

Briefing:

“Lawsuit Challenges US Aid to Israel & Nuclear Gag Order”

October 23, 2017

Grant F. Smith

IRmep Programs



- Non-profit founded in 2002 to study US Middle East policy formulation
- [Israel Lobby Archive](#) repository of Israel and its US lobby's activities, mostly historical, fed by FOIA releases
- [Conferences](#) & Public events
- [Polls](#) 2014 polling
- [Center for Policy & Law](#)

Shifting Context

- Trump administration
 - Hostility to JCPOA/Iran over nuclear issues
 - Declared intent to buck international law by moving US embassy from Tel Aviv to Jerusalem
 - No enforcement of MOU aid caps
 - Ambassador & “peace” team more tilted toward Israel than any previous
 - Intense pressure on foreign news organizations (RT, AJ) that openly reported about Israel’s nuclear program
- Israel lobby attempts to
 - Criminalize boycotts of Israel
 - US engaged against Iran & Syria

IDA

IDA MEMORANDUM REPORT M-317 File Copy

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CRITICAL TECHNOLOGY ASSESSMENT
IN ISRAEL AND NATO NATIONS

Edwin S. Townsley, IDA
Project Director

Clarence A. Robinson, LTI
Team Leader

April 1987

Prepared for
Office of the Under Secretary of Defense
(International Programs and Technology)



INSTITUTE FOR DEFENSE ANALYSES
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In Shocking Breach, U.S. Declassifies Document Revealing Some of Israel's Nuclear Capabilities

3:25 PM, MAR 26, 2015 | By TOM GROSS



On February 12, the Pentagon quietly declassified a top-secret 386-page Department of Defense document from 1987 detailing Israel's nuclear program – the first time Israel's alleged nuclear program has ever been officially and publically referenced by the U.S. authorities.

THE MAGAZINE

October 02, 2017

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D.C. CURRENT

Don't Blame Obama for Data on Israel's Nukes

Judge had ordered release of 1987 U.S. weapons report by Feb. 15, in response to a longstanding lawsuit. And it never was a classified document.

Email Print 11 Comments Order Reprints

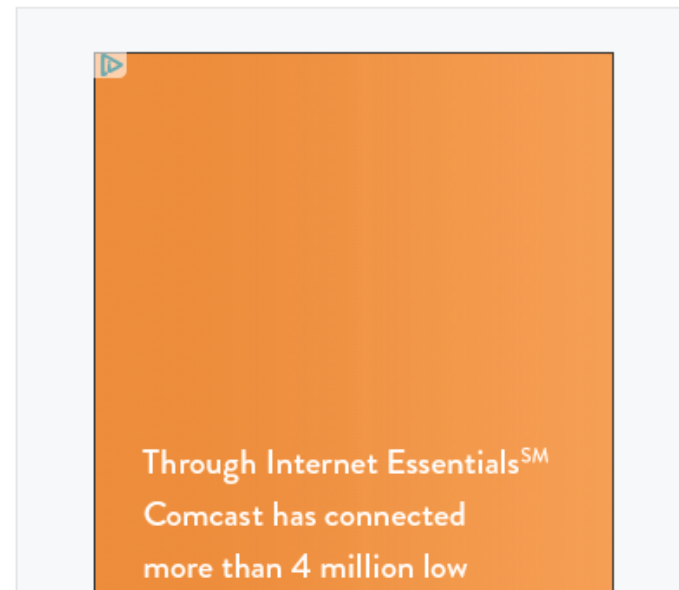
By JIM MCTAGUE

April 3, 2015 10:21 p.m. ET

Delete this from the right wing's list of Obama outrages: The president did not release Israel's atomic-bomb secret to the public in a fit of pique over Israeli Prime Minister Benjamin Netanyahu's March 3 speech to congressional Republicans.

Obama's 24/7 vilifiers claimed this to be the case as late as last week. They said he had declassified a 1987 Pentagon report titled, "Critical Technology Assessment in Israel and NATO Nations," which establishes that Israel has had nukes for decades. They ignored key facts to assure that the story would fit their hypothesis.

The mud-slinging created quite a hullabaloo along Pennsylvania Avenue. As the Washington Examiner reported on March 26, "Three years after a researcher filed a Freedom of Information Act request for a Department of Defense report discussing



Nuclear “ambiguity”



Lawsuit goals

- Work through the third branch for redress
- Improve US Middle East policy by increasing transparency and rule of law and fighting corruption
 - Obtain information that is tightly held for the wrong reasons (embarrassment, to cover up wrongdoing)
 - Petition for enforcement of important laws
- “Catalyst” for others to take action in relevant forums
- Focus
 - “Nuclear ambiguity”
 - Unconditional, unlawful US aid to Israel
 - Capture of key gov’t agencies and divisions
 - To protect such programs

IRmep Lawsuits (Past/Present)

