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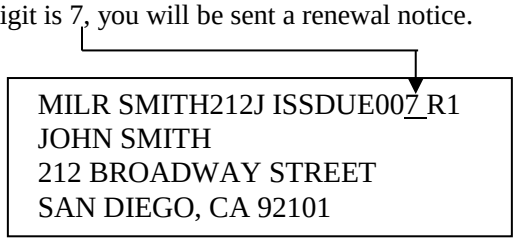

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MILITARY LAW REVIEW

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SHARING INTELLIGENCE WITH FOREIGN PARTNERS FOR LAWFUL, LETHAL PURPOSES

COLONEL JONATHAN HOWARD*

Power, today, comes from sharing information, not withholding it.[1]

I. Introduction

The United States often supports other nations, multinational forces, and non-state actors in their ongoing armed conflicts and law enforcement operations.[2] Sharing of intelligence, beyond the routine support incident

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[1] Keith Ferrazzi, 30 Keith Ferrazzi Quotes from Never Eat Alone, https://wealthygorilla.com/keith-ferrazzi-quotes/ (last visited Dec. 4, 2018).

[2] EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Dec. 2017) [hereinafter NSS 2017]. President Trump states: "America's allies and partners magnify our power and protect our shared interests. We expect them to take greater responsibility for addressing common threats. . . . America will seek partnerships with like-minded states to promote free market economies, private

to U.S. participation in combat operations,[3] provides the U.S. Government a means to assist allies, while pursuing its own national security objectives, without a large expenditure of people, equipment, and dollars. However, sharing sensitive, hard-earned, and valuable intelligence information is not without risk, not only to sources and methods, but also to national security, foreign policy objectives, and domestic support. It also raises significant legal questions, particularly when potential recipients have questionable records of adherence to the Law of Armed Conflict (LOAC) and human rights, a flexible relationship with the rule of law, or a culture that places more importance on ends than on means.

On the other hand, intelligence sharing relationships with foreign partners often reap enormous benefits to the United States by bringing foreign partner resources to bear against priority threats, such as terrorist activities or nuclear proliferation. It also enables the United States to leverage external capabilities (e.g., language, cultural, technical, and geographic expertise) to assist the U.S. Intelligence Community (USIC) to collect, process, and analyze intelligence. This helps the United States plug collection gaps, improve the quality of U.S. assessments, and secure budgetary efficiencies.[4] Balancing the gains against the risks, to include

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sector growth, political stability, and peace." *Id.* The previous strategy provided more granularity. *See* EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Feb. 2015) [hereinafter NSS 2015]. That strategy states, "We are now pursuing a more sustainable approach that prioritizes targeted counterterrorism operations, collective action with responsible partners, and increased efforts to prevent the growth of violent extremism and radicalization that drives increased threats." *Id.* at 9–10. It also states, "[E]ven where our strategic interests require us to engage governments that do not share all our values, we will continue to speak out clearly for human right and human dignity in our public and private diplomacy." *Id.* at 19.

[3] When conducting combat operations in a multinational environment, the United States routinely shares intelligence with its allies to provide a common picture of the battlefield, heightened situational awareness, and information to assist in defense of forces.

[4] John O. Brennan, Dir., CIA, Remarks at the Council on Foreign Relations on CIA's Global Mission: Countering Shared Threats (Mar. 13, 2015). Director Brennan stated:

> By sharing intelligence, analysis and know-how with these partner services, we open windows on regions and issues that might otherwise be closed to us. And when necessary, we set in concert to mitigate a common threat. By collaborating with our partners we are much better able to close key intelligence gaps on our toughest targets, as well as fulfill CIA's mission to provide global coverage and prevent surprises for our nation's leaders. There is no way we could be successful in carrying out our mission of such scope and complexity on our own.

legal risks, can be a complex process, with various entities of the U.S. Government having different positions, based on their vantage points and policy objectives.

While this article does not attempt to detail fully the array of reasons to share—or not to share—intelligence, it explores the legal issues implicated when such sharing is intended, or can foreseeably be used, for lethal purposes.[5] Although foreign intelligence sharing arrangements themselves are not normally the subject of public scrutiny, these relationships sometimes reach the light of day, often as the result of unfortunate circumstances. Understanding the potential application of various laws on these sensitive relationships is critical to ensuring that the United States and its agents are able to defend their support, either to Congress, the courts, U.S. citizens, or the international community. After providing an overview of the legal risks associated with this type of assistance, the article details the policy framework that has been constructed to ensure that risks are properly evaluated and, when necessary, measures implemented to promote adherence with these laws and decrease risk of complicity in partner actions.

The extent of U.S. support to others varies widely, from heavy engagement across multiple lines of effort to situations where intelligence sharing is the sole item of value the United States brings to the table. In its unclassified "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations," the previous U.S. administration stated that "the United States provides intelligence support to foreign partners engaged in conflicts in which the United States is not participating directly."[6] One example noted in the report is the support provided to the "Saudi-led military operations against Houthi and Saleh-aligned forces in Yemen."[7] The report explains that although "U.S. forces are not taking direct military action in Yemen . . . the United States provides certain logistical support

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Id.

[5] For purposes of this article, "actionable" or "lethal" intelligence means intelligence that is known or reasonably expected to be used by a foreign partner (government, international organization, or non-state entity) for military or law enforcement purposes that will or could involve the use of lethal force.

[6] REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS, THE WHITE HOUSE (Dec. 2016) [hereinafter NATIONAL SECURITY OPERATIONS REPORT].

[7] *Id.*

(including air-to-air refueling), intelligence sharing, best practices, and other advisory support when requested and appropriate."[8]

The Kingdom of Saudi Arabia's campaign in Yemen underlines some of the potential pitfalls of working with and through partners, sometimes far from areas where the U.S. military is involved in large-scale combat operations. In light of allegations that the Saudi-led coalition has conducted indiscriminate and/or unlawful targeting in prosecuting the armed conflict, both media and human rights organizations have highlighted, and sometimes condemned, the intelligence support provided by the United States. On 4 October 2016, the Washington Post noted: "Reservations are growing within the Obama administration about the American military involvement in Saudi Arabia's air campaign in Yemen, as some lawmakers and human rights groups charge the United States with responsibility for Saudi attacks that have killed many civilians."[9] Human Rights Watch has been particularly vocal in condemning international support to the Saudi-led coalition. It has publicly called on the United States to "clarify the U.S. role in the armed conflict, including what steps the [United States] has taken to minimize civilian casualties in air operations" and "conduct investigations into any airstrikes for which there is credible evidence that the laws of war may been violated and that the United States may have been a direct participant, either by refueling participating aircraft or providing targeting information, intelligence, or direct support."[10]

Yemen is only one example of U.S. support to lethal operations through the provision of intelligence. As the terrorist threat posed by organizations like al Qaida and the Islamic State of Iraq and ash-Sham (ISIS) has evolved, and the desire of many in the United States to send troops overseas has decreased, the option of supporting partners through intelligence sharing vice boots-on-the-ground has become increasingly attractive. But the capabilities of these partners vary widely, from their ability to protect and safeguard U.S. intelligence to their processes and procedures to ensure adherence to the LOAC and respect for human rights.

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[8] *Id.*

[9] Missy Ryan, *Civilian Casualties in Yemen Put U.S. in a Bind*, WASH. POST, Oct. 4, 2016, at A8.

[10] *What Military Target Was in My Brother's House: Unlawful Coalition Airstrikes in Yemen*, HUM. RTS. WATCH, Nov. 2015 at 8, https://www.hrw.org/report/2015/11/26/what-military-target-was-my-brothers-house/unlawful-coalition-airstrikes-yemen#.

Many countries[11] do not come close to the rigorous targeting standards and precision capabilities of the United States.

Working through partners raises the important question of when does a nation truly bear responsibility, as a legal matter, for the actions of others when a lethal operation, relying in some part on U.S. intelligence, either goes awry, causes indiscriminate non-combatant casualties, or is conducted without a lawful basis. Whether the casualties are the result of intentional targeting of an unlawful target, use of an indiscriminate or prohibited weapon, an extrajudicial killing,[12] inexperience, or simple or gross negligence, the United States must be ready to defend its actions—to Congress, the international community, the American public, or the courts. This article does not seek to tread new ground or argue for a new understanding of the law. Rather, it summarizes the various legal sensitivities of sharing potentially lethal intelligence and the processes the U.S. Government has put in place to highlight and address those concerns.

II. Legal Considerations

To reduce the risk of a valid legal claim against the United States or its officials, decision-makers in the Executive Branch focus on two principal issues before authorizing an intelligence sharing arrangement that could have potentially lethal consequences: (1) whether the partner has a legal basis for operations supported by U.S. intelligence; and (2) whether the partner intends to execute its operations lawfully.[13] If either

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[11] Unlike the Five Eyes (FVEY) partners and other militarily equivalent nations. In addition to the United States, the FVEY partners include Great Britain, Australia, Canada, and New Zealand.

[12] Extrajudicial killing refers to "the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Geneva Convention Relative to the Treatment of Prisoners of War art. 3(d), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *See also* International Covenant on Civil and Political Rights art. 6.2, adopted Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) ("sentence of death" may "only be carried out pursuant to a final judgment rendered by a competent court"). Extrajudicial killings do not include permissible killings conducted during an armed conflict pursuant to the Law of Armed Conflict (LOAC).

[13] The Obama Administration articulated these principles in this fashion: "When supporting foreign partners, the United States ensures that it understands their legal basis for acting, and, as laid out in more detail below, takes a number of steps to ensure U.S. assistance is used lawfully and appropriately under domestic and international law." NATIONAL SECURITY OPERATIONS REPORT, *supra* note 6, at 15.

of these prongs fails to pass muster, then the United States or its officials could be at legal risk, at home or abroad.[14] After discussing these prongs, this article will describe the most likely legal pitfalls triggered by these relationships.[15]

A. Valid Legal Basis for Potentially Lethal Operations

A foreign government recipient might have a variety of lawful bases for its lethal operations.[16] For instance, the U.S. partner may be

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[14] One scholar has recommended the following questions to better understand the factual and legal circumstances surrounding a proposed intelligence sharing arrangement:

> • Which state is receiving the assistance, which agency within the state, and (if appropriate) which officials?
> • What is the nature of the assistance?
> • How established is the relationship between the two (or more) states (including relative leverage between the states)?
> • By what international laws is the recipient state bound, and what is its understanding of the interpretation of those laws?
> • What are the relevant laws, procedures and standards on human rights in the recipient state?
> • Are relevant departments, officials and armed forces likely to be trained to take into account the international and domestic law implications of the acts in question?
> • What is the recipient state's past practice in this area, including its record of compliance with international law?
> • What are the views of other states operating in the environment concerned, in terms of both the record of compliance of the recipient state and the credibility, reliability and track record of assurances from the state concerned?
> • Does the recipient state have remedial and accountability mechanism in place to enable the investigation and remedying of any breaches of international and domestic law to which the assistance could potentially contribute?

Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism* 39, CHATHAM HOUSE (2016), https://www.chathamhouse.org/publication/aiding-and-assisting-challenges-armed-conflict-and-counterterrorism.

[15] The DoD Law of War Manual provides an overview of several of the other legal ramifications implicated by nation-states providing aid and assistance to other nations. *See generally* U.S. DEP'T OF DEF., DOD LAW OF WAR MANUAL para. 18.7 (Dec. 2016) [hereinafter LAW OF WAR MANUAL]. *See also* Brian Finucane, *Partners and Legal Pitfalls*, 92 INT'L L. STUD. 407 (2016).

[16] Some in the Federal Government hold an important caveat to this prong and additionally inquire whether the United States would be authorized to undertake the lethal action itself under its own authorities. The Obama Administration stated, "Sharing must

conducting offensive operations in the prosecution of an already ongoing armed conflict, either of an international or non-international nature,[17] or, if outside the context of an armed conflict, the partner's actions might be justified as an act of national or collective self-defense, execution of a United Nations (U.N.) Security Council authorization, or an exhibition of host nation law enforcement authorities.[18] In explaining the distinction between lawful and unlawful killings, Professor John Yoo, former Deputy Assistant Attorney General at the Office of Legal Counsel, states:

> Killing an individual is legal as capital punishment imposed on a convicted first-degree murderer. It is legal when a police officer shoots an attacker armed with a weapon. It is illegal when it is murder, as are any of the hundreds of premeditated homicides that occur in the United States every year. It is illegal when it is assassination, except that killing the enemy in wartime is legal. . . . Killing a foreign head of state in peacetime is an assassination. Firing a Hellfire missile to kill bin Laden is not an assassination.[19, 20]

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always be consistent with U.S. domestic law, including the requirement that intelligence agencies cannot ask another party to undertake activities which they are themselves prohibited from undertaking." NATIONAL SECURITY OPERATIONS REPORT, *supra* note 6, at 13. However, asking a partner to conduct an operation, which it did not intend to take, should not be confused with providing intelligence support to a partner undertaking its own independent operations, with a grounded legal basis. For instance, the United States may not have the authority itself to arrest a terrorist located in a foreign nation, but is not prohibited from providing information to a nation so that it can conduct the arrest.

