

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

GOVERNMENT ACCOUNTABILITY)
PROJECT,)

Plaintiff,)

v.)

Civil Action No. 19-499 (RDM)

UNITED STATES DEPARTMENT OF)
STATE, et al.)

Defendants.)

_____)

**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO
DEFENDANT CIA'S MOTION FOR SUMMARY JUDGMENT
AND IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

The Freedom of Information Act (“FOIA”) requests at issue in this case relate to matters of extraordinary public interest and concern: efforts by private entities and individuals, acting in concert with the Trump administration, to advance a so-called “Middle East Marshall Plan” that sought to bypass protocols intended to protect United States interests in order to provide Saudi Arabia with nuclear technology. The House Committee on Oversight and Reform is investigating these efforts and has produced a wealth of evidence concerning these efforts. In two recent reports the House Oversight Committee outlined significant concerns raised by whistleblowers “about the potential procedural and legal violations connected with rushing through a plan to transfer nuclear technology to Saudi Arabia,”¹ and concluded, based on a review of key documents, that “with regard to Saudi Arabia, the Trump Administration has virtually obliterated the lines normally separating government policymaking from corporate and foreign interests.”²

The government has now filed a motion for summary judgment with respect to the request Plaintiff Government Accountability Project (“GAP”) made to the Central Intelligence Agency (“CIA”) for documents that would explain and expand on the publicly available information about the role the Trump Administration played. Cloaking itself in a veil of secrecy, the CIA claims it can neither confirm nor deny the existence of any responsive records—a so-called “*Glomar*” response—because to do so would reveal classified information that falls within

¹ Interim Staff Report, Whistleblowers Raise Grave Concerns with Trump Administration’s Efforts to Transfer Sensitive Nuclear Technology to Saudi Arabia (“*First Interim Staff Rpt.*”), at 2, Feb. 2019, available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Trump%20Saudi%20Nuclear%20Report%20-%20202-19-2019.pdf>.

² Second Interim Staff Report, Corporate and Foreign Interests Behind White House Push to Transfer U.S. Nuclear Technology to Saudi Arabia (“*Second Interim Staff Rpt.*”), at 3, July 2019, available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Trump%20Saudi%20Nuclear%20Report%20July%202019.pdf>.

the protection of FOIA Exemptions 1 and 3. Its response, however, mischaracterizes the full scope of GAP's FOIA request. It also ignores the growing body of evidence the House Oversight Committee has amassed that identifies the CIA as one of the government agencies that outside individuals, working with Trump Administration officials, have sought to draw into their scheme to influence U.S. policy in Saudi Arabia, all in furtherance of their personal financial interests. The CIA's *Glomar* response cannot prevail because GAP's FOIA request seeks information beyond intelligence information and the sources of that information, and because the CIA cannot properly rely on a *Glomar* response to cover up embarrassing or possibly illegal conduct.

FACTUAL BACKGROUND

The Atomic Energy Act

The actions on which GAP's FOIA request seeks to shed light are best understood within the statutory context of Section 123 of the Atomic Energy Act. That statute requires approval of Congress before the U.S. may transfer nuclear technology to a foreign country. This requirement "ensure[s] that the agreement reached with the foreign government meets nine specific nonproliferation requirements." *First Interim Staff Rpt.* at 2. Career experts at the National Security Council ("NSC"), Department of State, Department of Energy, and Department of Defense "typically negotiate[]" these agreements. *Second Interim Staff Rpt.* at 2. The so-called "Gold Standard" for these 123 Agreements "is a commitment by the foreign country not to enrich or re-process nuclear fuel and not to engage in activities linked to the risk of nuclear proliferation." *Id.* Saudi Arabia has refused to agree to this standard, and there is now "strong bipartisan opposition to abandoning the 'Gold Standard' for Saudi Arabia in any future 123 Agreement." *Id.*

The CIA has a publicly acknowledged role in this process. By memorandum President Trump has designated the CIA director, among others, as a regular attendee of the NSC. *See* National Security Presidential Memorandum, April 4, 2017, <https://s3.amazonaws.com/public-inspection.federalregister.gov/2017-07064.pdf>. More broadly, the CIA has itself acknowledged publicly that it plays a role in counterproliferation, which includes an undercover/ clandestine element in “confront[ing] the threat of weapons of mass destruction—*nuclear*, chemical, and biological[.]” Press Release, CIA, CIA Launches New Counterproliferation Center (Aug. 18, 2010) (emphasis added), <https://www.cia.gov/news-information/press-releases-statements/press-release-2010/cia-launches-new-counterproliferation-center.html>.