	DOD REPORT ON ISRAELI NUCLEAR WEAPONS DEVELOPMENT INFRASTRUCTURE 14-01611	CIA NUMEC DIVERSION FILES 15-00224	US AID TO ISRAEL AND "NUCLEAR AMBIGUITY" 16-01610	CIA INTELLIGENCE AID TO ISRAEL 1990-2015 TOPLINE BUDGET NUMBERS 15-01431
Research/Drafting/ Expert Review				
Filed				
Briefing / Dispositive Motions				11/3/2017
Decision	Report Released 02/10/2015	Dismissed 3/31/2017		
Appeal			4/25/2017	
Remand/Dismissal				
Decision				Page 9

Israel is a nuclear weapons state

- Has never signed the Nuclear Non-Proliferation Treaty
- Abundant information in the public domain about the its nuclear weapons program.
- Even more classified information held by the US government.



Israel's Dimona Nuclear Weapons Facility

What is U.S. posture toward nuclear Israel?

- Seymour Hersh (1991):
 - The “Samson Option”
 - Israel will take down the entire world if threatened with being “driven into the sea.”
- How does the NSC / DoD deal with that?
- Posture evolving?



Is U.S. posture toward nuclear Israel?

- Same as North Korea?
- US does not “recognize” North Korea as a nuclear power.
- Simultaneously fears “nuclear blackmail” by North Korea
- Any similarity to secret U.S. policy on Israel?



9/12/2017

Isn't foreign aid to a Non-NNPT signatory nuclear country unlawful?



- It is impossible to get a response to this important question from U.S. executive branch and federal agency officials when they are in office.
- List of “ambush” videos in resource section at the end (Barack Obama, Dick Cheney, Condoleezza Rice, State Dept. Spokesperson etc.)
- MSM avoids.

What are Symington & Glenn?

- 1970s amendments to the Foreign Assistance Act of 1961 (now in AECA)
- Prohibit U.S. aid to any non-NPT signatory building up a nuclear weapons program
- Require U.S. President to either:
 - Stop aid
 - Issue waivers to Congress specifying how delivering aid to a non-NPT nuclear power “would have a serious adverse effect on vital United States interests.”

