IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH, Plaintiff, v. CENTRAL INTELLIGENCE AGENCY, Defendant.	Case No.: 1:15-cv-01431 (TSC)

MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION FOR RECONSIDERATION

INTRODUCTION

Defendant, the Central Intelligence Agency ("CIA"), respectfully requests that this Court reconsider its March 30, 2017, ruling that President Obama's statement that the United States had provided "intelligence assistance" to Israel constituted an official acknowledgement confirming that the CIA had line items in its budget supporting Israel.

Reconsideration is warranted to correct several factual misimpressions. First, the Court determined that President Obama's reference to "intelligence assistance" must have referred to the CIA, because the Court was not aware of "other agencies that might provide intelligence support abroad." There are, however, seventeen intelligence agencies within the United States Intelligence Community that at times provide intelligence support abroad. Accordingly, a reference to "intelligence assistance" to Israel does not necessarily mean that such assistance was provided by the CIA. Second, the Court inferred that there was a single "'intelligence budget' and it is the CIA's." However, there is not a single intelligence budget, much less one belonging

to the CIA. As such, intelligence assistance to Israel would not necessarily be included within the CIA's budget. Finally, this Court relied on the D.C. Circuit's opinion in *American Civil Liberties Union v. CIA*, 710 F.3d 422 (D.C. Cir. 2013). In that case, the court relied on statements by the CIA Director and other high-level government officials that it concluded strongly implied that the Director (and therefore the agency) possessed the records at issue in that case. In light of the above factual corrections, however, *ACLU* does not decide the matter here, since there are no statements implying that the CIA has any such records sought. For these reasons, Defendant respectfully requests that this Court reconsider its ruling denying Defendant's motion for summary judgment.

BACKGROUND

In this Freedom of Information Act ("FOIA") case, the Plaintiff filed a FOIA request with the CIA, requesting "a copy of the intelligence budget that pertains to line items supporting Israel [from 1990 through 2015]." Compl., Ex. 1, ECF No. 1; *see also* Mem. Op., at 1, ECF No. 16. The CIA filed a *Glomar* response, refusing to confirm or deny the existence of such records. Mem. Op. at 1-2. On February 5, 2016, the CIA moved for summary judgment, ECF No. 12. Plaintiff opposed. ECF No. 13. He argued that a statement by President Obama, where the President said that "partially due to American military and intelligence assistance, which my administration has provided at unprecedented levels, Israel can defend itself against any conventional danger," constituted an official acknowledgement of the existence of the records in question. Mem. Op. at 5.

On March 30, 2017, this Court denied the CIA's motion for summary judgment. *See* Mem. Op; Order, ECF No. 17. In its opinion, the Court acknowledged that President Obama's statement did not refer to "any specific intelligence agency." Mem. Op. at 6. But the Court was

"not aware of, nor ha[d] the CIA pointed to, other agencies that might provide intelligence support abroad." *Id.* The Court also found that "[t]he CIA's reference to 'the intelligence budget' refutes its suggestion that some entity other than the CIA might be responsible for the noted 'intelligence assistance,' as it implicitly acknowledges that there is a definitive 'intelligence budget' and it is the CIA's." *Id.* And the Court reasoned that even if the President was referring to non-monetary assistance such as information sharing, such assistance still "has to be budgeted for." *Id.*

Accordingly, the Court concluded "that the inferences available from President Obama's statement are (1) that the CIA provides intelligence support to Israel, and (2) that it therefore must have some means of appropriating funds to do so, meaning that the budget line items must exist." *Id.* at 5-6. The Court therefore held that the CIA's *Glomar* response was unwarranted because President Obama had officially acknowledged the existence of the records sought, and did not reach whether, absent the official acknowledgement, Exemptions 1 and 3 of the FOIA would properly justify a *Glomar* response. *Id.* at 8. The Court ordered the CIA to process the FOIA request, inform Plaintiff of the number of records responsive to the request, and either release the records or identify exemptions that form the basis of withholding. Order, ECF No. 17.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 54(b), a district court may reconsider its decisions "at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b); *see also Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 227 (D.C. Cir. 2011). District courts grant reconsideration under Rule 54(b) "as justice requires," *Capitol Sprinkler Inspection, Inc.*, 630 F.3d at 227, for example, when "the

Court has 'patently misunderstood a party, has made a decision outside the adversarial issues presented to the Court by the parties, [or] has made an error not of reasoning but of apprehension, or where a controlling or significant change in the law or facts [has occurred] since the submission of the issue to the Court.'" *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005) (second alteration in original). A court "has broad discretion to consider whether relief is 'necessary under the relevant circumstances.'" *North v. U.S. Dep't of Justice*, 892 F. Supp. 2d 297, 299 (D.D.C. 2012).