Efforts to Advance the Middle East Marshall Plan

A congressional investigation by the House Oversight Committee and other public reporting have revealed the steps former National Security Advisor Michael Flynn and others took “to use their influence with the Trump Administration to bypass” concerns about nuclear proliferation “in order to serve their own financial interests in building nuclear reactors in Saudi Arabia.” *Second Interim Staff Rpt.* at 2 When Flynn joined President Trump’s national security team in January 2017 as the National Security Advisor he brought a wealth of experience and contacts in promoting a plan to work with Russia to build nuclear reactors in the Middle East, the so-called “Middle East Marshall Plan.” The plan was fashioned around three critical stakeholders: the U.S., Russia, and the Gulf States. Complaint (“Compl.”) ¶ 18. And it was motivated by three principal rationales: (1) to provide an excuse for the United States to remove sanctions against Russia and Russian businesses; (2) to reap profits of potentially hundreds of billions of dollars; and (3) to serve a broader economic policy and geostrategic objective for the Middle East. *Id.* ¶ 19.

Before joining the Trump Administration Flynn pursued these interests in several capacities: as an advisor for ACU Strategic Partners, which was promoting a plan to work with Russia to build nuclear reactors in the Middle East, *id.* ¶¶ 18-21; as an advisor to a new company co-founded by Retired Rear Adm. Michael Hewitt, International Peace Power & Prosperity Corporation (“IP3”), which was promoting a plan to build nuclear reactors in the Middle East, *id.* at ¶ 25; and as a foreign policy advisor to then-candidate Donald Trump and later as a member of the President’s transition. *Id.* ¶¶ 24, 25, 30-31. On November 18, 2016, while Flynn was being vetted to be National Security Advisor, Special Advisor to the Joint Chiefs of Staff Reuben Sorensen described the pending appointment in an email to ACU managing partner Alex Copson as “a big win for the ACU project.”³

In early January 2017, Flynn “talked favorably” about the nuclear proposal with Thomas Barrack, Jr., a businessman and long-time Trump confidante who was heading the Trump Inauguration Committee. Compl. ¶ 32. Following up on this conversation, Barrack had a series of conversations with former colleagues of Flynn at IP3 and with soon-to-be senior White House advisor Jared Kushner. *2017 Oversight Committee Timeline* at 7-8 At that time, Barrack had extensive business contacts in the Middle East. *Id.*; Compl. ¶ 32. Barrack also was considering buying a stake in Westinghouse Electric Company, a producer of nuclear reactors. *Id.* Barrack served as a link between President Trump, Kushner, and top officials of the United Arab Emirates and Saudi Arabia based on contacts that Barrack had forged through decades of business in the Persian Gulf. *Id.* ¶ 34.

³ *Timeline*, General Michael Flynn’s Efforts to Lift Sanctions and Promote a Joint Project with Russia to Build Nuclear Reactors in the Middle East, at 5 (“*2017 Oversight Committee Timeline*”), available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Timeline%20of%20Events%20with%20Flynn.pdf>.

On January 20, 2017, while newly sworn in President Trump was giving his inaugural address, Flynn sent ACU's Alex Copson a text message indicating the nuclear project was "good to go" and directing his business colleagues to move forward. *2017 Oversight Committee Timeline* at 8. Reportedly Copson stated that "Mike has been putting everything in place for us," and further that "[t]his is going to make a lot of very wealthy people." *Id.* Copson also claimed that Flynn was ensuring that sanctions would be "ripped up" to allow money to flow into the nuclear power plan. *Id.* Just days later Flynn was installed as the National Security Advisor. Compl. ¶ 39.

