

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<sup>66</sup> Seymour M. Hersh, *Huge C.I.A. Operation Reported In U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES (Dec. 22, 1974) A01.

<sup>67</sup> *Id.*

<sup>68</sup> These included the United States President's Commission on CIA Activities within the United States, also known as the “Rockefeller Commission,” chaired by then-Vice President Nelson Rockefeller, and the United States House Permanent Select Committee on Intelligence from 1975-1976, also known as the “Pike Committee.”

<sup>69</sup> U.S. SENATE, *Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities – Outcome* (Accessed April 14, 2018). Available at <https://www.senate.gov/artandhistory/history/common/investigations/ChurchCommittee.htm>

<sup>70</sup> 94<sup>th</sup> Cong. 24 Session, U.S. SENATE, Report 94-855, *Book I: Foreign and Military Intelligence, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Oversight and the Intelligence Budget*, Gov. Printing Office, Washington, D.C. (April 26, 1976) 469. Available at <https://archive.org/stream/finalreportofsel01unit#page/68/mode/2up/search/appropriations>

<sup>71</sup> *Id.*

intelligence, or by the intelligence agencies individually is appropriate, given the priorities.<sup>72</sup>

In addition to the condemnation of secret appropriations, the Church Committee remained critical of the lack of oversight from the Office of Management and Budget (OMB) of intelligence funds for advances, reprogramming, and management of intelligence activities.<sup>73</sup> The Committee held “a large proportion of funds spent for CIA covert action projects have come from Defense Department advances” with more than half of large-scale covert action programs from 1961 to 1976 not coming to OMB for review.<sup>74</sup>

Ultimately, the Church Committee recommended courses of action to address these concerns. First, the committee recommended a “National Intelligence Budget” figure should be made public as this would eliminate speculation around the overall cost of intelligence programs without compromising national security.<sup>75</sup> Second, the Committee recommended congressional oversight committees should be able to monitor tactical and indirect support accounts for intelligence operations to ensure they are kept in “proper perspective and balance.”<sup>76</sup> Third, the Committee recommended the then-named General Accounting Office (GAO) should be able to audit the classified budgets of the intelligence agencies.<sup>77</sup>

These three recommendations concerning the “Black Budget” remained just a small part of the 96 recommendations the Committee proposed for increased oversight of the intelligence agencies. The arguments the Committee brought to the public arena also reverberated into legal academic writing at the time.<sup>78</sup> An overall evaluation of the Church Committee must conclude it led to more transparency regarding intelligence expenditures. However, since the establishment of congressional oversight in the late 1970s, some lament that congressional oversight expertise ebbs and flows over time, depending on the committee chairperson or level of talent within the staff of congressional committees.<sup>79</sup> “We talk a lot

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 68, *Apportionment and Budget Execution*.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 470.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* Note: The Government Accounting Office has since changed its name to the Government Accountability Office but still retains the GAO acronym.

<sup>78</sup> See, e.g. *The Secret Funding and the Constitution*, 84 YALE L. J. 3 (1975), and R.B. Schwartzman, *Fiscal Oversight of the Central Intelligence Agency: Can Accountability and Confidentiality Coexist?* 7 NEW YORK UNIV. J. OF INT’L L. & POLITICS 493 (1974).

<sup>79</sup> *Id.*



about transparency but we don't do much about it," said Gregory Treverton, who served in government for the first Senate Select Committee on Intelligence, and as chair of the U.S. National Intelligence Council (NIC), the DNI's organization for interagency intelligence support.<sup>80</sup> Both *Richardson* and the Church Committee thus represent major milestones in U.S. public awareness of the "Black Budget."

*b. Intelligence Consolidation and Convergence from Carter to Clinton*

As a consequence of the Church Committee, the Senate approved Resolution 400, establishing the Senate Select Committee on Intelligence. In 1978, Congress passed the Foreign Intelligence Surveillance Act (FISA).<sup>81</sup> President Jimmy Carter signed the act into law on October 25, 1978 thus creating a new Foreign Intelligence Surveillance Court (FISC) system for the Executive Branch to request a warrant for proposed surveillance.<sup>82</sup> In addition to this precursor of the FISA court system, the Church Committee also led to a series of internal changes to policies in agencies, such as the CIA and NSA.<sup>83</sup>

Within the intelligence and defense communities in the 1980s and into the 1990s a new trend of convergence emerged as the military began to experiment with intelligence-like activities, with member of the CIA experimenting with military-like activities.<sup>84</sup> Specifically, the CIA began to use lethal force "in circumstances in which diplomatic and political constraints made overt military force unpalatable."<sup>85</sup> This included proposals from within the National Security Council (NSC) to conduct lethal intelligence operations against Hezbollah in Lebanon, as well as other terrorist targets throughout the world.<sup>86</sup>

A particularly well-known example of the convergence of military and intelligence functions using the secret budgets occurred in the supplying of weapons to the Afghan *mujahideen* fighters in the Soviet-Afghan War of 1979 to 1989, known as "Operation Cyclone." Representative Charles Wilson (D-

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<sup>80</sup> *Id.*

<sup>81</sup> 50 U.S.C. 36 § 1801, 92 Stat. 1783

<sup>82</sup> *Id.*

<sup>83</sup> Andrew J. Swab, Interview with Gregory Treverton, Belfer Center for Science and International Affairs, Harvard Kennedy School (April 23, 2018).