[17] The Law of Armed Conflict (LOAC) applies to armed conflicts that arise between nations and "to armed conflicts between one or more States and organized armed groups." INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 13 (2013) [hereinafter OPLAW HANDBOOK]. The full body of LOAC applies to international armed conflicts (IACs). *Id.* For non-international armed conflicts (NIACs), like conflicts against non-state actors, it is generally agreed that Common Article 3 of the Geneva Convention and Additional Protocol II apply. *Id.* However, "[n]ot all conflicts between a State and armed actors constitute armed conflicts. For example, Article 1(2) of [Additional Protocol II (AP II)] excludes 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.'" *Id.*

[18] For example, offensive operations could be authorized pursuant to Chapter VII of the U.N. Charter.

[19] JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 58 (2006).

[20] The case of Anwar al-Aulaqi provides a good example of an Executive Branch review of the U.S. domestic laws implicated by an overseas lethal operation. Applicability of

Some existing intelligence sharing arrangements are in the context of armed conflicts where the United States exercises an active role, e.g., Iraq, Afghanistan, and Libya.[21] In these cases, both the partner's and the United States' authority for conducting lethal operations against various armed groups can be traced to the internationally recognized armed conflicts ongoing in these regions. In other armed conflict situations, the role of the United States is more limited, like the support provided to the Multinational Joint Task Force (MNJTF) combatting Boko Haram in the Lake Chad Basin of Africa or the Saudi-led coalition in Yemen fighting the Houthi rebels. Both MNJTF and Yemen provide examples of occasions where the United States supports partners engaged in armed conflict where the United States is not a party to the conflict.

In regards to U.S. support to MNJTF, an article on the increasing role of U.S. Africa Command's special operations units stated in February 2016:

Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi, Op. O.L.C. (Jul. 16, 2010). In 2010, the U.S. Department of Justice Office of Legal Counsel (OLC) reviewed the legal implications of the targeted killing of Shaykh Anwar al-Aulaqi. The legal opinion, which has been redacted and released in an unclassified format, closely examined the applicability of federal criminal laws (specifically sections 1119, 956, and 2441 of title 18) and the U.S. Constitution, particularly due to al-Aulaqi's status as a U.S. citizen. *Id.* The OLC, in finding the proposed operation lawful, stated,

> [W]e believe DoD's contemplated operation against al-Aulaqi would comply with international law, including the laws of war applicable to this armed conflict, and would fall within Congress's authorization to use "necessary and appropriate force" against al-Qaida. In consequence, the operation should be understood to constitute the lawful conduct of war and thus to be encompassed by the public authority justification . . . [and] would not result in an "unlawful" killing . . . .

Id. The OLC found that their conclusion did not change if the Central Intelligence Agency (CIA), as opposed to the Department of Defense (DoD), conducted the operations. "If the killing by a member of the armed forces would comply with the law of war and otherwise be lawful, actions of CIA officials facilitating that killing should also not be unlawful." *Id.* The opinion did, however, note that al-Aulaqi maintained some constitutional due process and unlawful seizure protections under the Fourth and Fifth Amendments, as a U.S. citizen, even while abroad and acting as a member of the enemy force. While these considerations did not, in the opinion of the OLC, bar a lethal operation in the circumstances under review, the al-Aulaqi opinion supports conducting an additional review, from a constitutional perspective, if U.S. intelligence may be used in lethal operations targeting U.S. citizens.

[21] NATIONAL SECURITY OPERATIONS REPORT, *supra* note 6, at 15–18.

> Over time, the level of cooperation between AFRICOM and African partners has been growing, and . . . [i]t seems clear that the actions of AFRICOM in Africa is an integral part of Washington's policy, that right after the September 11 attacks has focused its attention to the expansion of the terrorist threat in the macro-region in order to safeguard its strategic interests.[22]

To assist MNJTF, comprised of Benin, Cameroon, Chad, Niger, and Nigeria, in its fight against Boko Haram, the United States provides "enhanced intelligence sharing to counter the growing terrorist threat."[23] Before authorizing the intelligence sharing, the United States likely found that the MNJTF, acting pursuant to an authorization from the African Union with the consent of participating nations, had the appropriate legal basis to use lethal force since the conflict rose to the level of a non-international armed conflict.[24] While the unclassified record makes it unclear whether the sharing arrangement involves intelligence used to support lethal operations, the first prong of the test is satisfied because the MNJTF has a legal basis for using lethal force against Boko Haram in its prosecution of an ongoing armed conflict.

When conducting operations in the territory of another nation, the United States must also examine whether the partner nation has the appropriate legal authority to do so under international law. For instance,

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[22] Marco Cochi, *AFRICOM kicks off Operation Flintlock to Counter Jihadism in Africa*, https://eastwest.eu/en/opinioni/sub-saharan-monitor/africom-kicks-off-operation-flintlock-to-counter-jihadism-in-africa.

[23] *Id.*

[24] In accordance with AP II, which the United States recognizes as reflecting customary international law, the situation of a non-international armed conflict:

> [T]ake[s] place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under a responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations . . . . This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), art. 1(1), June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* 16 I.L.M 1442 (1977) [hereinafter AP II].

the other State can provide consent for the partner to engage in operations within its territory or the U.N. Security Council can authorize a State to conduct operations in the territory of another State.[25] With the Saudi-led coalition operating in Yemen, the Obama Administration stated, "The U.S. support for the Saudi-led coalition military operations is being provided in the context of the Coalition's military operations being undertaken in response to the Government of Yemen's request for assistance, including military support, to protect the sovereignty, peace, and security, of Yemen."[26] The United States has recognized an exception to the general rule of requiring either consent or a U.N. Security Council Resolution for operations in another country:

> States defend themselves, in accordance with the inherent right of individual and collective self-defense, when they face actual or imminent armed attacks by a non-State armed group and the use of force is necessary because the government of the State where the threat is located is unable or unwilling to prevent the use of its territory by the non-State actor for such attacks.[27]

In this situation, the partner nation must have a reasonable basis to conclude that the other State is unwilling or unable to address a threat emanating from its territory such that the recipient has no reasonable alternative to using force in the third State's territory.[28]

For operations occurring entirely within the territory of a partner nation, not rising to the level of an armed conflict,[29] the review must look to other bodies of law for a legal basis, such as a partner nation's domestic law. In these cases, the United States should ensure that the domestic law is consistent with international human rights law (IHRL).[30] For instance,

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[25] NATIONAL SECURITY OPERATIONS REPORT, *supra* note 6, at 8–11.
[26] *Id.*
[27] *Id.* at 10.
[28] *Id.*
[29] Article 1(2) of AP II excludes from the definition of an armed conflict "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature . . . ." AP II, art.1(2), *supra* note 24.
[30] The United States holds the view that International Human Rights Law (IHRL) "regulates the relationship between States and individuals within their territory and under their jurisdiction." OPLAW HANDBOOK, *supra* note 17, at 46. Outside the context of an armed conflict, the United States would look to the host nation law as a basis for the partner's operations. In December 2011, the U.S. State Department stated:

the foreign partner may be seeking U.S. intelligence to assist it in arresting an individual or group, like a foreign terrorist or foreign terrorist organization, using its law enforcement authorities. In this scenario, it is possible that lethal force may be used as a self-defense measure. In supporting a law enforcement operation, the United States would look to whether the host nation had the domestic authority to effect the arrest of the individual or group, and the exercise of this authority complied with IHRL.[31]

B. Lawful Conduct of Operations

If the partner has a lawful basis for its lethal operation, the United States would also seek to ensure that the recipient of U.S. intelligence will carry out its operations lawfully.[32] As a practical matter, this prong has a temporal aspect that requires an evaluation of the partner's history of compliance with applicable LOAC or human rights standards, as well as the future likelihood of compliance. While decision-makers (and their lawyers) may readily come to a consensus on the legal foundation for a partner's exercise of lethal force (first prong), the assessment of a partner's intent to carry out its operations lawfully may not be as straightforward (second prong). On one extreme, the partner may have an impeccable

> Under the doctrine of *lex specialis*, the applicable rules for the protection of individuals and conduct of hostilities in armed conflict are typically found in [LOAC] . . . [IHRL] and [LOAC] are in many respect complementary and mutually reinforcing [and] contain many similar protections. . . . Determining the international law rule that applies to a particular action taken by a government in the context of an armed conflict is a fact-specific determination, which cannot be easily generalizes, and raises especially complex issues in the context of non-international armed conflict . . . ."

Id. at 47 (citing U.S. Dep't of State, United States Fourth Periodic Report to the United Nations Committee on Human Rights, para. 506, 30 Dec. 11, https://www.state.gov/g/frl/rls/179781.htm).

[31] *Id.* The principal sources of human rights law include the Universal Declaration of Human Rights (viewed as aspirational), G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; and the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, which has been implemented in the United States by the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), *reprinted in* 28 U.S.C. § 1350 (2000).

[32] *See* NATIONAL SECURITY OPERATIONS REPORT, *supra* note 6, at 12–14.

record of complying with LOAC and human rights standards; on the other extreme, the partner may have an egregious record of compliance. Certainly, in the first case, the United States can reasonably expect, based on past conduct and reputation, that partner operations, using U.S. intelligence, will be conducted lawfully. In the second situation, decision-makers will have less confidence that a partner will conduct its operations lawfully. This, however, does not mean that the United States cannot provide intelligence assistance, but it does mean that the United States must carefully examine the legal risk involved in such assistance, and, as discussed below, whether measures can be taken to minimize that risk to an acceptable level, like monitoring, assurances, and training.

In an armed conflict situation, the United States would expect its partner to abide by the LOAC,[33] which prevents the lethal targeting of civilians taking no part in hostilities and people who are *hors de combat* due to sickness, wounds, or having surrendered; requires detainees be treated humanely and afforded a fair trial prior to any punishment; and mandates operations be conducted to minimize collateral damage. In cases where the U.S. Government is supporting operations outside the context of an armed conflict, like a law enforcement action to arrest an individual, the legal review would examine whether the recipient's actions are consistent with its domestic law and applicable human rights law.[34]

C. Legal Implications for Supporting Unlawful Lethal Operations

If the partner does not have a lawful basis for its military or law enforcement operations or executes its operations unlawfully, then the sharing of U.S. intelligence may constitute a violation of international law, foreign domestic law, or U.S. domestic law and executive order, to include a potential violation of section 2.11 of EO 12333, which states that "[n]o person employed by or acting on behalf of the United States Government shall engage in or conspire to engage in assassination."[35] Even when the partner is alleged to have committed an unlawful act, it does not necessarily mean that the United States or its officials acted in violation of

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[33] *Id.* at 14.

[34] *Id.*

[35] This provision of Exec. Order No. 12,333 precludes the sharing of U.S. intelligence to support assassinations, which is defined as an unlawful killing. Exec. Order No. 12,333, United States Intelligence Activities, 46 Fed. Reg. 59941 (1981), *as amended by* Exec. Order 13,284 (2003), Exec. Order 13,355 (2004), and Exec. Order 13,470 (2008). *See also* YOO, *supra* note 19, at 58.

any law by providing intelligence support to the partner. The United States takes great care to ensure both its actions and the actions of its partner are lawful,[36] but circumstances may arise when (1) a foreign entity or U.S. person may decide to pursue a civil remedy in U.S. or foreign courts, or (2) the U.S. Government, a foreign nation, or an international tribunal may deem it appropriate to criminally prosecute a case under international or U.S. domestic law.

Decisions on forum, remedies, and the applicable body of law are complicated by issues of nationality, territoriality, and sovereignty (to include immunity).[37] Those reviewing intelligence sharing arrangements should understand the increasing desire (and ability) of outside judicial bodies to hold States and their officials accountable on matters of "international concern."[38] In arguing against the need for international

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[36] NATIONAL SECURITY OPERATIONS REPORT, *supra* note 6, at 12.

