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# The Statement and Account Clause as a National Security Freedom of Information Act

Lawrence Rosenthal



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# The Statement and Account Clause as a National Security Freedom of Information Act

*Lawrence Rosenthal\**

*The amount of the aggregate annual appropriations for the civilian and military intelligence programs is the only aspect of intelligence spending that is publicly disclosed. As a consequence, a great deal of information about how public funds are spent remains secret, potentially insulating from ordinary processes of political accountability not only waste, inefficiency, and abuse, but also what the public may regard as unwarranted intrusions on its privacy. This Article offers a constitutional vehicle for greater transparency—the Constitution’s Statement and Account Clause, which provides that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” The scholarly literature contains no comprehensive treatment of the clause; Part I fills that gap, and contends that at least presumptively, information that is material to the public’s assessment of the manner in which the intelligence community spends public funds must be annually disclosed. Part II turns to the question of judicial enforcement, widely thought unavailable since the Supreme Court’s 1974 holding in *United States v. Richardson* that a lawsuit asserting taxpayer standing to obtain information about the CIA’s budget was nonjusticiable. Part II demonstrates that jurisprudential developments since *Richardson* limit its scope and suggest that it does not bar lawsuits brought by voters to enforce the Statement and Account Clause. *Richardson* poses no obstacle to suits seeking disclosure of information about intelligence spending under the Freedom of Information Act (“FOIA”), even if they*

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also contend that the FOIA's exemption of information about intelligence matters from the statutory duty of disclosure is unconstitutional as applied to information that must be disclosed under the Statement and Account Clause.

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## INTRODUCTION

Transparency can have dramatic effects on national security policy. Consider three examples:

*Example One:* Shortly after the terrorist attacks of September 11, 2001, President Bush authorized the National Security Agency (“NSA”) to undertake a number of new, highly classified intelligence activities, including, in some circumstances, intercepting, albeit without legislative authorization or court order, international communications when there was “a reasonable basis to conclude that one party to the communication is a member of al-Qa’ida, affiliated with al-Qa’ida, or a member of an organization affiliated with al-Qa’ida.”<sup>1</sup> This program was first disclosed publicly in articles appearing in the *New York Times* in December 2005.<sup>2</sup> Public controversy ensued, as did litigation pressing legal challenges to the program.<sup>3</sup> An internal review of the program by the Inspector Generals of the Departments of Defense and Justice, the Central Intelligence Agency (“CIA”), the NSA, and the Office of the Director of National Intelligence concluded that the program was of uncertain efficacy.<sup>4</sup> There was also debate about whether the program violated statutory and constitutional restrictions on electronic surveillance.<sup>5</sup> In January 2007, the Attorney General announced the suspension of surveillance by presidential directive and indicated that the administration had agreed that surveillance should be conducted pursuant to court order.<sup>6</sup> In August 2007, Congress enacted the Protect America Act, which created a system of judicial review of the procedures utilized to determine which conversations would be intercepted.<sup>7</sup> In July 2008, the FISA Amendments Act of 2008 was enacted, which provided for a more elaborate system of judicial review

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1. OFFICES OF INSPECTORS GEN., U.S. DEP’T OF DEF. ET AL., UNCLASSIFIED REPORT ON THE PRESIDENT’S SURVEILLANCE PROGRAM 6 (2009), <https://fas.org/irp/eprint/psp.pdf>. [hereinafter UNCLASSIFIED IG REPORT] (footnote omitted).

2. *Id.* at 29–30.

3. *See, e.g.*, Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 141–49 (2010).

4. UNCLASSIFIED IG REPORT, *supra* note 1, at 32, 36.

5. For a helpful overview of the legal issues raised by the program, see DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS 2D §§ 15:1–15:13 (2d ed. 2012).

6. *See* Eric Lichtblau & David Johnston, *Court to Oversee U.S. Wiretapping in Terror Cases*, N.Y. TIMES, Jan. 18, 2007.

7. *See* Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552.

of the procedures for intercepting conversations.<sup>8</sup>

*Example Two:* Beginning in May 2006, the Foreign Intelligence Surveillance Court issued orders directing specified telecommunications carriers to turn over “telephony meta-data” to the NSA and the Federal Bureau of Investigation (“FBI”), including information detailing the originating and terminating telephone numbers, and the time and duration of the call, for all telephone calls between the United States and abroad, or wholly within the United States, including local calls.<sup>9</sup> The program remained secret until its existence was disclosed by former NSA contractor Edward Snowden.<sup>10</sup> In the wake of those disclosures, President Obama appointed a “Review Group” to assess the NSA’s surveillance and its implications for both liberty and security.<sup>11</sup> The Review Group concluded that the program of collecting telephony meta-data was of uncertain efficacy in preventing terrorist attacks and had experienced significant compliance problems and recommended a number of changes in the program that it believed would better protect privacy and liberty without sacrificing the interests of national security.<sup>12</sup> The President subsequently announced that he agreed that a number of reforms should be undertaken in the surveillance program to restrict the access of intelligence agencies to phone records.<sup>13</sup> Congress thereafter enacted a variety of reforms imposing additional statutory constraints on the program.<sup>14</sup>

*Example Three:* On December 8, 2004, in an open session of the Senate, Senator Rockefeller rose to take what he characterized as “a somewhat unprecedented action” to publicly oppose the 2005

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8. See Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, § 702, 122 Stat. 2436, 2438–48 (codified as amended at 50 U.S.C. § 1881a (2012)).

9. THE PRESIDENT’S REVIEW GRP. ON INTELLIGENCE & COMMC’NS TECHS., LIBERTY AND SECURITY IN A CHANGING WORLD 94–97 (Dec. 12, 2013), [https://www.whitehouse.gov/sites/default/files/docs/2013-12-12\\_rg\\_final\\_report.pdf](https://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf) [hereinafter LIBERTY AND SECURITY].

10. Charlie Savage, *Extended Ruling by Secret Court Backs Collection of Phone Data*, N.Y. TIMES, Sept. 18, 2013, at A1.

11. LIBERTY AND SECURITY, *supra* note 9, at 10–13.

12. *Id.* at 104–24. For a thorough explication of the legal challenges against the program, see Laura K. Donahue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J.L. & PUB. POL’Y 757 (2014). For a survey of the debate over the program, see Susan Freiwald, *Nothing to Fear or Nowhere to Hide: Competing Visions of the NSA’s 215 Program*, 12 COLO. TECH. L.J. 309 (2014).

13. See Mark Landler & Charlie Savage, *Obama Outlines Calibrated Curbs on Phone Spying*, N.Y. TIMES, Jan. 18, 2014, at A1; Charlie Savage, *Obama Says N.S.A. Curbs Would Address Worries*, N.Y. TIMES, Mar. 26, 2014, at A10.

14. See U.S.A. Freedom Act of 2015, Pub. L. No. 114-23, 129 Stat. 268.

intelligence authorization conference report based on a “strenuous objection—shared by many in our committee—to a particular major funding acquisition program that I believe is totally unjustified and very wasteful and dangerous to national security,” adding that he could not fully discuss his objection in open session because of “the highly classified nature of the programs.”<sup>15</sup> A published account soon appeared reporting that the program at issue was a \$9.5 billion spy satellite system that could operate only in daylight and clear weather and that had been criticized as wasteful and duplicative of other programs.<sup>16</sup> Bush Administration officials reacted by requesting that the Justice Department investigate whether classified information had been improperly disclosed, and Senate Republicans considered referring the matter to the Senate Ethics Committee.<sup>17</sup> Nevertheless, a review of the program was subsequently ordered and within a year a new Director of National Intelligence had ordered work on the program halted.<sup>18</sup> The program was terminated in March 2008.<sup>19</sup> It appears that Senator Rockefeller’s public protest of continued funding for the program played an important role in its demise.<sup>20</sup>

These examples illustrate the power of transparency—when these previously secret programs came to light and faced public scrutiny, even the presidential administrations that had undertaken them agreed to important modifications or, in the final example, outright elimination. Yet, transparency is limited in the intelligence community. The Director of National Intelligence is given broad authority to “protect intelligence sources and methods from unauthorized disclosure,”<sup>21</sup> including authority to develop a system for classifying information in order to limit its dissemination and disclosure.<sup>22</sup> “Classified

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15. 150 CONG. REC. S11957 (Dec. 8, 2004). Senator Wyden promptly echoed this objection. *See id.* at S11957–58.

16. *See* Douglas Jehl, *New Spy Plan Said to Involve Satellite System*, N.Y. TIMES, Dec. 12, 2004, at A11.

17. *See* David Johnson, *Justice Dept. May Explore Leak on Spy Satellites*, N.Y. TIMES, Dec. 15, 2004, at A28.

18. *See* Douglas Jehl, *Spy Satellite Programs Are in Upheaval*, N.Y. TIMES, Sept. 30, 2005, at A17.

19. MARSHALL CURTIS ERWIN, CONG. RESEARCH SERV., R40240, INTELLIGENCE AUTHORIZATION LEGISLATION: STATUS AND CHALLENGES 1, 7 (2013).

20. *See* AMY B. ZEGART, EYES ON SPIES: CONGRESS AND THE UNITED STATES INTELLIGENCE COMMUNITY 107–09 (2011).

21. 50 U.S.C. § 3024(i)(1) (2012).

22. *Id.* § 3024(j)(2).

information” is defined as “information or material designated and clearly marked or clearly represented, pursuant to the provisions of a statute or Executive Order . . . as requiring a specific degree of protection against unauthorized disclosure for reasons of national security.”<sup>23</sup> An Executive Order, in turn, authorizes the classification of any information that “pertains to . . . intelligence activities (including covert action), intelligence sources or methods, or cryptology.”<sup>24</sup>

This legal framework for restricting the disclosure of any sources or methods by which intelligence is gathered affords the government enormous power to keep information about the activities of the intelligence community confidential. After all, pretty much any aspect of intelligence gathering can be characterized as a source or method. Programs of intelligence gathering generally come into public view only when, as in the examples above, an unauthorized leak of classified information discloses their existence. Otherwise, these programs frequently amount to examples of what Professor David Pozen has labeled “deep secrecy”—not merely information that the public understands it is being denied such as “the sailing dates of transports or the number and location of troops,”<sup>25</sup> but instead information about governmental activities of which the public is entirely unaware.<sup>26</sup> Among the objections to deep secrecy, Professor Pozen argues, is that it undermines democratic accountability by enabling the government to undertake a course of action that the public might see as immoral or imprudent, but without fear of adverse political consequences because the public has no inkling what its government is doing.<sup>27</sup>

It is easy to grasp the need for secrecy in the intelligence community, where secrecy often facilitates success.<sup>28</sup> Indeed, the Supreme Court

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23. *Id.* § 3126(1).

24. Exec. Order No. 13,526, § 1.4, 75 Fed. Reg. 707, 709 (Jan. 5, 2010).

25. *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 716 (1931) (footnote omitted).

26. See David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 265–75 (2010). For a similar bifurcation of governmental secrecy, see Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 514–15 (2007).

27. See Pozen, *supra* note 26, at 285–92. Professor Pozen is not alone in articulating these concerns; for an argument along similar lines, see HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION 12–14, 85–112 (2015).

28. For a helpful summary of the considerations supporting national security secrecy, see Laura A. White, Note, *The Need for Governmental Secrecy: Why the U.S. Government Must Be Able to Withhold Information in the Interest of National Security*, 43 VA. J. INT’L L. 1071, 1078–85 (2003).

has written that decisions to protect intelligence sources and methods from disclosure “are worthy of great deference given the magnitude of the national security interests and potential risks at stake.”<sup>29</sup> Still, the costs of deep secrecy are not insubstantial; deep secrecy is all too likely to skew policymakers’ consideration of the costs and benefits of intelligence-gathering programs.

There is considerable debate in the literature about the efficacy of the current regime of intelligence oversight given a variety of institutional limitations faced by Congress and the other participants in that process.<sup>30</sup> But, even putting that debate aside, policymakers are unlikely to fully appreciate the costs of a particular course of action if they believe that potentially improvident policies will never become public. Nor do elected officials have much incentive to engage in vigorous oversight if their efforts remain hidden from view.<sup>31</sup> For example, if policymakers can undertake surveillance with reasonable confidence that the very existence of a program that compromises privacy interests will remain undisclosed, they are likely to be insufficiently attentive to the value of the privacy interests it compromises, or the potential of abuse, waste, or inefficiency. The same is true of any intelligence-gathering program that remains a deep secret.

Deep secrecy means that the political incentive to protect national security may not be appropriately tempered by ordinary processes of political accountability for undertakings that may produce inefficiency, abuse, or that are simply unwarranted. Officials may not be fully sensitive to the costs of a program—monetary and otherwise—if they believe that the electorate will never learn of them. The earlier examples illustrate the point—once those surveillance programs became public, programs that the executive and legislature had previously

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29. *CIA v. Sims*, 471 U.S. 159, 179 (1985). For an elaboration on the prevalence of judicial deference to such claims, see Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 211–16 (2013).

30. For a useful summary of criticisms of the current regime of intelligence oversight, see Benjamin S. Mishkin, Note, *Filling the Oversight Gap: The Case for Local Intelligence Oversight*, 88 N.Y.U. L. REV. 1414, 1427–38 (2013).

31. Cf. KITROSSER, *supra* note 27, at 6 (“[I]t is often not in the political interests of individual congresspersons to be fully informed as to what is going on in the executive branch. Where the choice is between knowing enough to be held responsible should things go awry versus retaining ignorance and preserving the flexibility to align or distance oneself from presidential actions as events develop, ignorance can be bliss. This is particularly, though not exclusively, true in the realm of national security.”).



supported were reformed or eliminated. The cost-balance calculus of policymakers, in short, was seemingly altered by the fact of public disclosure. Thus, even proposals to embed within the intelligence community officials responsible for advocating on behalf of liberty and privacy interests are of uncertain efficacy. If officials responsible for making policy need not fear political accountability for imprudent, unwarranted, or potentially unlawful invasions of privacy, those charged with advocating for privacy may find themselves without sufficient influence.<sup>32</sup>

To be sure, deep secrecy is sometimes frustrated by leaks.<sup>33</sup> There is, however, reason to doubt that leaking supplies adequate transparency. After all, leakers run enormous legal risks. Despite the First Amendment's prohibition on laws "abridging the freedom of speech, or of the press,"<sup>34</sup> a public employee who leaks classified information is likely to face criminal liability for the leak and even a media entity publishing leaks and journalists working for such entities face a serious risk of liability.<sup>35</sup> An even more serious problem with relying on leaks as a means to transparency involves the risks to national security posed by leaking. Although some leaks are undertaken by senior officials to

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32. For a discussion of the problems that inhere in maintaining the effectiveness of officials within the intelligence community charged with protecting privacy by an advocate of such an approach, see Margo Schlanger, *Intelligence Legalism and the National Security Agency's Civil Liberties Gap*, 6 HARV. NAT'L SECURITY J. 112, 188–204 (2015).

33. See, e.g., Mark Fenster, *The Implausibility of Secrecy*, 65 HASTINGS L.J. 309 (2014).

34. U.S. CONST. amend. I.

35. See, e.g., JENNIFER K. ELSEA, CONG. RESEARCH SERV., R41404, CRIMINAL PROHIBITIONS ON THE PUBLICATION OF CLASSIFIED DEFENSE INFORMATION 8–17, 22–27 (2013); Christopher J. Markham, *Punishing the Publishing of Classified Materials: The Espionage Act and WikiLeaks*, 23 B.U. PUB. INT. L.J. 1 (2014); David McCraw & Stephen Gikow, *The End to an Unspoken Bargain? National Security Leaks in a Post-Pentagon Papers World*, 48 HARV. C.R.-C.L. L. REV. 473, 475–79 (2013); John D. Moore, *In the Same Boat: Leaks, the Press, and the First Amendment*, 18 HOLY CROSS J.L. & PUB. POL'Y 137, 145–81 (2014); David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 522–27 (2013); Geoffrey R. Stone, *Secrecy and Self-Governance*, 56 N.Y.L. SCH. L. REV. 81, 85–95 (2011); Stephen I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL'Y REV. 219 (2007); *Developments in the Law—The Law of Media*, 120 HARV. L. REV. 990, 1007–19 (2007). For somewhat more skeptical accounts of the scope of prosecutorial power, see KITROSSER, *supra* note 27, at 58–66, 130–42; and Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 512–44 (2014). For arguments that different considerations come into play when governmental secrecy conceals illegality, see, for example, Jenny-Brooke Condon, *Illegal Secrets*, 91 WASH. U. L. REV. 1099, 1157–67 (2014); and Alexander J. Kasner, Note, *National Security Leaks and Constitutional Duty*, 67 STAN. L. REV. 241, 264–82 (2015).

advance official objectives, others are unauthorized and undertaken for reasons that may be in tension with legitimate national security interests.<sup>36</sup> If leakers are free to disseminate confidential information without impartial review by those with adequate information and incentives to weigh national security interests fairly, it poses serious risks to national security.<sup>37</sup> As the Supreme Court observed in one of its few encounters with this issue: “Without a dependable prepublication review procedure, no intelligence agency or responsible Government official could be assured that an employee privy to sensitive information might not conclude on his own—innocently or otherwise—that it should be disclosed to the world.”<sup>38</sup> Thus, even leakers sincerely acting in the belief that they are bringing misconduct to light may inadvertently disclose information that poses serious risks to national security.

To the extent that the institutional press acts as an additional safeguard by deciding whether to publish leaked government secrets, there is still reason to doubt that national security concerns will receive adequate consideration. As Cass Sunstein has noted, even if the press is granted robust protection to publish leaks, given its institutional incentive to disseminate information, the press may well undervalue the government’s interest in confidentiality when making decisions about whether to publish government secrets.<sup>39</sup>

Accordingly, if a judicially supervised process were created that could provide sufficient transparency without unduly compromising legitimate governmental interests, national security might be better protected, and the incentive to engage in unauthorized leaks might be reduced.<sup>40</sup>

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36. For valuable efforts to develop a typology of leaks in terms of their motivation, see STEPHEN HESS, *THE GOVERNMENT/PRESS CONNECTION: PRESS OFFICERS AND THEIR OFFICES* 75–77 (1984); GARY ROSS, *WHO WATCHES THE WATCHMEN? THE CONFLICT BETWEEN NATIONAL SECURITY AND FREEDOM OF THE PRESS* 71–77 (2011), <https://www.fas.org/spp/eprint/ross.pdf>; and Pozen, *supra* note 35, at 532–34, 559–72.

37. For a helpful survey of the harm to national security caused by leaks, see ROSS, *supra* note 36, at 79–121. For a more anecdotal account, see GABRIEL SCHOENFELD, *NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW* 24–26, 30–32, 95–98, 108–40, 204–05, 208–20, 255–59, 266–68 (2010).

38. *Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980) (per curiam). For a powerful defense of the Court’s view, see Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 339–53.

39. Cass R. Sunstein, *Government Control of Information*, 74 CALIF. L. REV. 889, 901–04 (1986). For a more elaborate argument along similar lines, see Note, *Media Incentives and National Security Secrets*, 122 HARV. L. REV. 2228, 2234–44 (2009).

40. For a more elaborate argument along these lines, see Margaret B. Kwoka, *Leaking and*

If the First Amendment were understood to grant the press or public a right of access to confidential governmental information essential to informed self-government, it might provide a satisfactory vehicle for containing the scope of deep secrecy through a judicially supervised process. Indeed, a number of scholars have advanced the view that the First Amendment's protection for free speech and a free press should include a right of access to government information, although it is unclear whether the right of access advocated by these scholars would be sufficiently robust to protect disclosure in the face of the government's assertion of a national security justification need for confidentiality.<sup>41</sup> In any event, there is as yet little sign of a First Amendment right of access to government secrets involving national security. Although the Supreme Court has recognized a presumptive right of access to judicial proceedings by stressing that such proceedings have historically been open to public scrutiny,<sup>42</sup> the Court has otherwise steadfastly rejected a First Amendment right of access to information.<sup>43</sup> The Court's position is understandable; when the media are free to disseminate whatever information they wish, and are merely

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*Legitimacy*, 48 U.C. DAVIS L. REV. 1387, 1454–56 (2015).

41. See, e.g., Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 489–95 (1985) (arguing for a right of access to information subject to balancing of competing interests); Mary I.M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690, 719–32 (1984) (advocating invalidation of arbitrary limitations on access to information); Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 14–20 (arguing for a right of access but recognizing limitations for information about intelligence gathering and espionage); Steven Helle, *The News-Gathering Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1, 49–59 (arguing for a right of access to information subject to balancing of competing interests); Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards A Realistic Right to Gather Information in the Digital Information Age*, 65 OHIO ST. L.J. 249, 344–55 (2004) (arguing for a right to information of general public concern for purposes of widespread dissemination to the public); Timothy B. Van Dyck, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 931–38 (1992) (advocating invalidation of selective and arbitrary restrictions on access to information).

42. See, e.g., *Press-Enter. Co. v. Super. Ct. of Cal. for Riverside Cnty.*, 478 U.S. 1, 6–10 (1986); *Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty.*, 457 U.S. 596, 603–07 (1982).

43. See, e.g., *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999) (seeking access to names and addresses of arrestees); *Houchins v. KQED, Inc.*, 438 U.S. 1, 12–16 (1978) (plurality opinion) (seeking access to prison); *id.* at 16 (Stewart, J., concurring) (same); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974) (seeking access to prisoners); *Pell v. Procunier*, 417 U.S. 817, 833–35 (1974) (same); *Kliendienst v. Mandel*, 408 U.S. 753, 762–70 (1972) (scholars contesting denial of visa permitting foreign scholar to travel to United States); *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965) (seeking ability to travel to Cuba to gather information).

denied access to confidential government information, it is far from clear that there has been any “abridge[ment]” of the freedom of speech or the press within the meaning of the First Amendment.<sup>44</sup>

The discussion that follows offers an alternate constitutional vehicle for greater transparency in national security—the Constitution’s Statement and Account Clause, which provides that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”<sup>45</sup> Unlike the First Amendment, the Statement and Account Clause expressly mandates the disclosure of information.

The scholarly literature to date contains no comprehensive treatment of the scope of the obligation imposed by the Statement and Account Clause; Part I endeavors to fill that gap, and goes on to argue that the clause guarantees the public access to a good deal of information about the manner in which the government spends public funds for intelligence-related purposes. It sketches an account of the disclosure obligation that requires, at least presumptively, that information that is material to the public’s assessment of the manner in which the intelligence community spends public funds must be disclosed on an annual basis. This standard of materiality, and the longstanding practices for disclosure of nonintelligence spending, provides useful yardsticks for identifying the constitutional standards for disclosure.

Part II turns to the question of judicial enforcement, widely thought unavailable since the Supreme Court’s holding that a lawsuit seeking information about the CIA’s budget under the Statement and Account Clause was nonjusticiable in *United States v. Richardson*.<sup>46</sup> Part II

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44. Beyond that, perhaps the most powerful argument deployed against a putative First Amendment right of access to confidential governmental information is premised on the government’s unquestionably legitimate need to keep some information relating to national security secret. Assessing competing interests in confidentiality and disclosure seemingly enmeshes the courts in what is essentially a policy debate over the justification for treating information as confidential; such claims, it is said, “invite[d] the Court to involve itself in what is clearly a legislative task.” *Houchins*, 438 U.S. at 12 (plurality opinion). For valuable scholarly discussions critical of an asserted First Amendment right of access to government information, see, for example, LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 146–50 (1971); DAVID M. O’BRIEN, *THE PUBLIC’S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT* 30–54, 166–67 (1981); Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CALIF. L. REV. 482, 497–516 (1980); and Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 273–76 (1971).

45. U.S. CONST. art I, § 9, cl. 7.

46. 418 U.S. 166 (1974).

explains that although the precise holding of *Richardson* remains good law, subsequent jurisprudential developments have greatly limited its scope. There is a substantial argument that *Richardson* does not bar lawsuits brought by voters under the Statement and Account Clause, and an even stronger argument that it poses no obstacle to suits seeking information about intelligence spending under the Freedom of Information Act (“FOIA”). *Richardson* does not bar these actions, even if they involve claims that the statutes that exempt information about intelligence community from disclosure under the FOIA are unconstitutional. In this fashion, the clause can function as a national security freedom of information act.