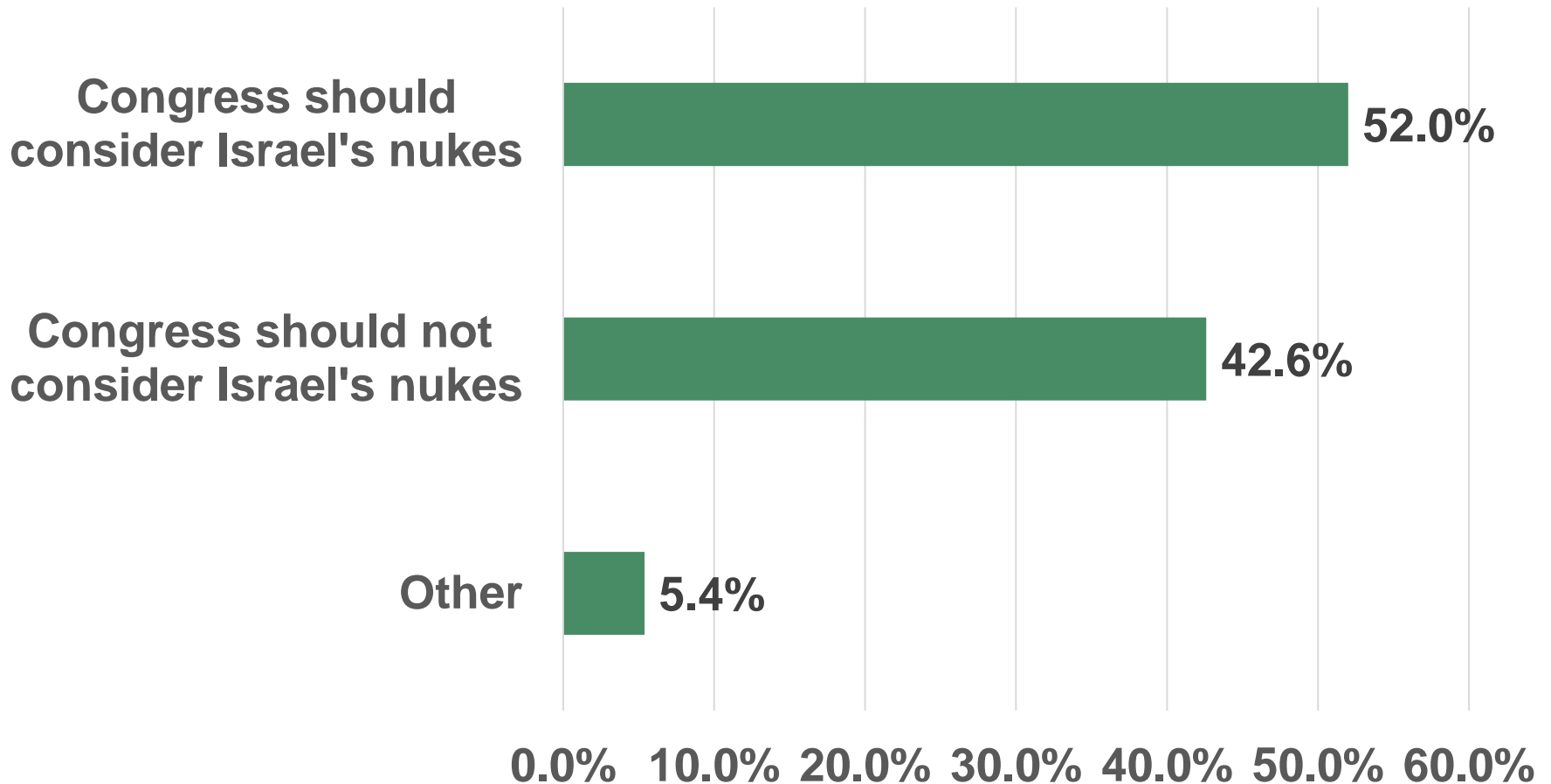
S&G Legislative intent

- “...if you wish to take the dangerous and costly steps necessary to achieve a nuclear weapons option, you cannot expect the United States to help underwrite that effort indirectly or directly.”
- 22 USC §2799aa–1 *Nuclear reprocessing transfers, illegal exports for nuclear explosive devices, transfers of nuclear explosive devices, and nuclear detonations*