[37] Senior Lecturer Sarah Williams writes:

> It is a well-established principle of international law that states and state agents are immune from the jurisdiction of other states in certain circumstances. In particular, states and their officials cannot be the subjects of criminal proceedings in foreign states. For present purposes, there are three situations in which issues of immunity are most likely to arise. First, state officials may be tried before the courts of their own state. Immunity under international law does not arise. However, individuals may be accorded immunity under the Constitution or domestic legal instruments of their own state. The application of national immunities will be a matter of interpreting the relevant domestic legal instruments. Second, state officials may be tried before the domestic courts of another state based on principles of extraterritorial jurisdiction, including universal jurisdiction. Immunities accorded by international law will be relevant and, in such 'horizontal' cases, the nature of the immunity accorded will be important. Immunity extended under the laws of the state of nationality of the accused may not be relevant, as immunity accorded under domestic law cannot preclude the exercise of jurisdiction by another state. The third – so-called 'vertical' – situation is a trial before an international criminal court, which has been established either by a treaty or a Security Council resolution. Again, immunities accorded under international law will be relevant, and immunity accorded to the individual under the domestic law of their own state irrelevant.

SARAH WILLIAMS, HYBRID AND INTERNATIONALIZED CRIMINAL TRIBUNALS: SELECTED JURISDICTIONAL ISSUES 326 (2012).

[38] LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 269 (3rd ed., 2015).

oversight, some States claim that they have adequate domestic mechanisms to ensure accountability of its officials.[39] A desire to share intelligence in support of another's lethal operations should be viewed with consideration of the larger global dialogue on international accountability for state actions. Scholars often compare and contrast the systems of accountability in terms of a vertical legal order (which exercises domestic jurisdiction) and horizontal legal order (which exercises jurisdiction over matters of international concern).[40]

> The dichotomy between matters of international concern and those of domestic jurisdiction inheres in the very concept of international law, even in a world rationally organized on geographic basis. It signifies the necessity of a continuing allocation and balancing of competence between the general community and its component territorial communities, states, or regions, in ways best designed to serve the common interest. . . . An important function of international law is to permit external decision makers to intercede in matters that would otherwise be regarded as essentially internal to a particular state.[41]

One scholar explained that:

> [T]he authority of states is, initially, allocated under certain reciprocally honored principles of jurisdiction . . . . The competence over particular events achieved by states under most of these primary principles of jurisdiction are complemented by certain secondary allocations of competence under doctrines such as "act of state" and "sovereign immunity." [42]

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[39] *Id.* at 274. *See* Brief for the United States, Hernandez v. Mesa, 785 F.3d 117 (5th Cir. 2016), *cert. granted* (U.S. Oct. 11, 2016) (No. 15-118).

[40] *Id.* at 269–97.

[41] *Id.* at 270.

[42] *Id.* at 280. Professor Lung-Chu Chen separates the principles of jurisdiction into five categories: territoriality, nationality, impact territoriality, passive personality, and universality.

> The principle of territoriality empowers states to prescribe and apply law to all events occurring within their boundaries, regardless of whether such events involve nationals or non-nationals. The nationality principle authorizes states to make and apply law to their own nationals, wherever they may be. Under the principle of impact

Prior to approving the sharing of intelligence for lethal purposes, legal advisors must carefully assess the principles discussed above and advise policymakers on the legal risks, both horizontal and vertical, and whether actions can be taken to minimize risk of exposure to the United States and its officials. The appropriateness of risk mitigation measures can be informed by understanding the various laws, and the associated standards of responsibility, implicated by sharing intelligence information.

The following hypothetical helps to illustrate the potential legal ramifications:

> *A new branch of ISIS has organized and operates a military force of several thousand, conducts frequent military operations, and controls a large region of land spanning the borders of several nations. A regional military force has been organized to counter the threat, which is being supported by the U.S. intelligence. Unfortunately, in one of its first major operations, a coalition aircraft destroyed a field hospital, killing and injuring non-combatants, to include members of an international relief organization. Several NGOs and media organizations are reporting that the hospital was appropriately marked and the location known to regional forces. One media report stated, citing an unnamed source, that the forces deliberately targeted the hospital, using U.S. overhead imagery, because of the medical aid it was providing to ISIS. The international community, NGOs, survivors, next of kin, and Congress are calling*

> territoriality, a state may take measures against direct attacks on its security and against activities having substantial impact on its other important values, though the events occur outside its territory. The principle of passive personality authorizes states to make and apply law to people who injure their nationals, wherever the events may occur. The principle of universality, rooted in the perception that certain events (such as those involving piracy, slave trading, war crimes, and genocide) are great threats to common interests of all humanity, authorizes any state having effective control over the offenders to apply certain inclusive civil or criminal prescriptions on behalf of the international community. Together these principles confer on any state the competence to make and apply law regarding all events having significant effect on it.
>
> *Id.*

> *for an official investigation into the incident and for those responsible to be held accountable.*

Prior to authorizing the intelligence sharing arrangement, it can be assumed that the United States concluded that the regional forces were engaged in an ongoing armed conflict (non-international) with consent of the concerned nations, which provides a legal basis for lethal force. Questions remain, however, whether the partners were executing their operations lawfully and what, if anything, U.S. officials knew about them. Several of the potential legal issues, by no means exhaustive, raised by the scenario include: (1) State Responsibility under International Law for Supporting an Unlawful Act; (2) U.S. Criminal Liability for War Crimes; (3) U.S. Civil Liability for a Violation of the Law of Armed Conflict; and (4) International/Foreign Criminal and Civil Liability.[43]

D. The Doctrine of State Responsibility[44]

The doctrine of State Responsibility[45] provides an international framework for assessing the complicity of a nation-state for the unlawful actions committed by a partner nation.[46] The doctrine supports a horizontal theory of accountability—that certain state actions rise to a level of international concern, which must have a forum for accountability. States that fail to adhere to the doctrine may find themselves defending their actions before international tribunals, like the U.N. International Court of Justice or a specific conflict-focused international tribunal, established by treaty or U.N. Security Council resolution. As a general rule, per Common Article I of the Geneva Conventions, States have agreed

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[43] Brian Finucane published an article that examined the legal issues surrounding support to foreign partners. *See generally* Finucane, *supra* note 15.

[44] The Just Security blog and Chatham House hosted a mini-forum to discuss the Chatham House research paper. S*ee* Moynihan, *supra* note 14. The series of postings, in addition to the Chatham House research paper, is a valuable resource to those interested in exploring this issue in more depth. Chatham House Mini-Forum, https://www.justsecurity.org/tag/chatham-house-mini-forum/ (last visited Feb. 27, 2019).

[45] As Miles Jackson notes, "Article 16(i) covers *all* forms of assistance and (ii) applies in respect of *any* principal wrongful act, so long as that act would be wrongful if committed by the assisting state. Miles Jackson, *Aiding and Assisting: The Relationship with International Criminal Law?*, JUST SECURITY, (Nov. 15, 2016), https://www.justsecurity.org/34441/chatham-houses-paper-aiding-assisting-international-criminal-law/.

[46] U.N. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,* art. 16 (2001).

"to respect and ensure respect" for the Conventions.[47] Article 16 of the International Law Commission's Draft Articles on State Responsibility further provides:

> A state which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) the States does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.[48]

While helpful in articulating an international standard, the article contains several ambiguous terms, like the phrases "aids or assists" and "with knowledge of the circumstances."[49] In 2001, regarding these ambiguities,

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[47] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S 287; see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1, June 8, 1977, 1125 U.N.T.S 3. In its commentary on the Geneva Conventions, the International Committee of the Red Cross states:

> This duty to ensure respect by others comprises both a negative and a positive obligation. Under the negative obligation, High Contracting Parties may neither encourage, nor aid or assist in violations of the Conventions by Parties to a conflict. Under the positive obligation, they must do everything reasonably in their power to prevent and bring such violations to an end.

ICRC, *COMMENTARY OF 2016*, para. 37 (2016).

[48] *Id.*

[49] U.S. DEP'T OF STATE, *Draft Articles on State Responsibility: Comments of the Government of the United States of America*, at 10 (Mar. 1, 2001), https://www.state.gov/documents/organization/65781.pdf. The entire paragraph follows:

> The United States believes that Article 16 can be further improved by providing additional clarification in the commentary to Article 16 as to what "knowledge of the circumstances" means and what constitutes the threshold of actual participation required by the phrase "aids or assists." We note that in both the commentary to the first reading Article 27 and in the Special Rapporteur's discussion of this article in his Second Report, it has been stressed that the "intent requirement must be narrowly construed. An assisting state must be

the United States stated: The United States believes that Article 16 should cover only those cases where "the assistance is clearly and unequivocally connected to the subsequent wrongful act."[50] In 2016, the Obama Administration provided its view of the doctrine by stating:

> The United States has taken the position that a state incurs responsibility under international law for aiding or assisting another States in the commission of an internationally wrongful act when: (1) the act would be internationally wrongful if committed by the supporting State; (2) the supporting State is both aware that its assistance will be used for an unlawful purpose and intends its assistance to be so used; and (3) the assistance is clearly and unequivocally connected to the subsequent wrongful act.[51]

Knowledge of the underlying wrongful act is a critical element of the principle, but Article 16 does not explicitly require a state to make inquiries into a partner's past, present, or future conduct before aiding or assisting another state.[52] It also does not allow a state to be willfully blind[53] to the unlawful conduct of a partner. "[W]here an assisting state has actual or near-certain knowledge that the assistance will be used for unlawful purposes by the recipient state, or where the state is willfully blind to such knowledge, it will have the degree of knowledge specified in Article 16."[54] One scholar wrote,

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> both aware that its assistance will be used for an unlawful purpose and so intend its assistance to be used. The United States believes that Article 16 should cover only those cases where "the assistance is clearly and unequivocally connected to the subsequent wrongful act." . . . The inclusion of the phrase "of the circumstances" as a qualifier to the term "knowledge" should not undercut this narrow interpretation of the intent requirement, and the commentary to Article 16 should make this clear.

Id. (citations omitted).

[50] *Id.*

[51] NATIONAL SECURITY OPERATIONS REPORT, *supra* note 6, at 14.

[52] Moynihan, *supra* note 14, at 32.

[53] "[A] deliberate effort by the assisting state to avoid knowledge of illegality on the part of the state being assisted, in the face of credible evidence of present or future illegality." *Id.* at 14.

[54] *Id.* at 15.

> [G]overnments must not be willfully blind in the face of "credible evidence of present or future illegality," and, in a dynamic situation "the responsibility of the assisting state may evolve as the facts, and its level of knowledge, develop." In such situations, there should be a feedback loop whereby *ex post facto* investigation of alleged past violations, combined with information from other sources, plug into ongoing *ex ante* assessments of the potential consequences of future assistance.[55]

In other words, governments should continuously monitor and assess partner activities to inform decisions on continued or future support. The provision, however, should not be interpreted as creating a doctrine of strict liability when supporting others. Professor Ryan Goodman, a former advisor to the General Counsel of the Department of Defense, writes,

> I disagree with those who suggest that any targeting assistance that the U.S. Defense Department may provide the Saudi-led coalition "as a matter of law means [the United States] is liable for unlawful strikes in which it takes part." Such a rule would discourage States from providing any assistance in the form of helping ensure that a recipient's target selection and military strikes comply with the laws of armed conflict. . . . [T]here should, indeed, be a safe harbor from liability for assistance that is designed to ensure a recipient's practice comply with international law. . . .[56]

Some also dispute whether intent, in addition to knowledge, is a requisite of holding States accountable under the doctrine.[57] The Chatham House report summarizes the tension as follows: "States should be able to cooperate without being unduly fettered where they have no reason to anticipate the wrongful use of their assistance, but they should not be able to deny their responsibility for assistance in situations in which

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[55] Alex Moorehead, *How Should Governments Evaluate the Actions of States They Assist?*, JUST SECURITY (Nov. 17, 2016), https://www.justsecurity.org/34587/governments-evaluate-actions-states-assist/.

[56] Ryan Goodman, *The Law of Aiding and Abetting (Alleged) War Crimes: How to Assess US and UK Support, for Saudi Strikes in Yemen*, JUST SECURITY (Sep. 1, 2016), https://www.justsecurity.org/32656/law-aiding-abetting-alleged-war-crimes-assess-uk-support-saudi-strikes-yemen/.

