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CIA Fights Disclosure of Secret Aid to Israel

By Grant Smith
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On March 30 Federal Judge Tanya Chutkan found it "neither logical nor plausible" for the CIA to claim it had no intelligence budget expenditure data of support to Israel between the years 1990 and 2015. The court then ordered the Department of Justice legal counsel to "meet and confer" about responding to the original Freedom of Information Act request for the data and file a response by April 24.

The original FOIA request sought public disclosure of the secret portion of US taxpayer-funded foreign assistance delivered to Israel. (PDF) Although "memorandum of understanding" packages, the most recent guaranteeing \$3.8 billion per year over a decade, and additional Israel-bound appropriations passed by Congress are publicly known, secret US intelligence aid is not.

On September 11, 2013 journalist Glenn Greenwald revealed that the National Security Agency was pumping electronic intercepts of communications of American citizens to Israel, with no legally binding limits on how the data could be used.

On August 5, 2015 President Barack Obama quantified the possible dollar value boundaries of intelligence aid during a speech at American University, claiming "...due to American military and intelligence assistance, which my administration has provided at unprecedented levels, Israel can defend itself against any conventional danger..." Given historic military aid is publicly known, secret intelligence aid to Israel in 2015 was either an additional \$1.9 billion per year or

\$13.2 billion if the president adjusted for inflation. These are the amounts Obama would have had to provide to meet "unprecedented" combined levels of military and intelligence assistance.

The question has grown in importance. The Trump administration has indicated that it will be slashing the US foreign aid budget, except for funding to Israel. This may make the percentage of total US aid received by Israel jump from an average of 9 percent over the past four years to 20- 30 percent or even more of the total foreign aid pie. This worries many within the Israel lobby who wish to obscure how disproportionate it has become. Also, according to statistically significant opinion polling, the majority of Americans overwhelmingly oppose US aid to Israel.

The legality of US aid to Israel is also under scrutiny. In February reporter Sam Hussein made Senator Chuck Schumer, an ardent Israel supporter, admit during a National Press Club briefing that Israel has nuclear weapons. Under the Arms Export Control Act, the US may not provide foreign aid of any type to nuclear weapons states operating outside the Nuclear Non-Proliferation Treaty unless they comply with special procedures.

On April 21, hoping to avoid a public hearing, Justice Department legal counsel Joseph Borson made a second attempt to get Chutkan to dismiss the CIA aid FOIA lawsuit. (PDF) Avoiding entirely the topic of whether the CIA is providing intelligence support to Israel, Borson argued that because there are "17 separate intelligence agencies" it was wrong for Chutkan to assume definitively the CIA had any budget data on Israel.

In an attached affidavit, Chief Management Officer of the Director of National Intelligence Mark W. Ewing cautioned that if the court forced the CIA to go beyond a "GLOMAR" response (neither confirming nor denying such information exists) it would reveal too much. (PDF) "If the CIA were to confirm or deny 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 HUMINT (a CIA area of expertise)."

If, rather than being forced to meet in court on April 24, the CIA manages to get the judge to throw the FOIA lawsuit out, the pathway it recommends to the information sought is clear. The plaintiff would have to file a FOIA with each of the remaining 16 intelligence agencies, either wait years for responses or sue them within 20 working days, receive their GLOMAR responses or citations of FOIA exemptions allowing them to withhold information from release—all without ever knowing whether the CIA had responsive data.

Or Judge Chutkan could order the CIA to release the information in court because it is in the public interest, as she did the Department of Defense in 2015, revealing the DOD knew as early as 1987 that Israel had a hydrogen bomb program.

However, the CIA may not be as accommodating as the Pentagon. It has long resisted public accountability generally and the Freedom of Information Act particularly. In practice, courts have little ability to enforce orders to produce information under FOIA or punish the CIA even when it willfully and egregiously violates the law. When ordered by a judge to produce the so-called "torture tapes" of detainee interrogations, in 2005 the agency instead incinerated them.

The Justice Department, which rigorously defends the CIA in all FOIA cases, subsequently chose not to charge the agency officials responsible for violating the order.