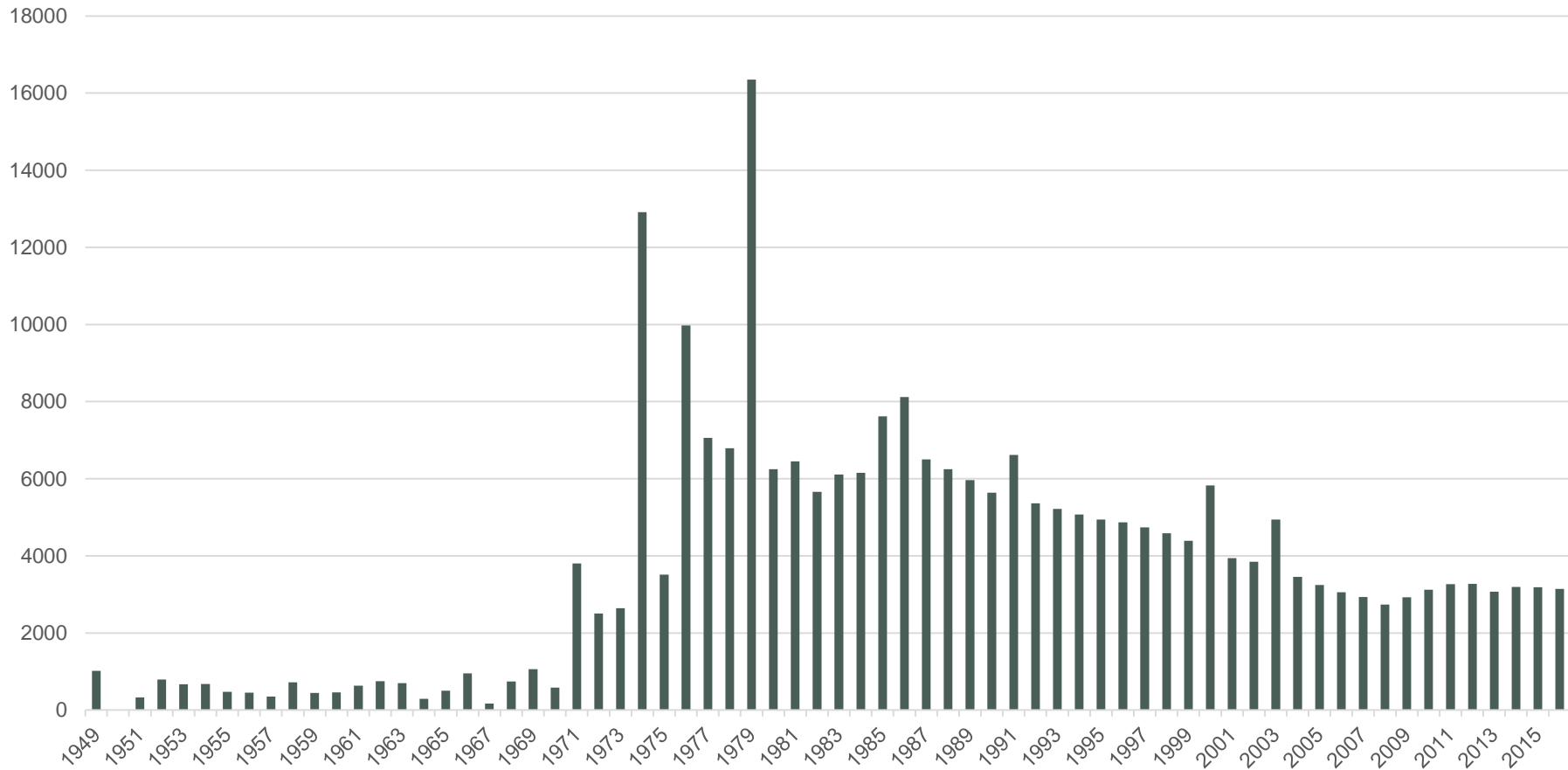


Senator Stuart Symington

Question: 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.



1948-2016 US Aid to Israel \$254B Inflation Adjusted (Unclassified)



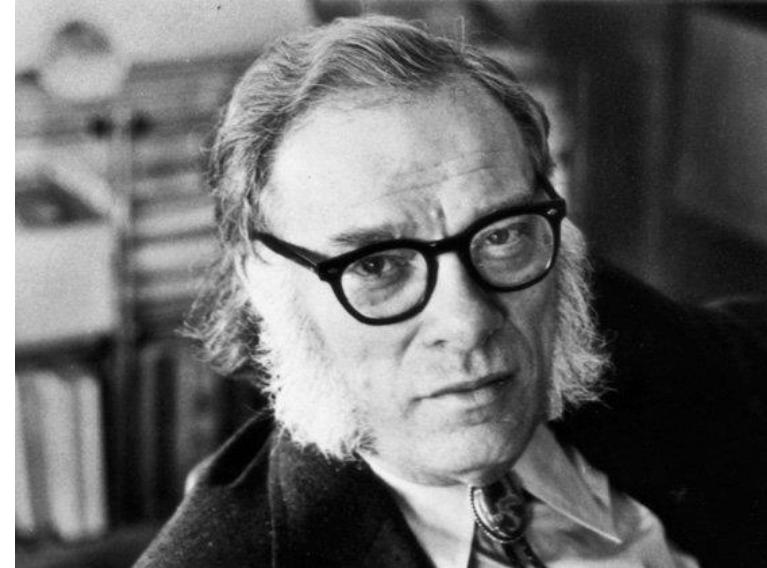
Sued to block US foreign aid to Israel

- Fagan Dickson- 1975
- Harvard lawyer, anti-Vietnam war activist behind “bring Lyndon home” campaign.
- “..grants of foreign assistance by the United States to Israel are prohibited by the Establishment of Religion Clause of the First Amendment to the Constitution.”
- Denied standing.



Sued to block US foreign aid to Israel

- Author Isaac Asimov among plaintiffs who challenged taxpayer-funded foreign aid to religious schools through AID
- Establishment Clause
- Dismissed 1991
- “Non-justiciable political question” and for standing as taxpayers



Other recent cases against US Foreign Aid

- Joe Pool Jr.
- Three-time Republican candidate for the TX Supreme Court.
- Foreign aid to Afghanistan “amounts to illegal support for Muslim nations.”
- Legal scholars find no obvious standing.



“Ultimately, he’s (Trump) proposing the defense & establishment of Islam.”

Standing “lessons” and success



- “Establishment clause” challenges over harm as “taxpayers” have not been successful.
- Most successful recent lawsuit challenging a President and federal agencies on overreach/not following civil procedure and rule of law
- International, political question over Deferred Access for Childhood Arrivals (DACA)
- States sued Obama and prevailed over harm alleged by “unlawful legislative rules” issued over undocumented immigration.
- Real, and immanent injury/harm

DACA & IRmep lawsuit to block Israel aid & overturn WPN-136



Modeled on the successful DACA lawsuit, except

	DACA litigation 2014	IRmep litigation 2016
Cause	Obama administration legislative rules on immigration	Obama administration legislative rules on nuclear ambiguity.
Harm	Unfunded costs incurred by states over DACA mandates	Unreimbursed costs incurred under WPN-136 mandates
Parties	A group of U.S. states	A nonprofit research group
Outcome	Derailed President Obama's deportation amnesty program.	TBD

- **Argument:** President and federal agencies denied the Plaintiff access to government information about Israel's nuclear weapons program.
- Defendants blocked information release to preserve "ambiguity," official recognition about Israel's nuclear weapons program and deliver foreign aid without observing Arms Export Control Act provisions.
- In 2012 Obama administration "codified nuclear ambiguity" in unlawful legislative rule WPN-136.

What has been driving “ambiguity?” For how long?