[57] Moynihan, *supra* note 14, at 18.

internationally wrongful acts are manifestly being committed."[58] While scholars and the international community may hold differing views, the current U.S. position, previously articulated by the Obama Administration, is that the doctrine of State Responsibility has both knowledge and intent requirements.[59]

In sum, Article 16 serves as a valuable tool to promote a normative framework to prevent State support of the wrongful actions by others. It provides an incentive for taking reasonable measures to ensure States do not support the unlawful operations. It should not be seen, however, as an impediment to responsible support. Practitioners should be aware of the divergence in how the doctrine has been interpreted.[60]

The United States has robust authority, through the exercise of domestic jurisdiction (vertical legal order), to impose accountability on U.S. officials who engage in criminal actions. "[F]olks in official capacity should be aware that just because their State may not incur legal responsibility for complicity in the war crimes or other human rights violations of other States, that does not mean they, themselves, are immune from criminal accountability . . . ."[61] Of course, officials who conscientiously perform their responsibilities, while adhering to established policies and procedures for U.S. intelligence sharing, should face little practical risk that their actions will land them in U.S. criminal court. On the other hand, if the facts in the above scenario demonstrated that a U.S. official willfully caused or conspired with a partner to commit a war crime, then the U.S. official may be in violation of U.S. criminal law.[62]

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[58] *Id.* at 18–19.

[59] NATIONAL SECURITY OPERATIONS REPORT, *supra* note 6, at 14.

[60] *See generally* Moynihan, *supra* note 14, and discussion on the Just Security Blog, *supra* note 44.

[61] Gabor Rona, *Letter to the Editor: Chatham House Report and Individual Criminal Liability of Gov't Officials*, JUST SECURITY (Nov. 18, 2016), https://www.justsecurity.org/34490/letter-editor-chatham-house-report-individual-criminal-liability-govt-officials/.

[62] As a general matter, a prosecution involving intelligence support to a lethal operation would most likely fall under a theory that the U.S. official intentionally caused or conspired to commit an unlawful act covered by the statute. Prosecution under 18 U.S.C. § 2441 using a theory of aiding and abetting (18 U.S.C. § 2) would be unlikely because section 2441 requires either the person committing the crime or the victim be a member of the U.S. armed forces or a U.S. national. 18 U.S.C. § 2 of the federal criminal code states,

Under U.S. law, the commission of a war crime can be prosecuted before U.S. federal courts,[63] a military court-martial,[64] or a military

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.

18 U.S.C. § 2441 states, in pertinent part:

> (a) Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
> (b) Circumstances.—The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act). . . .

Prohibited conduct includes intentionally causing, or conspiracy to commit, murder, maiming, and serious bodily injury:

> (D) Murder.—The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.
> (E) Mutilation or maiming.—The act of a person who intentionally injures, or conspires or attempts to injure, or injures whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause, by disfiguring the person or persons by any mutilation thereof or by permanently disabling any member, limb, or organ of his body, without any legitimate medical or dental purpose.
> (F) Intentionally causing serious bodily injury.—The act of a person who intentionally causes, or conspires or attempts to cause, serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war.

[63] OPLAW HANDBOOK, *supra* note 17, at 38. While U.S. treaty (non-self-executing) and customary international law obligations do not automatically become part of the domestic law of the United States, Congress often passes laws to implement these international commitments and make violations a matter of domestic criminal law. *Id.*
[64] *Id.*

commission.[65] The War Crimes Act of 1996[66] makes it a federal crime for a U.S. national or member of the U.S. armed forces to intentionally kill or cause serious bodily injury to civilians or other persons taking no active part in hostilities, or to conspire or attempt to do so.[67] The Act "provides federal courts with jurisdiction to prosecute any person inside or outside the U.S. where a U.S. national or member of the U.S. armed forces is involved as an accused or a victim."[68] This last requirement would make a prosecution under a theory of aiding and abetting untenable,[69] because it is unlikely that the partner, the underlying principal, is a U.S. national or member of the U.S. armed forces. The statute, in short, requires that the U.S. official specifically intended, either as a principal or a conspirator, that the partners kill or seriously injure civilians taking no active part in hostilities.

If warranted by the evidence, U.S. officials could be found liable for other violations of the U.S. criminal code with extraterritorial application.[70] These could include aiding and abetting genocide or

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[65] States may also exercise criminal jurisdiction over individuals who commit criminal acts within the state. While the state code may not directly mention war crimes, most states would consider it a crime to aid and abet an unlawful killing.

[66] War Crimes Act of 1996, 18 U.S.C. § 2441.

[67] *Id.* The statute specifically excludes "collateral damage" or "death, damage, or injury incident to a lawful attack" as a basis for liability. *Id.* at 2441(d)(3).

[68] *Id.*

[69] 18 U.S.C. § 2.

[70] Congress has deliberately incorporated a number of crimes into the federal criminal code, specifying extraterritorial application that could cover situations where a U.S. official criminally provided intelligence to a foreign partner in support of a lethal operation. These include the following violations of title 18 of the U.S. Code:

• § 956 – Conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country. This prohibits individuals from conspiring to commit abroad what would constitute murder if committed in the United States. It states:

> (a)(1) Whoever, within the jurisdiction of the Unites States, conspires with one or more other persons, regardless of where such other person or person are located, to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United State shall, if any of the conspirators commits and act within the jurisdiction of the United State to effect any object of the conspiracy, be punished . . . .

• § 1091 – Genocide. 18 U.S.C. § 1091 provides:

> (a) Basic offense.—Whoever, whether in time of peace or in time of war, in a circumstance described in subsection (d) and with the specific intent to destroy in whole or in substantial part, a national, ethnic, racial, or religious group as such—
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> (1) kills members of that group;
> (2) causes serious bodily injury to members of that group;
> (3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;
> (4) subjects the group to condition of life that are intended to cause the physical destruction of the group in whole or in part;
> (5) Imposes measures intended to prevent births within the group; or
> (6) transfer by force children of the group to another group; or attempts to do so . . . .

• § 1116 – Murder or manslaughter of foreign officials, official guests, or internationally protected persons. 18 U.S.C. § 1116 provides, in pertinent part, "Whoever kills or attempts to kill a foreign official, official guest, or internationally protected persons shall be punished as provided . . . ."

It also state:

> If the victim of an offense . . . is an internationally protected person outside the United States, the United States may exercise jurisdiction over the offense if (1) the victim is a representative, officer, employee, or agent of the United States, (2) an offender is a national of the United States, or (3) an offender is afterwards found the United States. . . .

Id.

Section 1116(b)(4) defines an internationally protected person as:

> (A) a Chief of State or the political equivalent, head of government, or Foreign Minister whenever such person is in a country other than his own and any member of his family accompanying him; or (B) any other representative, officer, employee, or agent of the United States Government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection against attack upon his person, freedom, or dignity, and any member of his family then forming part of his household.

Other sections include,

• § 1117 – Conspiracy to murder (if underlying offense has extraterritorial application). 18 U.S.C. § 1117 provides, in pertinent part, "If two or more persons conspire to violate section 1111 [Murder], 1114

conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country.[71] For offenses under a theory of aiding and abetting, the Department of Defense Law of War Manual states:

> [A]iding and abetting holds an individual liable for an offense committed by another based on certain assistance that the individual gave in relation to the crime. [It consists] of three elements: (1) knowledge of the illegal activity that is being aided and abetted; (2) a desire to help the activity succeed; and (3) some act of helping.[72]

In explaining the knowledge standard at play, both the Department of Defense (DoD) Law of War Manual and Professor Ryan Goodman refer to the 1994 opinion written by Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Department of Justice.[73] The facts underlying the opinion "involved the U.S. Government's providing intelligence information and other assistance to foreign government engaged in military strikes to shoot down civil aircraft."[74] Professor Goodman writes that the opinion concluded, "USG agencies and personnel may not provide information (whether "real-time" or other) or other USG assistance (including training and equipment) to Colombia or Peru in circumstances in which there is a reasonably foreseeable possibility that such information or assistance will be used in shooting down civil aircraft."[75] The opinion continues, "Where a person provides assistance that he or she knows will contribute directly and in an essential manner to

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[Protection of officers and employees of the United States], 1116, or 1119 of this title, and one or more of such persons do any poverty act to effect the object of the conspiracy, each shall be punished . . . ."

• § 1119 – Foreign murder of United States nationals. 18 U.S.C. § 1119 provides, in pertinent part, "A person who, being a national of the United States, kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished as provided . . . ."

Id.

[71] *Id.*

[72] LAW OF WAR MANUAL, *supra* note 15, at 1124.

[73] United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking, 18 Op. O.L.C. 148, 156 (1994).

[74] Goodman, *supra* note 56.

[75] *Id.*

a serious criminal act, a court readily may infer a desire to facilitate that act."[76]

As discussed in detail below, the United States has implemented procedures to protect U.S. officials from criminal liability for their official acts. When the process works as intended, it ensures the United States only shares potentially lethal intelligence with a partner who has a lawful basis for its operations and intent to carry them out lawfully. However, it is important to have a mechanism available, when needed, to hold U.S. officials fully accountable for criminal actions.

E. U.S. Civil Liability for Unlawful Killings

In the scenario described above, it is possible that the next of kin or survivors may pursue a suit in U.S. court against those officials involved in providing intelligence support to the operation. Whether a U.S. court has jurisdiction to review the actions of U.S. officials is complicated by the interplay between statutes and case law on jurisdiction, official immunity, and sovereignty.[77] Of course, it would significantly impact U.S. foreign relations if U.S. officials feared lawsuits for their every act.[78] This concern has been highlighted in litigation surrounding the application of the Alien Tort Statute (ATS), originally enacted in 1789.[79] The ATS provides that the "courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[80]

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[76] *Id.*

[77] The Foreign Sovereign Immunities Act, 28 U.S.C. § 1601 *et. seq.*, waives sovereign immunity for certain acts. *See* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 183 (5th ed. 2011). Typically, the United States cannot be sued unless Congress has waived sovereign immunity. Chisolm v. Georgia, 2 U.S. 419, 478 (1793); Cohen v. Virginia, 19 U.S. 264, 412 (1821). The Supreme Court in Dalehite v. United States, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953), held that the Federal Tort Claims Act did not waive sovereign immunity for "the exercise of judgment at a planning rather than operational level . . . ." Federal Torts Claims Act, 28 U.S.C. § § 1346(b), 2671-2678 (1946). In addition, the Federal Torts Claims Act has not waived sovereign immunity for the combatant activities of the armed forces in wartime. *Id.*

[78] "That a nation-state generally cannot be sued without its consent has long been established under both international law and the law of most states." CHEN, *supra* note 38 at 287–88 (citing the case of The Schooner Exchange v. M'Fadden, 11 U.S. (7 Cranch) 116 (1812)).

[79] Alien Tort Statute, 28 U.S.C. § 1350 (2006).

[80] *Id.*

The ATS is a procedural statute, requiring a plaintiff to demonstrate a violation of the "law of nations" or a "treaty of the United States" upon which U.S. courts can exercise jurisdiction. In *Sosa v. Alvarez-Machain,*[81] the plaintiff, a Mexican national, alleged that his detention in Mexico by Mexican officials, conducted at the behest of the U.S. Drug Enforcement Agency, was in violation of Federal Tort Claims Act (FTCA) [82] and the ATS.[83] Although the Supreme Court recognized that Congress had waived sovereign immunity for injury caused by the wrongful acts of Government employees while acting within the scope of their employment, it dismissed the FTCA claim on grounds that the Act did not extend to arrests occurring outside the United States. It also determined that the ATS "only created subject matter jurisdiction, not a cause of action for violation of international law."[84] In other words, the ATS does not provide an avenue for all treaty and customary international law violations,[85] only those violations that are part of U.S. law, through either incorporation or recognized common law.[86] "*Sosa* thus requires that the tort be 'committed' in violation of international law, not that international law itself recognize a right to sue in domestic courts and not that Congress adopt implementing legislation defining the wrong."[87] Subsequent courts, relying on *Sosa,* have found that only certain "egregious violations of human rights law,"[88] like torture, genocide, and war crimes,[89] would be

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[81] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[82] Federal Torts Claims Act, 28 U.S.C. § 1346(b)(1), §§ 2671–2680.

[83] Alien Tort Statute, 28 U.S.C. § 1350 (2006).

[84] DYCUS, *supra* note 77, at 189. The OPLAW Handbook states: "Recently the United States Supreme Court addressed the Alien Tort Statute (ATS) in *Sosa v. Alvarez-Machain.* OPLAW HANDBOOK, *supra* note 17, at 54 (citing Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)). Refining and tightening the standard for establishing torts 'in violation of the law of nations,' the Court characterized the statute essentially as a jurisdictional statute." *Id.*

[85] Customary international law "is incorporated into federal law, under the analysis in Sosa, only when its incorporation has been authorized either by the structure of the Constitution or by the political branches, and it is to be applied interstitially in a manner consistent with the relevant policies of the political branches." Bradley, Curtis A. and Goldsmith, Jack Landman and Moore, David H., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007).