Flynn brought Retired Army Col. Derek Harvey with him to the NSC, and the two pushed for approval of IP3's nuclear plan. Compl. ¶ 40. Just days after Harvey joined the NSC, IP3's co-founder and director Robert McFarlane emailed documents to Flynn, which included an outline of the Middle East nuclear plan and "a draft memo for the president to sign authorizing the project" and instructing cabinet secretaries to implement it. *Id.* ¶ 42. The CIA director was among the cabinet secretaries to whom the memorandum would be sent, along with the message, "I have assigned a special representative, Tom Barrack, to lead this important initiative and I am requesting him to engage each of you over the next 30 days to gain your input and support for our Middle East Marshal [sic] Plan." *First Interim Staff Rpt.* at 9. Reportedly Flynn passed these documents along to NSC staff and instructed them to "[p]repare a package for the president," that "proposed working with Russia on a nuclear reactor project." *2017 Oversight Committee Timeline* at 8.

NSC staff raised concerns with Harvey that any plan to transfer nuclear technology must comply with Section 123 of the Atomic Energy Act, which requires consultation with experts at the NSC, Department of State, Department of Defense, and Department of Energy. *First Interim*

Staff Rpt at 4. Nevertheless, Harvey insisted that decision already had been made during the transition, *id.*, and continued discussions with Barrack and his representative, Rick Gates, about the IP3 nuclear proposal. *Id.* at 5; *2017 Oversight Committee Timeline* at 9. Both Barrack and Gates were seeking investment ideas centered on the Trump Administration's policy in the Middle East. Compl. ¶ 48.

After Flynn was fired as National Security Advisor on February 13, 2017, Harvey continued to push NSC staff to work on the nuclear plan. *Id.* ¶ 49. NSC staff advised incoming National Security Advisor General H.R. McMaster about their concerns regarding Harvey, including his ongoing contacts with Flynn. *First Interim Staff Rpt* at 12. On March 27, 2017, McMaster informed NSC staff they should no longer work on the Middle East Marshall Plan. *Id.* at 17.

In a March 14, 2017 Oval Office meeting, President Trump and Kushner discussed with Saudi Deputy Crown Prince Mohammed bin Salman "opportunities for U.S. companies to invest in Saudi Arabia." Compl. ¶ 51. Harvey submitted to NSC staff a draft readout of the meeting that referenced "a new United States-Saudi program . . . in energy, industry, infrastructure, and technology worth potentially more than \$200 billion in direct and indirect investments within the next four years." *First Interim Staff Rpt.* at 14. Career NSC staff knew nothing about the referenced program. *Id.*

On March 21, 2017, Harvey and Gates had a call with Barrack to discuss the Middle East Marshall Plan. *Id.* at 15. According to an NSC staffer who also was present for the call, Harvey continued to promote the IP3 plan "so that Jared Kushner can present it to the President for approval." *Id.* at 16. After Flynn's termination, his former business colleagues also continued to

lobby federal agencies for the nuclear plan and met with Kushner. *2017 Oversight Committee Timeline* at 9.

After the murder of journalist Jamal Khashoggi, a bipartisan group in Congress called on President Trump to break off talks with Saudi Arabia over a potential civil nuclear agreement. Compl. ¶ 65. Nevertheless, in December 2018, Energy Secretary Rick Perry reportedly was “pressing ahead with efforts to strike a deal that would allow U.S. companies such as Westinghouse Electric Co. build [sic] nuclear reactors in Saudi Arabia[.]” *Id.* At that time, Secretary Perry had “wrapped up a round of talks with Saudi Minister of Energy Khalid Al-Falih and the CEO of state-run Saudi Aramco[.]” *Id.* On January 10, 2019, the Saudi energy minister stated that “Saudi Arabia aims to work closely with the United States on its plans to build nuclear power generation capacity,” and “wants Washington to be ‘part and parcel’ of Saudi Arabia’s nuclear program[.]” *Id.* at ¶ 67. And on February 12, 2019, U.S. nuclear energy developers, including Westinghouse, met with President Trump to seek assistance in winning contracts to build power plants in the Middle East and other countries. Jack Keane, another IP3 co-founder, initiated the meeting. *Id.* at ¶ 68. Discussions included efforts to secure Section 123 Agreements with Saudi Arabia and Jordan that would allow U.S. nuclear power companies to share their technology with those countries and others in the Middle East. *Id.* A White House official described the meeting as being led by Keane, with whom “the president talks . . . periodically.” *First Interim Staff Rpt.* at 23.