- **Nixon Administration**

“The policy and practice of nuclear opacity was codified in 1969 in an extraordinary secret accord between Israeli Prime Minister Golda Meir and U.S. President Richard

Nixon. as long as Israel did not advertise its possession of nuclear

weapons by publicly declaring or testing them, the United States would tolerate and shield Israel's nuclear program” – Avner Cohen

Recently declassified Nixon administration files reveal fears of a "Zionist campaign to try to undermine" U.S. resistance to Israel going nuclear were a major factor in the compromise.

Still hundreds of unreleased Nixon admin files on this topic.



Remaining Nixon NSC NSSMs and Related Files

NATIONAL SECURITY COUNCIL INSTITUTIONAL FILES



The first NSC meeting of the Nixon Administration, January 21, 1969. (WHPO# C0127-01)

Nixon Presidential Materials Staff
National Archives and Records Administration

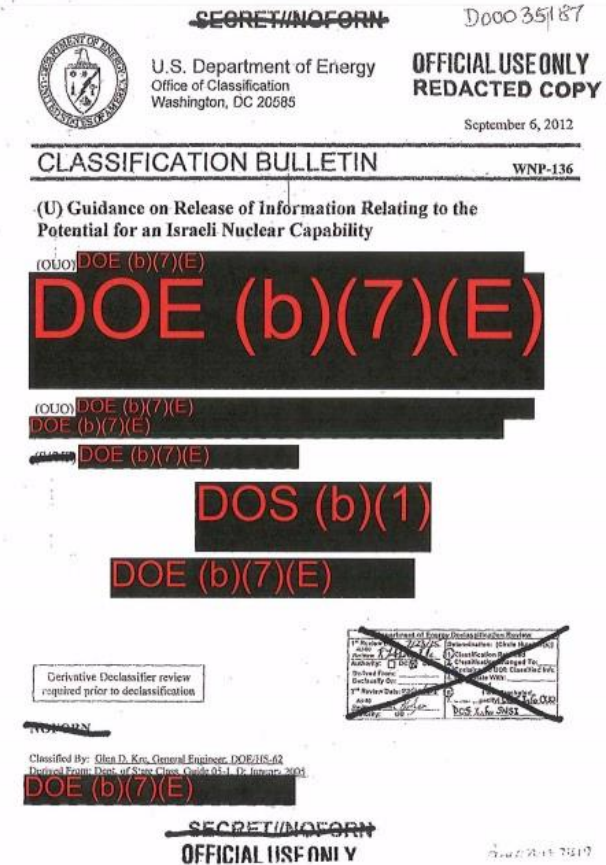
Nixon (NARA) Finding Guide – NSSM 40



NSSM 36 10 APR 69	VIETNAMIZING THE WAR
NSSM 37 10 APR 69	VIETNAM
NSSM 38 10 APR 69	POST-VIETNAM ASIAN POLICY
NSSM 39 10 APR 69	SOUTHERN AFRICA
NSSM 40 10 APR 69	CLASSIFIED TITLE
NSSM 41 11 APR 69	TREATY FOR NUCLEAR ARMS CONTROL OF THE SEABEDS
NSSM 42 11 APR 69	PERU
NSSM 43 15 APR 69	IMPLEMENTATION OF PRES PROPOSALS TO NATO MINISTERIAL MTG
NSSM 44 19 APR 69	US POSITIONS FOR NATO NUCLEAR PLANNING GRP (NPG)
NSSM 45 21 APR 69	US FOREIGN AID
NSSM 46	SPAIN

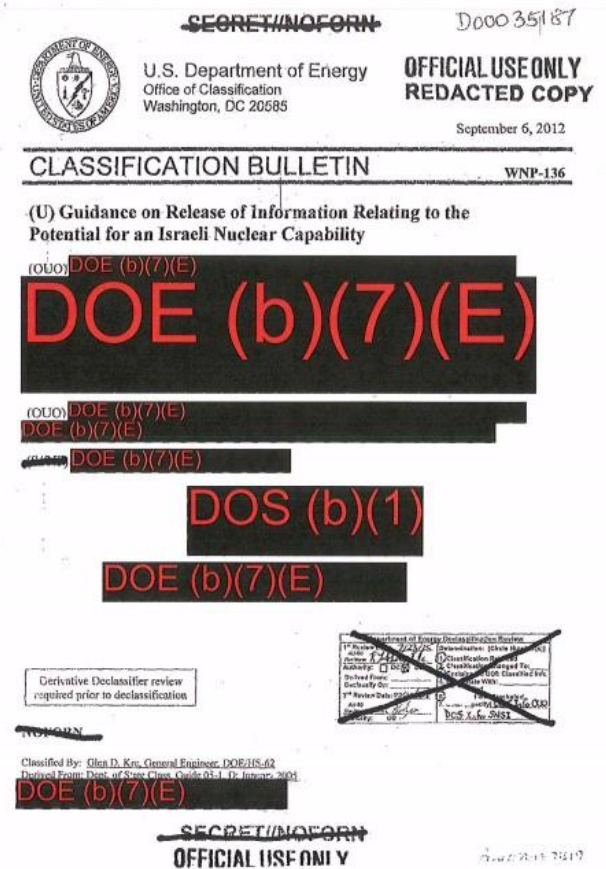
What is WPN-136?