<sup>84</sup> *supra* note 21 at 549.

<sup>85</sup> *Id.*

<sup>86</sup> *See supra* note 21 at 549-552 and Timothy Naftali, *Blind Spot: The Secret History of American Counterterrorism*, 148 (2005).

Tex.), who served on the House Defense Appropriations Subcommittee added \$40 million to the budget of the CIA specifically for a Swiss-made 20-mm Oerlikon antiaircraft gun by 1983.<sup>87</sup> William Casey, then the Director of the CIA, used leftover FY 1984 DOD appropriations to boost the funds available for covert action in Afghanistan.<sup>88</sup> At the time, DOD possessed tens of millions of dollars in leftover funds, which Rep. Wilson pushed toward the CIA's Near East Division in the FY1985 budget, bringing the total amount for covert action in Afghanistan to \$250 million, as much as all previous years combined.<sup>89</sup>

During this time, senior members of the administration of President Ronald Reagan met within an interagency Planning Coordination Group (PCG) chaired by Don Fortier, the Deputy National Security Advisor. On February 25, 1986, the PCG approved the FIM-92 Stinger missile for use by the Afghan *mujahideen* and the anticommunist insurgency in Angola.<sup>90</sup> Once approved, the previous appropriation for weapons procurement for the CIA could then be applied to acquire the Stinger missile, in service for the larger foreign policy aim of supporting Pakistan and the Afghan *mujahideen* against the Soviet Union.<sup>91</sup> Senator Dennis DeConcini (D-Ariz.) heard of the decision and sponsored a last-minute amendment to ban the export of Stinger missiles, however the vote fell short in the Senate 62-34.<sup>92</sup> On September 25, 1986, *mujahideen* fighters fired five Stinger missiles at three Soviet MI-14 Hind helicopters, causing them to drop from the sky.<sup>93</sup> This example of "Black Budget" appropriations remains a key example by which covert action programs can impact foreign policy without direct public scrutiny of the use of public funds. Funding for Operation Cyclone skyrocketed to \$630 million by 1987.<sup>94</sup> Recall also that overall U.S. intelligence spending peaked at the end of the Cold War in 1989.<sup>95</sup>

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<sup>87</sup> Robert Pear, *Arming Afghan Guerillas: A Huge Effort Led by U.S.* N.Y. TIMES, A01 (April 18, 1988).

<sup>88</sup> Steve Coll, *Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, from the Soviet Invasion to September 10, 2001*, Penguin Books, 101-102 (Dec. 28, 2004).

<sup>89</sup> *Id.* At 102.

<sup>90</sup> Kristen Lundberg, *Politics of a Covert Action: The U.S., the Mujahideen, and the Stinger Missile*, JOHN F. KENNEDY SCHOOL OF GOVERNMENT, HARV. UNIV. (1999). Available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a413880.pdf>

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *supra* note 83 at 46 and 581.

<sup>95</sup> *Supra* note 20.

In the post-Cold War era, Congress created the Aspin-Brown Commission to address issues such as the size and secrecy of the intelligence budget, the structure of the IC, management of the CIA, the collection of economic intelligence on foreign powers, and the role of congressional oversight of the intelligence agencies.<sup>96</sup> The Aspin-Brown Commission, also known as the a Commission on the Roles and Capabilities of the United States Intelligence Community, unanimously called for the disclosure of the top-line intelligence budget figure.<sup>97</sup> However they also stated the “disclosure of additional detail should not be permitted.”<sup>98</sup> In stating their position, the Commission balanced the questions of national security with operating a government in an open society, stating:

Intelligence agencies ... pose unique difficulties when it comes to public accountability. They cannot disclose what they are doing to the public without disclosing what they are doing to their targets. Yet they are institutions within a democracy, responsible to the President, the Congress, and, ultimately, the people. Where accountability can be strengthened without damaging national security, the Commission believes it should be.<sup>99</sup>

Aspin-Brown also concluded that a major problem in the post-Cold War intelligence landscape included intelligence program managers not having an adequate evaluation of whether or not their program responded to the information needs of policymakers in government.<sup>100</sup> These themes of balancing efficacy, transparency and security from this era remain today.

### *c. Post-9/11 Reforms*

After the surprise attack on the World Trade Center and Pentagon on September 11, 2001, the Congress and President George W. Bush signed into law the creation of a commission with a mandate of examining the circumstances surrounding the attacks. The 9/11 Commission Report laid out a series of reforms to with large implications for federal budget policy, including the “Black Budget.”

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<sup>96</sup> Harold Brown and Warren B. Rudman, *Preparing for the 21st Century: An Appraisal of U.S. Intelligence* (March 1, 1996). Available at <https://lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2011/08/Aspin-Brown-Report-on-the-Intelligence-Community-1996.pdf>

<sup>97</sup> *Id.* at xxv.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 65-66.