Congressional Oversight

On February 19, 2019, the House Committee on Oversight and Reform released its first interim staff report about “efforts inside the White House to rush the transfer of highly sensitive U.S. nuclear technology to Saudi Arabia in potential violation of the Atomic Energy Act and

without review by Congress as required by law—efforts that may be ongoing to this day.” *First Interim Staff Report* at 2. The report states that multiple whistleblowers came forward to express “significant concerns about the potential procedural and legal violations connected with rushing through a plan to transfer nuclear technology to Saudi Arabia.” *Id.* at 2-3.

In July 2019, the House Oversight Committee, based on a review of more than 60,000 pages of documents obtained since February 2019, released a second interim report, which concludes that “contacts between private commercial interests and high-level Trump Administration officials were more frequent, wide-ranging, and influential than previously known—and continue to the present day.” *Second Interim Staff Rpt.* at 3. That access included

unprecedented access to the highest levels of the Trump Administration, including meeting directly with President Trump, Jared Kushner, Gary Cohn, KT McFarland, and Cabinet Secretaries Rick Perry, Steven Mnuchin, *Mike Pompeo*, Rex Tillerson, James Mattis, and Wilbur Ross.

Id. (emphasis added).

Specifically as to the CIA, the Second Interim Staff Report outlines the following involvement by the CIA or its implication in efforts to sell nuclear technology to Saudi Arabia:

- In the days following a meeting on March 14, 2017 between President Trump, Kushner, and Saudi Deputy Crown Prince Mohammed Bin Salman, officials from IP3 “continued to promote their plan with high-level stakeholders—including . . . CIA Director Mike Pompeo” (*Second Interim Staff Rpt.* at 5, 27);
- In a March 12, 2017 letter from IP3’s McFarlane to nuclear industry chief executives seeking their investment in IP3’s plan, McFarlane noted “we are continuing to meet with the State, Energy, Defense, National Security Council, Treasury, Commerce, and the *Intelligence Community* to ensure they are fully apprised of the details of our energy and security proposal to Saudi Arabia” (emphasis added) (*id.* at 24);
- An April 3, 2017 email from IP3 CEO Hewitt to an employee of Barrack’s company, Colony NorthStar, included “a ‘two pager summary that has been used by many of the Cabinet Secretaries, *Pompeo*, others” (emphasis added) (*id.* at 28)
- An August 4, 2017 email from Hewitt to a Defense Department official attaching a presentation IP3 gave Kushner in August about IP3’s plan notes “Other Cabinet

officials briefed; Rick Perry, Wilbur Ross *and Mike Pompeo*” (emphasis added) (*id.* at 35);

- An August 20, 2018 email from McFarlane to two NSC staff references the “close dialogue with principals at the Departments of State and Energy *as well as senior professionals throughout the IC [Intelligence Community]*” that the IP3 team had maintained “[o]ver the past two years” (emphasis added) (*id.* at 42-3).

CIA FOIA Request at Issue

On August 29, 2018, GAP submitted a FOIA request by facsimile to the CIA seeking documents and communications from January 20, 2017 to the present regarding: (1) civil nuclear cooperation with Middle Eastern countries, most notably Saudi Arabia; (2) the Middle East Marshall Plan; (3) negotiation of a U.S.-Saudi “123” Civil Nuclear Cooperation Agreement; (4) the IP3 Corporation and its proposal for nuclear and cyber cooperation with various Middle Eastern countries; and (5) Westinghouse, including its March 2017 bankruptcy and the subsequent policy response of the U.S. Government. Compl. ¶ 85.

