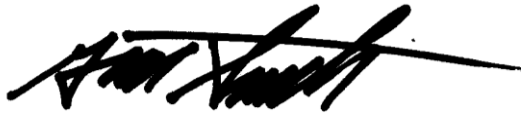
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH, *PRO SE*	)	
Plaintiff,	)	
vs.	)	
U.S. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION	)	
	)	
	)	Case: 18-02048
Defendant.	)	**Oral Argument Requested**
	)	
	)	

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT AND REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGEMENT



Grant F. Smith
IRmep
P.O. Box 32041
Washington, D.C. 20007
202-342-7325

info@IRmep.org

For process service:
Grant F. Smith c/o IRmep
1100 H St. NW Suite 840
Washington, D.C. 20005

The ongoing, $228 billion fraud perpetrated by the federal government against U.S. taxpayers can best be viewed as a rotting, tottering three-legged stool.[1] The first leg of the stool is an intertwined column of executive and legislative branch violations of laws and treaties that govern provision of U.S. assistance to a single foreign, non-NPT signatory nuclear state—Israel—in order to lavish more aid to Israel than any other foreign recipient.

The second leg of the stool is a stanchion of the multiple government agencies which work to gag relevant officials from discussing Israel's nuclear weapons (See Exhibit A, WNP-136)[2] and preemptively block release of all information under FOIA pertaining to Israel's nuclear weapons program, using a relatively new, questionable device aptly named "Glomar" after a failed CIA-Howard Hughes boondoggle. (Exhibit B, "Why Glomar is such an apt name for the preemptive denial of FOIA claims")

The third—and most important— leg of the stool is the massive flow of campaign contribution from the Israel lobby that fuel executive and legislative branch electoral ambitions, and precipitate preemptive recipient actions and which are the reason the stool was cobbled together in the first place. (See ECF 11-1, page 26) This case centers largely on the second leg of the "ambiguity" policy maintenance stool.

[1] https://original.antiwar.com/smith-grant/2018/06/24/four-presidents-conspired-to-give-100-billion-to-israel/
[2] https://original.antiwar.com/smith-grant/2018/08/09/can-the-us-keep-lying-about-israels-nukes/

Defendants confidently assert that U.S. aid to Israel is legal because "…the National Defense Authorization Act of 2019 expressly authorizes certain defense aid to Israel. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1688." (ECF 16, page 7).

However, since the Arms Export Control Act was amended in 1976, the President is required to file special waivers with Congress when providing foreign aid to non-NPT signatory nuclear weapons states such as Israel. See *22 USC §2799aa-1: Nuclear reprocessing transfers, illegal exports for nuclear explosive devices, transfers of nuclear explosive devices, and nuclear detonations.* Plaintiff has proven that, despite knowing Israel is a nuclear weapons state, no president has ever filed the required waivers before providing public and black budget aid to Israel. (ECF 11-1, page 46) (ECF 11-6) Defendants have offered no plausible explanation for how such aid can possibly be lawful in their attempts to quash this public interest lawsuit.

Plaintiff observes that not all laws passed by Congress are constitutional or legal, and that it is the role of the courts, as here, to make such determinations. It is also the role of the court to disallow spurious claims of secrecy intended to rob Americans of their right to access information under FOIA as a means to exercise their constitutional right to meaningfully petition for redress.

I. Defendants are classifying information "in order to conceal unlawful conduct."

Executive Order 13526 prohibits classifying information "in order to . . . conceal violations of law." Exec. Order No. 13,526 § 1.7. This section of 13526 is of overriding concern. Executive branch classifying of information to protect the three-legged "ambiguity" stool is rampant. Plaintiff has filed three other related lawsuits in this court. Each, in its own way, has revealed a different aspect of how this federal agency second leg activity the keeps the other two legs of the stool standing (Israel lobby cash to politicians, massive and unconditional politician aid to Israel).

The first case, *Smith v. DoD*, 14-01611 (D.D.C., 2015) won release of a document the Department of Defense failed—much to its regret as seen it court filings—to classify in 1987, "Critical Technology Assessment in Israel and NATO Nations."[3] (Exhibit C) The Israel lobby's pundits went into paroxysm when it was publicly released in 2015, because Israel and the lobby were—at the time of release—fighting the Obama administration's Iran nuclear deal. The Israel lobby and its foreign principals did not want a document intimately describing Israel's very real nuclear weapons development infrastructure, much of it provided at U.S. taxpayer expense for exclusively peaceful use—to be juxtaposed with its own nebulous accusations

[3] http://files.courthousenews.com/2015/02/12/nuc%20report.pdf

lodged against Iran. The release of DoD's document, by this very court, did not end the world or compromise U.S. national security, despite affidavits filed by classification authorities.[4] It simply confirmed that the U.S. has not been upholding the NPT or its own Arms Export Control Act since 1987. However, anybody who was paying attention already knew that with or without the official release.

