UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH, *PRO SE*

Plaintiff-Appellant-

V.

[redacted]

UNITED STATES OF AMERICA, *et al.,*

Defendants-Appellees.

PLAINTIFF-APPELLANTS' MOTION FOR EMERGENCY RELIEF

Pursuant to Federal Rule of Appellate Procedure 8 and D.C. Circuit Rule 8, Plaintiff-Appellant Grant F. Smith, Director of the Institute for Research: Middle Eastern Policy, moves this Court for emergency injunctive relief pending Plaintiff's appeal of the district court's order denying Plaintiff's Motion for a Preliminary Injunction. Plaintiffs request that this Court grant emergency injunctive relief enjoining Defendant-Appellees Donald Trump, President of the United States, and Steven Mnuchin et. al. from transferring U.S. tax dollars appropriated by Congress via Omnibus Spending Bill, signed into law on May 5, 2017, as foreign aid to the state of Israel.

PRELIMINARY STATEMENT

This case involves violations of the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq, and the Take Care Clause, U.S. CONST. art. II, § 3, cl. 5. and 28 U.S. Code § 1361 and Executive Order 13526 – Classified National Security Information taken in concert to violate the

Symington & Glenn provisions of the Arms Export Control Act[1], which forbid U.S. foreign aid to nuclear weapons states that are not signatories to the Nuclear Non-Proliferation Treaty, absent required special procedures.

As a public interest researcher, the Plaintiff has suffered direct injuries, both financial, professional and informational, as a result of this unlawful collusion, which has even has a name, "nuclear ambiguity."

The district court denied Plaintiff's motion to preliminarily enjoin the Defendants from engaging in the various violations underpinning "nuclear ambiguity." *Smith v. United States of America et al*, 1:16-cv-01610-TSC. Specifically, the court concluded based on misinterpreting an entirely new precedent, established after the Plaintiff had filed his final motions, that "APA section 704 limits review under that statute to agency actions 'for which there is no other adequate remedy in court" (*Citizens for Responsibility & Ethics in Washington v. United States Dep't of Justice*, No. 16-5110, 2017 WL 412626 at *7–8 (D.C. Cir. Jan. 31, 2017

However, this precedent was never intended to comprehensively remove matters on public records from review under the Administrative Procedure Act. Particularly such an egregious, superseding violation as "nuclear ambiguity." Indeed, the opinion states, "no one should understand our decision as "assum[ing], categorically," — i.e., outside the FOIA context — that an alternative remedy will preclude APA relief even if that alternative circumscribes courts' authority to order appropriate injunctive relief."

The "nuclear ambiguity" system, which the Obama administration codified in 2012 via an unlawful Department of Energy gag order known as WPN-136 *Guidance on Release of*

[1] "International Security Assistance and Arms Export Control Act of 1976," Public Law 94-329, 94t Congress, H.R. 13680, June 30, 1976, section "Nuclear Transfers," p 1210-1211

Information Relating to the Potential for an Israeli Nuclear Capability, can only be redressed through APA review.

Absent immediate injunctive relief, the Plaintiff risks imminently losing their opportunity to obtain any meaningful remedy. That is because on May 5, 2017, the President signed into law $3.7 billion in foreign aid to Israel as part of a $1.17 trillion bill[2], that does not comply with the Arms Export Control Act under the unlawful "nuclear ambiguity" WPN-136 gag order system. Even members of Congress laugh off compliance with the Arms Export Control Act as they pass aid, and refuse to demand required waivers. Senator Chuck Schumer told reporters at a National Press Club Briefing, ""It is a well-known fact that Israel has nuclear weapons, but the Israeli government doesn't officially talk about what kinds of weapons and where, et cetera." ("Israel's Not-So-Secret Nukes Won't Kill US Aid," Courthouse News Service, March 2, 2107).

However, the Defendant's violations of APA within "nuclear ambiguity" and the WPN-136 gag order is solely employed to unlawfully distribute the aid absent the required steps of withholding it, or providing public waivers legalizing its distribution, or changing the AECA.