- 2012 Gag order on the release of information or official discussion of Israeli nuclear weapons program by US government agency employees or contractors.
- Penalties:
 - Reprimand
 - Job loss
 - Imprisonment



Impact of WPN-136 on Sunshine Laws

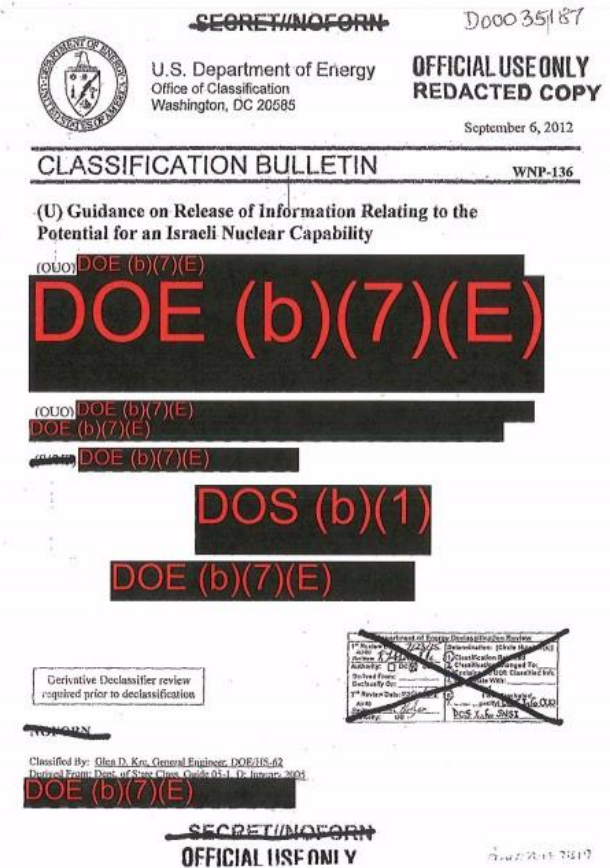
- Supersedes/undermines
 - Freedom of Information Act
 - Mandatory Declassification Reviews
- Places “out of reach”
 - Nixon administration/Kissinger files setting policy on Israel’s nukes
 - Other NSC and strategy files on Israeli proliferation and the “Samson Option”
 - BIS files on ongoing Israeli nuclear technology smuggling
 - Etc.



WPN-136 derived from US State Dept. classification guideline that states:



- “Reporting on and analysis of the internal affairs or foreign relations of a country is a central function of U.S. foreign service posts and is vital to the formulation and execution of U.S. foreign policy.”
- “This reporting should be unclassified when the subject matter is routine, already in the public domain, or otherwise not sensitive.”



WPN-136 “Gag law” Enforcement...by Congress

- Los Alamos National Laboratory nuclear analyst James Doyle wrote candidly about Israel’s nuclear weapons in “Why Eliminate Nuclear Weapons” in 2013.
- His report had passed a classification review
- After a congressional staffer read the article, it was referred to classification officials for a 2nd review.
- Doyle’s pay was then cut, his home computer searched, and he was fired.



“Nuclear weapons did not deter Egypt and Syria from attacking Israel in 1973...”

Our Complaint

- Filed August 8, 2016
- District of Columbia District Court
- *Smith v. U.S.A., 2016, No. 01610*
- Dismissed on standing, citing a brand-new precedent.
- Appealed *Smith v. USA, No. 17-5091*

The Defendants (then)



- Director Central Intelligence Agency John O. Brennan
- Secretary, U.S. Department Of Defense Ashton Carter
- Secretary, U.S. Department Of State John Kerry
- Secretary, U.S. Department Of Treasury Jacob Lew
- Secretary U.S. Department Of Energy Ernest Moniz
- President Barack Obama
- Secretary U.S. Department Of Commerce Penny Pritzker

The Defendants (now)

- Director Central Intelligence Agency Mike Pompeo
- Secretary, U.S. Department Of Defense James Mattis
- Secretary, U.S. Department Of State Rex Tillerson
- Secretary, U.S. Department Of Treasury Steven Mnuchin
- Secretary U.S. Department Of Energy Rick Perry
- President Donald Trump
- Secretary U.S. Department Of Commerce Wilbur Ross

What statutes?

- Violations of the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq,
- Take Care Clause, U.S. Constitution, art. II, § 3, cl. 5
- 28 U.S. Code § 1361.