### I. THE SCOPE OF THE CONSTITUTIONAL OBLIGATION TO DISCLOSE INFORMATION ABOUT INTELLIGENCE SPENDING

The first Congress, in the legislation creating the Department of the Treasury, required that the Treasurer of the United States, “on the third day of every session of Congress, lay before the Senate and the House of Representatives, fair and accurate copies of all accounts” as well as “a true and perfect account of the State of the Treasury.”<sup>47</sup> In the Second Congress, the House elaborated, passing a resolution that obligated the Secretary of the Treasury to lay before it annually “an accurate statement and account of the receipts and expenditures of all public moneys . . . in which statements shall also be distinguished the expenditures which fall under each head of appropriation.”<sup>48</sup> This obligation still persists today in substantially the same form; the Secretary of the Treasury is obligated, at the opening of each session of Congress, to “submit . . . a report for the prior fiscal year on the total amount of public receipts and public expenditures listing receipts, when practicable, by ports, districts, and States and the expenditures by each appropriation.”<sup>49</sup> The Treasury discharges this obligation through its annual *Combined Statement of Receipts, Outlays, and Balances*.<sup>50</sup>

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47. Act of Sept. 2, 1789, ch. 12, § 4, 1 Stat. 65, 66 (“An Act to establish the Treasury Department”). For a helpful description of framing-era practice with respect to the reporting of government spending, see FREDERICK C. MOSHER, *THE GAO: THE QUEST FOR ACCOUNTABILITY IN AMERICAN GOVERNMENT* 27–31 (1979).

48. 2 ANNALS OF CONG. 302 (1791).

49. 31 U.S.C. § 331(c) (2012); *see also id.* § 3513(a) (“The Secretary of the Treasury shall prepare reports that will inform the President, Congress, and the public on the financial operations of the United States Government.”).

50. *See, e.g.*, BUREAU OF FISCAL SERV., U.S. DEP’T OF TREASURY, *COMBINED STATEMENT*

This process does not apply to intelligence spending. Since the creation of the intelligence community following the Second World War, Congress has placed funds to be appropriated for intelligence purposes primarily in military appropriations that are subsequently transferred to intelligence uses.<sup>51</sup> The actual appropriations for intelligence purposes authorizing this procedure are placed in classified portions of appropriations legislation.<sup>52</sup> Congress provided a bit of transparency in 2007, when it required that, “[n]ot later than 30 days after the end of each fiscal year . . . , the Director of National Intelligence shall disclose to the public the aggregate amount of funds appropriated by Congress for the National Intelligence Program for such fiscal year.”<sup>53</sup> On the expenditure side, transparency remains non-existent; Congress has granted the various intelligence agencies authority to disregard the statutory obligations that are otherwise imposed regarding disclosure of the manner in which public funds are expended.<sup>54</sup>

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OF RECEIPTS, OUTLAYS, AND BALANCES (2014), [http://www.fiscal.treasury.gov/fsreports/rpt/combStmt/current\\_rpt.htm](http://www.fiscal.treasury.gov/fsreports/rpt/combStmt/current_rpt.htm) [hereinafter COMBINED STATEMENT].

51. See MARSHALL C. ERWIN & AMY BELASCO, CONG. RESEARCH SERV., R42061, INTELLIGENCE SPENDING AND APPROPRIATIONS: ISSUES FOR CONGRESS 10–11 (2013). For a helpful summary of the history of intelligence appropriations practices since World War II, see Richard A. Best, Jr. & Elizabeth B. Bazan, *Intelligence Spending: Public Disclosure Issues*, in INTELLIGENCE OVERSIGHT AND DISCLOSURE ISSUES 53, 57–62 (Philip R. Haas ed., 2010).

52. See, e.g., WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 51–53 (1994); RICHARD A. BEST, JR., CONG. RESEARCH SERV., RL33539, INTELLIGENCE ISSUES FOR CONGRESS 6, 8–9 (2009); Vicki Divoll, *The “Full Access Doctrine”: Congress’s Constitutional Entitlement to National Security Information from the Executive*, 34 HARV. J.L. & PUB. POL’Y 493, 506 n.45 (2011); Jennifer D. Kibbe, *Conducting Shadow Wars*, 5 J. NAT’L SEC. L. & POL’Y 373, 382–83 (2012). For an example of a public reference to the existence of a classified annex governing intelligence appropriations, see Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 8089(b), 128 Stat. 5, 1256.

53. Implementing Recommendations of the 9/11 Commission Act, Pub. L. No. 110-53, § 601, 121 Stat. 266, 335 (2007) (codified at 50 U.S.C. § 3306(b) (2012)). Congress subsequently required the President, at the time the annual budget is sent to Congress, to “disclose to the public the aggregate amount of appropriations requested for that fiscal year for the National Intelligence Program.” Intelligence Authorization Act for Fiscal Year 2010, Pub. L. No. 111-259, § 364, 124 Stat. 2654, 2702 (codified at 50 U.S.C. § 3306(a)). The “National Intelligence Program” is defined to include all confidential nonmilitary intelligence-gathering activities. See 50 U.S.C. § 3003(6). For helpful discussions of the process by which the aggregate figures came to be disclosed, see LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 236–40 (6th ed. 2014); Steven Aftergood, *An Inquiry into the Dynamics of Government Secrecy*, 48 HARV. C.R.-C.L.L. REV. 511, 516–19 (2013); and Best & Bazan, *supra* note 51, at 76–83.

54. See, e.g., 50 U.S.C. § 3038(c) (“[T]he Director of the Defense Intelligence Agency may expend amounts made available to the Director under the National Intelligence Program for

Thus, for example, for fiscal year 2014, the Director of National Intelligence announced that the “aggregate amount appropriated” for the National Intelligence Program “was \$50.5 billion,” and added, “[a]ny and all subsidiary information . . . will not be disclosed.”<sup>55</sup> Similarly, the Department of Defense disclosed that “[t]he aggregate amount appropriated” for the Military Intelligence Program “was \$17.48 billion,” adding that “[n]o other MIP budget figures or program details will be released, as they remain classified for national security reasons.”<sup>56</sup>

These limited disclosures, coupled with the intelligence community’s power to classify information that it regards as confidential, effectively blocks the public’s access to information relating to intelligence spending. For example, in an action under FOIA seeking disclosure of aggregate intelligence budgets prior to the statutory requirement that they be disclosed, a federal district court concluded that disclosure of even aggregate budget amounts would reveal classified information, “namely the allocation, transfer and funding of intelligence programs,” and therefore fell under the FOIA’s exemption from the obligation of disclosure for information “specifically exempted from disclosure” by statute.<sup>57</sup> This decision is no outlier; virtually all efforts to obtain disclosure of any aspect of intelligence spending under the FOIA have been rebuffed.<sup>58</sup>

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human intelligence and counterintelligence activities for objects of a confidential, extraordinary, or emergency nature, without regard to the provisions of law or regulation relating to the expenditure of government funds.”); *id.* § 3510(b) (“The sums made available to the [Central Intelligence] 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.”); *id.* § 3605(a) (“[N]othing in this chapter or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof . . .”).

55. Press Release, Office of the Dir. Nat’l Intelligence, DNI Releases Budget Figure for 2014 National Intelligence Program (Oct. 30, 2014), <http://fas.org/irp/news/2014/10/nip-2014.html>.

56. Press Release, Office of the Assistant Sec’y of Def., U.S. Dep’t of Def., DOD Releases Military Intelligence Program (MIP) Appropriate Top Line Budget for Fiscal Year (FY) 2014 (Oct. 30, 2014), <http://fas.org/irp/news/2014/10/mip-2014.html>.

57. *Aftergood v. CIA*, 355 F. Supp. 2d 557, 5561–62 (D.D.C. 2005) (citing 5 U.S.C. § 552(b)(3) (2000)).

58. *See, e.g., Halperin v. CIA*, 629 F.2d 144, 146–53 (D.C. Cir. 1980) (exempting from FOIA disclosure information relating to attorney retainer agreements, fee agreements, bills and statements, and related correspondence between the CIA and any attorneys or law firms retained by the CIA to provide legal services connected with classified activities). For a helpful summary

There is great doubt about whether this state of affairs can be reconciled with the Statement and Account Clause.<sup>59</sup>

A. *The Character of the Statement and Account Clause Obligation*

There are no precedents that authoritatively explicate the scope of the obligation imposed by the Statement and Account Clause; the Supreme Court has never “reach[ed] or decide[d] precisely what is meant by ‘a regular Statement and Account.’”<sup>60</sup> When one considers the clause’s text, history, and constitutional ethos and structure, however, it becomes plain that the clause requires that the public receive sufficient information about the manner in which public funds are spent to enable an informed judgment about the performance of the intelligence community.<sup>61</sup>

of statutory and case law granting intelligence agencies the ability to shield information from disclosure, see 1 JAMES T. O’REILLY, *FEDERAL INFORMATION DISCLOSURE* § 13:14 (rev. 2012).

59. In the wake of *Richardson*, a handful of student commentators contended that the then-extant regime, in which no information about appropriations or spending was disclosed, violated the Statement and Account Clause, although none considered whether the disclosure of aggregate appropriations or spending would pass constitutional muster. See Douglas P. Elliott, Note, *Cloak and Ledger: Is CIA Funding Constitutional?*, 2 HASTINGS CONST. L.Q. 717, 738–52 (1975); Robin Berman Schwartzman, Note, *Fiscal Oversight of the Central Intelligence Agency: Can Accountability and Confidentiality Coexist?*, 7 N.Y.U. J. INT’L L. & POL. 493, 521–26 (1974); Note, *The CIA’s Secret Funding and the Constitution*, 84 YALE L.J. 608, 621–35 (1975). In this period as well, a Senate select committee concluded that the CIA’s current practices were inconsistent with the Statement and Account Clause, without reaching a conclusion about whether the publication of aggregate spending would be sufficient. See 1 S. REP. NO. 94-755, at 367–84 (1976); see also S. REP. NO. 95-274, at 9 (1977) (“While the courts have not defined the constitutional requirements . . . as much information about appropriations and expenditures should be made available to the public as is possible consistent with interests such as the protection of the national security . . .”). A House committee, in contrast, concluded that “whether and to what extent budget disclosure is constitutionally mandated is a matter of policy which Congress is best qualified to judge.” H.R. REP. NO. 95-1075, at 2 (1978). In congressional testimony in 1977, two eminent scholars also opined that the CIA’s secret funding violated the Statement and Account Clause without specifically addressing the sufficiency of disclosing aggregate appropriations or spending. See *Whether Disclosure of Funds Authorized for Intelligence Activities Is in the Public Interest: Hearings Before the S. Select Comm. on Intelligence*, 95th Cong. 93–94 (1977) [hereinafter *1977 Senate Intelligence Funds Disclosure Hearings*] (statement of Ralph D. Spritzer); *id.* at 95–99 (testimony of Thomas I. Emerson). A third, in contrast, opined that the clause granted considerable freedom to Congress. See *id.* at 88 (statement of Gerhard Casper). At a 1994 hearing, another scholar expressed a similar view. See *Public Disclosure of the Aggregate Intelligence Budget Figure: Hearings Before the Permanent Select H. Comm. on Intelligence*, 103d Cong. 161–65 (1994) [hereinafter *1994 House Intelligence Funds Disclosure Hearings*] (statement of Robert F. Turner).

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

61. In invoking text, history, ethos and structure, I refer to the various modalities of constitutional interpretation identified by Philip Bobbitt. See PHILIP BOBBITT, *CONSTITUTIONAL*



### 1. Text

The Statement and Account Clause appears in the Constitution paired with the provision governing the authorization required to spend government funds, the Appropriations Clause: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of Receipts and Expenditures of all public Money shall be published from time to time.”<sup>62</sup>

The text is unqualified—the obligation to publish information regarding receipts and expenditures applies to all public funds, regardless of the purpose for which they are spent. This textual formulation stands in contrast to the Constitution’s limitation of a parallel publication requirement in the Journal Clause, which requires each House of Congress to “keep a Journal of its Proceedings, and from time to time publish the same, excepting such parts as may in their Judgment require Secrecy.”<sup>63</sup>

It is equally significant that the text makes no categorical distinctions among types of spending, much less contains an exception to the disclosure obligation when public funds are spent for military or other national security purposes. Other provisions of the Constitution, in contrast, expressly acknowledge the need for special rules relating to the military or wartime. For example, the Third Amendment forbids the quartering of troops in private houses, but permits a different rule in time of war.<sup>64</sup> The Fifth Amendment requires a grand jury indictment “for a capital, or otherwise infamous crime,” but carves out an exception for “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.”<sup>65</sup> And, the Suspension Clause provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>66</sup>

The constitutional text alone does not shed much light about how

INTERPRETATION 11-22 (1991).

62. U.S. CONST. art I, § 9, cl. 7. In contrast to the Statement and Account Clause, there is a fair amount of scholarship on the Appropriations Clause. For a leading example, see Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343 (1988).

63. U.S. CONST. art. I, § 5, cl. 3.

64. See U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”).

65. U.S. CONST. amend. V.

66. U.S. CONST. art. I, § 9, cl. 2.

often and how much information relating to expenditures must be disclosed, or to whom. It does, however, cast great doubt on the claim that the disclosure obligation imposed by the Statement and Account Clause is somehow circumscribed, if not eliminated entirely, when it comes to particular categories of spending, even if they involve a perceived need for confidentiality.

## 2. Original Understanding

The Supreme Court has written that in undertaking constitutional interpretation:

[W]e are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.<sup>67</sup>

On this view, the object of constitutional interpretation is to ascertain “the original understanding” of constitutional text.<sup>68</sup> This approach, of course, is often labeled originalism, which “regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.”<sup>69</sup>

### a. Framing and Ratification

In terms of its original semantic meaning, the Statement and Account Clause is straightforward and little different from its contemporary meaning. Framing-era sources, for example, define an “account” as a record of debts and expenses,<sup>70</sup> and “publish” as to disclose to the public.<sup>71</sup> This seemingly confirms the unqualified character of the

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67. *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931) (second alteration in original)).

68. *Id.* at 625.

69. Keith E. Whittington, *The New Originalism*, 2 *GEO. J.L. & PUB. POL’Y* 599, 599 (2004).

70. *See, e.g.*, 1 SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* 71 (1755) (“A computation of debts or expences; a register of facts relating to money.”); NOAH WEBSTER, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* 8 (1830) (“A sum stated on paper; a registry of a debt or credit; of debts and credits, or charges; an entry in a book or on paper of things bought or sold, of payments, services etc., including the names of the parties to the transaction, date, and price or value of the thing.”).

71. *See* 2 JOHNSON, *supra* note 70, at 1598 (“To discover to mankind; to make generally and openly known; to proclaim; to divulge.”); WEBSTER, *supra* note 70, at 653 (“To discover or make known to mankind or to people in general what before was private or unknown; to divulge, as a

obligation to disclose the manner in which public funds are spent.

Inquiry into the origins of the clause provides additional insight. The Appropriations Clause was inserted into the draft of what became the Constitution relatively early in the Constitutional Convention, and provoked little in the way of comment.<sup>72</sup> Relatively late in the Convention, a draft emerged that added the phrase “and a regular statement and account of the receipts and expenditures of all publick money shall be published from time to time.”<sup>73</sup> George Mason moved to require annual publication, but Gouverneur Morris objected that this “w[ould] be impossible in many cases,”<sup>74</sup> and Rufus King argued that “the term expenditures went to every minute shilling. This would be impracticable,” adding that Congress “might indeed make a monthly publication, but it would be in such general Statements as would afford no satisfactory information.”<sup>75</sup> James Madison then moved to strike “annually” from Mason’s proposal, substituting instead “from time to time,” contending that this formulation “would enjoin the duty of frequent publications and leave enough to the discretion of the Legislature. Require too much and the difficulty will beget a habit of doing nothing.”<sup>76</sup> Thomas Fitzsimons added, “[i]t is absolutely impossible to publish expenditures in the full extent of the term,” and James Wilson said that “[m]any operations of finance cannot be properly published at certain times.”<sup>77</sup> Madison’s motion carried.<sup>78</sup>

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private transaction; to promulgate or proclaim, as a law or edict.”).

72. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 523, 524, 526, 538–39 (Max Farrand ed., 1911); 2 *id.* at 14, 16, 154, 164, 178, 280, 568, 596.

73. *Id.* at 610 n.2.

74. *Id.* at 618.

75. *Id.* at 618.

76. *Id.* at 618–19.

77. *Id.* at 619.

78. *Id.* The Statement and Account Clause has no obvious antecedent. Its closest parallel in the Articles of Confederation required only semi-annual reports of debt incurred; Article IX authorized Congress “to borrow money, or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted.” ARTICLES OF CONFEDERATION of 1777, art. IX, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 14 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS]. The state charters or constitutions in effect at the time of the framing, to the extent that they addressed the matter, made the monitoring of public spending a legislative responsibility. For example, see N.C. CONSTITUTION of 1776, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2791 (“[T]he Governor, for the time being, shall have the power to draw for and apply such sums of money as shall be voted by the general assembly, for the contingencies of government, and shall be accountable to them for the same.”).

Thus, the Convention seems to have endorsed a measure of discretion when it came to the timing of disclosure. It believed that disclosure of every “minute shilling” would be impracticable, but there was no talk of a categorical exception to the disclosure obligation for types of spending that might be thought to demand confidentiality.

Since the Constitution was drafted in secret, the Convention’s deliberations might be regarded as having little probative value in ascertaining the framing-era public’s understanding of its terms, although the drafting history could offer some evidence of the context in which the text reached the public and the manner in which the Framers expected the public would understand the text.<sup>79</sup> The public conventions at which ratification of the Constitution was debated surely shed useful light on the framing-era public’s understanding of the obligation imposed by the Statement and Account Clause.

At the ratifying conventions, discussion of the Appropriations Clause and Statement and Account Clause was limited but still illuminating, reflecting the view that the clauses helped to secure the accountability of elected officials for the manner in which public funds were spent. For example, at the Maryland Convention, James McHenry explained “the People who give their Money ought to know in what manner it is expended.”<sup>80</sup> To similar effect, at the New York Convention, Chancellor Robert Livingston, addressing the charge that the Constitution was all too likely to generate corruption, included in his response a rhetorical question: “Are not Congress to publish, from time to time, an account of their receipts and expenditures?”<sup>81</sup>

The discussion most plainly directed to the relationship between the Statement and Account Clause and governmental secrecy came in the Virginia Convention, when George Mason objected to the clause’s “loose expression of ‘publication from time to time’” that, he feared, could “be extended ever so much,” and, the report of the proceedings added: “In matters relative to military operations and foreign negotiations, secrecy was necessary sometimes; but [Mason] did not conceive that the receipts and expenditures of the public money ought

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79. For powerful arguments along these lines, see Vasav Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1183–87 (2003).

80. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 72, at 149–50.

81. 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONSTITUTIONAL CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 292 (1891).

ever to be concealed.”<sup>82</sup> Richard Henry Lee responded that he found the publication requirement “sufficiently explicit and satisfactory” in that it “must be supposed to mean, in the common acceptance of language, short, convenient periods.”<sup>83</sup> Madison agreed, stating that “by giving them an opportunity of publishing them from time to time, as might be found easy and convenient, they would be more full and satisfactory to the public, and would be sufficiently frequent,” adding that “it was impossible, in such short intervals, to adjust the public accounts in any satisfactory manner.”<sup>84</sup> In this discussion, there was again no suggestion that the Statement and Account Clause admitted of categorical exceptions, whether for expenditures relating to national security or otherwise, or that it permitted indefinite delays in publication.<sup>85</sup> Nor, as we have seen, did anyone disagree when Mason opined that even when it came to military affairs and foreign relations, the manner in which public funds are spent must always be publicly disclosed. The clause’s proponents argued only that it granted reasonable discretion as to the timing of publication in order to render the disclosure obligation practicable.

#### b. Post-Ratification Commentary

Post-ratification commentary can also provide important insights into original meaning. Indeed, the Supreme Court has written that to ascertain the original understanding of a constitutional provision, it is

82. 3 *id.* at 459. Patrick Henry echoed this criticism, complaining that “publication from time to time . . . may conceal what they think requires secrecy.” *Id.* at 462.

83. *Id.* at 459.

84. *Id.* at 460.

85. Also illuminating in this regard is Madison’s statement on the allowance for secrecy in the proposed constitution:

The congressional proceedings are to be occasionally published, including *all receipts and expenditures* of public money, of which no part can be used but in consequence of appropriations made by law. This is a security which we do not enjoy under the existing system. That part which authorizes the government to withhold from the public knowledge what in their judgment may require secrecy, is imitated from the [Articles of] [C]onfederation . . .

*Id.* at 331. The “part” to which the final sentence refers is the Journal Clause, as only it permitted Congress to keep some matters secret and had an antecedent in the Articles of Confederation. See ARTICLES OF CONFEDERATION of 1777, art. IX, para. 7, reprinted in FEDERAL AND STATE CONSTITUTIONS, *supra* note 78, at 15 (“The Congress of the United States shall . . . publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy . . .”). In this fashion, Madison seems to have acknowledged that the Statement and Account Clause created a new and unqualified disclosure obligation distinct from the Journal Clause.

appropriate to undertake “the examination of a variety of legal and other sources to determine the *public understanding* of a legal text in the period after its enactment or ratification,” adding that “[t]hat sort of inquiry is a critical tool of constitutional interpretation.”<sup>86</sup>

Although most framing-era sources give scant attention to the Appropriation Clause and Statement and Account Clause,<sup>87</sup> some provide helpful explications, stressing the role of the clauses in producing political accountability. In his American edition of *Blackstone’s Commentaries*, St. George Tucker described the clauses as a vehicle to enable the people to monitor the exercise of governmental power:

All the expences of government being paid by the people, it is the right of the people, not only, not to be taxed without their own consent, or that of their representatives freely chosen, but also to be actually consulted upon the disposal of the money which they have brought into the treasury; it is therefore stipulated that no money shall be drawn from the treasury, but in consequence of appropriations, previously made by law; and, that the people may have an opportunity of judging not only of the propriety of such appropriations, but of seeing whether their money has been actually expended only, in pursuance of the same; it is further provided, that a regular statement and account of the receipts and expenditures of all public money shall be published from time to time. These provisions form a salutary check, not only upon the extravagance, and profusion, in which the executive department might otherwise indulge itself, and its adherents and dependents; but also against any misappropriation, which a rapacious, ambitious, or otherwise unfaithful executive might be disposed to make. In those governments where the people are taxed by the executive, no such check can be interposed. The prince levies whatever sums he thinks proper; disposes of them as he thinks proper; and would deem it sedition against him and his government, if any account were required of him, in what manner he had disposed of any part of them. Such is the difference between governments, where there is responsibility, and where there is none.<sup>88</sup>

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86. *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

87. For example, William Rawle’s treatise contained only a brief discussion of the Appropriations Clause in the context of the Treaty Clause, and no explication of the Statement and Account Clause. See WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 70–73 (William S. Hein & Co. 2003) (1829).

88. 1 ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE UNITED STATES; AND THE COMMONWEALTH OF VIRGINIA* app. at 362 (Phila., William Young & Abraham Small 1803) (footnote omitted).

In his treatise, Justice Story offered an account that tracked Tucker's:

The object is apparent upon the slightest examination. It is to secure regularity, punctuality, and fidelity, in the disbursements of public money. As all the taxes raised from the people, as well as the revenues arising from other sources, are to be applied to the discharge of the expenses, debts, and other engagements of the government, it is highly proper, that congress should possess the power to decide, how and when any money should be applied for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure. The power to control, and direct the appropriations, constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public speculation. In arbitrary governments the prince levies what money he pleases from his subjects, disposes of it, as he thinks proper, and is beyond responsibility or reproof. It is wise to interpose, in a republic, every restraint, by which the public treasure, the common fund of all, should be applied, with unshrinking honesty to such objects, as legitimately belong to the common defence, and the general welfare. Congress is made the guardian of this treasure; and to make their responsibility complete and perfect, a regular account of the receipts and expenditures is required to be published, that the people may know, what money is expended, for what purposes, and by what authority.<sup>89</sup>

Accordingly, important post-ratification commentary understood the clause as a vehicle for the public to hold elected officials accountable for the manner in which public funds are spent.

