

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

GOVERNMENT ACCOUNTABILITY )  
PROJECT, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
UNITED STATES DEPARTMENT OF )  
STATE, et al. )  
 )  
Defendants. )  
\_\_\_\_\_)

Civil Action No. 19-499 (RDM)

**PLAINTIFF’S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE**

Pursuant to Local Civil Rule 7(h), plaintiff Government Accountability Project (“GAP”) hereby submits its Statement of Material Facts Not in Genuine Dispute in support of its cross-motion for summary judgment.

1. Section 123 of the Atomic Energy Act requires approval of Congress before the U.S. may transfer nuclear technology to a foreign country to “ensure that the agreement reached with the foreign government meets nine specific nonproliferation requirements.” Interim Staff Report, Whistleblowers Raise Grave Concerns with Trump Administration’s Efforts to Transfer Sensitive Nuclear Technology to Saudi Arabia (“*First Interim Staff Rpt.*”) 2, Feb. 2019, <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Trump%20Saudi%20Nuclear%20Report%20-%202019-2019.pdf>.

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.*

3. The Central Intelligence Agency (“CIA”) has a publicly acknowledged role in this process: its director is a regular attendee of the National Security Council (“NSC”), *see* National Security Presidential Memorandum, April 4, 2017, <https://s3.amazonaws.com/publicinspection.federalregister.gov/2017-07064.pdf>, and 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>.

4. A congressional investigation by the House Committee on Oversight and Reform has 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 Report, Corporate and Foreign Interests Behind White House Push to Transfer U.S. Nuclear Technology to Saudi Arabia (“*Second Interim Staff Rpt.*”) 3, July 2019, <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Trump%20Saudi%20Nuclear%20Report%20July%202019.pdf>. 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 or transport nuclear reactors in or to the Middle East, the so-called “Middle East Marshall Plan.” Compl. ¶ 18.

5. In early 2017, Flynn “talked favorably” about the nuclear proposal with Thomas Barrack, Jr., a businessman and long-time Trump confidante who was heading up the Trump Inauguration Committee. Compl. ¶ 32. Following up on this conversation, Barrack had a series of conversations with former colleagues of Flynn at the International Peace Power & Prosperity Corporation (“IP3”) and with soon-to-be-senior White House advisor Jared Kushner. *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 9, <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Timeline%20of%20Events%20with%20Flynn.pdf> (“2017 Oversight Committee Timeline”).

6. At that time, Barrack had extensive business interests in the Middle East. *2017 Oversight Committee Timeline* at 9; Compl. ¶ 32. Barrack also was considering buying a stake in Westinghouse Electric Company, a producer of nuclear reactors. *Id.*

7. 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.

8. Just days after Harvey joined the NSC, IP3’s co-founder 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.

9. 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.*; *2017 Oversight Committee Timeline* at 9.

10. 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.

11. Nevertheless, in December 2018, it was reported that Energy Secretary Rick Perry 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.*

12. 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, IP3’s co-founder, initiated the meeting. *Id.* at ¶ 68.

13. 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.

14. 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 Rpt.* at 2.

15. 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.

16. 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 concluded that “contacts between private and 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.

17. According to that report, 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).

18. 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” (*id.* at 5, 27);
- In a March 12, 2017 letter from IP3’s McFarlene to nuclear industry chief executives seeking their investment in IP3’s plan, McFarlene 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 23, 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 through the IC [Intelligence Community]*” that the IP3 team had maintained “[o]ver the past two years” (emphasis added) (*id.* at 42-3).

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. By letter dated December 4, 2018, the CIA requested clarification from GAP on 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." 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.

25. 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. 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.* ¶ 93.

26. At its core, GAP's FOIA request to the CIA 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.

27. 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 request 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.



28. The work of the House Oversight Committee reinforces that the requested information does not fall within the protection of FOIA Exemptions 1 and 3 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.

29. Second, the Committee's work reflects efforts by outside entities initiating contact with the CIA and others to pursue their own agendas. *Second Interim Staff Rpt.* at 5, 27, 35, 42-43.

30. For example, IP3 officials promoted their plan to the CIA Director Pompeo, among other "high-level stakeholders," following a March 14, 2017 meeting between the President, Kushner, and Mohammed Bin Salman. *Second Interim Staff Rpt.* at 5, 27.

31. 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.

32. Further, Director Pompeo was among those that were briefed in August 2017 about IP3's plan. *Id.* at 35.

33. 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 through the IC [Intelligence Community]*" that the IP3 team had maintained "[o]ver the past two years[.]" *Id.* at 42-43 (emphasis added).

34. Based on its investigation the House Oversight Committee concluded that the administration has shown a "willingness to let private parties with close ties to the President wield outsized influence over U.S. policy towards Saudi Arabia." *Second Interim Staff Rpt.* at 3.

35. 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.*

36. 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. *See* E.O. 13526, § 17(a).

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Respectfully submitted,

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