Standing - sample Plaintiff injury claims



- Department of Commerce demand of \$6,984.50 for files detailing recent (post year 2010) Israeli front-company importation of nuclear weapons tech from US
- Non-payment of \$624.78 in court costs
- \$10,952.78 in costs and fees to pursue and release unclassified DoD report on the Israeli nuclear (including hydrogen bomb).
- Informational injury caused by “ambiguity” undermining sunshine law requests (including MDR.)

Harm “Fairly Traceable” to scheme to violate AECA/S&G



- Appellee/Defendants’ desire to ignore the AECA which places conditions on U.S. foreign aid to non-NPT signatory nuclear weapons states such as Israel;
- Implementation of “nuclear ambiguity” to restrict release of U.S. government information about Israel’s nuclear weapons program.
- Enforcement of “nuclear ambiguity” through WPN-136 and other measures to thwart information releases and informed official responses to public queries.
- Improper classification under EO 13526 that cover up wrongdoing. Perpetuation of violations through MDR.
- Spurious use of FOIA exemptions, MDR denials, excessive fees, and delaying tactics.

What Happened in the Lower Court 16-01610



- Plaintiff filed a request for injunction against disbursement of US aid to Israel until litigation resolved 11/1/2016
- Defendants sought dismissal on grounds of standing – 12/1/2016
- Lower Court dismissed on standing, ***citing a 1/31/2017 legal precedent*** – 2/27/17
- Five apparent errors in the seven-page decision provided grounds for an appeal.

IRmep Aid & Ambiguity 16-01610 is now 17-5091



[ORAL ARGUMENT NOT YET SCHEDULED]
No. 17-5091

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GRANT F. SMITH, IRmep

Plaintiff-Appellant,

v.

USA, et al

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

So far, the panel of Judges has refused to:



- Issue an injunction against further US aid until the case is decided.
- Review WPN-136 *in camera*
- Disallow a lengthy extension requested by the Department of Justice

Appeal Argument # 1

- **Lower Court misapplied *Crew v DOJ* (1/31/2017) “To the extent that plaintiff alleges informational injury — harm resulting from his inability to access the information he seeks — based on Executive Order 13526, he must seek redress under FOIA and not the APA.”**
- Appellant argues that WPN-136 is an unlawful legislative rule that nullifies FOIA.
-and can't be reached through FOIA.

Appeal Argument #2

- **Lower Court asserted “Plaintiff may seek compensation for his FOIA fees in the lawsuits he brought pursuant to FOIA.”**
- As a *Pro Se* litigant, the Plaintiff is uniquely *ineligible* to receive any fees (attorney fees) in FOIA lawsuits, only costs (such as court filing costs). Only members of the bar can receive fees.
- This a level of lower court error which should easily trigger a remand.

Appeal Argument #3

- Lower Court asserted ““To the extent that plaintiff alleges informational injury — harm resulting from his inability to access the information he seeks — based on Executive Order 13526, he must seek redress under FOIA and not the APA,”
- The Plaintiff also included MDR cases in his complaint. ***No MDR can be appealed to any court,*** only the federal-agency-controlled ISCAP. Impact of WPN-136 on MDR not reachable.
- Again, a level of lower court error which should easily trigger a remand. Appeal 17-5091 **Page 42**

Next moves

- Appellee Brief
11/8/2017
- Appellant Reply Brief
11/01/2017
- Final Briefs 11/22/2017
- Decision on remand
whether merits can
finally be addressed.



Relief

- “Nuclear ambiguity is the unlawful fulcrum the Defendants and their predecessors have employed for decades to illegally hoist the lion’s share of U.S. taxpayer funded foreign aid into the coffers of an unlawful recipient.”
- It directly injures Americans, such as the plaintiff, who attempt to overcome it and expose the truth.
- It indirectly injures American taxpayers.
- Relief is eliminating the fulcrum.

Defendant Tactics/Judicial Deference (from all cases)

- Delay, postpone, request more time
 - Judges grant
 - When timely filed
 - When not timely filed
- Appeal to authority
 - Boilerplate affidavits filed by high CIA officials about the alleged danger in releasing classified information are sacrosanct in the courtroom



Defendant Tactics/Judicial Deference (cont.)

- ***Impersistence*** of memory
- Judges will ***not*** consider that the CIA has previously incinerated and deleted information...
- ...even after being ordered by courts to turn it over in FOIA cases.
- Every case involving CIA has a fresh, clean, new slate, with no *priors*.



Defendant Tactics/Judicial Deference (cont.)

- Defendants frequently make sweeping, unsubstantiated claims.
- When proven wrong, there are no consequences
- Court allows them to pivot to other arguments.



Defendant Tactics/Judicial Deference (cont.)

- Frequent changes in DOJ representation
 - See “delay, postpone, request more time.”
- Multiple bites of the apple
 - Defendants allowed to make substantially similar arguments for dismissal over and again.
 - Plaintiffs only have to lose once.