### c. Framing-Era Practice

Beyond evidence of how the public understood the meaning of constitutional text, framing-era practice, such as the actions of the early Congresses as they endeavored to operationalize the Constitution, can also shed considerable light on the original understanding of the Constitution.<sup>90</sup>

As we have seen, the early Congresses required the Secretary of the Treasury to make annual reports of receipts and expenditures, broken

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89. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1342, at 213–14 (Cambridge, Brown, Shattuck & Co. 1833).

90. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151–52 (2010); *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986); *Marsh v. Chambers*, 463 U.S. 783, 790–91 (1983). For a powerful scholarly argument along these lines, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525–39 (2003).

down by head of appropriation.<sup>91</sup> Thus, for example, in his report of estimated receipts and expenditures for 1791–92, Secretary Hamilton reported expenditures by reference to the appropriations that had been previously made.<sup>92</sup> Accordingly, one must consult the underlying appropriations to understand the report of expenditures.

The first appropriation enacted could hardly have been briefer; a single paragraph, it appropriated fixed sums “for defraying the expenses of the civil list, . . . defraying the expenses of the department of war[,] . . . discharging the warrants issued by the late board of treasury, and . . . paying the pensions to invalids.”<sup>93</sup> One scholar has speculated that the brevity of this appropriation “seems to have arisen because of the unpreparedness and lack of time on the part of the members [of the First Congress].”<sup>94</sup> That theory seems sound in light of the greater specificity that was reflected in subsequent appropriations. The following two annual appropriations added specific categories to the military appropriation and referenced the estimates of the Secretary of the Treasury as the basis for the sums appropriated.<sup>95</sup> The estimates were detailed, listing, for example, the number of officers employed by the Department of War and their salaries and the costs of ordinance.<sup>96</sup> Given the estimates’ reference in the appropriations themselves, as one historian put it, “these estimates were, in effect, integral parts of the appropriation acts, and they were set out in considerable detail.”<sup>97</sup>

The reason for this change in practice seems to be the complaints of Senator William Maclay; although the Senate met in secret and published only a skeletal account of its proceedings,<sup>98</sup> in his journal,

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91. See *supra* text accompanying notes 47–48.

92. See Alexander Hamilton, *Estimates of Receipts and Expenditures for 1791–2*, in 1 AMERICAN STATE PAPERS: CLASS III: FINANCE 144–46 (William S. Hein & Co. 1998) (1832) [hereinafter AMERICAN STATE PAPERS].

93. Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95, 95 (“An Act making Appropriations for the Service of the present year”).

94. VINCENT J. BROWNE, *THE CONTROL OF THE PUBLIC BUDGET* 35 (1949).

95. See Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104, 104 (“An Act making appropriations for the support of government for the year one thousand seven hundred and ninety”); Act of Feb 11, 1791, ch. 6, § 1, 1 Stat. 190, 190 (“An Act making appropriations for the support of government for during the year one thousand seven hundred and ninety-one, and for other purposes”).

96. *E.g.*, Alexander Hamilton, *Public Credit*, in AMERICAN STATE PAPERS, *supra* note 92, at 15, 36–37.

97. LUCIUS WILMERDING, JR., *THE SPENDING POWER: A HISTORY OF THE EFFORTS OF CONGRESS TO CONTROL EXPENDITURES* 22 (1943) (footnote omitted).

98. See, *e.g.*, 1 ANNALS OF CONG. 15–93 (1789) (Joseph Gales ed., 1834) (ed. note). The Senate was not opened to the public until February 1794. See DANIEL N. HOFFMAN,



Maclay indicated that he had objected to lump-sum appropriations as “giving the Secretary the money for him to account for as he pleases.”<sup>99</sup> As one account put it:

Maclay’s critique struck a sympathetic chord. The next appropriation, by incorporating the executive’s estimates into the statutory text and dividing the military appropriation under twelve heads, was more specific. When the House offered an equally or more specific bill for 1793, the Senate initially balked, amending it in favor of a single lump sum and a small sum for unspecified contingencies. An unidentified participant in the ensuing debate argued that such appropriation in gross would vest too much discretion in secretary of war and, by keeping expenditures out of public view, would make it difficult to require a public accounting. The Senate gave in, and the more specific House bill was enacted.<sup>100</sup>

Thus, the framing-era annual reports of spending, in light of the appropriations and spending estimates they referenced, provided great detail about national security spending, down to the numbers and salaries of military officers employed. In addition to those reports, pursuant to his statutory charge, the Treasurer sent Congress periodic reports on receipts and expenditures.<sup>101</sup> The surviving reports detail the individual warrant reflecting each payment made by the Treasurer by payee, and include a brief description of the purpose of the payment (sometimes referring to an appropriation).<sup>102</sup> These reports, coupled with those of Secretary Hamilton and the underlying appropriations, offered the public a comprehensive account of federal spending.

The closest Congress came in the framing era to addressing the propriety of confidential spending came when Congress authorized the

GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS 84–88 (1981).

99. WILLIAM MACLAY, JOURNAL OF WILLIAM MACLAY: UNITED STATES SENATOR FROM PENNSYLVANIA 1789-1791, at 221 (Frederick Ungar Publ’g Co. 1965) (1810).

100. BANKS & RAVEN-HANSEN, *supra* note 52, at 34 (footnotes omitted). For an account to similar effect, see David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-91*, 61 U. CHI. L. REV. 775, 795–96 (1994).

101. *See, e.g.*, 1 ANNALS OF CONG. 1103–04 (1790) (Joseph Gales ed., 1834); 2 ANNALS OF CONG. 1653–54, 1717–18 (1790); 2 ANNALS OF CONG. 1839–40 (1791); 3 ANNALS OF CONG. 143–44, 227–28 (1791); 3 ANNALS OF CONG. 671–72, 731–32 (1792); 3 ANNALS OF CONG. 897–98 (1793); 4 ANNALS OF CONG. 141–42, 667–68, 783–84, 949–50 (1794).

102. For the surviving reports, and corresponding entries in the Treasurer’s daybook, see VIII DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 4 MARCH 1789–3 MARCH 1791: PETITION HISTORIES AND NONLEGISLATIVE OFFICIAL DOCUMENTS 790–834 (Kenneth R. Bowling et al. eds., 1998).

President to withdraw up to \$40,000 annually until the next session of Congress “for the support of such persons as he shall commission to serve the United States in foreign parts, and for the expenses incident to the business in which they may be employed.”<sup>103</sup> The appropriation also provided that:

the President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify, and cause a regular statement and account thereof to be laid before Congress annually, and also lodged in the proper office of the treasury department.<sup>104</sup>

Public reports were subsequently laid before Congress disclosing the annual spending pursuant to this authorization.<sup>105</sup> The Second Congress extended this authorization, and required that the President “mak[e] a certificate or certificates . . . of the amount of such expenditures, as he may think it advisable not to specify; and every such certificate shall be deemed a sufficient voucher.”<sup>106</sup>

Representative Scott said that the President’s confidential fund was justified in order to conceal the extent to which the United States varied in the money spent in different diplomatic posts, which might, if disclosed, suggest “invidious distinctions between foreign nations.”<sup>107</sup> Beyond that, it was widely understood that among the duties of Americans engaged in diplomacy abroad was espionage. Consider, for example, what Publius wrote to the people of New York, as they considered ratification of the Constitution:

It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *despatch* are sometimes requisite. These 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

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103. Act of July 1, 1790, ch. 22, § 1, 1 Stat. 128, 128 (“An Act providing the medium of intercourse between the United States and foreign nations”).

104. *Id.* at 129.

105. See, e.g., Thomas Jefferson, *Expenses of Foreign Intercourse (1792)*, reprinted in I AMERICAN STATE PAPERS: FOREIGN RELATIONS (William S. Hein & Co. 1998) (1833).

106. Act of Feb. 9, 1793, ch. 4, § 2, 1 Stat. 299, 300 (“An act to continue in force for a limited time, and to amend the act instituted ‘An act providing the means of intercourse between the United States and foreign nations’”).

107. 1 ANNALS OF CONG. 1127 (1790) (Joseph Gales ed., 1834) (statement of Rep. Scott).

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, therefore, 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 a manner as prudence may suggest.<sup>108</sup>

Thus, the character of the appropriation would likely have placed the public on notice that the confidential expenditures it authorized likely included payments to secret agents operating abroad.

The Third Congress increased the sum available in the confidential fund to one million dollars.<sup>109</sup> Gerhard Casper regarded this as a particularly important precedent given its size—"if . . . expended in 1 year it would have been 14 percent of the total outlays of the Federal Government"—and opined that it seemingly confirmed "Presidential discretion to withhold details from the public eye" since the money "was for ransoming American hostages held by Algiers."<sup>110</sup> Although a treaty with Algiers was concluded in 1796, "[t]he account of receipts and expenditures for the year ending September 30, 1796, made no reference to Algiers-related expenses."<sup>111</sup> The fact that the government made secret payments to ransom Americans held hostage by a foreign power would seem to support the view that the Constitution did not require the disclosure of expenditures bearing on sensitive matters relating to national security. Yet, there is more to this story; as Professor Casper acknowledged, the House subsequently voted "to lift the injunction of secrecy."<sup>112</sup>

Although the ransom payments were not disclosed to the public when they were made sometime the previous year, in February 1797, after a

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108. THE FEDERALIST No. 64, at 390–91 (John Jay) (Clinton Rossiter ed., 1961).

109. See Act of Mar. 20, 1794, ch. 7, 1 Stat. 345 ("An Act making further provision for the expenses attending the intercourse of the United States with foreign nations, and further to continue in force the act entitled 'An act providing the means of intercourse between the United States and foreign nations'"). A version of this statute remains in force. See 22 U.S.C. § 2364(c) (2012).

110. 1977 *Senate Intelligence Funds Disclosure Hearings*, *supra* note 59, at 90. In his congressional testimony, Professor Turner also regarded this as an important precedent supporting the constitutionality of confidential intelligence spending. See 1994 *House Intelligence Funds Disclosure Hearings*, *supra* note 59, at 162 (statement of Robert F. Turner).

111. 1977 *Senate Intelligence Funds Disclosure Hearings*, *supra* note 59, at 91.

112. *Id.* For a more complete account, see Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 242–55 (1989).

public debate in which some members expressed the view that the President should make a public accounting of sums expended to pay ransom, the House voted to adopt a resolution calling for an accounting.<sup>113</sup> After receiving a communication from the President, the House debated the matter in closed session in light of the President's request that his communication be kept confidential, but ultimately voted against confidentiality.<sup>114</sup> The communication from the President, which contained detailed estimates and an accounting of both the costs of the agreement and accounts of the negotiations seeking to free the American sailors held hostage, was then published in the *Annals of Congress*.<sup>115</sup> Although we cannot know what was said in closed session, it may well be that the House believed that the Statement and Account Clause compelled it to reject the President's request for confidentiality, at least when it came to expenses of this magnitude. In any event, the ransom payment was made public within about a year; so this is hardly a precedent for indefinite nondisclosure of information about the manner in which public funds are spent.

Another instance of confidentiality in financial affairs in which Congress again ultimately opted for disclosure occurred in 1811, when Congress secretly appropriated \$100,000 for the costs of preparing a military occupation of territory south of Georgia.<sup>116</sup> Similar to the Algiers precedent, the next year Congress voted to make the appropriation public.<sup>117</sup>

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113. See 6 ANNALS OF CONG. 1763–67 (1797). For accounts of the ransom negotiations and payments, see RAY W. IRWIN, *THE DIPLOMATIC RELATIONS OF THE UNITED STATES WITH THE BARBARY POWERS* 69–81 (1931); and RICHARD B. PARKER, *UNCLE SAM IN BARBARY: A DIPLOMATIC HISTORY* 91–124 (2004).

114. See 6 ANNALS OF CONG. 2235 (1797).

115. See *id.* at 2235–45. The Secretary of the Treasury estimated “[t]he whole expense of fulfilling the treaty” at \$992,463.25. *Id.* at 2239. Relatedly, it was the President's earlier request that certain presidential communications relating to negotiations to pay ransom to the Barbary powers be kept confidential that led the House to conclude that it had the power to make public communications that the President had conveyed confidentially. See HOFFMAN, *supra* note 98, at 100–04.

116. See Act of Jan. 15, 1811, 3 Stat. 471 (authorizing the occupation of territory and appropriating funds); Act of Mar. 3, 1811, 3 Stat. 472 (providing that the previous act not be printed or published). In 1813, Congress again authorized the President to use the military to occupy the territory, appropriating \$20,000. See Act of Feb. 12, 1813, 3 Stat. 472 (“An Act authorizing the President of the United States to take possession of a tract of country lying south of the Mississippi territory and west of the river Perdido”).

117. For reasons that are unclear, the 1811 appropriations were not actually published in 1818, see 3 Stat. 471 (1818) (ed. note), although the injunction of secrecy as to the 1811 appropriation had been removed by resolution of the House on July 6, 1812. See 24 ANNALS OF CONG. 1692–

Thus, in the framing era, confidential spending was limited to the President's confidential fund, which had a defined, rather specific and fairly well-understood purpose—the support of those abroad acting on behalf of the United States, who might have to undertake confidential activities related to sensitive diplomatic affairs. When Congress thought there was a compelling justification for additional secret expenditures—such as money for ransom or to occupy foreign territory—they were made public rather promptly after the exigency that had given rise to the perceived need for confidentiality had passed. Until the twentieth century, the only confidential spending that Congress authorized involved the President's confidential fund, for which the President's certificates were used as public documentation.<sup>118</sup> To this extent, there was public disclosure of both the purpose and the amount of these expenditures. The size of the confidential fund was modest; by 1899, the annual appropriation for the confidential fund had reached only \$63,000.<sup>119</sup> In short, framing-era practice suggests that the original understanding was that the details of every single expense need not be disclosed, but the essential character of all significant expenses must be published within a year or so.

In the twentieth century, confidential spending proliferated. Although it is difficult to gather relevant information given the opacity with which Congress had authorized confidential spending, Congress authorized confidential accounts in a variety of instances, though as with the President's confidential fund for intercourse with foreign

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93 (1812). For a detailed review of the relevant enactments and the sequence of their enactment and subsequent publication, see DAVID HUNTER MILLER, U.S. DEP'T OF STATE, SECRET STATUTES OF THE UNITED STATES 5–10 (1918). For a helpful account of the secret preparations to occupy this territory, which resulted in an occupation later withdrawn in the face of diplomatic pressure, see ALEXANDER DECONDE, A HISTORY OF AMERICAN FOREIGN POLICY 121–24 (2d ed. 1971).

118. See Louis Fisher, *Confidential Spending and Government Accountability*, 47 GEO. WASH. L. REV. 347, 348, 355–57 (1979). There was at least one effort to breach confidentiality, and it enjoyed some success. In 1846, the House asked President Polk to account for payments on presidential certificate from the confidential fund for foreign intercourse during the period in which Daniel Webster had served as Secretary of State under President Tyler, and President Polk refused. See *id.* at 355–56; Herman Wolkison, *Demands of Congressional Committees for Executive Papers: Part I*, 10 FED. B.J. 103, 119–21 (1949). Subsequently, President Tyler and former Secretary of State James Buchanan testified before congressional committees, and former President Adams submitted a deposition, explaining the use of the contingent fund. See 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 7.1(c)(iii), at 948–49 (4th ed. 2009).

119. See FISHER, *supra* note 53, at 234.

nations, Congress required certification of confidential spending by a designated official in all but a handful of instances, involving exceptional cases such as the Manhattan Project, the Atomic Energy Commission, White House operations, and the President's own expenses.<sup>120</sup> Nevertheless, "[o]vershadowing other confidential funds, both in dollar amount and in character of operation, are those spent on the U.S. intelligence community."<sup>121</sup>

It seems evident that twentieth- and twenty-first-century confidential spending has gone well beyond any framing-era precedent. To be sure, the demands on the intelligence community may have exponentially increased as America became a preeminent world power, but framing-era practice amounts to a slender reed supporting the contemporary regime of confidential intelligence spending, in which only annual aggregate appropriations are disclosed.

### 3. Constitutional Ethos and Structure

Another approach for fleshing out the meaning of the Constitution's text involves consideration of underlying principles; constitutional text frequently reflects fundamental ethical or structural principles that aid constitutional interpretation.<sup>122</sup> One famous example is when the Court held that the First Amendment offered protection for allegedly defamatory speech to a degree unknown in the framing era, reasoning that protection for "criticism of . . . official conduct" was "the central meaning of the First Amendment,"<sup>123</sup> a point to which the Court repeatedly turned in the subsequent doctrinal evolution of the constitutional protection for freedom of speech.<sup>124</sup>

That a fundamental ethical and structural principle is reflected in the Statement and Account Clause seems evident. As we have seen, the framing generation understood the clause in just this fashion—

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120. See Fisher, *supra* note 118, at 358–82.

121. FISHER, *supra* note 53, at 236.

122. For Professor Bobbitt's description of ethical and structural argument, see BOBBITT, *supra* note 61, at 14–16, 20–22. For a similar approach resting interpretative practice on underlying principles derived from constitutional text, see JACK M. BALKIN, *LIVING ORIGINALISM* 259–73 (2011).

123. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

124. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 534–35 (2001); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 771–78 (1986); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342–48 (1974). For the seminal commentary on the significance of Justice Brennan's characterization of the First Amendment's meaning, see Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

advancing a basic republican value by enabling the people to hold their government effectively accountable for the manner in which public funds are spent. This understanding has both ethical and structural resonance. The clause suggests an ethical duty on the part of those who decide how the public's money will be spent to disclose their decisions. It also has a structural role in ensuring that the electorate has adequate information available to hold officials accountable for their decisions about how public funds are spent through the electoral process that the Constitution also mandates.<sup>125</sup>

Scholars advocating a right of access to government information frequently frame their case in terms of enhancing the republican values embedded within the Constitution regarding democratic accountability.<sup>126</sup> The judicial opinions that have gone furthest in advocating a First Amendment right of access to governmental information have invoked similar principles.<sup>127</sup> The Statement and Account Clause has a similar function; as one scholar put it, the clause represents a “commitment to political accountability.”<sup>128</sup> The clause reflects both an ethical obligation to provide information to the people and a precondition for achieving representative democracy through the Constitution's electoral machinery. It is part of the constitutional ethic and infrastructure of political accountability.

The clause's placement with the Appropriations Clause, moreover, reinforces this role. The Appropriations Clause has long been understood to require that all spending be authorized by congressional appropriation,<sup>129</sup> and it follows, as Kate Stith has observed:

Both clauses make Congress accountable to the public for all federal spending. The appropriations requirement mandates that government

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125. See U.S. CONST. art. I, § 2 (popular election to the House of Representatives); *id.* art. II, § 1 (electoral college to choose the President); *id.* amend. XII (electoral college to choose the President); *id.* amend. XVII (popular election to the Senate).

126. See, e.g., Adam Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 916–23 (2006); Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know,"* 72 MD. L. REV. 1, 24–43 (2012).

127. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587–88 (1980) (Brennan, J., concurring in the judgment); *Houchins v. KQED, Inc.*, 438 U.S. 1, 30–32 (1978) (Stevens, J., dissenting).

128. Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1016 (2005).

129. For a summary of precedent on this point, see 1 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 2 (2004 & Supp. 2014).

expenditure be authorized by legislative action. The statement and account requirement provides a means of enforcing the requirement that spending be duly authorized. . . . As a matter of textual coherence, the two phrases should be regarded as synonymous.<sup>130</sup>

Thus, even though the Statement and Account Clause is found in Article I along with other enumerated powers of Congress, like the Appropriations Clause with which it is paired, it is both a grant of authority and a constraint. Indeed, the constraining character of both clauses is confirmed by their placement in Article I's Section 9, along with other limitations on governmental powers.<sup>131</sup>

This discussion has two implications. First, the Statement and Account Clause creates a mandatory duty that binds the political branches; not merely a discretionary power of publication. It would make little sense to place the clause in the Constitution if it did no more than authorize publication when Congress or the Executive found it convenient; as one scholar wrote, "we hardly need the Statement[] and Account[] Clause to tell Congress to publish as much of the federal budget as it politically decides ought to be published."<sup>132</sup> Similarly, the clause is unnecessary to enable Congress to demand from the Executive whatever information about federal spending it deems necessary—Congress can simply refuse to appropriate until it receives whatever information about spending it wants, or attach reporting requirements to the appropriations it enacts. The clause is superfluous if understood as a grant of power to the political branches; it is meaningful only if understood as an ethical and structural constraint on the political branches. Disclosure pursuant to the clause is part of the process specified in the Constitution by which officials are accountable to the

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130. Stith, *supra* note 62, at 1357. For a contrasting view, arguing that in some circumstances, the President can authorize spending, see J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162. Even on this view, however, a politically accountable official must authorize public spending, and the Statement and Account Clause ensures that the public is in a position to hold the Executive responsible for these expenditures.

131. See U.S. CONST. art. I, § 9 (limiting power to ban the slave trade, suspend habeas corpus, impose direct taxes, prohibiting bills of attainder, ex post facto laws, taxes or duties on articles imported from another state, preferences for any port, and granting titles of nobility).

132. Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 129 (2007) [hereinafter Siegel, *A Theory of Justiciability*]. Elsewhere, Professor Siegel has added that the political process is often an unsatisfactory method for producing compliance with constitutional norms because elections are generally not focused on single issues such as the incumbents' compliance with constitutional norms, but instead turn on a far more complex amalgam of factors. See Jonathan R. Siegel, *The Institutional Case for Judicial Review*, 97 IOWA L. REV. 1147, 1169–71, 1178–80 (2012) [hereinafter Siegel, *The Institutional Case for Judicial Review*].



electorate, not an option to be utilized in the political branches' discretion.

Second, the clause, properly understood, requires disclosure sufficiently frequent and detailed to facilitate real political accountability, not mere formality. Justice Frankfurter once wrote of the Fourth Amendment and its requirement that searches ordinarily be authorized by warrant:

It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper.<sup>133</sup>

So it is with the Statement and Account Clause: it makes all the difference whether one views it as an obligation to release a number, or instead as a requirement for disclosure sufficient to enable the public to hold elected officials accountable for the manner in which public funds are spent. Viewed purely as a formal requirement requiring publication of a number, no matter how unhelpful, the clause has little point. Viewed as a requirement that articulates a precondition for effective political accountability, it requires that the government publish sufficiently detailed and comprehensible information so that the people can understand the workings of their government, and, if necessary, hold elected officials accountable at the next election.

#### 4. Constitutional Pragmatism

Pragmatism has purchase as well in constitutional interpretation; in the context of national security in particular, the Court has long since embraced Justice Jackson's warning: "[I]f the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."<sup>134</sup> Pragmatism accordingly might be thought to argue for reading the Statement and Account Clause to permit the government to offer a "statement and account" that conceals sensitive categories of spending the disclosure of which would do serious harm to national security.

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133. *United States v. Rabinowitz*, 338 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

134. *Terminiello v. City of Chi.*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). For a particularly pertinent case embracing this admonition see *Haig v. Agee*, 453 U.S. 280, 306–10 (1981), which rejected claims that revocation of the passport of a former CIA agent who had disclosed classified information without authorization infringed freedom to travel, free speech, and due process.

It is easy to state this pragmatic argument for concealing intelligence spending; it was nicely summarized by then-Director of Central Intelligence Stansfield Turner even as he agreed that aggregate appropriations should be disclosed, as he explained why any additional disclosure would be prejudicial to national security: “Were we to intentionally or inadvertently disclose further details of the budget figure, we would expose those areas of emphasis and expertise regarding collection and analysis of intelligence, and over time, trends in such emphasis would become obvious.”<sup>135</sup>

Similarly, then-Acting Director of Central Intelligence John McLaughlin, while also supporting disclosure of aggregate appropriations, opposed any further breakdown of individual agency as “giv[ing] too much opportunity for adversaries to understand how we are moving our money from year to year, from technical programs to human source collection and to other objectives.”<sup>136</sup>

Yet, a measure of skepticism is warranted toward this type of speculation. Disclosure may compromise legitimate concerns for secrecy, but it also facilitates accountability and exposes mistakes. Thus, incumbents have incentive to err on the side of secrecy, some less legitimate than others. Even Director Turner acknowledged, “intelligence communities in general are very reluctant to see any information released whatsoever.”<sup>137</sup> More recently, a presidential commission that included former members of the intelligence community observed:

The reasons why government officials want secrecy are many and varied. They range from the truly compelling to the patently illegitimate. Sometimes government officials want secrecy because they rightly fear that the disclosure of certain information might seriously undermine the nation’s security. Sometimes they want secrecy because they do not want to have to deal with public criticism of their decisions or because they do not want the public, Congress, or the courts to override their decisions, which they believe to be wise. Sometimes they want secrecy because disclosure will expose their

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135. *1977 Senate Intelligence Funds Disclosure Hearings*, *supra* note 59, at 6–7 (testimony of Admiral Stansfield Turner). To similar effect, see *id.* at 46 (statement of William E. Colby).