To help focus the CIA’s search for responsive records, GAP provided four categories of additional information. First, GAP identified the following agencies as likely to have corresponded with the CIA on the subjects of GAP’s request: the Department of State, the Department of Commerce, the Department of Defense, the Department of Energy, the Department of the Treasury, and the White House, including, *inter alia*, the National Security Council. *Id.* ¶ 86.

Second, GAP identified 18 White House staff likely to have been referenced in the requested documents and communications: (1) former NSC Executive Secretary Megan Badasch; (2) former NSC Senior Director Michael Bell; (3) former NSC Senior Advisor Caroline Berson; (4) NSC Legal Counsel John Eisenberg; (5) former NSC Director Mark Eshbaugh; (6) former National Security Advisor Michael Flynn; (7) former NSC Senior Director

Chris Ford; (8) former NSC Senior Director Andrea Hall; (9) former NSC Senior Director Derek Harvey; (10) former NSC Chief of Staff Keith Kellogg; (11) Senior Advisor to the President Jared Kushner; (12) former Deputy National Security Advisor KT McFarland; (13) former National Security Advisor H.R. McMaster; (14) former NSC Gulf Director Sean Misko; (15) former NSC Nonproliferation Director Sean Oehlbert; (16) former Deputy National Security Director Dina Powell; (17) former Deputy National Security Advisor Ricky Waddell; and (18) former NSC Ethics Counsel Marguerite Walter. *Id.* ¶ 87. Third, GAP identified the following individuals at the IP3 Corporation for which the CIA would have correspondence: (1) Keith Alexander; (2) Michael (“Mike”) Hewitt; (3) Jack Keane; (4) Robert (“Bud”) McFarlane; (5) Stuart Solomon; and (6) Frances Fragos Townsend. *Id.* ¶ 88.

Fourth, GAP identified the following individuals at the CIA or categories most likely to have responsive information in their emails, archived documents, or other stored files: (1) former Director Mike Pompeo and his immediate staff, including Chief of Staff, Deputy Chief of Staff, and advisers; (2) the analytical staff assigned to the Middle East and Gulf issues; (3) the analytical staff assigned to the counterproliferation group; and (4) any other CIA employees involved in negotiations or discussions with Saudi Arabia regarding a potential 123 Nuclear Agreement. *Id.* ¶ 89.

GAP also sought a waiver of fees associated with processing its request on the basis that disclosure of the requested documents is in the public interest as it would, *inter alia*, significantly enhance the public’s understanding of the government’s operations with respect to energy and foreign policy issues in the Middle East and is narrowly tailored to discussions relating to the IP3/Middle East Marshall Plan. GAP explained how each of the criteria in the CIA’s regulation concerning a fee waiver, 32 C.F.R. § 1900.13(b)(2), were satisfied. *Id.* ¶ 90. GAP also requested

expedition of its request, explaining that the requested records were needed for a matter under review by the U.S. Congress and pertaining to a matter of significant public concern. *Id.* ¶ 91.

By letter dated September 11, 2018, the CIA acknowledged receipt of the FOIA on September 6, 2018, and advised GAP's request for expedition was denied based on the CIA's assessment that GAP had not established a "compelling need" for the requested information. *Id.* ¶ 92.

On December 4, 2018, the CIA sent a second letter to GAP requesting clarification for item 1 of the request based on the CIA's claim that the request, as drafted, "lacks specificity or its [sic] too broad or records not configured that way to search for it." Compl. ¶ 93. The CIA suggested as an example of clarification identifying which country or countries are providing civil nuclear cooperation to which other specific country or countries in the Middle East. Compl. ¶ 93. GAP responded by letter dated January 8, 2019, clarifying that its request for records regarding civil nuclear cooperation with Middle Eastern countries, most notably Saudi Arabia, should be interpreted to mean records regarding cooperation between the United States and one or more of the following: Egypt, Jordan, and Saudi Arabia. Compl. ¶ 94. GAP further clarified that the term "civil nuclear cooperation" should be interpreted to mean any form of assistance regarding the acquisition of nuclear material, equipment, or technology by foreign countries; funds or financing to acquire nuclear material, equipment, or technology; and efforts by U.S. entities and persons to promote the acquisition of civilian nuclear reactors and related services by foreign countries. *Id.* .