Commissioners examined the performance of intelligence agencies in the lead up to the 9/11 attacks and recommended reorganizing the federal government such that “the overall amounts of money being appropriated for national intelligence and to its component agencies should no longer be kept secret.”<sup>101</sup> The 9/11 Commissioners considered that the U.S.’s adversaries could learn about intelligence capabilities through publishing the top-line appropriations figure for the intelligence agencies, but concluded that this provides relatively little insight about U.S. intelligence sources and methods.<sup>102</sup> Both the Church Committee and the Aspin-Brown Commission issued a version of this same recommendation, however it had not been implemented by Congress in the period leading up to the 9/11 attacks.

The Committee report also echoed the Church Committee by describing some of the overall structural problems presented by hiding funds for intelligence agencies in defense appropriations.<sup>103</sup> Commissioners pointed to problems with the appropriations process and use of “Black Budgets” and explicitly expressed a need for a change.<sup>104</sup> The Committee wrote the Defense Subcommittees on Appropriations in the House and Senate had no subcommittees with jurisdiction solely over intelligence, and “the appropriations for the CIA and the national intelligence agencies – NSA, NGA, and NRO – are then given to the secretary of defense. The secretary transfers the CIA’s money to the DCI but disburses the national agencies’ money directly.”<sup>105</sup> To combat the secrecy associated with “Black Budgets,” the 9/11 Commission Report also called on Congress to pass a separate appropriation act for intelligence.<sup>106</sup>

In response to these findings, Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) to reform intelligence practices.<sup>107</sup> The act reorganized the U.S. IC to have an Office of the DNI who serves as the president’s principal intelligence advisor, and who directs, manages,

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<sup>101</sup> Thomas H. Kean and Lee Hamilton, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States, How to Do It? A Different Way of Organizing the Government*, Washington, D.C.: NAT. COMMISSION ON TERRORIST ATTACKS ON THE U.S., (2004) 416. Available at <https://www.9-11commission.gov/report/911Report.pdf>

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*, at 410.

<sup>104</sup> *Id.* at 407.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 416.

<sup>107</sup> 50 U.S.C. 15 § 401, 118 Stat. 3638.

and oversees the budget, resources and personnel of the IC.<sup>108</sup> The act also created the National Counterterrorism Center (NCTC).

Some reforms stemming from the 9/11 Commission Report took longer to work their way through Congress, including the recommendation for the U.S. Government to publish the top-line intelligence budget. With the passage of the Implementing Recommendations of the 9/11 Commission Act in 2007, the DNI was required by law to disclose the "aggregate amount of funds appropriated by Congress" for the NIP within 30 days of the end of the fiscal year.<sup>109</sup> The IC began to comply with this request for both NIP, MIP, and total expenditure requests starting in FY2007 and continuing to the most recent request for FY2019.

The two acts of Congress in 2004 and 2007 still only partially implemented all the recommendations from the 9/11 Commission report. Former New Jersey Governor Thomas H. Kean, the chairman of the 9/11 commission, specifically criticized the practice of burying intelligence community funds into DOD budgets, claiming:

[M]any [Intelligence] Community funds are buried in appropriations for the Department of Defense (DOD), a vestige of bygone days when the top-line intelligence budget was classified. With that figure now a matter of public record, there is no longer any reason to hide intelligence funds in the DOD budget. A united Intelligence Community budget, managed by the Director of National Intelligence and overseen by a single committee in each house of Congress, would enable ODNI to manage Community resources without navigating a bureaucratic labyrinth.<sup>110</sup>

Kean, as well as fellow 9/11 Commission member and former U.S. Deputy Attorney General Jamie Gorelick, also called upon Congress to create a unified IC budget system.<sup>111</sup> They testified to the House Committee on Homeland Security in 2014 that "cohesive and comprehensive oversight of all intelligence

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<sup>108</sup> U.S. SENATE, *The 9/11 Commission Report Implementation Act of 2004, Highlights of Legislation Title by Title* (2004). Available at <https://www.hsgac.senate.gov/imo/media/doc/090704twopagesummary911bill.pdf>

<sup>109</sup> 6 U.S.C. 1 § 101, 121 Stat. 266.

<sup>110</sup> BIPARTISAN POLICY CENTER, *Reflections on the Tenth Anniversary of the 9/11 Commission Report*, (July 2014), 24. Available at <http://bipartisanpolicy.org/wp-content/uploads/sites/default/files/%20BPC%209-11%20Commission.pdf>

<sup>111</sup> BIPARTISAN POLICY CENTER, *Today's Rising Terrorist Threat and the Danger to the United States*, Testimony before the House Committee on Homeland Security (July 23, 2014). Available at <https://docs.house.gov/meetings/HM/HM00/20140723/102473/HHRG-113-HM00-Wstate-KeanT-20140723.pdf>

community funding would be easier if appropriations for all 16 member agencies, plus ODNI, were conveyed in a single bill.”<sup>112</sup>

*d. The Current Committee Structures*

The reforms of Congress after the Church Committee, end of the Cold War, and after the 9/11 attacks reorganized the system of authorization and appropriation for classified budgets, including both the MIP and NIP. However, it is remarkable that the overall congressional architecture of classified budgeting has largely remained consistent from the late 1970s to today. Congress organizes oversight of classified budgets through four congressional committees, two in the House and two in the Senate. However, some funds within the U.S. Government remain secret, but may be authorized or appropriated in additional committees. This includes smaller amounts of classified intelligence funding to the Department of Homeland Security, or Treasury for example. The chart below helps map the different committees responsible for a given budgetary function within Congress.