136. *Building an Agile Intelligence Community to Fight Terrorism and Emerging Threats: Hearing Before the S. Comm. on Gov’t Operations*, 108th Cong. 17 (2004) (testimony of John E. McLaughlin) [hereinafter *Senate Government Operations Hearings*].

137. *1977 Senate Intelligence Funds Disclosure Hearings*, *supra* note 59, at 14 (testimony of Admiral Stansfield Turner).

own incompetence, noncompliance, or wrongdoing. Some of those reasons for secrecy are obviously more worthy of deference than others.<sup>138</sup>

Similarly, in a debate about disclosing the intelligence budget, Senator Moynihan once opined: “Secrecy congeals intelligence. It conceals failure, and it conceals mistakes.”<sup>139</sup>

An illustration of the need for caution when assessing the intelligence community’s objections to financial transparency is provided by then-Director of Central Intelligence William Colby’s claim in 1975, in response to litigation seeking disclosure of CIA budgeting information, that disclosure of even aggregate appropriations, in combination with other publicly available information, would be of considerable use to a hostile power.<sup>140</sup> In 1994, the Director of Central Intelligence and a number of his predecessors similarly opposed disclosure of aggregate annual appropriations, expressing a litany of concerns that disclosure would inhibit future budgeting and assist potential adversaries.<sup>141</sup> In 2004, the Director of the FBI voiced a similar concern about disclosure of aggregate appropriations aiding adversaries,<sup>142</sup> and at his confirmation hearing later that year, Director of Central Intelligence-Designate Porter Goss also opposed disclosure of aggregate expenditures: “It served us well not to put that top line out when we were in what I will call a bipolar stand-off with the Soviet Union.”<sup>143</sup> Also that year, when a proposal to require disclosure of aggregate appropriations was removed from pending legislation, the Bush Administration applauded: “Disclosing to the nation’s enemies, especially during wartime, the amounts requested by the President, and provided by the Congress, for the conduct of the nation’s intelligence

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138. LIBERTY AND SECURITY, *supra* note 9, at 125.

139. 139 CONG. REC. S15560 (1993). For Senator Moynihan’s argument that secrecy had a corrosive effect on intelligence gathering during the Cold War, see DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* 178–201 (1998).

140. *1977 Senate Intelligence Funds Disclosure Hearings*, *supra* note 59, at 345–46 (interrogatory answers of William E. Colby). For a summary of the arguments that were made against disclosure of aggregate appropriation levels, see Best & Bazan, *supra* note 51, at 17–21.

141. *1994 House Intelligence Funds Disclosure Hearings*, *supra* note 59, at 6–11 (statement of R. James Woolsey); *id.* at 73–76 (statement of Robert Gates); *id.* at 76–77 (statement of Richard Helms).

142. See *Senate Government Operations Hearings*, *supra* note 136, at 18 (testimony of Robert S. Mueller III).

143. *Nomination of the Honorable Porter J. Goss To Be Director of Central Intelligence: Hearings Before the S. Select Comm. on Intelligence*, 108th Cong. 37 (2004) (testimony of Porter J. Goss).

activities would harm the national security.”<sup>144</sup> Yet, as we have seen, Congress directed disclosure of aggregate appropriations in 2007, without apparent ill effects.<sup>145</sup>

This is not the only instance in which intelligence officials’ predictions about the adverse effects of disclosure of classified information have proven overblown. Mark Fenster, for example, has amassed considerable evidence that the massive disclosure of classified information through WikiLeaks did not generate anything like the adverse effects predicted by government officials.<sup>146</sup> Similarly, it seems likely that those who designed the three programs considered in the three examples that introduced this article regarded secrecy as essential, and the programs as necessary to address profound, perhaps even existential threats to national security in the post-9/11 landscape. Yet, once those programs were disclosed to the public, even the presidential administrations that had previously supported them retreated. Apparently, these programs seemed less essential to national security in the face of the political accountability that transparency can produce.

To be sure, disclosure that breaks down intelligence spending beyond the aggregate annual intelligence budget poses some particular risks. Director Colby, for example, explained that if the CIA had been required to disclose that it was spending large sums on a new surveillance aircraft, the disclosure might have alerted adversaries, and could have led them to target likely manufacturers for espionage, or to advance their own efforts to develop similar technology.<sup>147</sup> He also argued that as more information is publicly released by the United States, it becomes cheaper and easier for adversaries to learn about United States intelligence capacities.<sup>148</sup> But, an adversary might make similar use of information about spending by the military to develop a new aircraft, and yet the military does not insist that this type of spending be concealed, even though its disclosure presents largely

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144. *The Nomination of Dr. Condoleezza Rice To Be Secretary of State: Hearings Before the S. Comm. on Foreign Relations*, 109th Cong. 283 (2005) (letter of October 18, 2004 of Joshua B. Bolten & Condoleezza Rice).

145. See text accompanying notes 53–56.

146. See Mark Fenster, *Disclosure’s Effects: Wikileaks and Transparency*, 97 IOWA L. REV. 753 (2012).

147. *1977 Senate Intelligence Funds Disclosure Hearings*, *supra* note 59, at 346–47 (interrogatory answers of William E. Colby).

148. See *U.S. Intelligence Agencies and Activities: Intelligence Costs and Fiscal Procedures: Hearings Before the Select Comm. on Intelligence, U.S. H.R.: Part One*, 94th Cong. 116–18 (1975) (testimony of William E. Colby).

indistinguishable risks to national security.

Nevertheless, there is little doubt that detailed disclosure could compromise intelligence gathering—comprehensive disclosure that reveals the specifics of ongoing operations and tactics, for example, would likely alert targets and thereby provoke countermeasures that could jeopardize their success. But, disclosure obligations could be tailored to avoid disclosing operational detail. For one thing, the Statement and Account Clause may not require such detailed disclosure—a question considered below. For another, even apparently unqualified constitutional text may admit of exceptions on sufficiently compelling circumstances. As an example, despite the seemingly absolute protection for free speech and a free press in the First Amendment, it may well be that on a compelling showing of imminent and serious danger to national security, a restraint on publication might be constitutionally permissible.<sup>149</sup>

Limiting seemingly absolute rights in this fashion is one device for ensuring that the Constitution does not become Justice Jackson's suicide pact. For just this reason, perhaps a limiting principle could be applied to the Statement and Account Clause that excuses disclosure to the extent that it would create a serious and demonstrable threat.<sup>150</sup> Congress's decision to delay disclosure of ransom payments in 1797 and the 1811 appropriation for the expense of the secret military preparations to occupy territory south of Georgia offers some framing-era support for delaying disclosure during periods when secrecy is essential for avoiding prejudice to ongoing negotiations or operations.<sup>151</sup> The possibility that particular disclosures might produce particular risks, however, surely cannot sustain a regime that as a matter of course, and without requiring any particularized justification, discloses nothing but aggregate intelligence appropriations.

When canvassing the pragmatic considerations, it is worth noting as

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149. See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713, 725–27 (1971) (Brennan, J., concurring).

150. In congressional testimony, Professor Thomas Emerson suggested tracking Justice Brennan's position on the permissibility of prior restraints, that "prohibition of disclosure on the basis of national security was permissible only when there was 'Governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea.'" *1977 Senate Intelligence Funds Disclosure Hearings*, *supra* note 59, at 98 (testimony of Thomas I. Emerson) (quoting *N.Y. Times*, 403 U.S. at 726–27 (Brennan, J., concurring)).

151. See *supra* text accompanying notes 109–17.

well that disclosure may entail risks, but it may also yield benefits. It is notable that the National Commission on Terrorist Attacks (the “9/11 Commission”) recommended that aggregate appropriations for the intelligence community and its component agencies should no longer be secret, not based on constitutional considerations but to improve the performance of the intelligence community.<sup>152</sup> Perhaps the 9/11 Commission’s proposal was too modest given the problem it identified. When only aggregate appropriations or spending is disclosed, this may also conceal particular programs that involve the kind of waste and inefficiency that could not bear public scrutiny, such as the satellite system described in the third example that opened this Article, and which proved unable to retain political support once the public got a glimpse of a debate that had previously been conducted only in secret. In this respect, facilitating public scrutiny of intelligence spending may strengthen the intelligence community when compared to that of an adversary that is not subject to an effective regime of political accountability. When officials know they will be held publicly accountable for successes and failures alike, they may exercise greater prudence in decision making.

Pragmatic considerations, in short, offer no clear guide for interpreting the Statement and Account Clause—secrecy has its virtues but also its vices. Perhaps pragmatism argues for an approach to the clause developed with this dualism in mind.

### *B. Ascertaining the Scope of the Obligation to Disclose Intelligence Spending*

As we have seen, intelligence spending is exempted from any obligation of public disclosure; only the total aggregate figures for the National and Military Intelligence Programs requested by the President and appropriated by the Congress are disclosed. At first blush, it seems impossible to reconcile this regime with the Statement and Account Clause.

Under the current regime, although limited information is released about appropriations, no information whatsoever is released about expenditures. The possibility that expenditures might diverge from appropriations is more than theoretical; both the Secretary of Defense and the Director of National Intelligence are granted authority to

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152. See NAT’L COMM’N ON TERRORIST ATTACKS, THE 9/11 COMMISSION REPORT 410, 416 (2006) [hereinafter 9/11 REPORT].

transfer appropriated funds that are available for intelligence activities.<sup>153</sup> Accordingly, disclosure of appropriations is hardly equivalent to a publication of expenditures as required by the Statement and Account Clause. The same is true with respect to information about intelligence spending given to Congress. It is unclear what classified intelligence information about intelligence appropriations and spending is shared with Congress, though apparently all members are permitted to review the classified annexes to appropriations legislation for intelligence spending.<sup>154</sup> But, even if comprehensive information about intelligence spending is shared with Congress, the rules of both Houses forbid members to disclose classified information to the public.<sup>155</sup> As we have seen, however, information must be disclosed to the public at large if the clause is to fulfill its function of enabling the electorate to hold officials accountable for the manner in which public funds are spent.

In light of the absence of any publication of intelligence expenditures, there are only two types of arguments that could reconcile this regime with the Statement and Account Clause. The first is a claim that when it comes to sensitive matters at the intersection of national security and foreign affairs in which a need for confidentiality presents itself, the clause is properly understood to accommodate that need. The second is a claim that the disclosure of aggregate appropriations is sufficient to comport with the clause. An inquiry into these arguments sheds considerable light on the scope of the obligation imposed by the Statement and Account Clause.

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153. See 10 U.S.C. § 429 (2012) (Secretary of Defense); 50 U.S.C. § 3024(c)(5)(B), (d) (2012) (Director of National Intelligence).

154. See, e.g., BEST, *supra* note 52, at 12; 1994 House Intelligence Funds Disclosure Hearings, *supra* note 59, at 11 (statement of R. James Woolsey). In addition, when funds are to be used for other than an appropriated purpose, the necessary congressional committees must be notified. See 50 U.S.C. § 3094.

155. See JOHN V. SULLIVAN, CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 111-157, at X.11(g), XXIII.13 (prohibiting disclosure of classified information unless the House votes to disclose and requiring members to take an oath prior to gaining access to classified information); U.S. SENATE SELECT COMM. ON INTELLIGENCE, RULES OF PROCEDURE app. A, § 8 (prohibiting disclosure of classified information unless select committee votes to do so and gives notice to majority and minority leaders and the president and Senate fails to timely vote to prevent disclosure).

### 1. The Argument for a National Security Exception to the Publication Requirement

The argument that the Statement and Account Clause tolerates secrecy upon adequate justification rests on a straightforward pragmatic claim that the clause accommodates concerns about the need for national security secrecy, although it relies as well on framing-era practice. As Gerhard Casper put it in congressional testimony:

In view of th[e] early history and in view of my general sense of the attitude of the framers toward secrecy, I find it difficult to believe that the statement and account clause mandates annual disclosures of intelligence expenditures if it is the considered judgment of the Congress that publication would harm the national security.<sup>156</sup>

In a legal memorandum submitted to Congress during the same congressional hearings, the CIA's Office of General Counsel agreed, relying on the Supreme Court's decision in *United States v. Richardson* to support the view that Congress has plenary power to decide what information should be disclosed to the public under the Statement and Account Clause.<sup>157</sup> Indeed, this view is suggested by dicta in *Richardson*, when the Supreme Court, while acknowledging that it "need not reach or decide precisely what is meant by 'a regular Statement and Account,'" nevertheless opined that "Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest," adding that "historical analysis of the genesis of [the Statement and Account Clause] suggests that it was intended to permit some degree of secrecy of governmental operations."<sup>158</sup>

Yet, it is enormously difficult to square this assertion of vast, if not entirely unlimited, congressional power over the manner and extent to which information about governmental expenditures will be disclosed with the Constitution's text, original understanding, and the Statement and Account Clause's place in constitutional ethos and structure. The text of the clause grants discretion over the timing of disclosure, but it admits of no categorical exception from the duty of disclosure for intelligence or national security-related spending. The evidence of the

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156. *1977 Senate Intelligence Funds Disclosure Hearings*, *supra* note 59, at 91.

157. *Id.* at 9 (Memorandum of Law from Office of General Counsel, CIA).

158. *United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974). To similar effect, see *Harrington v. Bush*, 553 F.2d 190, 194 (D.C. Cir. 1977) (dictum) ("This clause is not self-defining and Congress has plenary power to give meaning to the provision." (footnote omitted)).



original understanding of the clause indicates that it means what it says. Although opponents feared that congressional discretion related to frequency of publication might facilitate secrecy, the clause's proponents uniformly denied that assertion. Not one of them even hinted at the view that the clause admitted of any exception for national security or other sensitive types of spending, and they denied that it conferred unfettered discretion to delay disclosure indefinitely. Post-ratification commentary similarly discerned no broad power to treat some types of expenditures as confidential. The clause was understood to grant Congress a degree of discretion on the timing of disclosure, but not discretion about whether some expenditures were too sensitive to be disclosed.

Constitutional ethos and structure point to the same conclusion. The clause is coherent only as a check on the ability of elected officials to insulate themselves from political accountability; if Congress was to enjoy plenary power to conceal whatever it deems appropriately confidential about the manner in which public funds are spent, there would hardly have been a place in the Constitution for a provision imposing a mandatory duty of disclosure with respect to receipts and expenditures. To be sure, the Constitution plainly tolerates secrecy in some circumstances, such as with the Journal Clause, which expressly confers power on Congress to keep secret what it regards as sensitive information.<sup>159</sup> The Statement and Account Clause, however, confers no parallel authority.<sup>160</sup>

Indeed, the Statement and Account Clause is a remarkably

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159. See *supra* text accompanying note 63.

160. In its 1977 legal memorandum, ignoring the textual difference between the two clauses, the CIA's Office of General Counsel endeavored to make some use of the Journal Clause as a vehicle for interpreting the Statement and Account Clause: "It would appear foolish to attribute to the framers an intention to include in the Constitution an absolute obligation that every appropriation and expenditure be publicized, even though the Constitution explicitly authorizes each House to keep secret its debates and decisions on these very matters." *1977 Senate Intelligence Funds Disclosure Hearings*, *supra* note 59, at 12. This, however, seems more a pragmatic argument against the clause itself; as we have seen, the two clauses employ strikingly different formulations, and there is no evidence that anyone understood the Statement and Account Clause to admit of an exception for confidential information. Nor is it necessary to conclude that the Framers must have believed that the Journal Clause and the Statement and Account Clause reflected identical considerations when it came to secrecy. The closest anyone came during the process of framing to addressing that issue was when George Mason, at the Virginia ratifying convention, argued that information about government expenditures was different from other types of information that is properly treated as confidential. See *supra* text accompanying notes 82–85.

inappropriate vehicle to support a claim of effectively unfettered congressional power. By its terms, it delegates no power to Congress or the President, and is framed as a mandatory duty. Beyond that, this view makes the clause virtually meaningless. It suggests that if Congress found that disclosure of military or diplomatic spending, or spending of virtually any other type, would harm national security, Congress could prevent disclosure. On this view, the clause is deprived of efficacy. If the clause only requires disclosure when Congress thinks it prudent, the clause requires nothing more than the same policy judgment Congress would doubtless make about the propriety of disclosure in the clause's absence. In terms of constitutional ethos and structure, the clause becomes comprehensible only if it imposes a mandatory duty—if it treats disclosure as a precondition to ordinary politics to ensure they are conducted in a manner that facilitates accountability.

As for the evidence of framing-era practice invoked by Professor Casper and other defenders of confidential spending, it provides little in the way of support for the current regime of confidential intelligence spending. The First Congress authorized the President's confidential account, but the amount and the character of the confidential spending from the account were hardly a secret. The appropriation made plain that its purpose was to support individuals acting on behalf of the government abroad, it was widely understood that one of the functions of diplomats abroad was to engage in espionage, and the amounts spent on the basis of the President's certification were disclosed.<sup>161</sup>

Thus, there was little mystery about the amount or the relatively discrete purpose of the confidential expenditures from the confidential account. The confidential account most likely protected the names and locations of foreign agents from disclosure, and the precise salaries and duties of each, but it did little to conceal from the public the nature, purpose, and amount of these expenditures. Given the small size and relative specificity of the appropriation, the subsequent disclosure of what was spent from the account, and the relatively modest range of tactics involved in the eighteenth-century world of espionage, it is surely more plausible to regard the specificity of the appropriation and the subsequent certification procedure as representing a framing-era judgment about the type of disclosure that was deemed sufficient to

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161. *See supra* text accompanying notes 103–08.

comply with the Statement and Account Clause, rather than to suggest that the clause admits of a broad national security exception inconsistent with its text. The framing-era handling of the President's confidential account may offer convincing evidence that the specifics, down to the penny, of every single instance in which public funds are spent need not be disclosed, but it is far from convincing evidence to support a broad national security exemption from the Statement and Account Clause's disclosure obligation.

Perhaps, as Professor Casper believed, the more significant framing-era precedent was when the Third Congress increased the sum available to the President to one million dollars without further specifying the purpose of the appropriation, in an apparent effort to conceal the fact that the money was used to pay ransom.<sup>162</sup> Still, the appropriation was accompanied by a public statement of its purpose—relating to intercourse with foreign nations—and Congress ultimately came down on the side of disclosure, publishing the documents supporting its decision to appropriate the money at issue and disclosing the funds spent for ransom within about a year.<sup>163</sup> The 1811 secret appropriation covering the costs of preparations to occupy territory south of Georgia involved a military operation in which secrecy was essential, and the House also voted to make it public within about a year.<sup>164</sup> The historical evidence regarding the President's confidential fund, in short, offers scant support for concealing the vast sums incorporated in today's intelligence spending.

Beyond all this, caution is required when assessing the interpretive significance of this evidence. Even most originalists draw a distinction between original meaning and original expected applications, and regard only the former as binding.<sup>165</sup> Michael McConnell, for example,

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162. See *supra* text accompanying notes 109–110.

163. See *supra* text accompanying notes 111–15.

164. See *supra* text accompanying notes 116–17.

165. See, e.g., BALKIN, *supra* note 122, at 6–14; Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405, 410 (2007); Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 385–89 (2007); Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 668–72 (2009); Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 580–82 (2006); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1284–87 (1997); Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not to)*, 115 YALE L.J. 2037, 2059–62 (2006); James E. Ryan, *Laying Claim to the Constitution: The Promise of the New Textualism*, 97 VA. L. REV. 1523, 1539–46

has written that “[n]o reputable originalist . . . takes the view that the framers’ assumptions and expectation about the correct application of their principles is controlling,” explaining that “[m]ainstream originalists recognize that the Framers’ analysis of particular applications could be wrong, or that circumstances could have changed and made them wrong.”<sup>166</sup> For his part, Justice Scalia, likely the current Court’s foremost originalist, has agreed that constitutional interpretation should be based on the original meaning of the text itself, rather than “the concrete expectations of lawgivers.”<sup>167</sup>

Thus, it is the Statement and Account Clause’s text and not framing-era practice that reflects the obligation imposed by the clause; we should be skeptical of an approach to framing-era practice that argues for an exception to the obligation imposed by the clause inconsistent with its text. Framing-era practice is best understood to illuminate the type of disclosures that were regarded as consistent with the clause, rather than to support a categorical national security exception to the obligation of disclosure stated in the clause lacking textual support. Viewed in this light, framing-era practice is illuminating, and reconcilable with the clause’s text. It suggests that the clause imposes no obligation to disclose every penny spent, or every covert operation undertaken abroad. But in none of the framing-era precedents was the public deprived of information that enabled it to hold its representatives accountable for the manner in which public funds were spent—the public knew roughly what was spent on the salaries of foreign agents supporting its diplomatic efforts; roughly what those agents were doing; and when the confidential account was used for another purpose—the payment of ransom—those payments were disclosed, even over the President’s objection.

Confidential spending—primarily intelligence spending—mushroomed in the twentieth century. Nothing fairly comparable to a vast intelligence community engaging in electronic surveillance of American’s telephone habits or operating a fabulously expensive satellite system was secretly funded in the framing era. Yet, the Court

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(2011); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 Vand. L. Rev. 507, 513–14 (1988); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 Nw. U. L. REV. 923, 935 (2009).

166. McConnell, *supra* note 165, at 1284.

167. Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129, 144 (Amy Gutmann ed., 1997).

tells us that even absent framing-era support, “[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions’ regulating the relationship between Congress and the President.”<sup>168</sup> This observation, however, was made about the relationship of the legislative and executive branches. In that context, each branch of government has ample incentive to protect its prerogatives, and accommodations they reach may well be entitled to deference. The Statement and Account Clause, in contrast, functions to constrain and hold accountable the political branches to the public. It protects the interests of the people, not their elected representatives. Therefore, it should be unsurprising if the practices of the political branches have, over time, watered down the clause’s force. Accordingly, political branches’ judgment concerning the potency of a mechanism which holds them accountable to voters should surely be taken with a grain of salt.

There are certainly powerful policy arguments favoring national security secrecy. But, as the Supreme Court has reminded us, “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.”<sup>169</sup> So too does a constitutional disclosure obligation. Given the Statement and Account Clause’s demand for disclosure without categorical exception, pragmatic arguments about the justification for exempting intelligence spending from the constitutional obligation of disclosure are ultimately policy and not legal arguments. Perhaps, if it were clear that intelligence spending disclosures would amount to Justice Jackson’s suicide pact, a construction of the clause which demanded such disclosures should be rejected as absurd. But, as the discussion above demonstrates, pragmatic considerations yield no simple answer about the consequences of such a disclosure obligation.

This does not mean that the Constitution compels disclosure of everything that would not, if disclosed, produce an imminent and serious threat to national safety. The Statement and Account Clause does not demand unlimited disclosure; it requires only “a regular statement and account.” It may well be that the clause permits spending to be stated at a sufficiently high level of generality that disclosure of either aggregate appropriations or spending is constitutional, or at least permits some alternative that would obviate the concerns of the

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168. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (alteration in original)).

169. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

intelligence community about the perils of more detailed disclosure. It is to that question that we turn next.