The second case, *Smith v. CIA* 15-00224 (D.D.C., 2017) dislodged a substantial number of formerly unreleased CIA files about Israel's diversion—in collusion with Zionist Organization of American operatives running a U.S. nuclear processing facility—of government-owned weapons grade uranium into the Israeli nuclear weapons program. (Exhibit D) The release confirmed how gingerly the CIA, FBI and members of Congress investigating NUMEC felt—just like Richard Nixon and Henry Kissinger—about possibly being beaten over the head by the ever-present Israel lobby leg of the "ambiguity" stool. And yet congressional investigators were also infuriated that nobody went to prison for violating the Atomic Energy Act. This fury ultimately led in 1976 to passage of AECA restrictions on foreign aid to non-NPT signatory nuclear states, which remain in effect to this day. See *22 USC §2799aa-1: Nuclear reprocessing transfers, illegal exports for nuclear explosive devices, transfers of nuclear explosive devices, and nuclear detonations.*

[4] https://www.courthousenews.com/dod-report-details-israels-quest-for-hydrogen-bomb/

For its part, the FBI was revealed to have been emasculated by the CIA's decades-long withholding of conclusive proof of the diversion—radioactive testing clandestinely performed in Israel. The released documents revealed[5] that the U.S. allowed Israel and its U.S. agents to conduct illegal nuclear espionage activities in and against the US with impunity. In essence, the documents released about the coverup of the NUMEC diversion were about maintaining "ambiguity." Released documents[6] from 1977-1979 reveal that since the U.S. did not wish to publicly explain the wrongdoing and absence of criminal prosecutions of known perpetrators, most of whom are now quietly passing away from old age—so it improperly used secrecy to cover up the whole affair. The released documents are yet another officially released substantiation of "ambiguity" policy maintenance. It was—like all matters of "ambiguity"—never a matter of U.S. national security. Most Americans and all Arab states know Israel has nuclear weapons. The world did not end after the documents were released, and even published by the National Security Archive at George Washington University.[7]

The third case, *Smith v. Department of State & Department of Energy* 18-0077 (D.D.C.) revealed yet another 2012 policy maintenance component of "ambiguity."

[5] https://original.antiwar.com/smith-grant/2015/09/06/cia-cover-up-thwarted-fbis-nuclear-diversion-investigations/
[6] http://www.israellobby.org/numec/08312015_cia_numec.pdf
[7] https://nsarchive.gwu.edu/briefing-book/nuclear-vault/2016-11-02/numec-affair-did-highly-enriched-uranium-us-aid-israels

WNP-136 is a gag order that is used to prosecute, fine and imprison any federal agency or contractor employee found to have written about Israel's nuclear weapons program as fact—even when referencing public domain sources. James Doyle, a former DOE employee, was brutally arrested in his home, much like Israeli whistle blower Mortdecai Vanunu was abducted overseas by Mossad after he revealed photographs of Israel's nuclear weapons production facilities. Doyle was punished over a single magazine article discussing Israel's nuclear weapons using public domain sources. Though not concluded, *Smith v. Department of State & Department of Energy* 18-0077 (D.D.C.) is all about the ongoing production of instruments for "ambiguity" policy maintenance used to punish American government employees in order to lie to (by omission) and bilk U.S. taxpayers.

What these cases all should reveal to the court is how casually, reflexively and routinely the government violates E.O. 13526 prohibitions on using secrecy to coverup wrongdoing, in order to keep the rotting three-legged stool from finally toppling over. But they also reveal another striking fact. The release of such secrets has never had any of the dramatic, predicted impacts on U.S. national security advanced by defendants in reams of similarly worded boilerplate (some not even properly listing the names of Plaintiffs, because individual Plaintiffs are largely irrelevant in the larger Glomar scheme) filed in every single case. This is because

"ambiguity" represents the substitution of U.S. national security policy with Israeli policy. Another sad fact is that the bad behaviors and illegal activities covered up by classification no longer have any shock value when courts order document release, or when documents are leaked. Dispiritingly, in an era in which endless wars are launched on false pretexts, agencies and their contractors torture and kidnap suspects with impunity, Americans accused of terrorism can be summarily executed by drone overseas, and pardoned felons reenter as executive branch "service" as policymakers to continue crimes against humanity, Americans have come to expect such behavior from their government. How long that tolerance will continue is an open question. One question that is not open is that this court could play a role in providing the transparency necessary to ensure accountability.