The CIA has now invoked a *Glomar* response claiming it can neither confirm nor deny the existence or nonexistence of any of the requested records.

ARGUMENT

- I. In invoking a *Glomar* response, the CIA mischaracterizes GAP’s request, which seeks information beyond intelligence information and the sources of that information, namely the extent to which private entities and the U.S. government sought to provide nuclear technology to Saudi Arabia outside of the statutorily mandated process.**

The CIA bears the burden here of proving that the withheld information falls within the exemptions it has invoked, which it typically meets with a justification that is “‘logical’ or ‘plausible.’” *Larson v. Dep’t of State*, 565 F.3d 857, 862 (D.C. Cir. 2009), quoting *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007). Agency declarations in support of summary judgment must “demonstrate that the information withheld logically falls within the claimed exemption[.]” *Larson*, 565 F.3d at 862, quoting *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984).

Glomar responses like the one that the CIA provided in response to GAP’s request “are an exception to the general rule that agencies must acknowledge the existence of information responsive to a FOIA request,” and “are permitted only when confirming or denying the existence of records would itself ‘cause harm cognizable under an FOIA exception.’” *American Civil Liberties Union v. CIA* (“*ACLU v. CIA*”), 710 F.3d 422, 426 (D.C. Cir. 2013), quoting *Roth v. U.S. Dep’t of Justice*, 642 F.3d 1161, 1178 (D.C. Cir. 2011). Courts review *de novo* an agency’s reliance on any of the FOIA’s exemptions to withhold responsive documents. *ACLU v. CIA*, 710 F.3d at 427 (citation omitted).

The Declaration of Antoinette B. Shiner (“Shiner Decl.”) (ECF No. 24-3) and the supporting memorandum the CIA has submitted to justify its *Glomar* invocation fail to meet these standards in several key respects. Specifically, the CIA’s *Glomar* response rests on several mischaracterizations of GAP’s FOIA request. First, the CIA asserts without proof that the request “on its face, seeks ‘intelligence information’ and the ‘identif[ication]’ of the sources of that information[.]” Memorandum of Points and Authorities in Support of CIA’s Motion for

Summary Judgment (“CIA’s Mem.”) (ECF No. 24-1), at 12. This construction is at odds with the request itself which focuses on documents and communications regarding five specified topics: “(1) civil nuclear cooperation with Middle Eastern countries, most notably Saudi Arabia; (2) the Middle East Marshall Plan; (3) negotiation of a U.S.-Saudi “123” Civil Nuclear Cooperation Agreement; (4) the IP3 Corporation and its proposal for nuclear and cyber cooperation with various Middle Eastern countries; and (5) Westinghouse, including its March 2017 bankruptcy and the subsequent policy response of the U.S. Government.” Compl. ¶ 85. Far from seeking “intelligence information,” the request seeks information about the extent to which private interests corrupted the process the United States is statutorily required to use in reaching civil-nuclear agreements. The CIA fails to explain or otherwise support its interpretation of how any of these topics facially falls within Exemption 1.

Second, the CIA rooted its *Glomar* response in the proposition that GAP’s FOIA request seeks documents reflecting how the CIA “contributed intelligence to alleged discussions surrounding nuclear and cooperation agreement with Middle Eastern countries” and posits that even revealing whether the CIA “participated in or had an interest in policy discussions regarding nuclear cooperation with Middle Eastern countries or the Westinghouse bankruptcy” would reveal classified information. CIA Mem. at 13. According to the CIA, revealing that the CIA attended certain meetings to obtain intelligence, participated in discussions about Middle Eastern countries, “or at least had an intelligence interest in” some unidentified “subject matter” would “undermine the CIA’s ability to effectively operate as a clandestine intelligence agency.” *Id.* Ms. Shiner asserts that “the CIA typically cannot disclose whether or not it has any role or interest in specific U.S. Government meetings with foreign diplomats, policy initiatives or cooperation agreements, or any other topics that may have been discussed.” Shiner Decl. ¶ 12.