## 2. The Argument that Disclosure of Aggregate Annual Appropriations Is Sufficient

The argument that disclosure of aggregate annual appropriations as required by current law is sufficient to satisfy the constitutional obligation of disclosure encounters two threshold problems. First, current law requires disclosure of aggregate appropriations, not spending; yet, the Statement and Account Clause requires disclosure of expenditures, not appropriations. Perhaps disclosure of aggregate spending would be sufficient, but spending does not inevitably track appropriations, especially given the power of the intelligence community to transfer appropriated funds.<sup>170</sup> Second, it is doubtful that current law produces accurate disclosure because intelligence spending is hidden within military and other appropriations.<sup>171</sup> Spending levels disclosed in the *Combined Statement* and elsewhere are therefore artificially high because they include funds actually transferred to and then spent by the intelligence community. The Statement and Account Clause's objective of enabling the people to understand how their money is spent is not achieved when published accounts of expenditures include funds actually spent for other purposes.<sup>172</sup>

Beyond these threshold problems, the case for deeming aggregate disclosure of aggregate spending as satisfying the Statement and

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170. See *supra* text accompanying note 153; see also S. REP. No. 95-274, at 15 (1977) (minority view of Sens. Chafee, Garn, Goldwater, Hathaway, Lugar, Moynihan, Pearson, and Wallop) (“[T]here is no way in which the [Statement and Account C]lause may be read as requiring publication of the annually *appropriated* amount as the majority of this Committee has recommended.”).

171. See *supra* text accompanying notes 51–54.

172. Professor Casper, despite his sympathy with the governmental interest in confidentiality, acknowledged the problem. After stating his view that Congress could decline to disclose intelligence spending, he added:

This is not to say that what is apparently the present system of deceptive appropriations and accounting is constitutionally bearable . . . . Accounting to serve any purpose must be accurate. This requirement may be served by allocating funds to relatively nonspecific governmental functions; it cannot be served, however, by pretending to spend money for one purpose while in reality it is spent for a totally different purpose. The present system for hiding intelligence appropriations should be scrutinized very closely as to what it does in terms of poor accounting and bad constitutional practices.

1977 *Senate Intelligence Funds Disclosure Hearings*, *supra* note 59, at 88 (statement of Gerhard Casper).

Account Clause remains fraught. The framing-era acceptance of the President's confidential fund powerfully suggests that the clause was not understood in the framing era to demand a precise accounting of every penny, but rather that the account had a fairly clear, discrete, and widely understood purpose. Indeed, a much larger ransom-related expense from the same account was separately disclosed with reasonable speed. Framing-era practice hardly supports the view that the clause permits the government to tell the public nothing about intelligence spending beyond aggregate annual figures. Plainly, at some point, spending is disclosed at such a high level of generality that it achieves compliance with the clause in only the most formal sense. If the government disclosed no more than total federal spending each year, its "statement and account" would be of no assistance in determining the purposes for which public funds were spent, or whether they were spent consistent with applicable appropriations. Disclosure at such a level of generality would effectively deny the public the information required to assess the benefits of public spending, even if it is apprised of the total cost.

As we have seen, there are powerful arguments based on original meaning and constitutional ethos and structure against reducing the Statement and Account Clause to a mere formality that denies the public information about how public funds are spent. Even as he defended confidential spending in his congressional testimony, Professor Casper acknowledged the point: "[I]t is obvious that some detailed breakdown has to occur because otherwise the people would not know for what purpose their money was expended."<sup>173</sup>

It follows that the *Combined Statement* does not comply with the Statement and Account Clause. Because intelligence spending is hidden in other appropriations, the *Combined Statement* is seriously misleading—intelligence expenditures are not reported as such, but instead are concealed within other heads of appropriation. If one were to consult the *Combined Statement* without more, one might conclude that the United States does not have an intelligence community.<sup>174</sup>

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173. *Id.* at 91.

174. This is not the only respect in which current practice may be problematic. For an argument that reporting practices related to federal insurance programs and government-related entities violate the clause, see Katherine Clark Harris, Note, *The Statement and Account Clause: A Forgotten Constitutional Mandate for Federal Reporting*, 32 YALE L. & POL'Y REV. 505, 529–35 (2014).

Even putting these problems aside, to the extent that the disclosure of aggregate annual figures creates a misleading impression about the performance of the intelligence community—concealing, for example, substantial waste and inefficiency, or serious costs to the public’s privacy and liberty—the public is deprived of material information that could otherwise be used to hold incumbents accountable through the electoral process. Omissions that create a materially false impression about the overall performance of the intelligence community therefore fall short of the constitutional duty of disclosure.

In fact, aggregate figures are a terribly unsatisfactory way for providing the public sufficient information to assess intelligence spending. Disclosure of aggregate spending can reveal overall trends, and they can be compared to trends in other areas of spending, but beyond that, little more can be discerned.<sup>175</sup> For example, when aggregate spending increases sharply, it is impossible to know whether this reflects added capabilities or waste. Among the intelligence and congressional officials who have publicly addressed the question, there seems to be unanimity of opinion that the disclosure of aggregate figures is of little value in understanding intelligence spending. When Congress considered disclosure of intelligence spending in the 1970s, every intelligence official who addressed the matter agreed that disclosing only aggregate spending would provide no meaningful insight; most opposed disclosure precisely because it would be so unhelpful.<sup>176</sup> The same assessment was offered by the chairs of the

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175. For an illustration of the limited insight that the aggregate annual budget data provides, see ERWIN & BELASCO, *supra* note 51, at 2–7.

176. See, e.g., *Disclosure of Funds for Intelligence Activities: Hearings Before the Permanent H. Select Comm. on Intelligence of the H.R.*, 95th Cong. 102 (1978) [hereinafter *1978 House Intelligence Funds Disclosure Hearings*] (testimony of William E. Colby) (“[T]here would be little public benefit in the revelation of an overall figure.”); *id.* at 147 (testimony of Admiral Daniel J. Murphy) (“[T]he activities and programs encompassed by the aggregate figure are so many and diverse, and the expenditures for them so often fluctuate over time, that we believe relatively little can be learned by observing changes in the overall figure.”); *1977 Senate Intelligence Funds Disclosure Hearings*, *supra* note 59, at 52 (testimony of William Colby) (“I believe that it is not necessary, that it would not be helpful to the public . . . and that it would be unwise for our Nation to be the first in the world to reveal its intelligence budget.”); *id.* at 74 (testimony of Richard Helms) (“[T]he thing that tilted me on the side of nondisclosure as against disclosure, was the idea that more and more information would be required to explain this and that figure.”); *id.* at 82 (statement of George Bush) (“I have concluded that one figure, standing alone, is all but meaningless.”). The Director of Central Intelligence did not oppose disclosure of the aggregate appropriation for nonmilitary intelligence on the ground that the disclosure would enhance the credibility of the CIA, but rather because it would facilitate public accountability. See *id.* at 17–18, 28–29, 30 (testimony of Admiral Stansfield Turner); see also *1994 House*



House and Senate Appropriations Committees.<sup>177</sup> In 1993, Director of Central Intelligence James Woolsey similarly opined: “coming forth with a single number communicates really nothing until one knows what goes into the number,”<sup>178</sup> a view embraced by a number of his predecessors at hearings the following year.<sup>179</sup> In a 1993 debate about disclosure of intelligence spending, members of the Senate took a similar position.<sup>180</sup> And, even as it recommended disclosure of aggregate appropriations in 2006, the 9/11 Commission acknowledged that this “top-line figure by itself provides little insight into U.S. intelligence sources and methods.”<sup>181</sup> Significantly, when the intelligence community’s proposed budget summary for fiscal year 2013 was leaked by Edward Snowden, it weighed in at 178 pages, and broke down spending in a manner that enabled an assessment of the

*Intelligence Funds Disclosure Hearings*, *supra* note 59, at 91 (testimony of Admiral Stansfield Turner) (“It isn’t this number itself is going to illuminate the world for the American public. It is that the American public does not trust the intelligence community and the way it is managed.”). To similar effect, see COMM’N ON ROLES AND CAPABILITIES OF U.S. INTELLIGENCE CMTY., PREPARING FOR THE 21ST CENTURY: AN APPRAISAL OF U.S. INTELLIGENCE 142 (1996) (“While disclosure [of the aggregate intelligence budget] would necessarily convey limited information, it would let the American public know what is being spent on intelligence as a proportion of federal spending. This in itself is a worthwhile purpose, and may, to some degree, help restore the confidence of the American people in the intelligence function.”).

177. See *1978 House Intelligence Funds Disclosure Hearings*, *supra* note 176, at 95 (testimony of George H. Mahon) (“Another reason I oppose publishing the intelligence budget total is that I do not believe it would substantially improve congressional handling of intelligence matters. . . . By itself the mere total would be somewhat meaningless and perhaps even misleading.”); *id.* at 117 (testimony of William D. Hathaway) (“[N]o one is going to learn anything from publication of a single figure.”).

178. *Director Woolsey—Future of the Intelligence Community: Hearing Before the Permanent Select S. Comm. on Intelligence*, 103d Cong. 13 (1993) (testimony of R. James Woolsey).

179. See, e.g., *1994 House Intelligence Funds Disclosure Hearings*, *supra* note 59, at 73 (statement of Robert Gates) (“I do not know how you would defend [the aggregate intelligence budget] once it is made officially a part of the public debate without breaking it down . . . .”); *id.* at 92 (testimony of Richard Helms) (“I don’t think the number by itself in the aggregate really enlightens anybody about anything.”); see also *id.* at 164 (statement of Robert F. Turner) (“[J]ust releasing a general figure . . . is going to be about as useful as saying the score is nine; and, if nothing else, it is going to lead people to want to ask questions.”).

180. See, e.g., 139 CONG. REC. S28418 (1993) (Sen. Cohen) (“[D]isclosing the bottom-line figure of what we spend on intelligence will not contribute one iota to the public’s understanding of what goes into the makeup of that intelligence budget . . . .”); *id.* at S28421 (Sen. Chafee) (“It seems to me that all that can come of the Senator’s amendment, if approved, is that with the details of the budget remaining secret, as it does under his amendment, it only frustrates the public, which wants to find out more about how the money is spent.”).

181. 9/11 COMMISSION REPORT, *supra* note 152, at 416.

extent to which the intelligence community had achieved goals identified by Congress.<sup>182</sup> Some thirty-two categories of expenses were detailed.<sup>183</sup> Such a disclosure, of course, permits far more meaningful analysis than is possible when only a single aggregate figure is released.

As we have seen, the Statement and Account Clause is properly understood to permit the people to hold their officials accountable for the manner in which public funds are spent. Disclosing only aggregate annual spending is a plainly inadequate means to that end. The aggregate figure provides no meaningful basis for an assessment of whether the intelligence community provides benefits that justify its enormous cost.

### 3. The Presumptive Obligation to Disclose Material Facts Annually

If the current disclosure regime falls short of constitutional standards, it remains to identify a constitutionally sufficient disclosure regime.

Consider, as a basis for ascertaining the scope of the constitutional duty of disclosure, an analogy to the duty to disclose material facts in the law of fraud. Under the federal securities laws, for example, the Supreme Court has concluded that a duty to disclose is breached by “a material misrepresentation or omission,”<sup>184</sup> and a misrepresentation or omission is considered material “when there is ‘a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information made available.’”<sup>185</sup> Similarly, the Second Restatement of Torts provides that a representation should be regarded as “material” when “a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in

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182. See Barton Gellman & Greg Miller, “Black Budget” Summary Details U.S. Spy Network’s Successes, Failures and Objectives, WASH. POST, Aug. 30, 2013, at A1.

183. See Wilson Andrews & Todd Lindeman, *52.6 Billion: The Black Budget*, WASH. POST (Aug. 29, 2013), <http://www.washingtonpost.com/wp-srv/special/national/black-budget/>.

184. *E.g.*, *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1192 (2013); see also RESTATEMENT (SECOND) OF TORTS § 525 (1977) (“One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for the pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.”); *id.* § 551(1) (“One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.”).

185. *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1318 (2011) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988)).

question.”<sup>186</sup> In the context of the Statement and Account Clause, this standard would mean that the constitutional duty to disclose is breached by misstatements or omissions relating to intelligence spending when the undisclosed facts would alter a reasonable person’s assessment of the overall performance of the intelligence community.

To be sure, an analogy between disclosures required by anti-fraud laws and the Statement and Account Clause is imperfect. For one thing, the public does not seek to maximize profits from the operations of government in the way that investors seek to profit from their investments. For another, the duty to disclose imposed by the Statement and Account Clause is affirmative and absolute rather than the more limited duty to refrain from fraudulent misstatement or concealment found in the law of fraud. Under the clause, the government is required to disclose, rather than merely to refrain from fraudulent misstatements when it chooses to disclose. Indeed, the absolute nature of the obligation imposed by the clause renders irrelevant the justifications that might be proffered for nondisclosure. We can presume that the government discloses only aggregate expenditures not in an effort to defraud, but in order to preserve what it regards as appropriate confidentiality. The clause, however, while granting the government a measure of discretion about timing, imposes an absolute duty to make disclosure.

Accordingly, the concept of materiality has much to commend it. The Statement and Account Clause is properly understood as a constitutional vehicle enabling the public to assess the performance of government. The clause therefore imposes a duty to disclose material facts necessary to such an assessment, just as the requirement of disclosure in the securities laws is properly understood as an effort to enable the public to assess the performance (and prospects) of the issuer of the securities. Materiality offers a helpful conceptual vehicle for determining what must be disclosed to give the public fair notice of pertinent financial facts with respect to how public funds are spent.

It is doubtless true that neither the text of the Statement and Account Clause nor the evidence of its original meaning refers to the concept of materiality. Still, framing-era practice lends it a bit of support. The framing-era treatment of the President’s confidential fund suggests that not every expense must be detailed, although the character and amount

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186. RESTATEMENT (SECOND) OF TORTS § 538(2)(a) (1977).

of significant categories of expense must be disclosed, especially when they involve types of spending of political and policy significance that are not fairly discernable from the public record—such as the payment of ransom.<sup>187</sup> This suggests a framing-era endorsement of using a threshold of significance to trigger the duty of disclosure. Beyond that, even many originalists agree that there are occasions on which original meaning must be supplemented to operationalize a constitutional command, necessitating resort to what they call constitutional “construction.”<sup>188</sup>

Nonoriginalists, for their part, cheerfully acknowledge that the interpretation of constitutional text must often be supplemented by judicially created doctrine because of the inadequacy of the text to resolve any number of issues about how the Constitution should be implemented.<sup>189</sup> Canvassing the nonoriginalist considerations, we have seen that the clause’s place in constitutional ethos and structure require that some standard be used to assess whether disclosures are adequate to produce meaningful political accountability, while pragmatism offers little clear guidance beyond avoiding disclosures that would create a manifest danger to national security.<sup>190</sup> Pragmatism counsels caution, but the pragmatic considerations are surely not so clear that they justify truncating the disclosure obligation in a manner inconsistent with any

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187. See *supra* text accompanying notes 102–118.

188. See, e.g., BALKIN, *supra* note 122, at 14, 31–32, 256–59; RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 118–30 (2004); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 5–14 (1999); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 467–72 (2013); Grégoire C.N. Webber, *Originalism’s Constitution*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 147, 173–76 (Grant Huscroft & Bradley W. Miller eds., 2011). Likely the leading academic dissenters from this view among originalists are Professors McGinnis and Rappaport, who argue that constitutional interpretation should be confined to interpretive methods in use in the framing era, though they agree that in the framing era, it was an understanding that some constitutional provisions might be unclear and present interpretive difficulties. See John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 757–60. Even on this view, however, something along the lines of a standard of materiality commends itself, given the evidence that the Statement and Account Clause was regarded as binding and required sufficiently robust disclosure to facilitate political accountability, though not requiring that every aspect of spending be disclosed.

189. See, e.g., RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 7–101 (2001); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 79–107 (2004); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1655–67 (2005).

190. See *supra* Parts I.A.3, I.A.4.

coherent account of the clause's test, history, and purpose, and producing a legal regime little different from what we would have in the clause's absence.

Thus, for the Statement and Account Clause, the concept of materiality commends itself as a vehicle for evaluating the adequacy of a financial disclosure, as it does in other areas of the law. Yet, as in other areas of the law, there is no precise formula for determining what constitutes sufficiently detailed disclosure to discharge a duty to disclose material facts. Moreover, the concerns addressed by the clause are not merely financial, but instead involve an assessment of the performance of the government. In this fashion, the clause is concerned with disclosure of information that is politically and not merely financially material. There are, however, some objective indicia that can be used to identify the minimum bounds of a constitutionally acceptable disclosure, in order to produce a constitutional construction that fleshes out the meaning of a constitutional text stated at a high level of generality but which nevertheless is properly understood as imposing a binding obligation.

The level of detail reflected in intelligence appropriations offers a useful starting point. If Congress regards a category of expense as sufficiently important to merit separate line-item treatment in classified intelligence appropriations, especially when it also identifies a particular goal or reporting requirement to benchmark the efficacy of spending in a discrete area, then presumably this is a politically material category of spending, at least in the judgment of the very officials that are politically accountable for that spending. Beyond that, although we cannot know what confidential activities might be revealed if all material information about intelligence spending were disclosed precisely because so much about intelligence spending is currently undisclosed, the examples that begin this Article provide useful illustrations of the concept of materiality for these purposes.<sup>191</sup> Each involved a failure of the government to disclose what would seem to be material information about the manner in which the government spends public funds; in all three examples, information had been concealed about the manner in which intelligence dollars are spent, and once that information came to light, it rendered intelligence-gathering programs politically untenable, and produced significant reforms. For just that

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191. *See supra* text accompanying notes 1–20.

reason, in the political sense most pertinent to the Statement and Account Clause, these disclosures brought material information to the public's attention—information could not be gleaned from aggregate spending levels alone.<sup>192</sup> These disclosures offer paradigmatic examples of material information that offer a starting point for fleshing out this standard.

As for the frequency with which material information about intelligence spending must be disclosed, although the Statement and Account Clause recognizes discretion by requiring disclosure “from time to time,” the clause's proponents consistently offered assurances that the discretion over timing was not unlimited and would not undermine the integrity of the disclosure obligation.<sup>193</sup> In terms of constitutional structure, and function as well, given the clause's role in securing political accountability, the discretion over timing implicit in the phrase “from time to time” should not be understood to justify a delay in disclosure so lengthy that it would render the information effectively useless in holding officials politically accountable for public spending. Delays on this order would convert the obligation of disclosure into one of more interest to historians than voters—a wholly implausible view of the constitutional role of the clause.

In no other context would an obligation to make periodic financial disclosure be viewed as granting unfettered discretion, much less discretion to permit delays so lengthy as to undermine the utility of disclosure. For example, if a loan were made pursuant to a contract in which a borrower pledged to provide the lender with an accounting of its financial condition “from time to time,” that would likely be construed to impose an enforceable rather than a fatally indefinite obligation.<sup>194</sup> There is little reason to view the Statement and Account Clause differently. Its inclusion in the Constitution doubtless reflects

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192. *Cf.* *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (defining “an omitted fact” in a proxy solicitation as “material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . . It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder.”).

193. *See supra* text accompanying notes 72–84.

194. *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. a (1981) (“[T]he actions of the parties may show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon. In such cases courts endeavor, if possible, to attach a sufficiently definite meaning to the bargain.”).

the binding character of a periodic disclosure obligation. Thus, in light of the clause's original meaning and its role in the Constitution's ethos and structure, the obligation to report "from time to time" is properly understood not as a grant of unfettered discretion; but instead, much as Richard Henry Lee explained to the Virginia ratifying convention, this phrase "must be supposed to mean, in the common acceptance of language, short, convenient periods."<sup>195</sup>

History not only confirms that discretion over the timing of disclosure is limited, but suggests what is likely the most obvious way to implement the periodic disclosure mandate. A requirement of annual disclosure dates to the framing era, is still in use, and is also employed for disclosure of aggregate intelligence appropriations under current law.<sup>196</sup> As we have seen, framing-era and even longstanding practice are of considerable aid in fleshing out the meaning of otherwise vague or ambiguous constitutional provisions.<sup>197</sup> The longstanding practice of annual disclosure confirms that that discretion over timing is properly regarded as limited, and given that the clause does not seem to contemplate different treatment for different categories of spending, the practice of annual disclosure for all other categories of spending suggests its soundness in this category as well. Moreover, annual disclosure offers a reasonable guarantee that disclosure is sufficiently prompt to facilitate meaningful political accountability through the electoral process.<sup>198</sup>

To offer a more concrete account of required disclosure, consider the *Combined Statement*, which represents the political branches' effort to comply with the Statement and Account Clause.<sup>199</sup> Given that the text

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195. 3 ELLIOT, *supra* note 81, at 295.

196. *See supra* text accompanying notes 47–50, 53.

197. *See supra* text accompanying notes 90, 168; *cf.* Nelson, *supra* note 90, at 527 ("Madison and his contemporaries expected the practice that developed under the Constitution to liquidate and settle the meaning of these contestable provisions." (footnote omitted)).

198. The Constitution employs the phrase "from time to time" in three other places: in the Journal Clause with respect to Congress's obligation to publish a journal of its proceedings, U.S. CONST. art. I, § 5, cl. 3; the President's obligation to "give Congress Information of the State of the Union," *id.* art. II, § 3, cl. 1; and Congress's power to create "inferior courts," *id.* art. III, § 1. Because the context in which this phrase appears in these provisions is so different from a financial reporting requirement, caution is required when using them to shed light on the Statement and Account Clause, but it is of some significance that in the framing era, the President's report on the State of the Union was thought to be an annual duty. *See, e.g.,* Vasan Kesavan & Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 13–15 (2002).

199. *See supra* text accompanying note 50.

of the Statement and Account Clause contemplates no special rules for particular types of spending, much less a categorical exemption for intelligence spending, the standards for and frequency of disclosure deemed appropriate by the political branches for all other purposes in the *Combined Statement* offer a baseline for identifying the scope of the duty to disclose intelligence spending. Moreover, with respect to specificity, the detail reflected in the *Combined Statement* for non-intelligence spending provides an objective baseline for specificity and frequency of disclosure consistent with the practicalities entailed in accounting for federal spending.

In particular, the *Combined Statement*'s handling of defense spending presumably reflects an effort to discharge the constitutional obligation of disclosure in light of legitimate concerns about national security confidentiality. After all, concerns about alerting adversaries to national security initiatives and capabilities are not unique to the intelligence community, but arise in the military as well. Moreover, any number of intelligence functions could be performed through ordinary military or law enforcement agencies, the spending of which would be subject to disclosure under the Statement and Account Clause. If essentially identical functions could be moved into the intelligence community and subjected for that reason alone to a less demanding regime of disclosure, incumbent officials would have an anomalous incentive to channel activities into the intelligence community in order to reduce the transparency of spending.<sup>200</sup> The approach to military spending taken by the *Combined Statement* accordingly offers a baseline for the specificity required in disclosure.

The *Combined Statement* breaks down expenditures for the Departments of the Army, Navy, and Air Force, and within each department, procurement is broken down, in the Army, for example, for aircraft, missiles, weapons and tracked combat vehicles, ammunition, and other procurement, identifying both spending and appropriated amounts.<sup>201</sup> This suggests a need to break down intelligence spending

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200. A number of scholars have pointed out the anomalies that are produced when essentially identical activities are subject to different regimes of oversight based on whether they are conducted by the military or the intelligence community, albeit without reference to the issues of disclosure of appropriations and spending considered here. See, e.g., Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SEC. J. 283, 352–65 (2011); Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SEC. L. & POL'Y 539, 583–628 (2012).

201. See COMBINED STATEMENT, *supra* note 50, at tbl.Department of Defense—Military, at



beyond aggregate figures. Yet, requiring disclosure that tracks the *Combined Statement* is likely insufficient. Disclosure of intelligence spending alone, even if broken down at the level of specificity reflected in the *Combined Statement's* report on defense spending, reduces transparency because intelligence appropriations, unlike defense appropriations, are classified.

We have seen both that one of the purposes of the Statement and Account Clause is to determine if spending has been properly authorized by law, and that congressional judgments about how to control intelligence spending by appropriation offer a guideline for assessing what types of spending should be regarded as material. If intelligence appropriations remain classified, however, it is impossible to determine if the intelligence community's spending has been authorized by law, or whether all aspects of spending that Congress regards as sufficiently politically material to warrant a separate appropriation have been disclosed.