FACTUAL AND PROCEDURAL BACKGROUND

A. Two longstanding amendments to the Foreign Aid Act of 1961, called the Symington & Glenn Amendments, are currently codified in 22 USC §2799aa-1: *Nuclear reprocessing transfers, illegal exports for nuclear explosive devices, transfers of nuclear explosive devices, and nuclear detonations*. Symington & Glenn prohibit U.S. foreign aid transfers to certain foreign states with nuclear weapons programs absent mandatory executive

[2] AIPAC thanks Congress for including Israel assistance in spending bill, JTA, May 7, 2017 http://www.jta.org/2017/05/07/news-opinion/politics/aipac-thanks-congress-for-including-israel-assistance-in-spending-bill

actions. Federal agencies such as the Department of Treasury, the Department of Defense, the Department of State, the Central Intelligence Agency and the Department of Commerce have acted unlawfully and in concert to help thwart Symington & Glenn. The Department of Energy in 2012 even created WPN-136, in what amounts to a law criminalizing informed public federal agency discussions and analysis of the Israeli nuclear program in furtherance of undermining Symington and Glenn.

Defendants have collectively engaged in a violation of administrative procedure and the Take Care Clause by unlawful failure to act upon facts long in their possession while prohibiting the release of official government information about Israel's nuclear weapons program, particularly ongoing illicit transfers of nuclear weapons material and technology from the U.S. to Israel. These violations are manifest in gagging and prosecuting federal officials and contractors who publicly acknowledge Israel's nuclear weapons program, imposing punitive economic costs on public interest researchers, such as the Plaintiff/Appellant who attempt to educate the public about the functions of government, refusing to make bona fide responses to journalists and consistently failing to act on credible information available in the government and public domain. These acts serve a policy that has many names all referring to the same subterfuge, "nuclear opacity," "nuclear ambiguity," and "strategic ambiguity." In the complaint, and appeal it is simply referred to as "nuclear ambiguity."

Such a unilateral suspension of the nation's Arms Export Control laws through violations of sunshine laws, Administrative Procedure Act, the Take Care Clause and Executive Order 13526 – Classified National Security Information is unlawful. Only this Court's immediate intervention can offer redress to the Plaintiff's past and future injuries

and broader relief to American taxpayers who have suffered grave and ongoing harm since 1978.

B. Plaintiff's Claim

Plaintiff, Grant F. Smith, is a public interest researcher and founder of the Institute for Research: Middle Eastern Policy, Inc. (IRmep). Smith's FOIA, mandatory declassification review (MDR) and Interagency Security Classification Appeals Panel (ISCAP) generated releases, research and analysis have been published in The Washington Report on Middle East Affairs, The Wall Street Journal, Antiwar.com, The Washington Examiner, Corporate Crime Reporter, Mint Press News, LobeLog, the Bulletin of the Atomic Scientists, The Nation Magazine, The Weekly Standard, Military.com, The Jewish Daily Forward, Business Insider, and Courthouse News Service. They have been carried on broadcast outlets such as C-SPAN, public and commercial U.S. radio stations, foreign broadcasts transmitted by VOA, as well as foreign news agencies like the BBC, Radio France and RT. For nearly a decade, the Plaintiff's rights to access information for use in vital public interest research have been violated by U.S. federal agencies.

Plaintiff's Complaint alleges Defendants are violating r 28 U.S.C. § 1331 because this action arises under the U.S. Constitution, art. II, § 3, cl. 5, and the APA, 5 U.S.C. § 706. The Court also has jurisdiction under 28 U.S.C. § 1346 because this is a civil action or claim against the United States. The district court particularly had jurisdiction over this action pursuant to 5 U.S.C. § - 7 - 552(a)(4)(B). Finally, the Court had jurisdiction to compel an officer or employee of the abovenamed federal agencies to perform his or her duty under 28 U.S.C. § 1361.