These assertions are overblown at best, and ignore a key focus of GAP's FOIA request—efforts by outsiders to draw the CIA and other government actors, which may include the 18 current and former NSC and White House staff for which the FOIA request seeks documents, *see* Compl. ¶ 87 and *supra* at 10, into their scheme to sell nuclear technology to Saudi Arabia. The CIA director attends meetings of the NSC, *see* National Security Presidential Memorandum, April 4, 2017, and therefore has a direct link to these events. Thus, at its core, GAP's FOIA request concerns the extraordinary and likely unlawful effort by former National Security Advisor Flynn and other White House and administration officials, working in concert with private entities and groups, to bypass the statutory process for selling nuclear technology to Saudi Arabia, all in the interest of “mak[ing] a lot of very wealthy people.” *2017 Oversight Committee Timeline* at 8. These interactions with Saudi Arabia “have been shrouded in secrecy, raising significant questions about the nature of the relationship.” *First Interim Staff Rpt.* at 2. Through its FOIA requests GAP seeks to shed light on that relationship, including the unsolicited efforts of outside groups and entities to enlist the help of agencies like the CIA.

This is a far cry from policy positions the CIA may have taken on the sale of nuclear technology to Saudi Arabia, intelligence efforts in which it may have engaged, or communications it may have itself initiated, all of which may properly be exempt from production if their disclosure would reveal intelligence sources and methods. Given the specific factual context here, however, efforts by outside individuals and entities like IP3 to enlist the assistance of the CIA and other agencies in implementing its Middle East Marshall Plan do not fall within the protection of Exemptions 1 and 3, as their disclosure would not reveal “a classified relationship with the agency[.]” CIA Mem. at 1.

The work of the House Oversight Committee further reinforces this conclusion in two key ways. First, it confirms that the CIA was one of a number of agencies from which these individuals and entities sought buy-in for their scheme. And second, it reflects efforts by outside entities initiating contact with the CIA and others to pursue their own agendas. For example, IP3 officials promoted their plan to then-CIA Director Pompeo, among other “high-level stakeholders,” following a March 14, 2017 meeting between President Trump, Kushner, and Mohammed Bin Salman. *Second Interim Staff Rpt.* at 5, 27. A month later, in an email to Barrack’s company, Colony NorthStar, IP3’s Hewitt included “a two pager summary” that Director Pompeo, among others, used. *Id.* at 28. Further, Director Pompeo was among those that were briefed in August 2017 about IP3’s plan. *Id.* at 35. And in an August 20, 2018 email IP3’s McFarlane related to NSC staff the “close dialogue with principals at the Departments of State and Energy as well as senior professional throughout the IC [Intelligence Community]” that the IP3 team had maintained “[o]ver the past two years[.]” *Id.* at 42-43 (emphasis added).

Under comparable circumstances courts have concluded that *Glomar* responses are not appropriate. For example, in *ACLU v. CIA*, the D.C. Circuit rejected the CIA’s reliance on a *Glomar* response to withhold documents pertaining to the use of drones by the CIA and the Armed Forces to kill targeted individuals. 710 F.3d at 425. As the court explained, the CIA’s justification for its *Glomar* response rested not on the necessity “to prevent disclosing whether or not the *United States* engages in drone strikes,” but on the need “to keep secret whether the *CIA itself* was involved in, or interested in, such strikes.” *Id.* at 428 (emphasis in original). But given the nature of the request at issue—which the court noted was not “limited to drones operated by the CIA”—and the CIA’s response—which was not limited to “drones operated by the Agency”—the Court found the CIA’s justifications insufficient, reasoning “[t]he CIA has

proffered no reason to believe that disclosing whether it has any documents at all about drone strikes will reveal whether the Agency itself—as opposed to some other U.S. entity such as the Defense Department—operates drones.” *Id.*⁴