Moreover, when appropriations are public, they provide additional insight into the manner in which public funds are spent. For example, the National Defense Authorization Act for 2014 not only contains a detailed breakdown of authorized spending,<sup>202</sup> but also discloses a variety of military initiatives as well as congressional efforts to contain their costs and assess their effectiveness.<sup>203</sup> These disclosures

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202. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 4001–701, 127 Stat. 672, 1086–163.

203. See, e.g., *id.* § 111, 127 Stat. at 690 (requiring a report on the status of Stryker vehicle spare parts); *id.* § 121, 127 Stat. at 691–92 (imposing cost limitation on aircraft carrier construction); *id.* § 124, 127 Stat. at 693–94 (imposing cost limitation on littoral combat ships); *id.* § 134, 127 Stat. at 695 (imposing limitation on purchasing C-27J aircraft); *id.* § 146, 127 Stat. at 700–01 (requiring consideration of alternative means to procure personal protection equipment); *id.* § 212, 127 Stat. at 703–04 (requiring report prior to purchasing new ground combat vehicle); *id.* § 213, 127 Stat. at 704 (limiting acquisition of unmanned carrier-launched surveillance and strike system); *id.* § 214, 127 Stat. at 704 (requiring report on Air Force logistics information technology modernization); *id.* § 216, 127 Stat. at 706 (limiting funds available for precision extended range munition program); *id.* § 217, 127 Stat. at 706–07 (requiring development of new air-launched cruise missile); *id.* § 231, 127 Stat. at 710–11 (requiring improvements to cost-estimate system for missile defense); *id.* § 237, 127 Stat. at 717–18 (requiring improved kill assessment capability for ground-based mid-course defense system); *id.* § 253, 127 Stat. at 723–24 (requiring report on strategy to improve body armor); *id.* § 325, 127 Stat. at 734–35 (requiring sustainment plan for littoral combat ship program); *id.* § 326, 127 Stat. at 735–36 (requiring asset-tracking plan); *id.* § 824, 127 Stat. at 810 (requiring Comptroller General's review of processes and procedures for weapons acquisition); *id.* § 904, 127 Stat. at 816–17 (requiring plan to streamline Department of Defense management headquarters).

importantly supplement those found in the *Combined Statement*, and surely would be considered in assessing whether the government has complied with the Statement and Account Clause when it comes to military spending. The lack of parallel disclosures for intelligence spending, however, leaves the *Combined Statement* without the supplementation available for military and other categories of spending in which appropriations are publicly disclosed.

Accordingly, at least presumptively, disclosure should be made as frequently and at a level of specificity roughly equivalent to the information made publicly available about defense spending annually in the *Combined Statement* and appropriations legislation. Prudential concerns about alerting adversaries to capabilities and covert operations are similarly present, and hence we can have some confidence that the political branches do not err on the side of excessive disclosure in that realm.

This does not mean that the clause demands disclosure so frequent and detailed that all ongoing confidential initiatives of the intelligence community are routinely publicized. Surely a wide variety of information about intelligence sources and methods can remain confidential without creating a materially false impression about intelligence spending. The obligation to disclose “from time to time” does not require immediate disclosure, and the standard of materiality does not require that the public be apprised of the performance of each discrete undertaking of the intelligence community, but rather that it receive sufficient information to make an assessment of its overall performance. As long as material facts are disclosed with sufficient promptness so that the disclosure has political salience, ample care can be taken to protect the confidential operational details of intelligence gathering.

The obligation to disclose only material facts accordingly permits a great deal of information—especially about specific ongoing covert activities—to remain confidential. The standard of materiality only requires that the public receive a fair overall impression of the manner in which the intelligence community spends appropriated funds; surely that is possible without disclosing the names of agents, where they are operating, or particular tactics that are employed to gather intelligence. Individual covert actions, for example, need not be disclosed unless they are so expensive or raise such serious issues that their existence or cost would be material to an overall assessment of intelligence spending.

As we have seen, the current disclosure regime, in which nothing

beyond aggregate annual appropriations are disclosed, falls far short of constitutional standards. This conclusion, however, leaves Congress free to enact a new statutory regime as long as it satisfies constitutional standards for disclosure.<sup>204</sup> Congressional efforts to tailor disclosure obligations that represent reasonable efforts to balance constitutional norms and prudential concerns might even be entitled to a modicum of deference to the extent that they are rooted in legitimate institutional expertise.<sup>205</sup> Moreover, the Statement and Account Clause grants a measure of discretion over the timing of disclosure, and a constitutional disclosure regime could afford officials discretion to delay disclosures in compelling circumstances. Perhaps, just as a prior restraint on publication may be justified in extraordinary circumstances, an initiative of importance and cost comparable to the Manhattan Project might warrant a departure from ordinary practices because of the demonstrable and immediate threat that disclosure would present to national security.<sup>206</sup> Such a rule would preclude an interpretation of the clause that could produce Justice Jackson's suicide pact.

The standard of materiality as a trigger for disclosure, even allowing for exigencies that might permit confidentiality in compelling circumstances, does not drain the Statement and Account Clause of its efficacy. As the examples opening this Article make plain, many covert intelligence-gathering programs have great political salience—once they are disclosed, they cannot stand the light of day without reform. These examples not only flesh out how materiality operates, but demonstrate that disclosure, even of an ongoing intelligence program, does not inevitably amount to a suicide pact. If the American people are to be compelled to fund a massive program that exposes them to warrantless wiretapping in the sole discretion of the executive or that vacuums up all of their telephone call records, or a gold-plated satellite program that offers highly debatable value, they are entitled to fair notice. The

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204. *Cf.* *Dickerson v. United States*, 530 U.S. 428, 436–42 (2000) (holding that Congress is free to regulate custodial interrogation by statute as long as such regulation satisfies constitutional requirements).

205. *Cf.* *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (“[C]oncerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government’s reading of the First Amendment, even when such interests are at stake. . . . But when it comes to collecting evidence and drawing factual inferences in this area, ‘the lack of competence on the part of the courts is marked,’ and respect for the Government’s conclusions is appropriate.” (citation omitted) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981)).

206. For a discussion of the doctrinal basis for a limitation on the disclosure obligation in such circumstances, see *supra* text accompanying notes 149–51.

Statement and Account Clause says so.

## II. JUDICIAL ENFORCEMENT OF THE STATEMENT AND ACCOUNT CLAUSE

In its only encounter with a lawsuit endeavoring to enforce the Statement and Account Clause, the Supreme Court held the suit nonjusticiable in *United States v. Richardson*.<sup>207</sup> That outcome, of course, leaves enforcement of the Statement and Account Clause to the tender mercies of the political branches. As we have seen, there is reason to doubt the political branches' appetite for disclosure. The Statement and Account Clause is a constitutional feature that facilitates the process by which the public holds incumbent officials politically responsible for the manner in which public funds are spent; we can hardly expect public officials to approach the task of facilitating accountability with enthusiasm. When a plausible justification such as national security presents itself to withhold disclosure, incumbent officials have ample incentive to seize on it. The judiciary, of course, lacks the incentive that incumbent officials have to insulate themselves from political accountability. But, the judiciary has not to date enforced the Statement and Account Clause, instead leaving that task to the politically accountable branches. The clause, in short, is a classic example of what Lawrence Sager once labeled "underenforced constitutional norms."<sup>208</sup>

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207. 418 U.S. 166 (1974). Before *Richardson*, the closest that the Court had come to treating with confidential spending was in *Totten v. United States*, 92 U.S. 105 (1875), an action to enforce an alleged contract with President Lincoln by which one Lloyd allegedly agreed "to proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States, and report the facts to the President; for which services he was to be paid \$200 a month." *Id.* at 105-06. The Court did not doubt the authority of the President, as Commander in Chief, to enter the contract, but given its confidential nature, the Court held that the alleged contract could not be enforced in a judicial proceeding which would necessarily compromise its confidentiality, without reaching any question about how payments under such an agreement should be disclosed under the Statement and Account Clause. *See id.* at 106-07. *Totten* was subsequently followed, again without reaching any question under the Statement and Account Clause, in an action brought against the Director of Central Intelligence to enforce an alleged confidential contract. *See Tenet v. Doe*, 544 U.S. 1, 8-11 (2005).

208. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1226 (1978). For an elaboration, see LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 86-128 (2004). This conception of underenforced constitutional norms enjoys considerable support among legal scholars. *See, e.g.*, FALLON, *supra* note 189, at 31-34; Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1594-96 (2000); Daryl J.

Accordingly, the discussion above is largely academic unless the Statement and Account Clause is judicially enforceable. There is, however, an emerging doctrinal avenue to judicial enforcement.

*A. The Justiciability of Litigation to Enforce the Statement and Account Clause*

*Richardson* can be understood to erect barriers to justiciability under two related doctrines—the standing requirement and the bar on adjudicating what are regarded as political questions. Subsequent doctrinal developments, however, have greatly narrowed *Richardson*'s force.

1. Standing

*Richardson* requested information that had been published pursuant to the Statement and Account Clause concerning the CIA's expenditures, and when he received only the *Combined Statement*, he brought suit seeking injunctive relief against the CIA's statutory exemption from financial reporting requirements.<sup>209</sup>

In its opinion holding *Richardson*'s suit nonjusticiable on the ground that he lacked standing to sue, the Court began by observing that “the question of standing in the federal courts is to be considered in the framework of Article III [of the Constitution] which restricts judicial power to ‘cases’ and ‘controversies.’”<sup>210</sup> The Court then wrote that to have standing, “[t]he party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement.”<sup>211</sup> *Richardson* claimed standing as a taxpayer, and the Court acknowledged that in *Flast v. Cohen*,<sup>212</sup> it had held that taxpayers have standing to challenge exercises of the taxing and spending power when “there is a logical nexus between the status

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Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 866–69 (1999); Robert C. Post & Reva B. Siegel, *Equal Protection Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 467–73 (2000); Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 321–24 (1987).

209. *United States v. Richardson*, 418 U.S. 166, 168–69 (1974).

210. *Id.* at 171 (quoting *Ass'n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 151 (1970) (quoting U.S. CONST. art. III, § 1)).

211. *Id.* at 172 (quoting *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923) (second alteration in original)).

212. 392 U.S. 83 (1968).

asserted and the claim sought to be adjudicated.”<sup>213</sup> But, Richardson, the Court wrote, “ma[de] no claim that appropriated funds are being spent in violation of a ‘specific constitutional limitation upon the . . . taxing and spending power,’” but rather sought “information on precisely how the CIA spends its funds.”<sup>214</sup> It followed that “there is no ‘logical nexus’ between the asserted status of taxpayer and the claimed failure of the Congress to require the Executive to supply a more detailed report of the expenditures of that agency.”<sup>215</sup> Richardson was merely “seeking ‘to employ a federal court as a forum in which to air his generalized grievances about the conduct of government.’”<sup>216</sup>

*Richardson* is hardly unassailable. In his dissenting opinion, Justice Douglas argued that because the Statement and Account Clause is part of the process by which officials are held politically accountable for spending, there was a sufficient nexus between taxpayer status and Richardson’s claim to support his standing to sue.<sup>217</sup> The soundness of this position, however, is open to question. *Flast* involved an appropriation to support religious schools, and the use of tax revenues to support religion has long been regarded as a form of coercion forbidden by the First Amendment’s Establishment Clause.<sup>218</sup> A violation of the Statement and Account Clause, however, may well not involve the same type of ideological coercion thought to inhere in the extraction of taxes to support religion; and without a coercive injury of this character, a complaint about the manner in which the government taxes and spends may not properly support taxpayer standing. At a minimum, mere citation to *Flast* will not do; one must construct an argument that a denial of information that must be disclosed under the Statement and Account Clause works the kind of injury that should afford taxpayers a right to sue.<sup>219</sup> The soundness of Justice Douglas’s

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213. *Richardson*, 418 U.S. at 174 (quoting *Flast*, 392 U.S. at 102).

214. *Id.* at 175 (quoting *Flast*, 392 U.S. at 104).

215. *Id.* (footnote omitted).

216. *Id.* (quoting *Flast*, 392 U.S. at 106).

217. *Id.* at 197–201 (Douglas, J., dissenting).

218. See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1445–47 (2011). For helpful scholarly explication of the type of coercive injury experienced by taxpayers compelled to fund governmental aid for religious activities, see William P. Marshall & Gene R. Nichol, *Not a Winn-Win: Misconstruing Standing and the Establishment Clause*, 2011 SUP. CT. REV. 215, 232–38; and Mark C. Rahdert, *Forks Taken and Roads Not Taken: Standing To Challenge Faith-Based Spending*, 32 CARDOZO L. REV. 1009, 1055–96 (2011).

219. Cf. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 271–72 (1988) (“[W]e should not make the mistake of thinking that there is something about federal taxpayer

argument along these lines is far from obvious; although a violation of the Statement and Account Clause undermines the Constitution's infrastructure of political accountability, linking standing to taxpayer status seems to miss something important about that infrastructure—elected officials are expected to be accountable to the electorate as a whole, not merely taxpayers.

In any event, even if *Flast's* nexus test, properly understood, supported standing in *Richardson*, the soundness of the nexus test itself is open to question. Taxpayer standing has long been regarded as problematic because of its inconsistency with the constitutional requirement that an alleged injury be redressed by a favorable judgment; in most cases, the Court has observed it is highly speculative whether a judgment identifying a constitutional deficiency in the process of taxing and spending will ultimately reduce the plaintiff's tax liability.<sup>220</sup> Indeed, in his separate opinion in *Richardson*, Justice Powell called for the repudiation of *Flast's* nexus test,<sup>221</sup> a view that members of the Court have reiterated more recently.<sup>222</sup>

Defenders of *Richardson* also argue that its rejection of standing for those who assert generalized grievances common to the public at large properly identifies the types of claims properly addressed through the political rather than legal process.<sup>223</sup> *Richardson's* critics respond, however, that an injury involving a denial of protections offered by

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status, considered in isolation, that will allow us to arrive at the correct standing decision in particular cases. Nor, when federal taxpayers are granted standing, as in *Flast*, should we make the related mistake of thinking that the decision has changed the essence of federal taxpayer standing. Rather, we are dealing only with a presumption, which may be overcome when the purposes of the particular clause at issue will be best served by permitting federal taxpayers to sue to enforce its obligations.”).

220. See, e.g., *Winn*, 131 S. Ct. at 1442–44; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342–46 (2006).

221. *Richardson*, 418 U.S. at 183–85 (Powell, J., concurring); see also *Flast*, 392 U.S. at 121–29 (Harlan, J., dissenting) (objecting to the view that standing should turn on the character of the plaintiff's claim).

222. See *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 633–37 (2007) (Scalia, J., concurring in the judgment). For scholarly criticism of *Flast*, see, for example, ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 63–65 (1970); Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 660–62 (1973); and Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1465–67 (1988).

223. See, e.g., Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1549–53 & n.185 (1991); Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 736–40 (1978); Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1699–700 (2007).

structural features of the Constitution, such as the Statement and Account Clause, should not be deemed insufficient to confer standing merely because it is widely shared.<sup>224</sup>

Whatever one's assessment of *Richardson*, its broadest language surely calls into doubt the justiciability of any litigation seeking access to information about the operations of government. The desire to obtain information about how the government functions may well be properly characterized as a generalized grievance, and given the language in *Richardson* suggesting that generalized grievances about an inability to obtain information about government operations are nonjusticiable, it becomes difficult to see how the federal courts could entertain any litigation seeking access to information about government—such as claims brought under the FOIA. In his dissenting opinion in *Richardson*, Justice Stewart made just this point; he argued that the government's refusal to provide Richardson information that he sought was indistinguishable from a case in which a litigant seeks to challenge an agency's refusal to provide requested information under the FOIA.<sup>225</sup>

Perhaps the distinction between standing to enforce the FOIA and standing to enforce the Statement and Account Clause lies in the FOIA's statutory grant of standing to persons seeking information about government. *Richardson* acknowledged that "Congress could grant standing to taxpayers or citizens, or both, limited, of course, by the 'cases' and 'controversies' provisions of Art. III."<sup>226</sup> *Richardson's* reference to Article III as a limitation on congressional power, however, suggests that Congress might be constitutionally precluded from conferring standing on those who seek information about government

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224. See, e.g., Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 271–79 (1990); Donald L. Doernberg, "We the People": John Locke, Collective Constitutional Rights, and Standing To Challenge Government Action, 73 CALIF. L. REV. 52, 98–102 (1985); David Dow, *Standing and Rights*, 36 EMORY L.J. 1195, 1209–15 (1987); Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915, 1936–39 (1986); Jeremy Patrick, *A Polemic Against the Standing Requirement in Constitutional Cases*, 42 CAP. U. L. REV. 603, 613–17 (2013); Robert J. Pushaw, Jr., *Fortuity and the Article III "Case": A Critique of Fletcher's The Structure of Standing*, 65 ALA. L. REV. 289, 342–46 (2014); Winter, *supra* note 222, at 1495–503. For scholarship contending that the framing-era understanding of judicial power permitted courts to entertain suits asserting an interest in compelling the government to obey the law, see, for example, Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Louis L. Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1269–82 (1961); and Winter, *supra* note 222, at 1394–425.

225. *Richardson*, 418 U.S. at 203–05 (Stewart, J., dissenting).

226. *Id.* at 178 n.11.



operations. Indeed, relying on *Richardson* and other cases articulating the rule against entertaining generalized grievances, the Court subsequently explained that Congress cannot, consistent with Article III, rely on “the public interest in proper administration of the laws” to create “an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue.”<sup>227</sup>

In the wake of *Richardson* and its progeny, some wondered whether this line of cases suggested that all litigation seeking access to information about the performance of government—such as claims seeking information under the FOIA—was nonjusticiable.<sup>228</sup> After all, the FOIA purports to grant about the broadest standing imaginable; it provides that federal agencies, “upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to *any* person.”<sup>229</sup> It goes on to provide that “[o]n complaint,” the federal district courts “ha[ve] jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.”<sup>230</sup> In this fashion, the FOIA confers a right to request information from a federal agency on virtually everyone, and if the requested information is improperly withheld, the requestor has a concomitant right to bring suit to compel disclosure.<sup>231</sup> This seems to be a right to obtain whatever information one wishes about the operations of government, without any requirement of an individualized injury; any “generalized grievance”—or even abstract curiosity—would seem sufficient. If *Richardson* and

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227. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576–77 (1992); see also *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (“[I]t would exceed [Article III’s] limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public’s nonconcrete interest in the proper administration of the laws. . . . [T]he party bringing suit must show that the action injures him in a concrete and personal way.” (quoting *Defs. of Wildlife*, 504 U.S. at 580–81 (Kennedy, J., concurring) (alterations in original))).

228. See, e.g., Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1189–90 (1993).

229. 5 U.S.C. § 552(a)(3) (2012) (emphasis added).

230. *Id.* § 552(a)(4)(B).

231. For helpful discussions of the breadth of standing to seek information under the FOIA, see O’REILLY, *supra* note 58, §§ 4:29–39; and Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine’s Dirty Little Secret*, 107 NW. U. L. REV. 169, 193–97 (2012).

its progeny erected a rule against the justiciability of what are regarded as generalized grievances, it would seemingly follow that FOIA claims are nonjusticiable.

And yet, despite *Richardson* and its progeny, the FOIA seems to have survived. Although the Supreme Court has never addressed the precise question whether *Richardson* and the bar on adjudicating what are regarded as “generalized grievances” renders suits seeking information under the FOIA nonjusticiable, it has been all but resolved by a pair of decisions addressing the justiciability of other statutes that similarly confer standing on those who seek information from the government.

In *Public Citizen v. United States Department of Justice*,<sup>232</sup> the suit was brought by organizations contesting the refusal of the American Bar Association to disclose a variety of information about its Standing Committee on the Federal Judiciary’s consideration of potential nominees for federal judgeships, alleging that disclosure was required under the Federal Advisory Committee Act (“FACA”).<sup>233</sup> The Court held that the organizations had standing to sue despite a claim that they failed to “allege[] injury sufficiently concrete and specific to confer standing” and instead “advanced a general grievance shared in substantially equal measure by all or a large class of citizens.”<sup>234</sup> The Court made short work of this attack on standing: “As when an agency denies requests for information under the Freedom of Information Act, refusal to permit appellants to scrutinize the ABA Committee’s activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue.”<sup>235</sup> The Court added:

The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure under FACA does not lessen [the organizations’] asserted injury, any more than the fact that numerous citizens might request the same information under the Freedom of Information Act entails that those who have been denied access do not possess a sufficient basis to sue.<sup>236</sup>

*Public Citizen* straightforwardly rejects the view that when one claims a legal entitlement to receive information, a refusal to disclose it is not a sufficiently concrete and specific injury to confer standing.

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232. 491 U.S. 440 (1989).

233. *Id.* at 447–48.

234. *Id.* at 448–49.

235. *Id.* at 449.

236. *Id.* at 449–50.

Indeed, one young lawyer with a big future named John Roberts saw just this implication in *Public Citizen*, citing it to support his conclusion that “[w]hen an agency wrongfully denies an individual’s FOIA request, that particular individual has suffered injury in fact under Article III and has standing to sue in federal court to redress that injury.”<sup>237</sup> *Public Citizen* did not, however, address *Richardson*, and the very brevity of its analysis might suggest that the Court had not considered the full implications of its holding.

The same cannot be said for the decision in *FEC v. Akins*.<sup>238</sup> In that case, a group of voters sought judicial review of the Federal Election Committee’s refusal to treat the American Israel Public Affairs Committee (“AIPAC”) as a “political committee” within the meaning of the Federal Election Campaign Act (“FECA”), and it required to disclose a variety of information that the statute provides that such committees must make public.<sup>239</sup> The voters prevailed in the court of appeals, but in the Supreme Court, as respondents, their standing to bring suit was challenged.<sup>240</sup> The Court observed that the injury on which the respondents’ standing was predicated consisted of “their inability to obtain information that, on [their] view of the law, the statute requires that AIPAC make public.”<sup>241</sup> Citing *Public Citizen*, the Court concluded that the respondents had identified an injury sufficient to confer standing:

There is no reason to doubt their claim that the information would help them (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC’s financial assistance might play in a specific election. Respondents’ injury consequently seems concrete and particular. Indeed, this Court has previously held that a plaintiff suffers an “injury in fact” when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.<sup>242</sup>

As for *Richardson*, the Court distinguished it: “Here, there is no constitutional provision requiring the demonstration of the ‘nexus,’” but

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237. John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1228 n.60 (1993).

238. 524 U.S. 11 (1998).

239. *Id.* at 15–18.

240. *Id.* at 19.

241. *Id.* at 21.

242. *Id.*

instead, “there is a statute which . . . seek[s] to protect individuals such as respondents from the kind of harm they say they have suffered.”<sup>243</sup> Moreover, “[t]he fact that the Court in *Richardson* focused on taxpayer standing, not voter standing, places that case at still a greater distance from the case before us.”<sup>244</sup> As for the claim that the respondents advanced only a “generalized grievance,” the Court responded: “[T]he informational injury at issue here, directly related to voting . . . is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.”<sup>245</sup>

#### a. Voter Standing

In *Richardson*, the Court stressed that only taxpayer standing was at issue.<sup>246</sup> *Akins* could be read as confining *Richardson* to cases asserting taxpayer and not voter standing. In *Akins*, the plaintiff-voters alleged that the information they sought would assist them in casting their votes, and for that reason the Court concluded that their injury was sufficiently particularized to support standing, and not merely an assertion of the generalized interest in promoting compliance with the law. The injury suffered by voters unable to learn anything of significance about intelligence spending, while seeking to hold incumbent officials accountable for such spending, seems, if anything, even more concrete and particularized than the injury asserted in *Akins*, which involved only information about the activities of a single alleged political committee and not budgetary decisions for which incumbent officials bear more direct accountability.

Even if the relationship between disclosure of information about government spending and the obligation to pay taxes is too tenuous to support taxpayer standing, *Akins* suggests that the relationship between disclosure and voting may well be sufficiently robust to support voter standing to enforce the Statement and Account Clause. The clause functions as a mechanism to enhance elected officials’ political accountability to the voters, and therefore a denial of information to which voters are entitled under the clause seems to work an injury no less direct and concrete as the injury that supported standing in *Akins*,

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243. *Id.* at 22.

244. *Id.*

245. *Id.* at 24–25. To similar effect, see *Massachusetts v. EPA*, 549 U.S. 497, 522 (2006).