**Congressional Entities Responsible for Intelligence Budget Oversight<sup>113</sup>**

	<b>House of Representatives</b>	<b>Senate</b>
<b>Authorization</b>	House Permanent Select Committee on Intelligence	Senate Select Committee on Intelligence
<b>Appropriation</b>	House Appropriations Committee, Subcommittee on Defense and Subcommittee on State, Foreign Operations, and Related Programs <sup>114</sup>	Senate Appropriations Committee, Subcommittee on Defense and Subcommittee on State, Foreign Operations, and Related Programs

<sup>112</sup> *Id.*

<sup>113</sup> Adapted from Mark M. Lowenthal, *Intelligence: From Secrets to Policy*, 7th Edition, CQ PRESS, (October 18, 2016), 196.

<sup>114</sup> Note: The subcommittee on State, Foreign Operations, and Related Programs was previously known as the Subcommittee on Foreign Operations, Export Financing, and Related Programs until 2008. Rep. Charles Wilson (D-Tex.) served as a senior member on all three House committees in the 1980s. It was through an appropriation in the House Subcommittee on Defense that he submitted an approved request to double the CIA budget in support of Afghans fighting against the Soviet Union under the codename “Operation Cyclone.” Funding began with \$500,000 in 1979, and rose to \$630 million in 1987. *See* CONG. RECORD, V. 150, PT. 8, (June 1, 2004) 1173.

Of particular note remains the use of subcommittees on defense as the main appropriator for budgets concerning the IC. Select committees examine issues that do not fit clearly within standing committee jurisdictions or cut across jurisdictional boundaries.<sup>115</sup> The House Permanent Select Committee on Intelligence operates like a permanent committee.<sup>116</sup> It is also important to note the difference in jurisdiction between the House Permanent Select Committee on Intelligence and the Senate Selection Committee on Intelligence. The House Intelligence Committee has jurisdiction over both the NIP and the MIP. However, the Senate Intelligence Committee has jurisdiction over only the NIP.

### III. Overview of Passing the Classified Budget

First, and foremost, it should be noted even for professional researchers, “[t]he appropriations process for intelligence activities is complex and not widely understood.”<sup>117</sup> The passage of a classified budget may take three years to complete a full cycle from planning to programming, budgeting and execution.<sup>118</sup> The chart below provides an overview of classified expenditures on intelligence programs.

**The Classified Budget Cycle<sup>119</sup>**

<b>Year</b>	<b>Activity</b>	<b>Activity (detail)</b>
<b>1</b>	Planning: Guidance	Broad guidelines of planning, programming, and budgeting are established
<b>2</b>	Programming: Request and Review	Program resources are projected for future year requirements for dollar and manpower resources.
<b>3</b>	Budgeting: Build and Submit	Money or authority available to purchase goods and services or hire people is set.
<b>4</b>	Execution: Obligate and Spend	Money on authorized programs is committed and spent.

<sup>115</sup> Valerie Heitshusen, *Committee Types and Roles*, CONG. RESEARCH SERV., 98-241, (May 2, 2017) 1.

<sup>116</sup> *Id.*

<sup>117</sup> Marshall C. Erwin and Amy Belasco, *supra* note 10.

<sup>118</sup> *supra* note 108 at 49.

<sup>119</sup> *Id.*

While this outlines the budget process, meetings are held between Executive Branch intelligence agencies, or DOD elements to brief persons holding the requisite clearances in Congress about given programs. The exact content of briefings is not readily made available to the public.

*a. The Executive Branch Role – Planning, Programming, Budgeting and Execution*

The DNI remains the Cabinet officer responsible for developing and determining the NIP budget in consultation with the heads of different departments and agencies that make up the IC.<sup>120</sup> The White House tasks the DNI with requesting IC agencies heads provide the “programmatic and budgetary information necessary to support the Director in developing the National Intelligence Program.”<sup>121</sup> The IC agency heads or “program managers” perform the work of assembling the budgets and information requirements to send to the DNI for approval.<sup>122</sup> Program managers supply the DNI with a NIP budget for presentment to the President for approval.<sup>123</sup> OMB prepares the President’s overall annual budget for submission to Congress normally by February for the upcoming fiscal year starting in October.<sup>124</sup>

For program managers and the civil service employees at intelligence agencies preparing budgets, there are a series of legal and bureaucratic compliance considerations for developing their requests for programs. These include considerations on how different elements of government will work together, as well as laws governing the conduct of covert operations, and general compliance with different Executive Branch oversight bodies. In addition, the NIP manager must consider the temporal dimensions of where they sit within a given budgeting cycle. The DOD programs based on a five-year basis, while other Cabinet departments, including constituents of the IC program based on a one-year basis.<sup>125</sup>

- **Major Legal Compliance Considerations**<sup>126</sup>
  - Title 10 / Title 50 Authorities

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<sup>120</sup> Marshall C. Erwin and Amy Belasco, *supra* note 10 at 11.