[86] *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). *Filartiga* is the oft-cited example of a U.S. federal decision where the court found that deliberate torture violated the law of nations and that plaintiff, a Paraguayan national, could bring a claim before a U.S. court, using ATS, against the a Paraguayan police officer. *Id. See* Ralph G. Steinhardt, *Determining Which Human Rights Claims "Touch and Concern" the United States: Justice Kennedy's Filartiga*, 89 Notre Dame L. Rev. 1695 (2014).

[87] Steinhardt, *supra* note 86, at 1697.

[88] *Id.* at 1698.

[89] *Id.* at 1698 n.27.

considered part of the U.S. common law. In theory, the litigants in the hypothetical could use the procedural aspects of ATS, but they would also have to allege some type of serious violation of international law "comparable to the '18th-century paradigms' . . . like piracy and attacks on diplomats."[90] Plaintiffs, for instance, could allege that U.S. officials committed a war crime by participating, through the provision of intelligence support, in the deliberate targeting of a hospital in violation of the Law of Armed Conflict.[91]

The Supreme Court, however, recently tightened the application of the ATS with the case of *Kiobel v. Royal Dutch Petroleum Co.*[92] In *Kiobel*, the Court stated a plaintiff cannot bring a suit through the ATS when the alleged tortious act occurred exclusively outside the jurisdiction of the United States. The Court tempered its holding by stating, "[In this case,] all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[93] The meaning of the "touch and concern" language has been the subject of several court cases, particularly, "how much domestic conduct or contact is required to rebut the presumption against extraterritoriality."[94]

The plaintiffs in the scenario might also make an argument alleging a violation of U.S. constitutional protections. As Professor Andrew Kent has stated, it has "been black letter law throughout the nineteenth century that noncitizens outside the United States lacked constitutional rights."[95]

The precedent of *Boumediene v. Bush*[96] extended constitutional protections to non-citizens in Guantanamo because the United States

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[90] *Id.* at 1702.

[91] *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995) (alleging violations of customary international law by the former Bosnian-Serb military commander).

[92] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct 1659 (2013).

[93] *Id.* at 1669.

[94] John Bellinger & Andy Wang, *The Alien Tort Statute and the Morrison "Focus" Test: Still Disagreement after RJR Nabisco*, LAWFARE (Feb. 21, 2007, 1:02 PM), https://www.lawfareblog.com/alien-tort-statute-and-morrison-focus-test-still-disagreement-after-rjr-nabisco.

[95] Andrew Kent, *Thoughts on the Briefing to Date in Hernandez v. Meza—The Cross-border Shooting Case*, LAWFARE (Dec. 27, 2016, 1:59 PM), https://www.lawfareblog.com/thoughts-briefing-date-hernandez-v-mesa—-cross-border-shooting-case).

[96] Boumediene v. Bush, 553 U.S. 723 (2008).

exercised practical sovereignty over those it detained in that location.[97] In *Boumediene*, the Supreme Court examined whether non-U.S. citizens, located overseas, should be afforded certain protections and legal recourse under the U.S. Constitution.[98] In examining the history of this issue, Professor Kent cites Justice Rehnquist, writing for the majority in *United States v. Verdugo-Urquidez:*[99]

> The United States frequently employs armed forces outside this country—over 200 times in our history—for the protection of American citizens or national security. Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest. Were respondents to prevail, aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters.[100]

It should come as no surprise that U.S. law has evolved to limit the avenues for foreign nationals to bring private actions against U.S. officials for their acts in furtherance of national security. Like all nations, the United States has an interest in conducting foreign affairs, without being routinely sued by aggrieved foreign nationals. This does not mean that U.S. officials can act impudently abroad; a number of other systems provide for accountability. Still, a foreign national will have significant legal challenges to overcome before a U.S. court will review the actions of those acting for the U.S. Government, particularly involving the support provided to an ally in an armed conflict situation.

F. International/Foreign Individual Criminal and Civil Liability

While it is unclear in the scenario where the intelligence support actually took place, it is likely that some U.S. personnel were located abroad, for example, at military bases or embassies. Certainly in cases of

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[97] *Id.*
[98] *Id.*
[99] United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).
[100] Kent, *supra* note 95 (In Verdugo-Urquidez, Justice Rehnquist cites to Bivens v. Six Unknown Federal Narcotic Agents, 403 U.S. 388 (1971); cf. Tennessee v. Garner, 471 U.S. 1 (1985); Graham v. Connor, 490 U.S. 386 (1989)).

"international concern," to include matters involving "universal jurisdiction,"[101] international and foreign domestic courts may seek to exercise horizontal jurisdiction, criminal or civil, for acts taken by individuals within their jurisdiction. During coordination and review, the United States must closely examine whether its intelligence support would place its employees at undue risk of a horizontal civil suit or criminal charges. While the United States can take measures to minimize the legal risks on the criminal side, like coordinating with impacted nations, it cannot prevent private citizens from filing civil suits. A case that implicated foreign domestic law was illustrated with the indictment by an Italian magistrate of several Central Intelligence Agency (CIA) personnel for the extradition of Abu Omar.[102] In writing about the operation, Professor A. John Radsan wrote, "It would be dangerous for the CIA to snatch an Italian resident without notifying the Italian government. . . . [I]f the Americans do not have permission for the snatch, they would be subject to prosecution in Italy for kidnapping or related charges."[103] He explained that the United States, particularly organizations like the CIA, closely examine the risk of foreign jurisdiction and work to minimize those risks. "CIA officers, advised by CIA lawyers, tend not to take unnecessary risks; they do not expose themselves to the laws of foreign countries unless there is a strong countervailing interest."[104] Of course, the United States, like in the Italy case, may seek to shield its officers from appearing in foreign court by removing them from the country.[105] Or, it may decide, upon request from a foreign country, to agree to the extradition of those facing charges so they can appear in the foreign court. Because foreign criminal and civil implications are highly fact dependent, lawyers and policymakers must review each arrangement to ensure that the United States is not placing its officials at undue risk of legal exposure.

Decision-makers must also consider the risk of prosecution before an international criminal tribunal,[106] like the International Criminal Court (if

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[101] WILLIAMS, *supra* note 37, at 314–15.

[102] A. John Radsan, *A New Recipe for Renditions and Extraditions*, in LEGAL ISSUES IN THE STRUGGLE AGAINST TERROR, 257 (John Norton Moore & Robert F. Turner eds., 2010).

[103] *Id.*

[104] *Id.*

[105] *Id.* One of the employees, Ms. DeSouza, who was residing in Portugal, is facing extradition to Italy. Ian Shapira, *Ex-CIA officer in Portugal Faces Extradition to Italy for Rendition Conviction*, WASH. POST, at A8.

[106] The U.S. Army Operational Law Handbook states:

it is able to exercise jurisdiction over United States citizens),[107] or a specifically created tribunal to address a particular conflict. Article 25(3) of the Rome Statute, which established the International Criminal Court, makes it unlawful for a person under their jurisdiction to facilitate, aid, abet, or otherwise assist in the commission of a crime.[108] Regarding intent, Article 30 of the statute states,

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
> 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
> 3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.[109]

> Violations of the LOAC, as crimes defined by international law, may also be prosecuted under the auspices of international tribunals, such as the Nuremberg, Tokyo, and Manila tribunals established by the Allies to prosecute German and Japanese war criminal after World War II. The formation of the United Nations has also resulted in the exercise of criminal jurisdiction over war crimes by the international community, with the Security Council's creation of the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia.

OPLAW HANDBOOK, *supra* note 17, at 40.

[107] More recent tribunals and special courts to adjudicate war crimes in the Former Yugoslavia, Rwanda, Sierra Leone, Cambodia, East Timor, and Lebanon. In 2002, the Rome Statute created the more permanent International Criminal Court in the Hague, Netherlands, to try cases of genocide, war crimes, and crimes against humanity. Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]. Currently, the United States is not a party to the Rome Statute and does not recognize its jurisdiction over itself or its citizens.

[108] Rome Statute art. 25(3).

[109] Rome Statute art. 30.

Some scholars[110] and practitioners[111] believe that this standard, agreed upon by parties to the treaty, is less stringent than that required by customary international law. In *United States v. Khalid Shaikh Mohammad, et al.*, for example, the United States argued that to be guilty of aiding and abetting under customary international law, an individual must have:

> 1) [P]rovided practical assistance, encouragement, or moral support to the perpetration of a crime or underlying offense, and
> 2) Such practical assistance, encouragement, or moral support, had a substantial effect upon the commission of a crime or underlying offense.[112]

Noting that the *mens rea* for this standard only requires knowledge and not intent, Brian Finucane, a legal advisor at the Department of State, commented: "[A]n aider and abettor must be aware of a "substantial likelihood" that he/she would assist in the commission of the offense, a standard akin to recklessness. A conscious desire or willingness to achieve the criminal results is not required."[113] He elaborates:

> The greater the awareness that the partner receiving assistance failed to comply with LOAC, that such violations reflected policy decision or systematic

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[110] Ryan Goodman, *Foreign Gov't Assistance to Trump Administration Policies: What Int'l Law Prohibits*, JUST SECURITY (Nov. 23, 2016), https://www.justsecurity.org/34835/foreign-govt-assistance-trump-administration-policies-intl-law-prohibits/.

[111] Finucane, *supra* note 1543, at 420

[112] *Id.* at 422 (citing Government Motion to Make Minor Conforming Charges to the Charge Sheet (AE120B) at 2, United States v. Khalid Shaikh Mohammad et al. (Military Comm'ns Oct. 18, 2013), https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE120B(Gov%20Sup)). pdf). The author writes:

> Under this standard for aiding and abetting it is not necessary that the assistance constituted a "but for" cause of the crime, nor (in contrast to State responsibility and federal law) that the assistance was specifically directed towards a crime. Assistance having a substantial effect could take a variety of forms, including transportation, providing personnel, weapons, ammunition or fuel.

Id.

[113] *Id.* at 422–23 (citations omitted).

> deficiencies and that violations were likely to continue in the future, the stronger the argument that individual officials of the assisting State would be aiding and abetting war crimes.[114]

This interpretation introduces the element of recklessness into the equation, either on the part of the assisting State (in allowing the support) or on the part of the partner (in not taking reasonable actions to correct deficiencies).[115] Thus, an intent to achieve the purpose of the unlawful activity may not be necessary under this interpretation of the customary international law standard; it may only require adequate knowledge that there is a substantial likelihood that the intelligence would assist in the commission of an unlawful activity, whether it was the result of a deliberate decision or negligent targeting practices. Other courts, to include the International Criminal Tribunal for Yugoslavia, have concluded that the international law standard for aiding and abetting is much higher and requires an individual to "specifically direct" that the assistance be used in the commission of the underlying offense.[116]

Regardless of the standard at play, the United States has thus far been resistant to attempts to formalize international criminal jurisdiction over its officials, citing concern that its agents, particularly members of the Armed Forces, would be subject to politically motivated prosecutions.[117] This concern has been demonstrated in the United States' reluctance to agree to the Rome Statute and the jurisdiction of the International Criminal Court.[118] However, as Professor Gabor Rona aptly summarized,

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[114] *Id.* at 424.

[115] The DoD Law of War Manual states:

> Commanders have duties to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war. Failures by commanders of their duties to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war can result in criminal responsibility.

LAW OF WAR MANUAL, *supra* note 15, at 1123 (citations omitted).

[116] *See, e.g.*, Int'l Criminal Tribunal for Yugoslavia, Prosecutor v. Perisic, Judgment (Appeals Chamber) Feb. 28, 2013 (Case No. IT-04-81-A).

[117] Edith M. Lederer, *US Supports War Crimes Tribunal for First Time*, WASH. POST, (Mar. 2, 2011), https://www.washingtonpost.com/wpdyn/content/article/2011/03/02/AR20110302001163.html.

[118] *Id.*

> While it's unlikely that a State will prosecute its own agents for acts that it authorizes, the risk of prosecution is real. Regimes change. Amnesties can be undone. The summer-in-Tuscany plan may be risky for CIA torturers. . . . In assessing the risk of prosecution, officials should be aware that some crimes are considered so heinous that they are subject to universal jurisdiction . . . . In fact, the Torture Convention, the Genocide Convention, and in the case of international armed conflicts, the Geneva Conventions not only permit, but require, parties to search for and either try, or extradite for trial, persons suspected of certain offenses prohibited by these treaties, regardless of where on earth the offenses occur.[119]

III. Strategy, Policy, and Process

To ensure adherence to international, foreign, and U.S. domestic law, while furthering U.S. strategic objectives, the Executive Branch has established a framework based on statutory law, executive order, national strategy, and departmental issuances. The structure allows the national security enterprise to balance national security, political, military, and foreign policy objectives, while accounting for the legal considerations discussed above.