246. *United States v. Richardson*, 418 U.S. 166, 167–68 & n.1 (1974).

which similarly rested on a statute that endeavored to enhance elected officials' political accountability to the voters.

To be sure, Richardson argued that “without detailed information on CIA expenditures—and hence its activities—he could not intelligently follow the actions of Congress or the Executive, nor could he properly fulfill his obligations as a member of the electorate,” and the Court characterized this as “a generalized grievance . . . since the impact on him [was] plainly undifferentiated and ‘common to all members of the public.’”<sup>247</sup> This discussion, however, was a dictum offered in the context of a claim of taxpayer standing. Even more important, as this dictum suggests, the rule against entertaining what are regarded as generalized grievances is properly understood as a rule against “suits ‘claiming only harm to [the plaintiff’s] and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than the public at large.’”<sup>248</sup> An action by a voter seeking disclosures about intelligence spending required by the Statement and Account Clause is not premised on a generalized interest in requiring the government to comply with the law, but rather on a constitutional mechanism that facilitates the accountability of the political branches for a discrete government function.<sup>249</sup> Indeed, in *Akins*, the Court wrote that had Richardson claimed standing as a voter, “the *Richardson* Court would simply have had to consider whether ‘the Framers . . . ever imagined that *general directives* [of the Constitution]. . . would be subject to enforcement by an individual citizen,” an inquiry that “would have rested in significant part upon the Court’s view of the Accounts Clause.”<sup>250</sup> Given the role that the clause serves in producing accountability through the electoral process, *Akins* suggests a powerful argument that voters have standing to enforce the clause. Taxpayer standing to enforce the clause, in contrast, is problematic.<sup>251</sup>

It is doubtless true that in *Richardson* the Court suggested that

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247. *Id.* at 176–77 (quoting *Ex parte Leavitt*, 302 U.S. 633, 634 (1937)).

248. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.3 (2014) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74 (1992) (alteration in original)).

249. *Cf. Richard Re, Relative Standing*, 102 GEO. L.J. 1191, 1212 & n.119 (2014) (arguing that *Akins* properly recognized standing based on the failure to disclose information to the plaintiffs “that would have helped them cast votes” while *Richardson* involved “the mere denial of information”).

250. *Akins*, 524 U.S. at 22 (alteration in original) (quoting *Richardson*, 418 U.S. at 178 n.11).

251. *See supra* text accompanying notes 218–22.

enforcing the Statement and Account Clause is none of the judiciary's business: "[T]he absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process."<sup>252</sup> In his extrajudicial writing, Justice Scalia has elaborated, arguing that it is not the function of the judiciary to entertain the claims of majorities asserting the interest of the general public in enforcement of the law, which are instead appropriately left to the political process.<sup>253</sup> And, of course, one might argue that the relief issued in a case brought to enforce the Statement and Account Clause provides only a generalized benefit to the public at large. There are, however, serious problems lurking within these claims.

As the discussion in Part I above demonstrates, the Statement and Account Clause treats disclosure of public spending not as a matter for resolution through the ordinary political process, but rather as a precondition for ordinary politics. The clause requires that politics be conducted under circumstances in which the voters are provided with sufficient information about government spending. Indeed, the objective of fostering political accountability is of greatest concern to those who are dissatisfied with incumbent officials and orthodoxies. If critics of the status quo cannot dislodge from the bowels of the government information about its operations, it may be difficult to make the case for change—the task of today's minority in making the case that it should be tomorrow's majority becomes that much harder.<sup>254</sup> Accordingly, the injury identified by a voter who has been denied information about intelligence spending is not merely the generalized concern of the body politic as a whole, as the Court held in *Akins*.<sup>255</sup>

Whether *Richardson* would have come out differently had it involved voter rather than taxpayer standing is a question that the Court noted but

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252. *Richardson*, 418 U.S. at 179.

253. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881, 894–97 (1983). But cf. Siegel, *A Theory of Justiciability*, *supra* note 132, at 101–02 (discussing collective action problems involved in remediating constitutional violations that can be characterized as generalized grievances); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 219–20 (1992) (same).

254. Cf. *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 242 (1974) ("[T]he failure of the CIA to account for any of its expenditures suppresses public indignation and may hinder the arousal of political opposition."). For a more elaborate argument along these lines, see Steven G. Gey, *The Procedural Annihilation of Structural Rights*, 61 HASTINGS L.J. 1, 60–62 (2009).

255. See *supra* text accompanying notes 238–45.

did not decide in *Akins*.<sup>256</sup> If so, this would convert *Richardson* into little more than a technical rule about the difference between taxpayer and voting standing, a view that perhaps gives too little weight to *Richardson*'s concerns about litigating generalized grievances. Yet, the Statement and Account Clause may identify a type of duty to the public that the judiciary appropriately enforces to preserve the Constitution's conception of political accountability. Even if this reduces *Richardson* to a rule of pleading, the Court has often made standing turn on niceties of pleading.<sup>257</sup> Still, the Court has expressed concern about entertaining suits based on what are regarded as generalized grievances, not merely in addressing taxpayer standing, but also to limit voter standing, at least when they are not brought by voters who allege that they reside in districts drawn in violation of one-person, one-vote principles.<sup>258</sup> Perhaps, however, in cases in which the constitutional infrastructure for enabling the voters to hold officials accountable through the electoral process—such as the Statement and Account Clause—is at issue, the Court would conclude that *Akins* governs, rather than *Richardson* and its progeny, much as the Court held voters may attack “congressional apportionment laws which debase a citizen's right to vote.”<sup>259</sup> When the mechanisms that produce political accountability are at stake, after all, voters are asserting their own prerogatives as voters, not merely a generalized interest in securing obedience to the law.<sup>260</sup>

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256. *FEC v. Akins*, 524 U.S. 11, 22–23 (1998).

257. *See, e.g., Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009) (rejecting standing based on “a failure to allege that *any* particular timber sale or other project claimed to be unlawfully subject to the regulations will impede a specific and concrete plan of Bensman's to enjoy the National Forests”); *Warth v. Seldin*, 422 U.S. 490, 504 (1975) (“We may assume, as petitioners allege, that respondents' actions have contributed, perhaps substantially, to the cost of housing in Penfield. But there remains the question whether petitioners' inability to locate suitable housing in Penfield reasonably can be said to have resulted, in any concretely demonstrable way, from respondents' alleged constitutional and statutory infractions. Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed.” (citation omitted)).

258. *See, e.g., Lance v. Coffman*, 549 U.S. 437, 439–42 (2007) (per curiam); *United States v. Hays*, 515 U.S. 737, 742–46 (1995)); *see also Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 216–27 (1974) (rejecting standing of citizens to challenge members of Congress from holding commissions in the military under the Incompatibility Clause); *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977) (rejecting legislator's standing to challenge statutory funding and reporting provisions governing the CIA under the Statement and Account Clause).

259. *Wesberry v. Sanders*, 376 U.S. 1, 5 (1964).

260. In addition to the constitutional dimensions of standing, the Court has articulated

### b. FOIA Standing

A contrasting reading of *Akins* would reject Richardson's standing even if he had asserted injury as a voter, but would render *Richardson* and other cases rejecting standing to press what are regarded as generalized grievances inapplicable to cases in which Congress has authorized the plaintiff to bring suit, on the view that Congress has authority to create by statute legally cognizable injuries sufficient to confer standing to sue. This reading of *Akins* as resting on a statutory right to information has been embraced by a number of commentators.<sup>261</sup> There is ample precedential support for the view that Congress has the power to create legally cognizable injury by statute; it has long been settled that "[t]he . . . injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"<sup>262</sup> This rule had even been applied to an assertion of

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prudential aspects of standing that "encompass[] 'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'" *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). In light of the discussion above, it should be plain that voters are the proper parties to complain about a violation of the Statement and Account Clause and lie within the zone of interests protected by the clause because its disclosure requirement implicates the process by which elected officials are to be held accountable to them. The discussion above also explains why an action brought by voters to enforce the clause should not be regarded as a generalized grievance, at least in terms of the constitutional aspects of the standing inquiry under Article III. The Court has never squarely held this doctrine also implicates distinct nonconstitutional prudential concerns about judicial interference with the judgments of the political branches on matters of national security. If a claim were advanced along these lines, however, it is unclear how, in a case in which relief is sought against an ongoing constitutional violation, nonconstitutional considerations of this character could trump a court's obligation to enforce a constitutional command such as the Statement and Account Clause. *Cf. Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) ("To the extent that respondents would have us deem petitioners' claims nonjusticiable 'on grounds that are prudential rather than constitutional,' 'that request stands in some tension with our recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging.'" (citations omitted) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014))). *See generally* S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95, 127–32 (2014) (advocating abolition of prudential standing requirements). Additional discussion of the anomalies in a conclusion that a court could elevate nonconstitutional prudential considerations over the constitutional disclosure mandate is found in Part II.B.1 below.

261. *See, e.g.*, Kimberly N. Brown, *What's Left Standing? FECA Citizen Suits and the Battle for Judicial Review*, 55 U. KAN. L. REV. 677, 715–28 (2007); Lee & Ellis, *supra* note 231, at 197–201; Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 641–48 (1999).

262. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992) (quoting *Warth v. Seldin*, 422 U.S.



standing based on an informational injury prior to *Public Citizen* and *Akins*. The Court earlier held that in the Fair Housing Act, Congress properly conferred standing to contest discriminatory rental practices on testers who had no intention of renting or purchasing a home, but who were nevertheless deprived of a statutory right to accurate information about the availability of housing.<sup>263</sup> It follows that although *Richardson* might bar voter-standing suits that have not been statutorily authorized, such as *Richardson*'s action, it would not bar a suit seeking information about intelligence spending predicated on the statutory right to the disclosure in the FOIA.

The view that Congress can create by statute sufficient, legally cognizable injuries that confer standing on those who otherwise have no justiciable claim has considerable appeal. If Congress has the constitutional power to enact the FOIA as a means of enhancing the accountability of the Executive Branch by requiring executive agencies to disclose information about their activities, surely an appropriate vehicle for achieving accountability would be to delegate to interested individuals the means to enforce the FOIA's disclosure requirement. After all, if enhancing accountability through public disclosure is a permissible legislative objective, then one logical way to pursue it is to grant to the public a right to enforce a statutory disclosure requirement.<sup>264</sup> Moreover, the FOIA particularizes both injury and right in a way that the Statement and Account Clause alone does not. The clause imposes a duty running to the public at large; the legal duty to disclose information articulated in the FOIA, in contrast, is triggered only when a particular individual requests specified information, and the resulting duty to disclose runs only to the individual FOIA requestor. In this sense, a failure to disclose information under the FOIA has the character of a particularized injury—not a generalized grievance, as *Akins* and *Public Citizen* conclude.

In addition, restrictions on standing can be understood as preserving

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490, 500 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)); see also *id.* at 580 (Kennedy, J., concurring) ("In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . .").

263. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–75 (1982).

264. Cf. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 185–88 (2000) (holding Article III permits Congress to authorize private litigants to bring suit to enforce environmental laws seeking civil penalties payable to the government as a means of deterring violations of law).

the executive's prerogative to enforce the law. Standing to enforce the FOIA, however, does not amount to an effective transfer of prosecutorial discretion from the executive. The FOIA is not a delegation of prosecutorial discretion to the public; instead, as the Court has explained, "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."<sup>265</sup> Therefore, FOIA requestors are properly understood as serving an oversight, rather than a prosecutorial function. Hence, they do not undermine executive prerogatives in the same way as a statutory grant of standing to members of the public to enforce the law. Accordingly, if Congress has the power to enact the FOIA in order to promote executive accountability, then there is no reason to regard the FOIA as impermissibly intruding on executive power.<sup>266</sup> It follows that, because *Richardson* was not a case involving a congressional grant of standing to those who have been denied access to agency records, it does not control cases in which such a statutory right—and statutorily defined injury—is at issue.<sup>267</sup>

There are, however, constitutional limits on congressional power to confer standing to assert statutory claims. The Court has long insisted:

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265. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

266. For a discussion along similar lines, see Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 827–29 & n.205 (2009). For a more general discussion of congressional power to regulate judicial practice and procedure under the Necessary and Proper Clause, see David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75.

267. Some have argued that the rule against entertaining generalized grievances is properly understood as a prudential consideration rather than a constitutional bar and accordingly Congress can repudiate it by statute. See, e.g., Kimberly N. Brown, *Justiciable Generalized Grievances*, 68 MD. L. REV. 221, 239–46 (2008). Indeed, the Court has sometimes characterized the problem with suits based on generalized grievances as a prudential consideration protecting the political branches against unwarranted judicial interference. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004); *Devlin v. Scardelletti*, 535 U.S. 1, 6–7 (2002); *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 474–75 (1982); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 120–21 (1979). But, on other occasions, the Court has characterized the rule as of constitutional dimension. See, e.g., *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.3 (2014); *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–76 (1992). At best, the law seems unsettled on this point, and a consideration of whether the rule is properly regarded as constitutional or prudential goes well beyond the scope of this discussion. But, to the extent that the rule against hearing generalized grievances is regarded as prudential, the FOIA represents a legislative rejection of such prudential considerations.

“In no event . . . may Congress abrogate the Art. III minima: A plaintiff must always have suffered ‘a distinct and palpable injury to himself,’ that is likely to be redressed if the requested relief is granted.”<sup>268</sup> Moreover, the Court has also held that Congress may not confer standing based on “the public interest in proper administration of the laws” and thereby “permit . . . all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue.”<sup>269</sup> FOIA standing, however, rests on individualized and concrete harm; the FOIA imposes a duty to disclose to an individual requestor that, if breached, gives rise to a concomitantly individualized injury rather than a generalized grievance. There is accordingly ample reason to regard the denial of information that is useful both to voters and the public at large in holding officials politically accountable as a “distinct and palpable” injury to the requestor, and a judicial order compelling release of that information unquestionably redresses that injury. Moreover, as we have seen, the FOIA is not premised on an abstract interest in the proper administration of the law but rather facilitates processes of political accountability.

Accordingly, a denial of information sought under the FOIA produces a sufficiently concrete and particularized injury to support standing to sue, even if, absent the statutory right to disclosure created by the FOIA, such a claim would be regarded as a nonjusticiable generalized grievance. There is no novelty in this conclusion. It is often the case that a statute creates individual rights that would not otherwise exist.<sup>270</sup> It is common as well that an individual’s dissatisfaction with an allegedly unlawful government policy that might otherwise represent a nonjusticiable generalized grievance can support standing to sue once that policy is applied in a manner that produces a sufficiently concrete and particularized injury to that individual.<sup>271</sup>

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268. *Gladstone*, 441 U.S. at 100 (footnote and citations omitted) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

269. *Depts. of Wildlife*, 504 U.S. at 576–77.

270. See *supra* text accompanying notes 260–261.

271. See, e.g., *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1154–55 (2013) (although litigants lacked standing to challenge electronic surveillance without proof that it had intercepted their conversations, if the fruits of surveillance were used to bring proceedings, defendants whose conversations were intercepted would have a basis to establish standing to sue); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181–84 (2000) (although standing to challenge alleged violations of environmental laws cannot be based on general claims that plaintiffs use wildlife areas, allegations that alleged violations have harmed specific wildlife areas used by the plaintiffs are sufficient to establish standing); *Allen*, 468 U.S. at 761–63 (although

Indeed, *Public Citizen* and *Akins* make both points.

One might agree that claims under the FOIA are usually justiciable, but still resist that conclusion when it comes to classified information about intelligence spending on the ground of redressability. After all, the FOIA treats virtually all information about intelligence spending as exempt from disclosure.<sup>272</sup> The availability of a statutory exemption from the general duty of disclosure seemingly means that an action brought pursuant to the FOIA would fail to redress the injury asserted by a FOIA requestor seeking information about intelligence spending. But, the existence of a potential or even a meritorious defense to an action seeking disclosure of information does not defeat standing to sue. Instead, it is regarded as a defense on the merits.<sup>273</sup>

In *Akins*, for example, after the Court rejected the attack on the respondents' standing, it remanded the case to the Federal Elections Commission to consider whether new regulations it had proposed would defeat the claim for disclosure.<sup>274</sup> Thus, the existence of a potential defense did not defeat standing. In *Public Citizen*, the Court actually reached the defense tendered on the merits and concluded that it prevailed. Yet, this conclusion did not somehow operate to defeat the plaintiff's standing to sue.<sup>275</sup>

Thus, the availability of a defense on the merits does not operate to defeat the plaintiff's standing. A meritorious defense may win the lawsuit for the defendant, but it does not undermine the plaintiff's standing to sue, which turns only on whether redress would likely occur "if the requested relief is granted."<sup>276</sup> If standing could be defeated by the availability of a defense on the merits, in contrast, then presumably a federal court could never enter judgment for a defendant; the existence

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claims by parents of public school students that state aid to discriminatory private schools produce "abstract denigration injury" do not confer standing, allegations that such aid produces unequal access to public goods or deprives litigants of rights under desegregations decrees confer standing); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (although doctors lacked standing to sue for a declaratory judgment that statute prohibiting use of contraceptives was invalid, once they had been convicted under the statute they had standing to attack it).

272. See *supra* text accompanying notes 57–58.

273. See, e.g., *Bond v. United States*, 131 S. Ct. 2355, 2362 (2011) ("[T]he question whether a plaintiff states a claim for relief 'goes to the merits' in the typical case, not the justiciability of a dispute . . . ." (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 92 (1998))).

274. *FEC v. Akins*, 524 U.S. 11, 26–29 (1998).

275. *Pub. Citizen v. U.S. Dep't. of Justice*, 491 U.S. 440, 451–67 (1989).

276. *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979) (emphasis added and footnote omitted).

of a meritorious defense would defeat the plaintiff's standing to bring the case, and therefore render it outside the federal judicial power over "cases" and "controversies."<sup>277</sup>

There is one final problem with an effort to use a statutory exemption from disclosure to defeat the standing of a litigant seeking information about intelligence spending under the Statement and Account Clause. The statutory exemption, to the extent that it permits the government to conceal information that must be disclosed under the clause, may well be unconstitutional. But, before we consider that point, one more

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277. Indeed, standing, at least in its constitutional dimensions, is required for a federal court to exercise jurisdiction over a case. See, e.g., *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230–31 (1990). Nevertheless, prior to *Public Citizen* and *Akins*, the D.C. Circuit, after treating with a FOIA requestor's suit seeking information about the CIA's legal bills and agreements with law firms on the merits insofar as the requestor premised his claim on the FOIA, then relied on *Richardson* to hold that the requestor lacked standing to challenge the statutes on which the CIA relied to defend its refusal to disclose the information at issue under the Statement and Account Clause, reasoning that the requestor's attack on the statutes on which the CIA's defense was predicated was a nonjusticiable generalized grievance: "For a FOIA plaintiff as well as a taxpayer, the constitutional objection to the CIA's fiscal secrecy is shared in common with all members of the public, and under the logic of *Richardson* this factor bars standing." *Halperin v. CIA*, 629 F.2d 144, 153 (D.C. Cir. 1980) (alternate holding) (footnote omitted). More recently, a district court in that circuit followed the *Halperin* holding. See *Aftergood v. CIA*, 355 F. Supp. 2d 557, 562–63 (D.C. Cir. 2005). *Halperin's* approach is deeply confused. If the court has jurisdiction over the case because *Halperin* had standing to sue for information under the FOIA, it is entirely unclear how he could not somehow lose that standing—with the court therefore somehow losing its jurisdiction—only insofar as *Halperin* attacked the constitutionality of the statutes on which the CIA had relied to mount its defense. After all, if *Halperin* had a sufficiently concrete and particularized interest in acquiring information about the CIA's spending to grant him standing to sue under the FOIA, he did not lose that concrete and particularized interest merely because he also challenged the statutory basis on which the CIA relied to defend the case. Standing inquires into the plaintiff's interest in bringing suit, not whether a court can consider particular defenses or responses thereto in the ensuing litigation; as the discussion above demonstrates, even the availability of a defense on the merits—such as the CIA asserted in *Halperin*—does not deprive the plaintiff of standing. *Richardson* explains that "a federal court cannot 'pronounce any statute . . . void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.'" *United States v. Richardson*, 418 U.S. 166, 171 (1974) (citation omitted) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). It follows that in an otherwise justiciable action involving the legal rights of a FOIA requestor, a court may indeed consider the constitutionality of statutes that exempt the material at issue from disclosure. The flaws in *Halperin's* reasoning become even more evident in light of the subsequent decisions in *Public Citizen* and *Akins*, which conclude that even what would otherwise be generalized grievances become justiciable when a specific request for information is made and refused under a statute that creates an individual right to information. To the extent that *Halperin* concluded that the justiciability problem in the case involved not the plaintiff's standing to sue but the nonjusticiability of a particular constitutional issue that the plaintiff sought to litigate, that goes not to the plaintiff's standing but rather to the political question doctrine, which is considered below.

barrier to justiciability must be addressed.

## 2. The Political Question Doctrine

Although the precise holding of *Richardson* involved standing, there is considerable language in the opinion suggesting that the political question doctrine might also preclude justiciability of claims seeking enforcement of the Statement and Account Clause. For example, as the Court acknowledged that its holding might mean that no one could bring a claim seeking judicial enforcement of the Statement and Account Clause, it observed that “the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.”<sup>278</sup> The Court added, albeit in dicta, that “Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest.”<sup>279</sup> These comments seem to imply that the judiciary has no role in enforcing the Statement and Account Clause.

If this language in *Richardson* was intended to suggest that enforcement of the Statement and Account Clause might involve a nonjusticiable political question, the hint was soon taken. In a memorandum to the President subsequently submitted to the House Intelligence Committee in 1978, Attorney General Griffin B. Bell opined: “[T]he constitutionality of any particular manner of accounting presents a ‘political question’ which could not be resolved by a court even if the Supreme Court were to conclude that an individual might have standing to institute a lawsuit for this purpose.”<sup>280</sup> The District of Columbia Circuit subsequently accepted this view in a case in which disclosure of financial records of the CIA was sought under the Statement and Account Clause, holding that “the decision to disclose material[] . . . is a nonjusticiable political question.”<sup>281</sup> There is academic support for this view as well. Jesse Choper, for example, has suggested that when an alleged constitutional violation affects the public at large, such as an alleged failure to comply with the Statement and Account Clause, it is properly treated as nonjusticiable under the

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278. *Richardson*, 418 U.S. at 179.

279. *Id.* at 178 n.11.

280. 1978 *House Intelligence Funds Disclosure Hearings*, *supra* note 176, at 32 (memorandum for the President of May 23, 1977).

281. *See Halperin*, 629 F.2d at 161 (alternate holding).

political question doctrine because all members of the electorate have an interest in redressing the alleged wrong, making the appropriate remedy political and not legal.<sup>282</sup>

What should be striking about the view that the Statement and Account Clause presents a nonjusticiable political question is that it is at utter odds with the purpose and function of the clause reflected in its text and original understanding, and constitutional ethos and structure. As we have seen, the clause is a check on the political branches rather than a grant of power to them. The clause operates as a precondition to politics under the Constitution, rather than identifying a matter to be addressed through the political process. Instead of leaving disclosure to the mercies of the political process, the clause represents one of the Constitution's checks on the operations of the political process—it reflects a judgment that neither legislators nor executive officials can be trusted to spend the people's money only if they are required to disclose those expenditures. To leave the clause's enforcement to the political branches, in short, is to let the fox guard the henhouse.

Thus, although all voters may have an interest in encouraging disclosure of the manner in which public funds are spent, if disclosure were left to the political process, it would occur only if voters were willing to put sufficient political pressure on officials to produce disclosure. The Statement and Account Clause, however, obviates the need to exert political pressure in this fashion; it represents a constitutional guarantee of disclosure without requiring the electorate to make special and insistent demands for information.

The point can be made in doctrinal terms. The test for a nonjusticiable political question involves a two-part inquiry: “[A] controversy ‘involves a political question . . . where there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.”’<sup>283</sup> As for the first prong of the inquiry, perhaps the classic example of a textual commitment to a political branch involves impeachments: “The Senate shall have the sole

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282. See Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1472–74 (2005).

283. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (alteration in original) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962))).

power to try all [i]mpeachments.”<sup>284</sup> Stressing this textual commitment of exclusive authority to the Senate, the Supreme Court has held that this provision deprives the judiciary of authority to review the manner by which the Senate tries an impeachment.<sup>285</sup>

By comparison, there is no textual commitment of the responsibility for discharging the constitutional obligation of publishing a statement and account of receipts and expenditures to the political branches. In contrast to the Impeachment Clause, the Statement and Account Clause contains no textually demonstrable commitment of responsibility to the political branches.<sup>286</sup> At most, the clause implies a measure of discretion to the political branches with respect to the timing and detail of disclosure. It is doubtful that this implication amounts to a “textually demonstrable constitutional commitment of the issue to a coordinate political department,”<sup>287</sup> but even if so, the political question doctrine does not bar judicial resolution of the question whether the political branches have exceeded the authority conferred by the Constitution’s text. For example, although the Constitution grants each House of Congress authority to “be the Judge of the . . . Qualifications of its own Members,”<sup>288</sup> the Court held that because the Constitution did not grant Congress the authority to add qualifications other than those enumerated in the Constitution, the question of whether the House of Representatives violated the Constitution by expelling a member for impermissible reasons was justiciable.<sup>289</sup> The Court also held that a noncitizen whose application for suspension of deportation was vetoed by one House of Congress could challenge that action despite Congress’s “plenary power” over matters of immigration because the

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284. U.S. CONST. art. I, § 3, cl. 6.

285. See *Nixon*, 506 U.S. at 228–36. At one time, the Court regarded Congress’s obligation to guarantee the states a republican form of government the classic example of a political question lacking in judicially manageable standards. See *Baker*, 369 U.S. at 223–29. More recently, however, the Court has expressed uncertainty about whether claims under the Guarantee Clause are justiciable. See *New York v. United States*, 505 U.S. 144, 183–86 (1992).

286. In contrast, if a member of Congress used the Statement and Account Clause to challenge the rules prohibiting disclosure of classified information, see *supra* text accompanying note 153, the textual commitment of authority to the Houses of Congress to make and enforce their own rules might well render such a challenge nonjusticiable. See U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the concurrence of two thirds, expel a Member.”).

287. *Zivotofsky*, 132 S. Ct. at 1427.

288. U.S. CONST. art. I, § 5.

289. See *Powell v. McCormack*, 395 U.S. 486, 518–49 (1969).



question of whether the Constitution permitted one House of Congress to exercise its power over immigration in this fashion was justiciable.<sup>290</sup> Similarly, the Court has held that Congress's plenary power over Indian affairs did not render nonjusticiable claims that Congress has exercised that power in a manner inconsistent with the equal protection requirement of the Fifth Amendment.<sup>291</sup> Thus, even on the dubious assumption that the clause should be read as reserving exclusively to the political branches the power to make decisions about the timing and detail of disclosure, the question whether they have utilized their discretion within constitutional bounds remains justiciable.

As for the second prong, although the extent and frequency of disclosure required by the clause cannot be stated with mathematical certainty, this is no bar to justiciability. It is the routine business of the judiciary to address a myriad of questions of constitutional interpretation and application in which the Constitution's text does not articulate precise standards. As the Court has explained, the judiciary is regarded as "capable of determining when punishment is 'cruel and unusual,' when bail is 'excessive,' when searches are 'unreasonable,' and when congressional action is 'necessary and proper' for executing an enumerated power."<sup>292</sup> The standards for compliance with the Statement and Account Clause are no less capable of judicial resolution. As the discussion in Part I demonstrates, the clause requires disclosure sufficiently frequent and detailed to enable the public to assess the manner in which public funds are spent. The boundaries of this obligation are surely capable of judicial resolution—especially inasmuch as the clause represents a constitutional judgment that the disclosure obligation cannot be left to the very officials whose powers are constrained by the clause.<sup>293</sup>

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290. See *INS v. Chadha*, 462 U.S. 919, 940–43 (1983).

291. See *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 83–85 (1977). Indeed, Professor Henkin once questioned whether decisions to reject a constitutional attack on the basis of a textual commitment of the question to a political branch reflected a "political question doctrine" or merely a more straightforward conclusion that the political branch had not exceeded the powers granted it by the Constitution. See Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 *YALE L.J.* 597, 604–06 (1976).

292. *United States v. Munoz-Flores*, 495 U.S. 385, 396 (1990). For a useful discussion explaining the grounds for skepticism when it comes to claims that the judiciary lacks manageable standards for resolving an issue, see Martin H. Redish, *Judicial Review and the "Political Question,"* 79 *NW. U.L. REV.* 1031, 1046–52 (1985).

293. Cf. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (the question whether a statute directing the Secretary of State to identify the country of birth on passports of

With respect to financial disclosure obligations in particular, the judiciary has had no difficulty in developing manageable standards; as we have seen in Part I.B.3, the concept of materiality has proven of particular use. There is little reason to believe that the judiciary is incapable of developing standards to govern the constitutional disclosure obligation reflected in the Statement and Account Clause. It would surely surprise lawyers who deal in financial fraud—not to mention the entire accounting profession—to learn that there are no judicially manageable standards for determining what amounts to an adequate accounting of receipts and expenditures. It may be difficult in individual cases to determine if a firm has made adequate disclosure under the securities laws, but this does not render the matter nonjusticiable.

Nor is it impossible to determine how frequently disclosure must be made. As the discussion in Part I.B.3 demonstrates, the clause is comprehensible only if, as its framing-era advocates contended, it requires disclosure at reasonable intervals rather than granting unbounded power to delay disclosure. That discussion also demonstrates that both history and congressional treatment of non-intelligence spending powerfully suggest a presumption in favor of annual disclosure. Under the current disclosure regime, moreover, Congress has not merely limited the times at which intelligence expenditures are disclosed; it has instead granted intelligence spending a blanket exemption from any disclosure requirement. Instead, only aggregate appropriations are annually disclosed—a standard of disclosure that the judiciary is fully competent to test against constitutional standards.<sup>294</sup>

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individuals born in Jerusalem as Israel unconstitutionally infringed on the Executive's powers over foreign relations "demands careful examination of the textual, structural, and historical evidence put forward by the parties . . . . This is what courts do. The political question doctrine poses no bar to judicial review of this case.").

294. In addition to the two-pronged inquiry into whether there is a textually demonstrable commitment of the issue to the political branches and the existence of judicially manageable standards, *Baker v. Carr* added four other factors:

[T]he impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962). The Court nevertheless concluded that the claim before it seeking reapportionment of congressional districts of unequal population was justiciable. *See id.* at 226–

It is doubtless true that there are likely a variety of means by which disclosure could be made consistent with the clause, but this too is no bar to justiciability. In a case challenging the method by which Congress apportions seats in the House of Representatives by state, for example, the Court, after noting that “the Constitution places substantive limitations on Congress’ apportionment power and that violations of those limitations would present a justiciable controversy,” concluded that it had authority to “determine whether Congress exercised its apportionment authority within the limits dictated by the Constitution.”<sup>295</sup> The Court reached this conclusion even though, as it upheld the method of apportionment chosen by Congress, it

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37. It is unclear whether any of the final four indicia have continued vitality given the Court’s more recent adherence to only the first two. *See, e.g.*, Carol Szurkowski, Recent Development, *The Return of the Classical Political Question Doctrine in Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), 37 HARV. J.L. & PUB. POL’Y 347, 357–61 (2014). In any event, since *Baker*, the only case in which the Court has placed any weight on any of the final four indicia sought ongoing judicial supervision of the Ohio National Guard, and in that context, the Court wrote:

[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability.

*Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). As one eminent scholar observed, the Court seems to be “saying that no judgment can be made on the merits of the constitutional claim, because the judiciary is effectively incapable of questioning the expertise of the professionals involved in the making of the original decisions.” Redish, *supra* note 292, at 1056. Judicial enforcement of the Statement and Account Clause involves quite different considerations; as we have seen, the judiciary has developed standards for addressing the sufficiency of financial disclosures, and a judgment invalidating the disclosure practices of the political branches would seem to involve no greater potential for interbranch conflict than any other case in which the judiciary is asked to invalidate a statute that the political branches are likely to regard as important. Moreover, enforcement of the Statement and Account Clause operates to enhance rather than undermine political accountability, and in that sense it is entirely consistent with the manner in which the politically accountable branches are expected to operate under the Constitution. Beyond this, as Professor Henkin observed, these aspects of the political question doctrine seem to be premised on the same types of prudential considerations that traditionally warranted courts to deny equitable remedies. *See Henkin, supra* note 291, at 617–22. To the extent that disclosures required by the Statement and Account Clause might pose a serious threat to national security, at least putting aside the likelihood that the clause itself might accommodate this concern, see *supra* text accompanying notes 202–204, a court might be warranted in withholding relief, but there is little reason to believe that the great bulk of the disclosures that are likely required by the clause are any more sensitive than the type of information that is routinely disclosed about defense spending.

295. *U.S. Dep’t. of Commerce v. Montana*, 503 U.S. 442, 458, 459 (1992).

acknowledged that when assessing competing methods, “[n]either mathematical analysis nor constitutional interpretation provides a conclusive answer,” and that the Constitution “does not provide sufficient guidance to allow us to discern a single constitutionally permissible course.”<sup>296</sup>

No different approach is appropriate for constitutional provisions involving the structural features of government, such as the Statement and Account Clause. For example, the Court has held that an individual’s claim that legislation raising revenue did not originate in the House of Representatives in violation of the Constitution’s Origination Clause was justiciable, explaining that even claims involving structural features of the separation of powers, implicated individual rights and not merely interbranch politics: “What the Court has said of the allocation of powers *among* branches is no less true of such allocations *within* the Legislative Branch . . . . [T]he Framers’ purpose was to protect individual rights.”<sup>297</sup> This observation is even more plainly applicable to the Statement and Account Clause, which is part of the constitutional infrastructure by which members of the public are able to hold officials accountable for the performance of their duties.<sup>298</sup>

It follows that the question whether the current disclosure regime

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296. *Id.* at 463.

297. *Munoz-Flores*, 495 U.S. at 394, 395.

298. To be sure, the existence of textual imprecision can be part of the political question inquiry; as it held that the question whether the procedures used by the Senate to try an impeachment was nonjusticiable, the Supreme Court concluded that “the use of the word ‘try’ in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate’s actions.” *Nixon v. United States*, 506 U.S. 224, 230 (1993). Yet, this conclusion rests on the textual delegation of “sole” authority to the Senate to determine how to implement its power to try impeachments:

The commonsense meaning of the word “sole” [in the Impeachment Clause] is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted. The dictionary definition bears this out. “Sole” is defined as “having no companion,” “solitary,” “being the only one,” and “functioning . . . independently and without assistance or interference.” If the courts may review the actions of the Senate in order to determine whether that body “tried” an impeached official, it is difficult to see how the Senate would be “functioning . . . independently and without assistance or interference.”

*Id.* at 231 (alterations in original and citation omitted). Conversely, not only is there no textual commitment of authority to the political branches in the Statement and Account Clause to determine how disclosure should be made, but recognizing authority in those branches to conceal facts about public spending material to the public’s assessment of that spending would also be inconsistent with the Constitution itself, as we have seen.

meets constitutional requirements, as well as an assessment of whether an alternative would fall within constitutional boundaries, are legal, and not political questions. Indeed, if the clause were thought to contain no manageable standards, then the discretion that it (perhaps) impliedly delegates to the political branches would be effectively boundless, in turn, making the clause essentially an illusory guarantee of disclosure—surely not a plausible interpretation of a provision that makes sense only if it imposes meaningful constraint on the political branches. We should be skeptical of the view that there are no judicially manageable standards for enforcing the Statement and Account Clause when the result of that conclusion would be to leave its enforcement to the discretion of the very elected officials that it is supposed to constrain. Even if there may on occasion be difficult questions about the sufficiency and frequency of disclosure in which deference to the judgment of the political branches is appropriate, this does not mean that the question of whether disclosure has fallen within constitutional bounds is nonjusticiable.

### *B. Actions To Enforce the Statement and Account Clause*

The remaining question, assuming litigation to enforce the Statement and Account Clause is justiciable, involves the avenue for achieving enforcement. Two are available.

#### 1. Actions Under the Constitution

As we have seen, there is a substantial argument that after *Akins*, *Richardson* bars only suits asserting taxpayer standing; a plaintiff asserting injury as a voter could well establish standing to enforce the Statement and Account Clause. Still, if suit were brought on this theory, the question whether the plaintiff has a right to bring suit in the absence of statutory authorization would necessarily arise.

The Court has been willing to recognize an implied right to sue for damages directly under the Constitution even absent statutory authorization unless there are what it characterizes as “special factors counseling hesitation in the absence of affirmative action by Congress.”<sup>299</sup> Some lower courts have concluded that when an asserted constitutional right of action involves litigation that would require the

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299. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971); *accord, e.g., Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); *FDIC v. Meyer*, 510 U.S. 471, 486 (1994); *United States v. Stanley*, 483 U.S. 669, 678–84 (1987).

disclosure of confidential information implicating matters of national security, this is the type of “special factor” that weighs strongly against recognizing an implied right of action.<sup>300</sup> In an action brought to enforce the Statement and Account Clause, a court would be faced with an argument that a suit seeking disclosure of classified information about intelligence spending is a factor that counsels against recognition of a right to sue, or otherwise supplies a basis to withhold a remedy. Yet, within that argument are serious problems.

At the outset, it bears noting that the Supreme Court has never indicated that its reluctance to imply a right of action under the Constitution when “special factors counseling hesitation” are present applies to actions seeking injunctive relief against an ongoing constitutional violation. There is instead a long history of affording injunctive relief against constitutional violations even absent express statutory authorization.<sup>301</sup> The explanation for this apparent inconsistency may well be that a court’s obligation to halt an ongoing constitutional violation and direct the government to comply with an affirmative constitutional obligation such as the Statement and Account Clause trumps prudential concerns about recognizing an implied right of action. The Supremacy Clause, for example, powerfully suggests that a constitutional obligation overrides countervailing prudential concerns such as those involving confidential intelligence gathering.<sup>302</sup> There are particularly powerful reasons to reach that conclusion when it comes to a claim that the government’s interest in preserving confidentiality should defeat recognition of a right to sue under the Statement and Account Clause.

Consider what would happen, for example, if a court recognized a right to sue under the Statement and Account Clause, and the

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300. See, e.g., *Lebron ex rel. Padilla v. Rumsfeld*, 670 F.3d 540, 552–56 (4th Cir. 2012); *Arar v. Ashcroft*, 585 F.3d 559, 574–77 (2d Cir. 2009) (en banc); *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008).

301. See, e.g., *Bivens*, 403 U.S. at 404 (Harlan, J., concurring in the judgment).

302. The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. For a more complete canvass of the considerations supporting injunctive relief against constitutional violations, see Michael T. Morley, *Public Law at the Cathedral: Enjoining the Government*, 35 CARDOZO L. REV. 2453, 2475–80 (2014).

government then proffered as a defense in the ensuing litigation the state secrets doctrine, which, the Supreme Court has held—at least in civil litigation brought on nonconstitutional claims—prevents disclosure of information considered confidential for reasons of national security in the course of otherwise justiciable litigation.<sup>303</sup> Some lower courts have applied the doctrine to claims seeking damages for an alleged constitutional violation.<sup>304</sup> But, in an action seeking disclosures required by the Statement and Account Clause, it should be plain that no argument about state secrets could be entertained—the clause, after all, is a constitutional prohibition on treating certain information as secret. If considerations regarding state secrecy have no place in the defense of litigation under the Statement and Account Clause, in turn, it is hard to understand why they counsel against recognizing the right to bring such a claim in the first place, or supply any other basis for withholding a remedy requiring constitutionally mandated disclosures based on prudential considerations.

To be sure, the Statement and Account Clause grants the government discretion over the timing and perhaps even the level of specificity of disclosure, but as we have seen, the intelligence community has been granted a statutory exemption from laws requiring the disclosure of government spending other than a requirement of disclosing aggregate appropriations. The clause, however, does not permit the government to treat the intelligence community's expenditures as a state secret—whether through the use of the common-law state secrets privilege, or through any other defense that seeks to keep secret information that the Constitution mandates be published. For just this reason, the Constitution forbids a court from treating a governmental assertion of a need to preserve secrecy as a basis to deny a disclosure remedy in an action brought directly under the Statement and Account Clause.

## 2. Actions Under the FOIA

We have seen that there is a strong basis for concluding that *Richardson* does not defeat standing to sue under the FOIA—the FOIA creates a legal duty of disclosure which does not run to the public at

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303. See, e.g., *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1905–08 (2011).

304. See, e.g., *Doe v. CIA*, 576 F.3d 95 (2d Cir. 2009); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Tenenbaum v. Simonini*, 372 F.3d 776 (6th Cir. 2004); *In re Sealed Case*, 494 F.3d 139 (D.C. Cir. 2007).

large, but to a particular requestor. As such, a denial of requested information sought under the FOIA is regarded as a sufficiently concrete and particularized claim to support standing. Neither is the political question doctrine a bar to justiciability.

Yet, one might wonder what bringing litigation under the FOIA offers for those seeking disclosure of intelligence spending because the FOIA provides an expansive exemption from the statutory duty of disclosure reaching virtually all information about intelligence spending.<sup>305</sup> Even if a FOIA claim were justiciable, it would seem to founder on the merits in light of the statutory defense. To the extent that a statutory exemption would prevent a court from ordering disclosure of information that must be disclosed to the public under the Statement and Account Clause, however, the clause forbids a court from enforcing the exemption.

The FOIA grants requestors a justiciable right to obtain information from the government. To be sure, the FOIA's exemption for information statutorily exempted from disclosure, coupled with the government's statutory power to classify information as confidential and nonpublic, might defeat the asserted statutory right to disclosure—unless the government lacks the constitutional power to exempt the information sought from disclosure. The government, however, lacks constitutional power to use a FOIA exemption if it is applied to defeat disclosure that must be made available to the public under the Statement and Account Clause.

The Statement and Account Clause, as we have seen, limits the ability of the government to treat information as confidential. A judicial order issued under the FOIA requiring an agency to disclose information that must be made available to the public by virtue of the clause, therefore, enforces the clause's constitutional requirement of disclosure. An order directing the release of information in the custody of intelligence agencies about their spending, to the extent that it must be disclosed under the Statement and Accounts Clause, accordingly amounts to a form of constitutionally mandated publication of information as required by the clause—one form by which a “regular Statement and Account” could be published with respect to intelligence

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305. See *supra* text accompanying notes 57–58. In *Richardson* itself, the Court wrote, citing the FOIA, “Congress has taken notice of the need of the public for more information concerning governmental operations, but at the same time it has continued traditional restraints on disclosure of confidential information.” *Richardson*, 418 U.S. at 175 n.8.



expenditures could be its provision to FOIA requestors.<sup>306</sup> Beyond that, if the government has unconstitutionally failed to publish material information about intelligence spending, the Constitution could hardly permit it to resist an effort to use the FOIA to compel publication of information it has unconstitutionally treated as secret to a FOIA requestor.

On this view, although nothing obligated Congress to create a statutory right of access to information, once it did so by enacting the FOIA, any limitations Congress places on the scope of that right must comport with applicable constitutional restrictions. Surely the government cannot use a statute that, at least as applied to the case before it, exceeds the government's constitutional power to maintain secrecy, in order to defeat a justiciable request for information under the FOIA.

In this conclusion there is also little that is novel—this approach is commonplace in other areas of constitutional law. For example, although the government is under no obligation to grant the public access to government property that does not qualify as a public forum, once it does so, the First Amendment limits its ability to impose restrictions to public access on the basis of the viewpoint of those who seek access to the property.<sup>307</sup> The same is true when the government chooses to dispense public funds to subsidize private activities.<sup>308</sup> Jurisprudence under the Appropriations Clause provides a particularly good example. Although, the Appropriations Clause forbids expenditures of public funds without an appropriation, when Congress has placed unconstitutional restrictions on the use of appropriated funds, the Court has invalidated them and permitted the expenditure of public funds pursuant to an appropriation cleansed of the invalid restriction.<sup>309</sup>

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306. Under the FOIA, an agency has no obligation to create records. *See, e.g.,* *Forsham v. Harris*, 445 U.S. 169, 182–85 (1980). Intelligence agencies, however, presumably create and retain records reflecting their spending which could be produced if required by the Statement and Account Clause. To the extent that agency records reflecting spending for intelligence purposes also contain information that need not be published under the clause, the FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this section.” 5 U.S.C. § 552(b)(9) (2012).

307. *See, e.g.,* *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 107–12 (2001); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390–94 (1993).

308. *See, e.g.,* *Bd. of Reg. of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 228–36 (2000); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–37 (1995).

309. *See, e.g.,* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001) (appropriation

It follows that if Congress places an unconstitutional limitation on the ability of FOIA requestors to obtain information from the government that it is constitutionally obligated to disclose, that restriction is properly invalidated, leaving only the statutory right of access to information.

In this fashion, the FOIA is an example of what Adam Samaha once labeled “constitutionally optional platforms” that “facilitate judicial implementation of norms drawn from the Constitution.”<sup>310</sup> Although Professor Samaha did not have the Statement and Account Clause in mind when he introduced this concept, the clause is, after all, the provision of the Constitution that most clearly expresses a norm in favor of disclosure. Thus, even if Congress is not subject to a legally enforceable obligation to subject governmental records to public scrutiny under the FOIA, once it creates a legally cognizable right to disclosure, surely the Supremacy Clause requires that records be made available consistent with the disclosure norm embodied in the Statement and Account Clause.

#### CONCLUSION: TAKING THE STATEMENT AND ACCOUNT CLAUSE SERIOUSLY

There can be little doubt that secrecy has a place in our constitutional order. As Professor Pozen put it, “[h]ardly a law review article on the unitary executive theory goes by without referencing Alexander Hamilton’s or John Jay’s tributes to the ‘secrecy and despatch’ that only the executive branch can provide.”<sup>311</sup> But, the prerogative of the political branches to keep secrets is not unlimited; perhaps it is the only provision of the Constitution of this character, but the Statement and Account Clause unambiguously rejects secrecy as a governmental entitlement when it comes to the disclosure of information material to an overall assessment of the manner in which the intelligence community spends public funds. The obligation imposed by the clause is unqualified, with no room for an exception rooted in executive prerogatives, national security, or the imperatives of the intelligence community. The obligation may well be limited to disclosure of only material facts, leaving a great deal of information about particular operations and techniques secret but not information required for an

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restriction invalidated under the First Amendment); *United States v. Lovett*, 328 U.S. 303, 315–18 (1946) (appropriation restriction invalidated as an unconstitutional Bill of Attainder).

310. Samaha, *supra* note 126, at 963–64.

311. Pozen, *supra* note 26, at 298 (footnote omitted).

intelligent assessment of the overall performance of the intelligence community.

Of course, it is possible to reconcile the disclosure of only aggregate intelligence appropriations with the Statement and Account Clause if one is determined to do so. Aggregate annual appropriations are likely a reasonable proxy for aggregate annual spending, and if an aggregate figure is released, there has been in a formal sense a “statement and account” of expenditures.

One can reach this conclusion, however, only by treating the Statement and Account Clause as a mere formality. If one is willing to take the clause seriously, however, mere formality will not do. In terms of its text, original meaning, and its place in constitutional ethos and structure, the clause is comprehensible only if it is understood as a mechanism that enables the people to effectively hold the government accountable for its use of public funds. Disclosing an aggregate figure without more makes the clause a bit of foolscap. Indeed, it is surely remarkable that no one—and certainly no intelligence official—has ever been willing to argue that the disclosure of aggregate appropriations enables the public to assess in a considered fashion the performance of the intelligence community. If the clause requires only a meaningless and ineffectual disclosure, however, it becomes impossible to explain what it is doing in the Constitution.

Perhaps the level of disclosure required if we take the clause seriously would put the United States at a disadvantage when compared to other nations that fund their intelligence communities in secret. Or perhaps the resulting accountability would make our intelligence community stronger; we will never know unless we adopt a more transparent regime. Ultimately, however, the constitutional question about disclosure of intelligence spending does not turn on considerations of policy but on the Statement and Account Clause itself. If we take the clause seriously, the current regime cannot stand.