I. A long trail of "ambiguity" records exist vel non

NARA has failed to justify its Glomar response denying additional records about the half-century old "ambiguity" policy. As a FOIA requester, Plaintiff has overcome their Glomar response through extensive documentation about the foreign machinations and subsequent executive avarice which led to the substitution of bona fide American nuclear policy with Israel's policy of "ambiguity."

Defendant argues that "the Kissinger memorandum was drafted decades before the alleged letters were supposedly drafted." (ECF 16, page 9-10). Defendants

fail to recognize that the point of introducing the Kissinger memorandum is to reveal the Nixon administration's initial policy choices: Making Israel sign the NPT and shut down its nuclear weapons program in the U.S. national interest (and the interest of peace), or US adoption of "ambiguity" because of the administration's fear of the Israel lobby. The record shows that the U.S. was coerced into adopting Israel's "ambiguity" policy, out of fear of Israel's U.S. lobby.

This Circuit has clarified that in the Glomar context, it is the "existence vel non of any records responsive to a FOIA request," rather than the content of the records, that is the focus of the inquiry. ACLU, 710 F.3d at 427. The Plaintiff has proven that like any policy, "ambiguity" requires constant effort to maintain. Lastly, Plaintiff has definitively established that presidential records pertaining to the foundation and maintenance of "ambiguity" do indeed exist and are releasable.

Plaintiff has already referenced the "ambiguity" policy maintenance of the CIA in attempting to stamp out accountability over the theft by Israel of U.S. weapons-grade uranium. The court record of the DoD's battle against releasing its 1987 report about Israel's nuclear weapons production facilities also document the policy maintenance of "ambiguity". The released document (Exhibit C) is irrefutable proof that the U.S. knows about the Israeli nuclear weapons program, but refuses to take

action as required under the NPT and AECA while fighting to keep the public in the dark, in the advancement of unlawful foreign aid delivery.

Plaintiff substantiates that after observably dabbling with the idea of actually upholding the Nuclear Non-Proliferation Treaty and pursuing a Middle East Nuclear Free Zone, President Obama reversed course and "reiterated to the Prime Minister that there is no change in U.S. policy when it comes to these issues." See Pl.'s Mem. at 26-27, ECF No. 11-1 at 27-28. Something caused the reversal. The president was clearly forced to perform maintenance on the "ambiguity" policy after attempting to pursue U.S. national interests, by signaling that all three legs of the stool would be left intact. The Israelis were thus assured that the vast amounts of foreign aid would not be subject to inflexible U.S. arms export law or the NPT, and that the president's party would continue to get Israel lobby campaign contributions, while the federal bureaucracy would keep its collective mouth shut about Israel's nuclear weapons program.

Obama did further "ambiguity" maintenance when his Departments of State and Energy in 2012 passed a legislative rule in the form of a classification guide making it illegal for federal agency employees and contractors to discuss Israel's nuclear weapons program. WNP-126 should be seen as yet another executive branch maintenance of "ambiguity." Enough of it has been declassified due to Plaintiff

efforts, that it can be seen as release of "ambiguity" policy maintenance documents. Presidential letters upholding "ambiguity" are merely unreleased policy maintenance documents. They warrant no special treatment, since they are mainly about campaign contributions, and not national security.

Plaintiff easily met his burden to show prior, official disclosure of this category of requested letters. But since Defendants are not convinced, "Plaintiff has not met his burden to do so" (ECF 16, page 9) as additional evidence, Plaintiff attaches (Exhibit A) as evidence of the "ambiguity" policy maintenance, WNP-136, "Guidance on Release of Information Relating to the Potential for an Israeli Nuclear Capability." WNP-136 is precisely an example of 'the prior disclosure establishes the existence (or not) of records responsive to the FOIA request.'" *Marino v. DEA*, 685 F.3d 1076, 1081 (D.C. Cir. 2012). In this case, it is irrefutable evidence of the Obama administration returning to "ambiguity" policy maintenance—after promising to do so in July 2010—through a gag order on all things related to Israel's nuclear weapons program. (Exhibit A) There are no substantive differences between the secret 2008 Obama letter, the 2010 official capitulation speech, and WNP-136. They are all form part of a chain of "ambiguity" policy under way since 1969. This court can examine the timeline, and using its familiarity with the issue, presume "the prior disclosure establishes the existence (or not) of records responsive to the FOIA request.'" *Marino*

v. DEA, 685 F.3d 1076, 1081 (D.C. Cir. 2012). The Bill Clinton and George W. Bush promises to maintain "ambiguity" lie along the chain.