<sup>121</sup> *See supra* note 21.

<sup>122</sup> *supra* note 85 at 75.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Correspondence with senior intelligence official, April 25, 2019.

<sup>126</sup> *supra* note 108.



- DOD Manual<sup>127</sup>
  - Intelligence Authorization Act<sup>128</sup>
  - Foreign Assistance Act of 1974, Hughes-Ryan Amendment<sup>129</sup>
  - Economy Act<sup>130</sup>
- **Major Bureaucratic Oversight Considerations**
    - Offices of Inspectors General, General Counsels, Judge Advocates General
    - Office of Management and Budget (OMB)
    - President’s Foreign Intelligence Advisory Board<sup>131</sup>

Given these legal and bureaucratic restraints, Congress then reviews the president’s budget and appropriates funds for intelligence through defense appropriations. Recall that more than 90 percent of NIP funding comes through these defense appropriations.<sup>132</sup> Specific appropriations for the CIA are included in defense appropriation acts, but these funds are transferred directly to the Director of the CIA.<sup>133</sup> When Congress enacts appropriations, OMB supplies the funds to agencies with national intelligence programs based on the final budget agreement.<sup>134</sup> This process changes when intelligence funds are appropriated as a function rather than for an agency, in this case, the scope of the process

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<sup>127</sup> DEPT. OF DEFENSE, *DOD Manual 5240.01, Procedures Governing the Conduct of DOD Intelligence Activities*, (August 8, 2016). Available at <http://dodsioo.defense.gov/Portals/46/DoDM%20%205240.01.pdf?ver=2016-08-11-184834-887>

<sup>128</sup> This refers to the general authorization which Congress passed, but also to the 1991 Intelligence Authorization Act, which requires reporting to Congress on certain budgetary issues. Congress remains a key decision maker regarding covert action as it can reject funding of operations by IC members, as it did with the Boland Amendment aimed at restricting CIA funding, supplying of arms, and training of opposing groups including the Contras in their attempt to overthrow the Nicaraguan government in 1982.

<sup>129</sup> 22 U.S.C. 32 § 2151, 88 Stat. 1795. The Hughes-Ryan Amendment prohibits the use of congressionally appropriated funds for intelligence or military covert actions until and unless the president issues a “finding” that such action is important to national security, and submits this finding to the appropriate congressional committees.

<sup>130</sup> U.S.C. § 1535 and 1536. The Economy Act provides the authority for one federal agency to order goods and services from another federal agency.

<sup>131</sup> OBAMA WHITE HOUSE ARCHIVES, *President's Intelligence Advisory Board (PIAB)* accessed April 15, 2018. “The Intelligence Oversight Board oversees the Intelligence Community’s compliance with the Constitution and all applicable laws ... It complements ... the oversight roles of the Director of National Intelligence, Department and Agency Inspectors General and General Counsels, and the Congressional Oversight Committees.”

<sup>132</sup> Marshall C. Erwin and Amy Belasco, *supra* note 10 at 11.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

widens to include the ways in which MIP funding is allocated within military intelligence agencies.<sup>135</sup>

*b. Congress' Role – Appropriating and Oversight*

Congress possesses an active role in the oversight of “Black Budget” expenditures through its committee structure. Typically, the chairman of the respective oversight committee as well as the committee staff director have the requisite security clearance to examine classified budgets. “The only thing they are not allowed to know is internal decision-making,” according to former U.S. Secretary of Defense Ash Carter.”<sup>136</sup> When an appropriation passes the subcommittee, full committee, both houses, and is signed into law, an intelligence agency's funds are then covertly transferred from the appropriations made to other governmental units.

Oversight functions include the calling of hearings, Questions for the Record (QFRs), receiving briefings regarding the budget process from members of the Executive Branch, and requesting documents regarding intelligence programs to be viewed in the Capitol Complex SCIFs.

#### **IV. The Contemporary Debate**

*a. The Snowden and Manning Leaks*

Within legal circles, the actions of Edward Snowden, an Booz Allen Hamilton contractor who copied and leaked classified information from the NSA in 2013 without authorization “dramatically recast the secrecy debate.”<sup>137</sup> Similarly, the disclosures of Private Chelsea Manning of nearly 750,000 classified and sensitive military and diplomatic records to WikiLeaks, caused a reassessment of the legitimacy behind leaking secret documents and of the problem of over-classification.<sup>138</sup>