A. National Strategy

Understanding why and how the United States shares intelligence[120] with foreign partners begins broadly with White House guidance contained in the National Security Strategy of 2017[121] and National Strategy for Information Sharing and Safeguarding.[122] These documents,

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[119] Rona, *supra* note 61.

[120] Intelligence information is one of the U.S. Government's greatest resources, cultivated through carefully crafted relationships with sources, the hardship and sacrifice of a worldwide network of U.S. personnel, and the expenditure of billions of dollars to develop technical capabilities. Hard-earned intelligence provides leaders and decision-makers an informational advantage over others, whether in the field of battle, the domain of commerce, or the realm of foreign affairs.

[121] NSS 2017, *supra* note 2.

[122] EXEC. OFFICE OF THE PRESIDENT, THE NATIONAL STRATEGY FOR INFORMATION SHARING AND SAFEGUARDING (Dec. 2012) [hereinafter NSISS 2017] (Although written by the previous administration, it has not yet been replaced and provides helpful guidance to those working in this arena.)

along with the National Security Act of 1947,[123] provide the top-level structure and framework for foreign intelligence sharing.

The National Security Strategy serves not only as an external message to Congress, the American people, and the world on how the United States will seek to address national security concerns, but it also provides internal guidance to the departments and agencies of the Executive Branch on how it should organize, prioritize, and execute their efforts. Importantly, the strategy advocates working with foreign partners[124] and seeks to "confront threats before they ever reach our borders or cause harm to our people."[125] The strategy also emphasizes that the United States will champion American values, including individual rights and the rule of law.[126]

Notably, the strategy directs the Executive Branch to pursue its national security objectives by working with foreign partners *while* also advancing American values.[127] The United States is often faced with the dilemma of whether it should work with those with questionable values in pursuit of its national security objectives. As Brian Egan, former Legal Adviser at the Department of State, stated in his April 2016 speech to the American Society of International Law, the United States has a strong interest in ensuring that, when we engage in armed conflict, we do so consistent with international law, and "legal diplomacy" has a role in ensuring that our partners, as a condition for receiving our assistance also follow the rules. "[T]he U.S. wants to work with partners who will comply with international law, and our partners expect the same of us.[128] In this way, international law serves as a critical enabler of international cooperation."[129]

The strategy promotes a moral dimension when evaluating a proposal to share intelligence with a foreign partner. While the current strategy is similar to the previous Administration's strategy in balancing security goals with a desire to promote individual rights, President Trump has made clear he places great weight on promoting American interests: "it is the

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[123] National Security Act of 1947, Pub. L. No. 235, 61 Stat. 496 (July 26, 1947) (codified as amended at 50 U.S.C. ch. 15).
[124] NSS 2017, *supra* note 2.
[125] *Id*.
[126] NSS 2017, *supra* note 2 ("We champion our values – including the rule of law and individual rights – that promote strong, stable, prosperous, and sovereign states.)
[127] *Id.*
[128] *Id.*
[129] *Id.*

right of all nations to put their own interests first . . . [and w]e do not seek to impose our way of life on anyone . . . ."[130] With mounting evidence of human rights violations by the Saudi leadership,[131] the Trump Administration faces a critical test on how it evaluates and weighs its current intelligence sharing relationship, particularly when the United States relies on the credibility of the Kingdom in assessing its adherence to international law in its operations in Yemen.

The 2012 National Strategy for Information Sharing and Safeguarding[132] provides more clarity on how to "strike the proper balance between sharing information with those who need it to keep our country safe and safeguarding it from those who would do us harm."[133] In seeking to achieve the overarching objective of sharing "the right information, with the right people, at the right time," the strategy recognizes that foreign entities are key partners in "prevent[ing] harm to the American people and protect[ing] national security."[134] The strategy is based on three core principles: (1) Information is a national asset that requires "stakeholders [to] make it available to those who need it, while also keeping it secure from unauthorized or unintended use;[135] (2) information sharing and safeguarding requires a mentality of risk management vice risk avoidance;[136] and (3) the understanding that information informs decision-making and "our national security depends upon an ability to make information easily accessible . . . in a trusted manner . . . ."[137]

Taken together, these strategies form the foundation for how, why, and when the U.S. Government shares information with foreign partners. While the documents do not directly link intelligence sharing with the promotion of American values, rule of law, and individual rights, the National Security Strategy emphasizes that these objectives are a priority for U.S. efforts abroad.

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130 Donald J. Trump, Inaugural Address (Jan. 20, 2017).
131 Patricia Zengerle, *U.S. Senate Hand Trump Historic Rebuke on Saudi Arabia*, REUTERS, (Dec. 13, 2018), www.reuters.com/article/us-usa-saudi-yemen/u-s-senate-hands-trump-historic-rebuke-on-saudi-arabia-idUSKBN1OC2S3.
132 NSISS, *supra* note 1222.
133 *Id.* (cover letter).
134 *Id.* at 3.
135 *Id. at 7.*
136 *Id.*
137 *Id.*

B. Law and Policy

The legal foundations establishing the roles and responsibilities for implementing the strategic guidance on sharing intelligence with foreign partners are grounded in the National Security Act of 1947[138] and Executive Order 12333.[139] These twin pillars of intelligence authority, derive, on the one side, from Congress's Article I law-making authority and, on the other, the President's Article II executive authority.[140]

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[138] The National Security Act of 1947, *supra* note 123 (National Security Act of 1947 sets forth the framework of the Intelligence Community and the role of the Director of National Intelligence (DNI)). The Act provides that the DNI shall "oversee" the coordination of foreign liaison relationships "under the direction of the President," with respect to intelligence related to the national security, commonly referred to as national intelligence. *Id.* Section 102A(a)(1)(E) further states that the DNI "shall be responsible for ensuring that national intelligence is provided . . . to such other persons as the DNI determines to be appropriate." *Id.* Section 102A(f)(1)(A) states that the DNI "shall establish objectives, priorities, and guidance for the intelligence community to ensure timely and effective collection, processing, analysis and dissemination of national intelligence . . . ." *Id.* Finally, section 102A(f)(8) states that the DNI "shall perform such other functions as the President may direct." *Id.* These provisions—at least in the aggregate, if not also individually—give the DNI statutory authority to issue national intelligence sharing guidance, at his own discretion or at the direction of the President. *Id.* In addition to this "intelligence provision" authority, the Act enumerates an "information sharing" obligation of the DNI, but this "information sharing" provision makes no explicit or implicit reference to the sharing of intelligence with foreign liaison. *Id.*

[139] Exec. Order No. 12,333, *supra* note 35 (Exec. Order No. 12,333 provides the basis for controlling disclosure of classified U.S. intelligence to officials of foreign governments and international organizations.). Section 1.3(b)(4)(A) of Executive Order 12333 states that the DNI "may enter into intelligence and counterintelligence arrangements and agreements with foreign governments and international organizations." *Id.* Section 1.3(b)(4)(B) states that the DNI "shall formulate policies concerning intelligence and counterintelligence arrangements and agreements with foreign governments . . . ." *Id.* Additionally, section 1.3(b)(4)(C) states that the DNI "shall align and synchronize intelligence and counterintelligence foreign relationships among the elements of the Intelligence Community to further United States national security, policy, and intelligence objectives." *Id.*

[140] Exec. Order No. 13,526, Classified National Security Information, 75 Fed. Reg., No. 2, (2010). Exec. Order No. 13,526 provides important guidance and authority on protecting intelligence information. *Id.* It establishes the conditions that apply to all decisions on access to classified information, including foreign disclosure decisions. *Id.* First, it prohibits the release of classified information outside the Executive Branch without an assurance that it will receive equivalent protection. *Id.* Second, it requires a determination that prospective recipients are trustworthy and have a need-to-know to perform or assist in a lawful and authorized government purpose. *Id.* Third, it requires the originator's consent for further dissemination (commonly referred to as the "third-party rule"). *Id.* Fourth, it provides for safeguarding information received in confidence from or jointly produced with foreign governments and international organizations. *Id.*

Together, they provide the authority for the Director of National Intelligence (DNI) to promulgate *Intelligence Community Directive 403*, which implements the Administration's national strategy on information sharing and "establishes policy governing the disclosure and release of classified national intelligence . . . ."[141]

C. Director of National Intelligence Issuances

Intelligence Community Directive 403, *Foreign Disclosure and Release of Classified National Intelligence*, first issued in 2013, implements the DNI's statutory and executive order duties and authorities related to foreign disclosure and release of classified national intelligence.[142] Among other things, ICD 403 sets forth the DNI's roles and responsibilities for intelligence sharing, as follows: "the DNI (a) provides strategic guidance and oversight for the conduct of foreign disclosures and releases of intelligence and issues specific guidance for the establishment, modifications and terminations of, and exceptions to IC guidance;[143] (b) authorizes disclosures or releases of intelligence that represent the establishment, modifications or terminations of, or exceptions to IC guidance, or that concern matters where DNI guidance is absent; and (c) authorizes disclosures or releases of intelligence in

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It also provides for holding in confidence, by mutual agreement, information produced jointly with them. *Id.* Fifth, it specifies that access may be permitted when necessary to perform or assist in a lawful and authorized governmental function. *Id.*

[141] National Security Act of 1947, *supra* note 123, § 3003. Section 3 of the National Security Act of 1947defines "national intelligence" as "all intelligence, regardless of the source from which derived and including information gathered within or outside the United States, that pertains, as determined consistent with any guidance issued by the President, to more than one United States Government agency; and that involves threats to the United States, its people, property, or interests; the development, proliferation or use of weapons of mass destruction or any other matter bearing on United States national or homeland security." *Id.* Executive Order 12,333 contains substantially the same definition. Exec. Order. No. 12,333, *supra* note 35. Notably, national intelligence does not include "military intelligence," over which the Secretary of Defense (in coordination with the Secretary of State) has primacy.

[142] OFF. OF THE DIR. OF NAT'L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE 403: FOREIGN DISCLOSURE AND RELEASE OF CLASSIFIED NATIONAL INTELLIGENCE, March 13, 2013 [hereinafter ICD 403] (unclassified version approved for public release).

[143] *Id.* Disclosure, as defined in ICD 403, is displaying or revealing classified intelligence whether orally, in writing, or in any other medium to an authorized foreign recipient without providing the foreign recipient a copy of such information for retention. Release is defined as the provision of classified intelligence, in writing or in any other medium, to authorized foreign recipients for retention. *Id.* at 2.

response to National Security Council policy direction."[144] Intelligence sharing is often characterized according to three categories, commonly referred to as: (1) bilateral/multilateral national intelligence sharing;[145] (2) ad hoc national intelligence sharing;[146] and (3) situational national intelligence sharing.[147] A fourth category of intelligence sharing exists for classified military information, discussed in more detailed below.[148]

Further guidance on implementing the provisions of priorities of ICD 403 is contained in Intelligence Community Policy Guidance (ICPG). Of the ICPGs in the 403 series, ICPG 403.1, *Criteria for Foreign Disclosure and Release of Classified National Intelligence*, importantly, provides the

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[144] To further the goals of improving information sharing, in a manner that properly safeguards the information while promoting national security, ICD 403 established the following criteria for foreign disclosures and releases:

> 1. U.S. intelligence is a national asset to be conserved and protected and will be shared with foreign entities only when consistent with U.S. national security and foreign policy objectives and when an identifiable benefit can be expected to accrue to the United States.
> 2. It is the policy of the U.S. Government to share intelligence with foreign governments whenever it is consistent with U.S. law and clearly in the national interest to do so, and when it is intended for a specific purpose and generally limited in duration.

Id.

[145] From time to time, individual agencies of the Intelligence Community may enter into a bilateral or multilateral intelligence sharing relationship under their own authorities. These relationships may be governed by a formal memorandum of agreement or other written framework. Agency counsel typically review proposed arrangements during the coordination process. Interview with James Daugherty, Director, Intelligence Sharing and Engagement Policy, Office of the Director of National Intelligence (Nov. 23, 2016).