Here, too, as in *ACLU v. CIA*, GAP’s FOIA requests implicate a range of government actors and agencies of which the CIA is only one. Thus, the CIA’s reliance on a *Glomar* response to keep secret the CIA’s role, if any, in the Middle East Marshall Plan provides “no reason to believe that disclosing whether it has any documents at all about [the Middle East Marshall Plan] will reveal” the CIA’s role in that effort—“as opposed to some other U.S. entity[.]” *ACLU v. CIA*, 710 F.3d at 428. *See also Leopold v. CIA*, 2019 WL 5814026, *7 (D.D.C. Nov. 7, 2019) (plaintiff was “entitled to more than a *Glomar* response” when its request sought records of payments in general to a Syrian rebel group “[r]ather than focusing on the CIA payments that might not exist”). It necessarily follows that the CIA’s invocation of a *Glomar* response for the entirety of its potentially responsive records, which ignores GAP’s request for records that plainly do not implicate and would not disclose the CIA’s intelligence role, must fail.

II. The CIA cannot properly rely on a *Glomar* response to cover up embarrassing or possibly illegal conduct.

One of the more disturbing conclusions the House Oversight Committee reached from its investigation of the events that underlie the FOIA request at issue is that the administration has shown a “willingness to let private parties with close ties to the President wield outsized

⁴ The Court also relied on the acknowledgments by the President and his counterterrorism advisor that “leave no doubt that some U.S. agency does” operate drones. *Id.* at 429.

influence over U.S. policy towards Saudi Arabia.” *Second Interim Staff Rpt.* at 3. Further, these efforts to wield influence

raise serious questions about whether the White House is willing to place the potential profits of the President’s friends above the national security of the American people and the universal objective of preventing the spread of nuclear weapons.

Id. Given these very serious risks and the fact that IP3 targeted the CIA director as an intended recipient of a memo it sought to have the president send that would have authorized the Middle East Marshall Plan, *First Interim Staff Rpt.* at 9, the CIA should not be permitted to rely on FOIA exemptions to cover up any role it may have had in this influence scheme.

The legal authority upon which the CIA relies for its Exemption 1 claims reinforces this point. Executive Order 13526, which sets forth the requirements and procedures for classifying national security information, provides in relevant part:

In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to:

- (1) conceal violations of law, inefficiency, or administrative error;
- (2) prevent embarrassment to a person, organization, or agency;

Exec. Order. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009). The CIA’s declarant relied on E.O. 13526 to justify the CIA’s reliance on FOIA Exemption 1. Shiner Decl. ¶¶ 19-22. But the circumstances here strongly suggest that the real purpose of withholding information is both to conceal potential violations of law and to prevent embarrassment to former CIA Director Pompeo.

In response to the investigation by the House Oversight Committee the White House refused to produce a single document, “and other agencies . . . stonewalled the Committee’s requests.” *Second Interim Staff Rpt.* at 10. The information the Committee was able to adduce from non-governmental individuals and entities shows a concerted effort by IP3 and close allies of President Trump to influence U.S. policy with respect to supplying Saudi Arabia with nuclear

technology by reaching out to those agencies that traditionally play a role in that arena, which necessarily includes the CIA given the obvious national security implications. By refusing to even process GAP's request under cover of a blanket *Glomar* response the CIA is continuing the administration's stonewalling. The circumstances of that stonewalling suggest an effort to keep the public from learning the extent to which "the Trump Administration has virtually obliterated the lines normally separating government policymaking from corporate and foreign interests." *Id.* at 3. Reinforcing this suggestion is the mounting evidence of similar abuses by the President and other top government officials to subvert our national interest to the personal and political interests of the President. The CIA should not be permitted to hide behind the cover of a *Glomar* response to prevent the public from learning the details of the scandal known as the Middle East Marshall Plan.

CONCLUSION

For the foregoing reasons, Defendant CIA's motion for summary judgment should be denied, Plaintiff's motion for summary judgment should be granted, and the CIA should be directed to process GAP's request as soon as possible and provide GAP with a determination within 30 days of the Court's decision on this matter.

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Respectfully submitted,

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