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<sup>135</sup> *Id.*

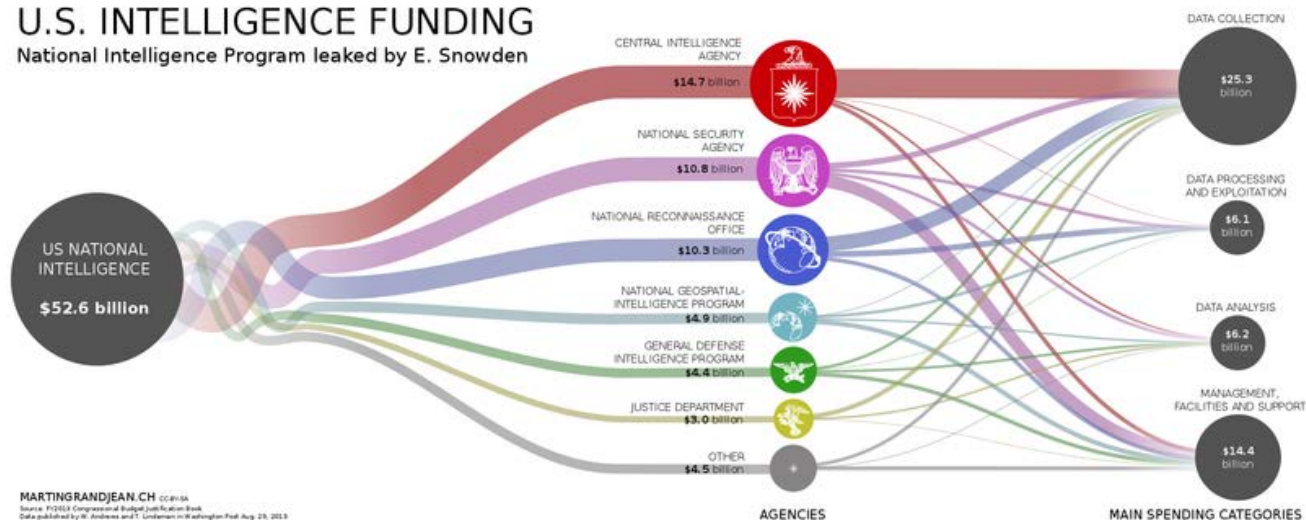
<sup>136</sup> Andrew J. Swab, Interview with Former U.S. Secretary of Defense Ashton Carter, Belfer Center for Science and International Affairs, Harvard Kennedy School (March 29, 2018).

<sup>137</sup> David E. Posen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV., 633.

<sup>138</sup> See, e.g. Margaret B. Kwoka, *Leaking and Legitimacy*, 48 U.C. DAVIS L. REV.

## U.S. INTELLIGENCE FUNDING

National Intelligence Program leaked by E. Snowden



Source: Washington Post

One consequence of the Snowden disclosures in particular remains a large amount of information to contextualize the intelligence budget. The graphic above provided by the *Washington Post* details the different agencies and functions toward which the top-line budget appropriation figure was applied in FY 2013.<sup>139</sup> The DNI, at that time James R. Clapper Jr., submitted an FY 2013 Congressional Budget Justification for NIP funding. This disclosure allows the U.S. public to know funding for the CIA increased far more rapidly than other agencies.<sup>140</sup> It also gave insight into programs funded by congressional appropriations that permit the CIA and NSA to infiltrate foreign computer networks for the purposes of collecting information in “offensive cyber operations.”<sup>141</sup> The disclosures also allowed the U.S. public to know counter-terrorism programs employ a quarter of the intelligence workforce and account for one-third of NIP spending.<sup>142</sup>

### *b. Intelligence Budget Transparency Act of 2018*

In the 116<sup>th</sup> Congress, a bipartisan group of lawmakers, including Senators Ron Wyden (D-Ore.)

<sup>139</sup> Barton Gellman and Greg Miller, “*Black Budget*” Summary Details U.S. Spy Network’s Successes Failures and Objectives, WASH. POST, (August 29, 2013).

<sup>140</sup> Richard McGregor, *Size of CIA’s Budget Slice Revealed in Edward Snowden Leaks*, FINANCIAL TIMES, (August 29, 2013).

<sup>141</sup> WASH. POST, *supra* note 101

<sup>142</sup> *Id.*

and Rand Paul (R-Ky.), as well as Representatives Peter Welch (D-Vt.) and Jim Sensenbrenner (R-Wis.) called for disclosure of *agency* top-line budget requests.<sup>143</sup> This legislation would require the annual budget submissions of the president include the total dollar amount requested by each intelligence agency. This proposed law goes beyond the requests from the Church Committee, Aspin-Brown, or the 9/11 Commission, which merely called for the disclosure of the overall top-line classified intelligence budget request. However, the U.S. public also already knows much of the individual agency requests for FY2013 given the disclosures by Edward Snowden. However, the actions of this bipartisan group can also be viewed as existing within the larger trend of intelligence revelation followed by a congressional reaction for more oversight or more transparency on secret budgets.