[146] Less formal, but still important, are ad hoc intelligence sharing arrangements through specified intelligence agency liaison authorities to share certain information. Typically, these are particular instances of information sharing, not part of an ongoing information sharing relationship on an issue or matter. *Id.*

[147] Situational intelligence sharing arises when U.S. national security interests are such that the President or National Security Council has directed the sharing of intelligence with a foreign entity, including for the purpose of enabling the foreign entity's lethal military operations. *Id.* The foreign entity could be a government, international organization, coalition partner, or other organization determined by the Director of National Intelligence. *Id.* Situational sharing of national intelligence is overseen by the Office of the Director of National Intelligence's Foreign Relations Committee (FRC), which is an interagency body chaired by the Assistant Director of National Intelligence for Partner Engagement, who works directly for the DNI. *Id.*

[148] ICD 403 states, "This Directive does not apply to disclosures or releases of classified military information pursuant to National Disclosure Policy 1 and National Security Decision Memorandum-119." ICD 403, *supra* note 142, at 1.

starting point on the factors to be considered when reviewing the "appropriateness and suitability of foreign disclosures or releases of intelligence."[149] To complement ICPG 403.1, ICPG 403.2, *Procedures for Foreign Disclosures and Release Requiring Interagency Coordination, Notification, and DNI Approval*, details the level of approval required for various intelligence sharing arrangements.[150]

The provisions of ICPG 403.1 provide the Intelligence Community with guidance on when intelligence can be shared, and when it should not, to include when sharing would be in violation of U.S. domestic and international law. According to the guidance, intelligence may be disclosed or released if:[151]

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[149] OFF. OF THE DIR. OF NAT'L INTELLIGENCE, INTELLIGENCE COMMUNITY POLICY GUIDANCE: CRITERIA FOR FOREIGN DISCLOSURE AND RELEASE OF CLASSIFIED NATIONAL INTELLIGENCE, at 2, Mar. 13, 2013 [hereinafter ICPG 403.1] (unclassified version approved for public release).

[150] OFF. OF THE DIR. OF NAT'L INTELLIGENCE, INTELLIGENCE COMMUNITY POLICY GUIDANCE 403.2: PROCEDURES FOR FOREIGN DISCLOSURE AND RELEASE REQUIRING INTERAGENCY COORDINATION, NOTIFICATION, AND DNI APPROVAL, Aug. 8, 2014 [hereinafter ICPG 403.2].

[151] The interagency, primarily Department of State and the Intelligence Community, must also assess the receiving country's ability to safeguard the information it will receive. *Id.* An affirmative finding must be made that the receiving state can provide adequate protections for the information we will give them, and that the information will not be used or disclosed in a manner that may harm U.S. interests. *Id.* ICPG 403.2 explains that:

> Adequate protection includes confidence that:
> a. The intelligence will not be further disclosure or release to another government or any other party without approval of the originating IC element;
> b. The foreign recipient has the capability and intent to provide U.S. intelligence substantially the same degree of protection provide it by the U.S.; and
> c. The intelligence will not be used for other than the state purpose without the approval of the originating IC element, and is not likely to be used by the recipient in an unlawful manner harmful to U.S. interests.

Id.

Consistent with the safeguarding requirements of ICD 403, the military's counterpart to ICD 403, National Disclosure Policy–1, requires that:

> Disclosure will not normally be made until the disclosure authority is in receipt of assurances from the recipient that:

a. Disclosure or release is consistent with U.S. foreign policy and national security goals and objectives;
b. Disclosure or release can be expected to result in an identifiable benefit to the U.S., such as:

(1) Service a specific U.S. national purpose in support of diplomatic, political, economic, military, or security policies as determined by senior U.S. Government (USG) policy makers [Senior USG policy makers are the President, the Vice President, and the National Security Council];
(2) Obtaining commensurate information or services from the proposed recipient;
(3) Supporting bilateral or multilateral treaties, alliances, agreements, arrangements or plans; or
(4) Aiding U.S. intelligence or counterintelligence activities.[152]

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(1) The information or acknowledgement of its possession will not be revealed to a third party, except with the prior consent of the U.S. originating department or agency . . . .;
(2) The information will be afforded substantially the same degree of security protection given to it by the United States.
(3) The information will be used for military or other specified purposes only, including production for military use when so authorized.
(4) The recipient will report promptly and fully to U.S. authorities any known or suspected compromise of United States classified military information released to them.
(5) All individuals and facilities that will have access to the classified military information will have security clearances granted by their government at a level equal to that of the classified information involved and an official need to know.
(6) The foreign recipient of the information has agreed to abide by or meet U.S.-specified special terms and conditions for the release of U.S. source information or material.

DEF. SEC. COOPERATION AGENCY, NATIONAL DISCLOSURE POLICY-1: NATIONAL POLICY AND PROCEDURES FOR THE DISCLOSURE OF CLASSIFIED MILITARY INFORMATION TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS, Oct. 2, 2002, at 13–14 (regulation contains classified information and is not releasable in its entirety; a new version of NDP-1 was published in January 2017, with limited dissemination, and was not available) [hereinafter NDP-1].

[152] ICPG 403.1, *supra* note 149, at 2.

On the other hand, certain types of intelligence are prohibited from disclosure or release, to include for purposes of this discussion:

> a. Intelligence, the disclosure or release of which would be contrary to U.S. law, or to agreements or treaties between the U.S. and foreign nations;
> b. Intelligence, not publicly available, on a U.S. person, unless collection, retention, and dissemination of such information is authorized by EO 12333 and implementing procedures and guidelines, and not otherwise prohibited by the Privacy Act, 5 USC 552a; requires special consideration and authorization, including referral to the NSC and compliance with NSC direction as appropriate;
> . . . .[153]

Requests for DNI approval for an intelligence sharing proposal must contain sufficient information to ensure that policymakers[154] can assess merits of the proposal and adherence to both national strategy and ICD 403, and the associated legal implications.[155]

Lastly, ICPG 403.1 contains another constraint to ensure that intelligence provided to others to facilitate lethal actions gets additional consideration and scrutiny. DNI approval is required[156] for "[d]isclosures

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[153] *Id.*

[154] Policymakers reviewing such proposals include members of Office of the Director of National Intelligence (ODNI), National Security Council (NSC) committees, and the Foreign Relations Committee (an interagency organization convened by ODNI to provide guidance and oversight on issues related to the provision of intelligence to foreign partners).

[155] ODNI has recommended requestors, at a minimum:

> 1. Identify the purpose for which the shared intelligence will be used;
> 2. Determine whether the appropriate Executive Branch body has articulated a policy to pass the intelligence for the identified purpose;
> 3. Determine whether the agency passing the information has the authority to pass it for the identified purpose and whether passing the information would violate any applicable U.S. or international law; and
> 4. An ability to monitor the post-sharing environment.

Daugherty, *supra* note 145. In particular, if the intelligence to be shared may potentially be used for lethal purposes or have likely lethal consequences, the agency requesting approval must adequately explain the purpose and parameters of the request. *Id.*

[156] ICPG 403.1, *supra* note 149, at 3.

and releases that would support or facilitate lethal action . . . ."[157] Before sharing intelligence of this nature, ICPG 403.1 requires the proposed disclosure or release undergo "special consideration and authorization [by DNI], including referral to the NSC and compliance with NSC direction as appropriate."[158] Of necessity, part of the review and approval required before sharing of such intelligence would be a determination that doing so would not violate the ICPG 403.1 prohibitions on sharing intelligence in violation of domestic law, international legal obligations, and EO 12333.

In sum, the processes ensure all proposals to share lethal intelligence are thoroughly vetted, coordinated, and reviewed. The procedures, particularly ICPG 403.1, restrict the USIC from sharing national intelligence for lethal purposes unless it has undergone "special" review and received approval from the DNI.[159] This prevents decentralized, lower level decisions to share such intelligence. Proposals can either be a bottom-driven, requested from a member of the USIC or a combatant command (and referred to the NSC per ICPG 403.1), or it can be top-driven direction from the NSC itself or one if its coordination committees (per ICPG 403.2). Regardless of how the proposal arrives, DNI will not authorize sharing unless it has received NSC-level review, which includes interagency deliberation.[160] Once the proposal has received a favorable review through the NSC coordination process,[161] ODNI will send the proposed arrangement through the Foreign Relations Committee (FRC),[162] a specialized interagency organization specifically designed to ensure coordination, support, synchronization, and effective implementation of intelligence sharing matters across the Executive Branch. Legal reviews of such national intelligence sharing proposals will be conducted at, at least, two points: by the interagency lawyers group,[163] in conjunction with any review by an NSC coordination committee, and by the ODNI General Counsel's Office, prior to the issuance of any intelligence sharing guidance by ODNI.[164] At any point in the deliberations, legal counsel and

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157 *Id*. at 4.
158 *Id.*
159 *Id.*
160 *Id.*
161 EXEC. OFFICE OF THE PRESIDENT, NAT. SEC. POLICY MEMO – 2, ORGANIZATION OF THE NATIONAL SECURITY COUNCIL AND THE HOMELAND SECURITY COUNCIL (Jan. 28, 2017).
162 *See* discussion, *supra* note 147.
163 John Bellinger, *Charlie Savage and the NSC Lawyers*, LAWFARE, (Nov. 8, 2015, 11:25 AM), https://www.lawfareblog.com/charlie-savage-and-nsc-lawyers-group (John Bellinger, former legal advisor to the National Security Council, discusses the formation and role of the NSC interagency lawyers group at the Lawfare Blog.).
164 Daugherty, *supra* note 145.

policymakers can suggest certain conditions, parameters, or risk mitigation measures to address any risks generated by legal or policy concerns, which, if agreed upon, can be incorporated into the final intelligence sharing authorization, issued by DNI.[165]

D. National Disclosure Policy – 1

Separate from the DNI's purview over sharing *national* intelligence with foreign entities, the Secretary of Defense (in conjunction with the Secretary of State) has independent authority to share *classified military information* (CMI),[166] which allows the United States military to work with allied forces and engage in military operations abroad. Unlike the DNI, the Secretary of Defense's intelligence sharing authority is derived from the President's authority as Commander-in-Chief and based on National Security Decision Memorandum (NSDM) 119, *Disclosure of Classified United States Military Information to Foreign Governments and International Organizations*, dated 20 July 1971.[167] *National Policy and Procedures for the Disclosure Classified Military Information to Foreign Governments and International Organizations* (NDP-1)[168] implements this authority.

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[165] *Id.*

[166] Classified Military Information is defined in NDP-1, as

> Information which (a) is under the control or jurisdiction of the Department of Defense, its departments or agencies, or of primary interest to them; (b) may be embodied in equipment or may be in written, oral, or other form; and (c) requires protection in the interests of national defense and security and in one of three classification categories—TOP SECRET, SECRET, or CONFIDENTIAL . . . .

NDP-1, *supra* note 151, at 2.

[167] OFF. OF THE WHITE HOUSE. NATIONAL SECURITY DECISION MEMORANDUM 119, 20 July 1971 [hereinafter NSDM-119]. NSDM-119 was approved by President Richard Nixon and signed by National Security Advisor Henry A. Kissinger. NDSM-119 is the basic policy that governs the disclosure of U.S. classified military information foreign governments and international organizations. Derived from the President's authority under Article II of the U.S. Constitution, it charges the Secretary of Defense and the Secretary of State with the responsibility for implementing the policy. It requires both to form an interagency mechanism and establish procedures to carry out the procedures. These procedures are contained in NDP-1. NDP-1 only covers information under the control or jurisdiction of the Department of Defense or of primary interest to it or its department or agencies. It does not have purview over national intelligence.

[168] NDP-1, *supra* note 151.

Since DoD intelligence sharing is heavily focused on support to military operations, the authority to share CMI in support of those operations flows from the presidential and secretarial approval to conduct the lethal operations.[169] Decisions to allow intelligence sharing for lethal purposes are thus made at the highest level of government, after much scrutiny, deliberation, and legal review.[170] In other words, sharing of CMI for lethal purposes is typically a subset of the overall approval to conduct or support lethal operations.[171] Department of Defense Directive 5230.11, *Disclosure of Classified Information to Foreign Governments and International Organizations*, supports this principle in paragraph 4.8: "Under conditions of actual or imminent hostilities, any Unified or Specified Commander may disclose classified military information through TOP SECRET to an actively participating allied force when support of combined combat operations requires the disclosure of that information."[172] A Record of Action[173] will normally be issued establishing the parameters for intelligence sharing, even with the existence of national policy direction authorizing combat operations.