ARGUMENT

I. Reconsideration is Warranted Because the CIA Is Not the Only Intelligence Agency To Provide Intelligence Support Abroad.

In its opinion, this Court concluded that President Obama's reference to "intelligence support [to Israel]" referred to activities conducted by the CIA, because "[t]he court is not aware of, nor has the CIA pointed to, other agencies that might provide intelligence support abroad." Mem. Op. at 6. Defendant respectfully submits that reconsideration is warranted on this point because there are in fact multiple intelligence agencies that provide intelligence support abroad. Accordingly, President Obama's statement about American intelligence support generally cannot be read to confirm (or deny) that the CIA is the specific intelligence agency to which he was referring. *See, e.g.*, *Wolf v. CIA*, 473 F.3d 370, 379-80 (D.C Cir. 2007) (holding that an official acknowledgement must confirm or deny "the existence *vel non*" of the sought records, and limiting disclosure only to records whose existence "have been previously disclosed (but not any others).").

The United States Intelligence Community consists of 17 separate intelligence agencies.[1] 50 U.S.C. § 3003(4); *see also* Decl. Mark W. Ewing ("Ewing Decl.") ¶¶ 5-6 [filed hereto]. These "entities at times provide intelligence assistance abroad." Ewing Decl. ¶ 10. For example, the various intelligence agencies conduct intelligence collaboration and sharing with multinational allies and partners. *See, e.g.*, Joint & National Intelligence Support to Military Operations, Joint Pub. 2-01 (Jan. 05, 2012), at II-26, http://www.dtic.mil/doctrine/new_pubs/jp2_01.pdf (discussing multinational intelligence collaboration between U.S. intelligence agencies and foreign intelligence agencies); Office of the Director of National Intelligence: Members of the IC, https://www.dni.gov/index.php/intelligence-community/members-of-the-ic (last visited April 21, 2017) ("The [National Security] Agency supports military customers, national policymakers, and the counterterrorism and counterintelligence communities, as well as *key international allies*.") (emphasis added). Accordingly, references to "intelligence assistance" to Israel cannot be read to *a priori* refer to the CIA, as many different intelligence agencies provide foreign intelligence assistance. President Obama's statement therefore does not confirm the existence of records with regard to the CIA *specifically*. *See Wolf*, 473 F.3d at 380.

[1] These include (1) the Office of the Director of National Intelligence; (2) the Central Intelligence Agency; (3) the National Security Agency; (4) the Defense Intelligence Agency; (5) The National Geospatial Intelligence Agency; (6) The National Reconnaissance Office; (7) other offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs; (8) the intelligence elements of the Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Department of Energy; (9) the Bureau of Intelligence and Research of the Department of State; (10) the Office of Intelligence and Analysis of the Department of Treasury; (11) The Office of Intelligence and Analysis of the Department of Homeland Security. 50 U.S.C. § 3003(4).

Nor did President Obama explain what type of intelligence assistance was provided. Each of the seventeen intelligence agencies have different functions related to foreign intelligence and counterintelligence activities, and some specialize in one of six intelligence collection disciplines, while others provide targeted analysis based on the needs of the government agency they support. Ewing Decl. ¶ 8. For example, the National Security Agency specializes in signals intelligence, the National Geospatial-Intelligence Agency specializes in geospatial intelligence, and the CIA specializes in human intelligence. *Id.* "Although President Obama generally acknowledged that the U.S. Government has provided intelligence assistance to Israel, he did not disclose which Intelligence Community entity was providing the assistance, or specify the nature or duration of any aid. If CIA were to confirm that a portion of its individual Agency intelligence budget relates to Israel, it would tend to show whether or not the intelligence assistance provided was related to [human intelligence] (a CIA area of expertise)." *Id.* ¶ 10.