While the exact details of disclosure may be debated within government, the IC does recognize the need for transparency to ensure its support among Members of Congress and the wider U.S. public. DNI Clapper lead the development and implementation of the IC's Principles of Intelligence Transparency in 2015.<sup>144</sup> These principles aim to provide appropriate transparency, allow for the IC to be more proactive in making information publicly available, and aim to consider "public interest to the maximum extent feasible when making classification determinations."<sup>145</sup> DNI Dan Coats revised a recent Intelligence Community Directive (ICD) to establish an IC transparency policy to establish "transparency as a foundational element of security public trust in our endeavors, alongside the protection of civil liberties and privacy."<sup>146</sup>

## **V. Normative Arguments Pro "Black Budget" Transparency and Against**

### *a. Pro-Transparency Arguments*

In considering the actions of the 116<sup>th</sup> Congress and the actions of Executive Branch officers such

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<sup>143</sup> THE HILL, *supra* note 6.

<sup>144</sup> OFFICE OF THE DIR. OF NAT. INTELLIGENCE, *Our Values Transparency*, (accessed May 11, 2019). Available at <https://www.intelligence.gov/index.php/mission/our-values/341-transparency>

<sup>145</sup> *Id.*

<sup>146</sup> OFFICE OF THE DIR. OF NAT. INTELLIGENCE, *Issuance of Updated Intelligence Community Directive 107 on Civil Liberties, Privacy, and Transparency*, (March 22, 2018). Available at [https://www.dni.gov/files/documents/CLPO/3-15-18\\_Memo\\_ICD-107-Trans-memo\\_18-00180\\_U\\_SIGNED.pdf](https://www.dni.gov/files/documents/CLPO/3-15-18_Memo_ICD-107-Trans-memo_18-00180_U_SIGNED.pdf)

as DNI Coats, it remains important to critically analyze arguments for and against transparency on issues concerning the “Black Budget.” Thinking on the merits of open government can be read the Founding Fathers. Madison wrote:

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.<sup>147</sup>

Given that arguments surrounding budgetary transparency quickly escalate to overall questions of the role of government in society, it may be more helpful to briefly survey the principle critiques legal analysts articulated in the modern era regarding “Black Budgets.”

- **Constitutional Questions:** Pro-transparency advocates since the era of *Richardson* and the Church Committee cite the conflict that arises when part of the federal budget is not publicly published. Arguments within this camp tend to cite Art. I Sec. 9 of the Constitution that expenditures of “all public Money shall be published from time to time.”<sup>148</sup> As the *Flast* and *Richardson* cases demonstrate the question of taxpayer standing arises in these disputes. With the disclosure of the top-line intelligence budget one could argue that a record of the expenditure is now a matter of public record.
- **Need for Public Support:** Classified intelligence practices remain unique in that by their very nature these practices does not encourage public debate. Also, the Aspin-Brown Commission argued intelligence remains a “function internal to the workings of government, one which has little perceptible effect on the daily lives of most Americans, and thus, generates few constituencies among the public.”<sup>149</sup> The argument for disclosure would advocate that the public writ large possesses an interest in knowing how their government spends public funds. This argument quickly enters the realm of questions of who actually needs to see classified

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<sup>147</sup> James Madison, Letter to W.T. Barry, Aug. 4, 1822, in 9 THE WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910).

<sup>148</sup> U.S. CONST. art. 1, § 9, cl. 9.

<sup>149</sup> *supra* note 85 at xi.

information, and who is permitted to see intelligence program line-items. As demonstrated in the precedent of the *Richardson* case, the standing of U.S. taxpayers will likely be a question of concern. However, advocates for transparency have successfully used suits using the Freedom of Information Act (FOIA) to see classified budget figures.<sup>150</sup>

- **Scrutiny on Spending:** When intelligence budgets remain secret, neither Congress nor the public can weight spending on certain programs against that of other agencies.<sup>151</sup> The public also has no assurance that a transfer of a given fund from a DOD program to an intelligence agency represents a *regular* statement of account.<sup>152</sup> In addition, the preparation of the classified budget requests of intelligence agencies suffers from similar problems as the preparation of the unclassified budget in that “while the details of the budget process are known in broad brush strokes, there are nevertheless many parts that remain hidden.”<sup>153</sup> This includes the quantity and substance of meetings among the White House, OMB, and intelligence agencies in forming their requested budget to present to Congress.<sup>154</sup>

#### *b. Pro-Security Arguments*

Advocates for security legal arguments to emphasize the U.S. Government classified “Black Budgets” for a reason. There remain several arguments for budget classification:

- **National Security** - While transparency advocates discuss the social good open government brings, it should be noted exceptions arise around issues concerning national security.<sup>155</sup>

Advocates for secrecy concerning “Black Budgets” state disclosure of such accounts would aid

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<sup>150</sup> Richard A. Best, *Intelligence Issues for Congress*, CONG. RESEARCH SERV., RL 33539 8 (June 11, 2010).

<sup>151</sup> *The CIA’s Secret Funding and the Constitution*, 84 YALE L. J. 3, 620 (1975).

<sup>152</sup> *Id.*

<sup>153</sup> Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L. J. 8 (June 2016), 2251.

<sup>154</sup> *Id.* at 2252.

<sup>155</sup> *See, e.g.* Nathan Alexander Sales, *Secrecy and National Security Investigations*, 58 ALA. L. REV. 811, 816 (2007). “Since the founding, it has been recognized that the need for secrecy is more acute in matters of foreign policy, military affairs, and other national security functions.”