Defendant Tactics/Judicial Deference (cont.)

- DOJ attorney “infallibility”
 - DOJ attorneys can file boilerplate briefs
 - with the wrong parties
 - and incorrect case numbers.
 - Generates no response or reprimand from the court.



Defendant Tactics/Judicial Deference (cont.)

- Indisputably authentic, but leaked (non-officially declassified or released) U.S. government documents
 - Often directly refute defendant arguments
 - Cannot be given due consideration by the court



IRmep Lawsuits (Past/Present)



	DOD REPORT ON ISRAELI NUCLEAR WEAPONS DEVELOPMENT INFRASTRUCTURE 14-01611	CIA NUMEC DIVERSION FILES 15-00224	US AID TO ISRAEL AND "NUCLEAR AMBIGUITY" 16-01610	CIA INTELLIGENCE AID TO ISRAEL 1990-2015 TOPLINE BUDGET NUMBERS 15-01431
Research/Drafting/ Expert Review				
Filed				
Briefing / Dispositive Motions				11/3/2017
Decision	Report Released 02/10/2015	Dismissed 3/31/2017		
Appeal			4/25/2017	
Remand/Dismissal				
Decision				


Classified U.S. foreign aid to Israel - 15-01431



- “But the fact is, partly due to American military and intelligence assistance, which my administration has provided **at unprecedented levels**, Israel can defend itself against any conventional danger -- whether from Iran directly or from its proxies.” ***President Obama – American University 8/5/2015***
- **\$1.884 billion intelligence aid?** (\$4.999 billion previous unadjusted high minus \$3.115 billion 2015 aid?)
- **\$13.205 billion?** (\$4.999 billion in 2015 dollars inflation adjusted to \$16.320 billion minus \$3.115 billion)

IRmep Lawsuits (New & Pending)



	Federal Agency Capture: US Department of Treasury 17-01796	Foreign Agents Registration Act Office – US Department of Justice	Federal Agency Capture: US Department of Justice	Federal Agency Capture: US Department of State
Research/Drafting/Expert Review		12/01/2017 est.	2/01/2018 est.	4/1/2018 est.
Filed	9/1/2017			
Briefing / Dispositive Motions				
Decision				
Appeal				
Remand/Dismissal				
Decision				

FOIA Response – DOJ Pardon Attorney – 16 days



Office of the Pardon Attorney
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Fifth Floor - East Side
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Direct Line: 202 616 6070

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Sarah Dobrofsky	Summer Intern		(b) (2)	Facsimile Machine		616-6069	5E.506
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Vacant	Contractor	(b) (2)		Conference Room		(b) (2)	

FOIA response OTFI Treasury Unit – 5 Years

[REDACTED]	[REDACTED]	[REDACTED]
BRONKHORST, MIKE A	USO/MISCELLANEOUS ADMINISTRATION AND PROGRAM	20120930 20120930
[REDACTED]	[REDACTED]	[REDACTED]
COHEN, DAVID SAMUEL	USO/MISCELLANEOUS ADMINISTRATION AND PROGRAM	20120930
[REDACTED]	[REDACTED]	[REDACTED]

Questions and Answers

Resources (Part 1)

- Israel Aid and Ambiguity Appellant Brief
 - http://irmep.org/CFP/S&G/09182017_Appellant_Brief_v36.pdf
- US State Department Spokesperson John Kirby Dodges Questions about how Israel's nuclear weapons make US aid unlawful:
 - <https://youtu.be/NXvi9QDWyO4>
- Sam Hussein/Chris Belcher Washington Stakeout: US executive branch officials dodging Israel nuke questions
 - <https://youtu.be/RSuIFDNz5KE>

Resources (Part 2)

- The Case of James Doyle
 - <https://www.publicintegrity.org/2014/07/31/15161/nuclear-weapons-lab-employee-fired-after-publishing-scathing-critique-arms-race>
- Obama speech mentioning intelligence aid to Israel at American University
 - <https://obamawhitehouse.archives.gov/the-press-office/2015/08/05/remarks-president-iran-nuclear-deal>
- IRmep public polls on nuclear weapons, foreign aid and other topics
 - <http://irmep.org/surveys/>

Resources (Part 3)

- Nixon Library (NARA) Finding Aid to National Security Council files
 - https://www.nixonlibrary.gov/forresearchers/find/textual/institutional/finding_aid.pdf
- “Erased” CIA torture report, videos
 - <http://thehill.com/policy/national-security/280002-cia-watchdog-accidentally-destroyed-only-copy-of-torture-report>
 - <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/09/AR2010110904106.html>
- IRmep cases, exhibits and filings:
 - <http://irmep.org/CFP/>



THE ISRAEL LOBBY & AMERICAN POLICY 2018

IsraelLobbyandAmericanPolicy.org

March 2, 2018 at the National Press Club, Washington, DC

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Thank you.