Vel non, ambiguity records exist, have been acknowledged, and a string of them have been either fully or partially released. Presidential letters propping up "ambiguity" therefore can and must be released. This court—more than any other—is well-positioned to see that all kinds of official acknowledgement and actions—and grudging release—of ambiguity policy maintenance documents exist, making any assertion that there has been none unsustainable.

II. The Clinton Library's Glomar response is improper

Glomar is spreading like an infectious disease throughout American courts, its overuse propelled by Glomar's smug, self-referential, tautological, mobius strip closure propelled entirely by what it hopes are unchallenged agency appeals to authority. Glomar was originally thought to be applicable only in limited circumstances, but is now almost the automatic response to FOIA requests. Plaintiff agrees with Defendant that deference to Glomar claims has been going on for four decades. (ECF 16, page 3-4) Plaintiff disagrees with Defendants that courts should allow it to continue unchallenged as it has in the past.

The Fitzpatrick affidavit (ECF 10-3) is exemplary of the pernicious attitude inherent in Glomar and the bad faith of Defendants. The affidavit should have begun with the following disclosure statement. "I, John P. Fitzpatrick, labored as a NARA functionary for four years just before joining the NSC." But, of course, the affidavit did not do so, because such material statements of fact are considered information that both the NSC and NARA wished to withhold from the court. For this reason alone the court should strike the affidavit as being "controverted by…..evidence of agency bad faith." *Miller v. Casey*, 730 F.2d 773, 776 (D.C.Cir.1984)

This action represents the very essence of GLOMAR—the substitution of any real-world examination of the facts about documents and classification markings, for

philosophical speculations and boilerplate assertions made by various agency authorities laboring up and down the second leg of the "ambiguity" stool.

The operative executive order (13526) expressly forbids classifying information for the purpose of wrongdoing. Fitzpatrick's speculative affidavit therefore has only one overriding purpose—preventing the public release of information that is fundamental to the maintenance of that wrongdoing. Such efforts have previously failed to convince this court, and they should not be convincing now.

Where Fitzpatrick asserts potential harm to national security, what he really means is harm to the three-legged stool. To the slush funds, and the affinity networks, and favor-banks. Defendants assert that information is "under control of the United States" because it is in U.S. and in Israeli hands. Fitzpatrick's suggestion that letters are properly classified, is made in entirely the interest of keeping those being bilked—American taxpayers—from getting their hands on the letters. (ECF 16, page 5). Plaintiff stands by his evidence, using facts, (ECF 11-1, pages 29-39) of the falsity of Fitzpatrick's assertions that the world believes the U.S. is committed to the NPT and that grave harm would result if even further evidence revealing that to be fake is ever made public, and all other NSC arguments. This is simply not any kind of "national security" matter, but rather a corruption question. Mr. Fitzpatrick admirably advances in this court grammar-school sensibilities of how government is supposed to function,

but the Executive Order which he wields mostly to keep information from the public, expressly forbids retention of information if the overriding purpose is covering up wrongdoing. It is therefore the role of this court to separate the documents from NARA's custody, examine and release them—through Plaintiff—to the American people, since the reasons advanced for retaining are neither "logical" nor "plausible." "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears `logical' or `plausible.'" *Wolf*, 473 F.3d at 374-75 (quoting *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C.Cir.1982), and Hayden v. NSA, 608 F.2d 1381, 1388 (D.C.Cir.1979)).

It is simply no longer "logical" or "plausible" that confirming the existence of letters could do anything to further undermine confidence in the U.S. commitment to the NPT, or adherence to the Arms Export Control Act. The Plaintiff has already presented evidence that public opinion cannot go lower. (ECF 11-1, pp 34, 45). Defendants neither offer counter-evidence to support their speculative claims, address the presence of authoritative "ambiguity" policy maintenance records in the public domain, nor do they refute the public opinion polling or other evidence presented by Plaintiff.

III. This court has broad powers to review Bush Library documents under "special access."

Presidential records are neither the property of the Archivist, the Archivist's designees, nor presidents of the United States. Perhaps unbeknownst to defendants, the mission of the National Archives is to "drive openness, cultivate public participation, and strengthen our nation's democracy through public access to high-value government records."[8] Release of the presidential letters would accomplish that.