U.S. adversaries, who can track trends in spending, or in the details of ongoing military and intelligence operations. However, overall the exact definitions of what does and does not constitute “national security” and “intelligence” remain unclear.<sup>156</sup> Pro-national security arguments may point to the social benefits for public officials to be able to operate freely in secret on certain issues without public scrutiny.<sup>157</sup> Secrecy might be desirable if “that increased risk were outweighed by greater welfare gains created by giving elected officials some discretion, in terms of both decreased monitoring costs and a greater ability of government actors to engage in desirable conduct.”<sup>158</sup> Under this logic, discretion for officials may be a positive outcome of permitting secrets. The cost of oversight would thus be a cost that may outweigh the benefit of discretion.<sup>159</sup> In legal terms, the mere argument in favor of national security does not close the questions when constitutional matters are concerned.<sup>160</sup>

- **Oversight Already Exists** – National security leaders also point out that current legal and bureaucratic frameworks function to create a rigorous process of oversight through congressional committees, legal approval chains, Inspectors General or the GAO. Secretary Carter stated the DOD’s handling of the classified budget “basically follows the process” of regular budgets, and “always worked well” during his tenure.<sup>161</sup> When the NSC makes an operational strategic decision, such as a classified airstrike potentially using NIP or MIP funds, there are calls to Congress beforehand, including House and Senate leaders, as well as committee chairs.<sup>162</sup> In addition, for this decision to reach the level of the NSC it needs to be approved by layers of Pentagon lawyers, including potentially the Office of the Legal Advisor to the DOD, or the

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<sup>156</sup> OFFICE OF THE DIR. OF NAT. INTELLIGENCE, *Intelligence Community Classification Guidance and Recommendations Report 11* (2008), available at <http://www.fas.org/sgp/othergov/intel/class.pdf>.

<sup>157</sup> Daniel Epps, *Mechanisms of Secrecy*, Vol. 121, No. 6 HAR. L. REV. (2008) 1560.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *See, e.g.* N.Y. Times Co v. U.S., 403 U.S. 713 (1971). Justice Hugo Black wrote, “The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.”

<sup>161</sup> Andrew J. Swab, Interview with Former U.S. Secretary of Defense Ashton Carter, Belfer Center for Science and International Affairs, Harvard Kennedy School (March 29, 2018).

<sup>162</sup> *Id.*

General Counsel of the Office of the DNI. Given this, the point does stand that there are only a few “Super Users” of highly classified intelligence information in the U.S. Government. “There are not many people in the executive branch who are cleared,” Secretary Carter stated. “Even in the committees of Congress, not many people are cleared”<sup>163</sup> This viewpoint emphasizes that there is a high degree of intra-Executive Branch oversight, as well as congressional oversight of classified programs within the IC or DOD. Most federal spending currently follows standard procedures, with checks beyond congressional oversight part of the overall process for national security decisions.

- **Consequentialist Arguments**

Consequentialist reasoning holds that increased disclosure would ensure yet more disclosure on the classified budget, leading to a circumstance in which national security might be threatened. This is in essence a version of the “slippery slope” theory which argues, “Disclosure will result in irresistible demands for more detailed information, the disclosure of which would be damaging to national security.”<sup>164</sup> However, the counter to this position would be disclosure of topline budget figures does not reveal capabilities.<sup>165</sup>

## **Conclusion**

This Briefing Paper sought to provide information to inform legal scholarship on issues surround the “Black Budget.” Thus, Part I explored the definitions of the “Black Budget.” Part II spoke to the history of reforms to the classified budget. Part III analyzed the process for passing the classified budget. Part IV discussed the contemporary debate regarding oversight of the budget in the wake of the Snowden and Manning intelligence disclosures. Part V discussed a series of normative arguments regarding classified budget transparency concerns.

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<sup>163</sup> *Id.*

<sup>164</sup> Miles, Anne Daugherty. . "Secrecy vs. Disclosure of the Intelligence Community Budget: An Enduring Debate." *Secrecy and Society* 2(1). <https://scholarworks.sjsu.edu/secrecyandsociety/vol2/iss1/4>

<sup>165</sup> *Ibid.*



Analyzing issues surrounding the “Black Budget” makes one bound to question the legality, constitutionality and legitimacy of intelligence programs. The Sixth Circuit declared “democracies die behind closed doors” in a case concerning the public’s right to know information regarding the inter-workings of government.<sup>166</sup> But legal interpretations on the constitutionality of “Black Budget” issues must answer the question what type of money is *all* public Money? Are security exemptions allowed? The use of “Black Budgets” thus brings to the fore constitutional questions that involve both law and public policy. There remains an open question of where interpreters of the law must stand when balancing national security concerns, issues of standing, compromising sources and methods, or those who argue the process already possesses internal checks. To find where one stands on this issue remains a pursuit worthy of future scholarship on the topic of “Black Budgets.”

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<sup>166</sup> Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6<sup>th</sup> Cir. 2002).