II. Reconsideration is Warranted Because There Is Not a Single Intelligence Budget, Nor Is It The CIA's.

This Court further concluded that "[t]he CIA's reference to 'the intelligence budget' refutes its suggestion that some entity other than the CIA might be responsible for the noted 'intelligence assistance,' as it implicitly acknowledges that there is a definitive 'intelligence budget' and it is the CIA's. Mem. Op. at 6. Respectfully, the inference the Court drew here is factually incorrect. There is no single intelligence budget, and certainly no single intelligence budget controlled by the CIA. Rather, the consolidated U.S. intelligence budget has two major components – the National Intelligence Program ("NIP") and the Military Intelligence Program ("MIP"). Ewing Decl. ¶ 7. The "annual consolidated National Intelligence Program budget" is developed by the Director of National Intelligence based on proposals submitted by the Intelligence Community. 50 U.S.C. § 3024(c)(1). It includes "all programs, projects, and

activities of the intelligence community," excluding those activities conducted by the military departments and Department of Defense that support tactical military operations. *Id.* § 3003(6); *see also* Ewing Decl. ¶ 6. Tactical military intelligence operations are separately budgeted through the MIP. Ewing Decl. ¶ 7. The topline budgets for both the NIP and MIP are publically released, but all other budget figures and program details are classified, including line-items that relate to particular intelligence agencies or programs. *See, e.g.*, 50 U.S.C. § 3306(b); Ewing Decl. ¶ 9.[2]

Accordingly, there is no single intelligence budget, nor, in any event, would it be the CIA's. President Obama's statement that there has been "intelligence assistance" to Israel does not, therefore, confirm or deny that there are line items in the CIA's budget supporting Israel. Defendant respectfully requests that this Court reconsider its ruling on this point.

III. Reconsideration is Warranted Because *ACLU v. CIA* Does Not Apply.

In its opinion, this Court found that this case fell within the limited ambit of *American Civil Liberties Union* ("*ACLU*") v. *CIA*, 710 F.3d 422 (D.C. Cir. 2013). Mem. Op. at 6-7. In light of the factual clarifications discussed above, Defendant respectfully requests that the Court reconsider this conclusion.

In *ACLU v. CIA*, the ACLU sought records held by the CIA "pertaining to the use of unmanned aerial vehicles [drones] . . . by the CIA and the Armed Forces for the purposes of killing targeted individuals." 710 F.3d at 425. The CIA provided a *Glomar* response, refusing to

[2] The following releases are typical: DNI Releases Budget Figure for the 2015 National Intelligence Program (Oct. 30, 2015), https://www.dni.gov/index.php/newsroom/press-releases/210-press-releases-2015/1279-dni-releases-budget-figure-for-2015-national-intelligence-program; Department of Defense Releases Budget Figure for 2015 Military Intelligence Program (Oct. 30, 2015), https://www.defense.gov/News/News-Releases/News-Release-View/Article/626734/department-of-defense-releases-budget-figure-for-2015-military-intelligence-pro/.

confirm or deny the existence or nonresistance of records responsive to the request. The D.C. Circuit rejected that *Glomar* assertion, citing a number of statements by government officials, such as the fact that it found that White House counterterrorism advisor John Brennan had acknowledged that the "full range of our intelligence capabilities" were consulted with respect to drone strikes." *Id.* at 430. The court concluded that the question of whether the CIA had an interest in drone strikes had been acknowledged. Furthermore, the Court found that CIA Director Panetta had "spoke directly about the precision of targeted drone strikes, the level of collateral damage they cause, and their usefulness in comparison to other weapons and tactics," which, it held, made it "implausible" to believe "that the CIA does not possess a single document on the subject of drone strikes." *Id.* at 431.

President Obama's general reference to "intelligence assistance" to Israel comes nowhere close to the type of alleged disclosures present in *ACLU*. In that case, the court found that the White House had confirmed that the "full range" of intelligence capabilities were consulted on drone strikes, a statement the court found could reasonably support the inference that the CIA, which it concluded was part of the full-range of those capabilities, *id.* at 243, had an intelligence interest in drone strikes. In addition, the court found that the CIA Director had alluded to drones. Here, by contrast, President Obama spoke only of "intelligence assistance" generally, without specifying which intelligence agency may have provided said assistance, the form of such assistance, or whether the entirety of the Intelligence Community provided intelligence assistance. And as discussed above, there are many different intelligence agencies which at times provide intelligence support abroad. Nor, contrary to *ACLU*, are there statements from the CIA or about the CIA. Accordingly, the *ACLU* decision does not support the conclusion that

President Obama has officially acknowledged the existence of line items in the CIA's budget support Israel.

CONCLUSION

For the aforementioned reasons, Defendant respectfully requests that this Court reconsider its ruling that President Obama had officially acknowledged the existence of the records sought. For the reasons stated in its motion for summary judgment, Defendant further requests that this Court conclude that Exemptions 1 and 3 of the FOIA properly justify the CIA's *Glomar* response.

Dated: April 21, 2017

Respectfully Submitted,

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