In his amended complaint, Dkt No. 17, plaintiff sought declaratory and injunctive relief for Defendants to cease "nuclear ambiguity," disgorgement of aid unlawfully sent in violation of the AECA, cease all gag orders and FOIA violations required under "nuclear ambiguity," and perform their duties under AECA. Since the complaint was filed, one Defendant complied with two Plaintiff requests to release formerly secret US Department of State foreign aid "Memorandums of Understanding."

C. Procedural History

On August 8, 2016, Plaintiff filed his complaint. Motions to dismiss filed by the Defendants were fully briefed before the district Court. On January 18, 2017, observing growing demands by the Israeli government and its unregistered foreign agent (The American Israel Public Affairs Committee (AIPAC), ordered to register when it was part of the American Zionist Council by Robert F. Kennedy Department of Justice on November 21, 1962[3]) for U.S. foreign aid, Plaintiff moved for an injunction, seeking to temporarily block the delivery of foreign assistance until the "nuclear ambiguity" system used by Defendants to violate the AECA a system which had financially and otherwise harmed the Plaintiff, and been properly reviewed by the court. Dkt No 18 By order dated February 27, 2017 the district court denied the Plaintiff's modtion. Dkt No 27. Plaintiff then filed a timely notice of appeal.

[3] J. Walter Yeagley, AAG, Internal Security Division. Foreign Agent Registration Act Order, November 21, 1962 http://www.israellobby.org/AZCDOJ/P6100127redorder/default.asp

ARGUMENT

I. THIS COURT SHOULD ENJOIN THE DEFENDANTS FROM UNLAWFULLY DISTRIBUTING FOREIGN AID FUNDING TO ISRAEL DURING THE PENDANCY OF THIS APPEAL

To succeed on a motion for emergency injunctive relief pending appeal, the moving party must satisfy the same factors necessary to prevail on a motion for preliminary injunctive relief before a district court: "(1) a substantial likelihood of success on the merits, (2) that [the movant] would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) ("CFGC") (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395.

Under the first factor, however, the movant must show it will likely succeed on the merits of its *appeal*. *See Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam).(1981)); *see* D.C. Cir. R. 8(a). This Court "'review[s] a district court's weighing of the four preliminary injunction factors and its ultimate decision to issue or deny such relief for abuse of discretion.'" *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009) (quoting *CFGC*, 454 F.3d at 297). "Legal conclusions—including whether the movant has established irreparable harm—are reviewed *de novo*."

A. Plaintiff is Likely to Succeed on the Merits of his Appeal

Plaintiff is likely to succeed on the merits of his appeal because: (1) the district court plainly erred in its rush to judgement that "APA section 704 limits review under that statute to agency actions 'for which there is no other adequate remedy in court" (*Citizens for Responsibility & Ethics in Washington v. United States Dep't of Justice*, No. 16-5110, 2017 WL

412626 at *7--8 (D.C. Cir. Jan. 31, 2017. The precedent cited makes no such sweeping limitations on review.

1. Plaintiff had made a strong and un-rebutted showing that "nuclear ambiguity" policies supersede the Freedom of Information Act, and harmed the Plaintiff

The Plaintiff has suffered documented financial harm as a victim of "nuclear ambiguity", a fact unrebutted by the Defendants. Plaintiff revealed charges, unpaid court costs and other direct financial harm imposed upon him by the Defendant's illegal scheme. Defendants show no evidence that their unique, and Orwellian, retention of government agency information about Israel's nuclear weapons program, which should have precipitated AECA controls, was withheld from public release for any reason other than to unlawfully deliver foreign aid. The district court simply erred in asserting that the financial penalties ($12,795) incurred by the Plaintiff in pursuit of duties as a public interest researcher were not sufficient particularized, and instead devoted the majority of its deadline-driven dismissal to generalized injuries. Now as Appellant, I believe these financial penalties will be found to be relevant.