Public access to Presidential records is not under the sole jurisdiction of the Archivist or NARA, but rather a question of the interaction between the Federal Records Act, the Presidential Records Act (PRA), and the Freedom of Information Act (FOIA). The Federal Records Act and FOIA broadly apply to all federal records. PRA only applies narrowly to records created by and on behalf of a president, such as records created during the George W. Bush Administration. Even so, despite the PRA's jurisdiction, such records may necessarily be subjected to judicial review when the overriding question at hand is—as in this FOIA case—pervasive criminal conduct.

Although a number of laws are in place to withhold presidential records from public access for particular durations of time, certain federal officials may access

[8] https://www.archives.gov/about/info/mission

presidential records within the 12-year time frame. This is known as gaining "special access" to presidential records. Specifically, under 44 U.S.C. §2205: [S]ubject to any rights, defenses, or privileges which the United States or any agency or person may invoke, Presidential records shall be made available—(A) pursuant to subpoena or other judicial process issued by a court of competent jurisdiction for the purposes of any civil or criminal investigation or proceeding…"

NARA's prior, documented release of George W. Bush administration records therefore, contrary to what Defendants claim, (ECF 16, page 3), does have direct bearing on the reviewability of records. If Congress had decided to issue a subpoena for the entire set of Kavanaugh records, which it probably would have done if Congress was under Democratic Party leadership at the time of nomination hearings, NARA would have had no option but to salute and fully release the records. Hypothetically, if Kavanaugh's conduct became the subject of a criminal case brought by alleged victims, a judge could have issued subpoenas for any Bush administration records deemed relevant to a fair trial. Courts, therefore, in no way lack jurisdiction to obtain and review presidential records, no matter the wishes of former presidents or vaunted claims of non-reviewability advanced by NARA. NARA is merely a custodian that must turn over any documents it has swept up into its bins to higher authorities when the law so demands.

The overriding question in this case is whether the records being withheld under FOIA are being withheld in service to an ongoing criminal enterprise. This court may therefore freely demand the George W. Bush presidential record in question, a single presidential letter which—in essence—perpetrates an ongoing conspiracy to thwart the NPT and AECA in exchange for the implied receipt of special interest campaign contributions. Such a judicial review is proper under FOIA, and particularly long overdue as a check on the overeager use of Glomar and misapplication of FOIA exemptions to cover up wrongdoing. Retroactively classifying or asserting Glomar in this case is made for an improper purpose. There is no independent purpose—other than violating the law—for which such records are withheld from public access.

This court properly rejected one similarly expansive CIA Glomar claim, that despite official presidential confirmation of "unprecedented" intelligence aid to Israel, it was "neither 'neither logical nor plausible' that the CIA does not have budget line items related to intelligence assistance for Israel."[9] *Smith v. CIA* 15-01431 (D.D.C., 2015)

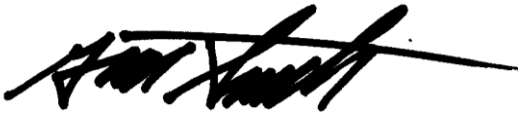
Perpetrating a $228 billion-dollar fraud against taxpayers ever since aid to non-NPT nuclear powers like Israel was outlawed in 1976[10] takes more than a few private

[9] https://www.courthousenews.com/cia-hammered-shrug-israel-records/
[10] https://original.antiwar.com/smith-grant/2018/06/24/four-presidents-conspired-to-give-100-billion-to-israel/

verbal agreements, campaign contributions and pats on the back. More policy documents implemented to perpetuate the fraud exist and must be properly located and released when requested under FOIA.

CONCLUSION

For the foregoing reasons, the Court should deny Defendant request for summary judgement and order NARA to finally process the FOIA before the one-year anniversary of the request (June 29, 2019). Plaintiff encourages this court to examine the presidential letters held by NARA, as is its prerogative, *in camera* for insight into the precise role it plays within the chain of "ambiguity" policy maintenance in subverting NPT and AECA, the presence of any original classification markings and to then make its own independent determination of whether NARA's preemptive Glomar invocations, speculative FOIA exemptions and flawed interpretation of PRA are in fact being improperly invoked with the primary aim to "cover up wrongdoing."



Grant F. Smith
IRmep
P.O. Box 32041
Washington, D.C. 20007
202-342-7325

info@IRmep.org

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1100 H St. NW Suite 840
Washington, D.C. 20005