B. Plaintiff Faces Irreparable Harm in the Absence of an Injunction

Because Plaintiff confronts the continuing and imminent risk that Defendants' actions will essentially render his claims moot, he faces irreparable injury that can only be prevented by emergency injunctive relief pending a bona fide review. To constitute irreparable harm, an injury "must be 'certain and great,' 'actual and not theoretical,' and 'of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.'" *FOP Library of Cong. Labor Comm. v. Library of Congress*, 639 F. Supp. 2d 20, 24 (D.D.C. 2009) (quoting CFGC,

454 F.3d at 297). "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm." Id. (quoting CFGC, 454 F.3d at 297-98).

Without injunctive relief pending appeal, the risk is great and imminent that the $3.7 billion will be quickly transferred to Israel, thereby depriving Plaintiff and his public interest following (and more important, the American people who oppose such aid and subterfuges) of a remedy. "[T]his circuit's case law unequivocally provides that once the relevant funds have been obligated, a court cannot reach them in order to award relief." City of Hous. v. HUD, 24 F.3d 1421, 1426 (D.C. Cir. 1994). Because the district court declined to grant preliminary injunctive relief, Defendants may obligate and distribute foreign aid to Israel at any time. And once Defendants transfer the funds overseas, the Plaintiffs will suffer irreparable injury. "It will be impossible … to award the plaintiffs the relief they request if they should eventually prevail on the merits." *Ambach v. Bell*, 686 F.2d 974, 986 (D.C. Cir. 1982).

Thus, a direct and immediate threat exists that in the time it would take for this Court to consider this appeal in the ordinary course, the entire $3.7 billion will be irretrievably dispersed, depriving the Court of the ability to provide the Plaintiffs with any remedy, including compliance with AECA and an end to WPN-136 violations of APA and FOIA. See *Population Inst. v. McPherson*, 797 F.2d 1062, 1081 (D.C. Cir. 1986) (granting injunction pending appeal because "this court will be unable to grant effective relief" if the agency distributes to other groups the funds plaintiff sought to enjoin the agency from withholding).

C.Injunctive Relief Will Not Harm Third Parties And The Public Interest Favors Requested Emergency Injunctive Relief

Emergency injunctive relief will not harm beneficiaries of foreign aid unlawfully given to Israel. First, Israel's possession of the only tactical and strategic nuclear weapons in the Middle East provide deterrence to the many enemies it has made (and tried to make America's own). Plaintiffs aim to make that nuclear arsenal part of the foreign aid process, as required by law and good governance.

Second, the relatively brief delay associated with enjoining the distribution of funds—only during the pendency of the appeal—does not justify denying the requested injunctive relief. See *Monument Realty LLC v. Wash. Metro. Area Transit Auth.*, 540 F. Supp. 2d 66, 80-81 (D. D.C. 2008); *George Wash. Univ. v. District of Columbia*, 148 F. Supp. 2d 15, 18-19 (D.D.C. 2001); see also *PCTV Gold, Inc. v. Speednet, LLC*, 508 F.3d 1137, 1145 (8th Cir. 2007).

Most important, the public supports due consideration, sunshine and transparency in general and the inclusion of Israel's nuclear weapons as a factor in U.S. foreign aid transfers in particular.

A statistically-significant poll of American attitudes on this matter fielded through Google Analytics Solutions asked, "Israel & its US lobby want Congress to finance Israel's 'Qualitative Military Edge' over rivals without considering Israel is the region's sole nuclear power." 52% of Americans believe, "Congress should consider Israel's nukes."[4] Allowing Congress and the Defendants to pretend the arsenal does not exist runs contrary to the public interest.

[4] "American attitudes about Israel/Lobby programs" March 26, 2017, ISBN 978-0-9827757-9-0 http://irmep.org/03262017_American_Attitudes.asp

CONCLUSION

For the foregoing reasons, the Court should enjoin the Defendants from transferring U.S. foreign assistance during the pendency of this appeal.

Id. Dated: 5/6/2017

Respectfully submitted,

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