Numerous other players, below the Pentagon level, provide additional safeguards to ensure only authorized intelligence, both national and military, is shared with a foreign partner within approved parameters.[174] Members of the combatant command, down to the tactical level, assess the partner's ability to safeguard the information, as well as their ability to use the intelligence appropriately, to include whether the partner will abide by the LOAC.[175] Attorneys, Foreign Disclosure Officers/ Representatives (FDOs/FDRs), intelligence personnel, and operators all keep a close eye on the category of sharing at issue and any conditions/restrictions that have been imposed.[176] This will drive a determination if approval exists or is

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169 Daugherty, *supra* note 145.
170 *Id.*
171 *Id.*
172 U.S. DEP'T OF DEFENSE, DIR. 5230.11, DISCLOSURE OF CLASSIFIED INFORMATION TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS 3 (June 16, 1992).
173 When a proposed disclosure exceeds the classification level delegated in Annex A of NDP-1, or if DoD has no disclosure authority for an intended recipient country, a DoD element submits a Request for an Exception to the National Disclosure Policy (ENDP) to the National Military Information Disclosure Policy Committee (NDPC) or the Military Intelligence Disclosure Policy Committee (MIDPC), interagency committees organized by DoD. NDP-1, *supra* note 151, at 20.
174 Interview with Anthony Pascuma, Chief, Foreign Disclosure Office, U.S. Africa Command (Jan. 25, 2017).
175 *Id.*
176 *Id.*

required for the intelligence to be shared and, if necessary, the process to be used in gaining approval.

Importantly, the FDO diligently tracks the various approvals and authorities for intelligence sharing across the combatant command in support of their various lines of efforts.[177] It is the FDO, and duly appointed FDRs, who, at the operational and tactical levels, ensure that intelligence sharing efforts are adequately supported by law and policy.[178] In making decisions on disclosure and release of intelligence, foreign disclosure officers/representatives execute the guidance found in the ICDs/ICPGs, NDP-1, Records of Action, bilateral and multinational sharing arrangements, and DNI intelligence sharing guidance.[179]

Whether the department or agency seeking to share intelligence for lethal purposes has the requisite authority depends on the military side, the existence of national direction, an EXORD, or a Record of Action, and, on the national side, the existence of DNI authorization and national guidance. Because military and national intelligence sharing initiatives often intersect and overlap, the USIC, particularly the interagency coordinating bodies for intelligence sharing[180] at the Office of the Director of National Intelligence and DoD, must manage proposals to share lethal intelligence to ensure seamless support of U.S. policy priorities.

In summary, the above law, strategy, and policy describe two separate, but integrated, frameworks[181] for intelligence sharing: National and Military, with national intelligence sharing being further divided into (1) bilateral/multilateral national intelligence sharing arrangements; (2) ad hoc national intelligence sharing; and (3) situational national intelligence

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[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] The FRC at ODNI or the NDPC and the MIDPC at DoD. *See* discussion, *supra* notes 147 and 173.

[181] The President can also authorize intelligence sharing for lethal purposes using his covert action authority. The President's authority to conduct covert action derives from his exercise of constitutional powers as Chief Executive and Commander in Chief to protect American citizens, property, and interests from foreign threats. The National Security Act of 1947, P.L. 235 of Jul. 26, 1947; 61 Stat. 496, recognizes the President's authority with respect to covert action and imposes certain statutory requirements. Covert action is defined in the National Security Act of 1947 as "[a]n activity or activities of the United States Government to influence political, economic or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly." 50 U.S.C. § 3093(e).

sharing. The Chatham House report encourages a state working with partners to "have policies in place to enable it to identify properly the risk of cooperation."[182] The structure and mechanisms established through ICD 403 and NDP-1 allow decision-makers to gather information, discuss, and effectively assess the legal risk of going forward with an intelligence sharing arrangement. It also allows the U.S. Government to issue guidance requiring certain actions be taken to reduce the risk of legal exposure to the United States and its employees.

E. Measures to Minimize Risk of Supporting Unlawful Actions

The U.S. Government has developed several tools to minimize the risk that the United States will be involved in supporting the unlawful actions of a partner.[183]

As appropriate, the United States can take a variety of measures, including diplomatic assurances, vetting, training, and monitoring, to ensure that the recipient of U.S. intelligence respects human rights and complies with the law of armed conflict.[184] The Chatham House report provides a similar formula to reduce the risk of assisting in unlawful acts by other states."[185] The report encourages states to use the following tools, similar to the list of measures previously provided by the United States:

- Attaching conditions to the provision of assistance;
- Diplomatic assurances;
- Legal diplomacy and demarches;
- Vetting and training recipients of assistance;
- Confining assistance to a particular part of a state; and
- Monitoring, reporting and follow up systems.[186]

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[182] Moynihan, *supra* note 14, at 40

[183] *See generally* Finucane, *supra* note 43, at 425-30. The author, an attorney at the Department of State, discusses various risk mitigation measures, in the context of aiding and assisting foreign partners, available to the United States, to include vetting and due diligence, training, monitoring, and owning. *Id.*

[184] NATIONAL SECURITY OPERATIONS REPORT, *supra* note 6.

[185] Moynihan, *supra* note 14, at 37.

[186] *Id. at*. 41–43.

Risk mitigation measures, like monitoring and receipt of assurances from a partner, may have the benefit of encouraging a partner to adopt more humanitarian practices, while making it aware that continued support is premised on certain behavior. The United States may also condition sharing on arrangements to ensure the United States can monitor use of the intelligence, to ensure the rules are being followed. It is important that "any decision to assist . . . be kept under review."[187] But some partners will need to be more closely monitored than others. In the area of risk mitigation measures, one size does not fit all. Depending on the circumstances, it may be prudent for the United States to closely monitor how U.S. intelligence is used; in other cases, it may be reasonable to place greater confidence in the partner. Risk mitigations measures, when necessary, serve to limit the risk that U.S. intelligence support facilitates an unlawful act, and demonstrates the intent to adhere to the rule of law in any support provided by the United States.

IV. Conclusion

Unlike other types of foreign aid and assistance, such as the provision of arms, equipment, or financial support, where it may be difficult to reverse aid already provided, an ongoing intelligence sharing relationship can always be suspended, terminated, or modified in the face of evidence that the partner has used U.S. intelligence unlawfully. This gives the United States flexibility and leverage when sharing intelligence with partners, which is especially important when the intelligence support has potentially lethal consequences. When faced with evidence of ongoing or future unlawful activity, appropriate action will minimize the risk of legal exposure for the United States and its officials. Measures to mitigate legal risk, like assurances, vetting, training, and monitoring, however, may not always be required, or even possible, and should be considered on a case-by-case basis. If the partner has a demonstrated record of complying with LOAC and respecting human rights, it may not be necessary to take any measures to reduce the risk that the United States would improperly support a partner's unlawful actions. On the other hand, some potential U.S. partners have poor human rights records or inappropriate targeting practices, but their assistance may be vital in addressing a U.S. national security priority. In those cases, the United States must use established processes to assess whether the legal risk can be managed to a degree that makes the intelligence sharing arrangement appropriate.

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[187] *Id. at* 41.

NO AUTHORITY, NO RECOURSE: WHY THE GAO'S SANCTIONS IN *LATVIAN CONNECTION LLC, B-413442* AND *B-415043.3,* CONSTITUTE UNCHALLENGEABLE AGENCY OVERREACH

MAJOR BRUCE H. ROBINSON*

I. Introduction

In 2016, the Government Accountability Office (GAO), acting in its bid protest adjudication capacity, faced a problem: a small business, Latvian Connection LLC (Latvian Connection), was inundating the GAO with bid protests.[1] As of 18 August 2016, Latvian Connection had filed 150 bid protests in fiscal year 2016, or 5.3 percent of all bid protests filed at the GAO in fiscal year 2016.[2] Only one of those protests was decided on the merits.[3] Most of the remaining protests were dismissed because Latvian Connection was not an interested party.[4] This behavior was merely a continuation of a trend. In fiscal year 2015, Latvian Connection filed 59 bid protests

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[1] Latvian Connection LLC (*Latvian I*), B-413442, 2016 CPD ¶ 194 (Comp. Gen. Aug. 18, 2016).

[2] *Id* at 2*; see* U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-314SP, GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2016 (2016) [hereinafter GAO FY16 REPORT].

[3] *Latvian I*, 2016 CPD ¶ 194, at 2.

[4] *See id*. To have standing at the Government Accountability Office (GAO) or the United States Court of Federal Claims (COFC), the losing contractor must be an interested party. An interested party is defined as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award or the contract or by failure to award the contract." 31 U.S.C. § 3551(2)(A) (2018); *see also* Am. Fed.'n Gov't Emps., v. United States, 258 F.3d 1294, 1302 (Fed. Cir. 2001).

in one week; all of these protests were dismissed because "the 59 solicitations that Latvian Connection was challenging did not actually exist."[5]

Beyond the sheer number of protests filed by Latvian Connection, the tone within the filings also troubled the GAO. These filings were "typically . . . a collection of excerpts cut and pasted from a wide range of documents having varying degrees of relevance to the procurements at issue, interspersed with remarks from the protestor. The tone of the filings is derogatory and abusive towards both agency officials and GAO attorneys."[6] Latvian Connection also made a number of "baseless accusations," to include alleging "GAO officials are white collar criminals . . . and that agency and GAO officials have engaged in . . . human trafficking and slavery."[7]

In response to this pattern of behavior, the GAO invoked its "inherent right to dismiss any protest, and to impose sanctions against a protestor [whose] actions undermine the integrity and effectiveness of [GAO's] process" and labeled Latvian Connection a vexatious litigant.[8] The GAO further concluded that Latvian Connection was not filing protests in order to ensure that it could compete on an equal basis for contracts and noted that the effect of Latvian Connection's numerous protests was to expend significant agency and GAO resources into responding to baseless protests.[9] As a result, the GAO held that Latvian Connection's conduct constituted an abuse of process, dismissed the instant protest, and then sanctioned Latvian Connection by suspending the company from protesting to the GAO for one year from the date of the decision.[10]

Latvian Connection completed its suspension on 18 August 2017.[11] At that time the GAO sent Latvian Connection a note "to remind the firm of a number of important legal requirements for filing and pursuing

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[5] Latvian Connection LLC (*Latvian I*), B-413442, 2016 CPD ¶ 194, at 3 n.3 (Comp. Gen. Aug. 18, 2016).
[6] *Id.* at 4.
[7] *Id.*
[8] *Id.* at 6.
[9] *Id.* at 6-7.
[10] Latvian Connection LLC (*Latvian I*), B-413442, 2016 CPD ¶ 194, at 7 (Comp. Gen. Aug. 18, 2016).
[11] Latvian Connection LLC – Reconsideration (*Latvian II*), B-415043.3, 2017 CPD ¶ 354, 5 (Comp. Gen. Nov. 29, 2017).

protests . . . ."[12] Over the next three months, Latvian Connection filed ten protests with the GAO.[13] The GAO determined that these protests "exhibit[ed] the same pattern of abusive litigation practices that previously led [the GAO] to suspend Latvian Connection."[14] As a result, on 29 November 2017, the GAO once again suspended Latvian Connection, this time for a period of two years.[15] At the conclusion of the opinion, the GAO put Latvian Connection on notice that continued "abusive litigation practices" could lead to the imposition of additional sanctions, to include "permanently barring the firm and its principal from filing protests at GAO."[16]

While Latvian Connection may not be a sympathetic figure, the implications of the GAO's decisions are significant. With the stroke of a pen, the GAO both articulated and imposed a sweeping authority to bar protestors from its forum as a sanction for abuse of process. As a result, unlike every other potential contractor in the world, Latvian Connection is unable to challenge the contract award decisions of federal agencies at the GAO. This necessarily begs two important questions. First, does the GAO have the authority to suspend a contractor from protesting at the GAO, and second, how and where can a sanctioned protestor challenge the sanction?

This article argues that the GAO exceeded its authority when it sanctioned Latvian Connection; however, there is no appellate authority or other mechanism to challenge the sanction, thus raising significant concerns about the lack of oversight of GAO's actions. Congress can and should cure this lack of oversight by making statutory changes that provide judicial scrutiny of GAO sanctions and other procedural decisions.[17]

The first part of the article briefly explains the bid protest fora available to sanctioned contractors. This section will then focus on

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[12] *Id*. at 5-6.
[13] *Id*. at 8, n.10.
[14] *Id*. at 6. For example, one of Latvian Connection's 2017 bid protests included "links to internet videos published by Latvian Connection's CEOs" that were "profane, inappropriate, and threatening." *Id*. at 11. More generally, the GAO noted that the 2017 bid protests continued Latvian Connection's pattern of levying "baseless accusations of criminal activity" against "agency and GAO officials." *Id*. at 10-11.
[15] *Id*. at 12.
[16] *Id*. at 12.
[17] GAO actions collateral to resolving the bid protest itself.

the GAO and summarize its history and jurisdiction over bid protests. The second part of the article examines whether the GAO has the authority to sanction protestors by barring them from its forum. The third part of the article discusses what mechanisms, if any, a sanctioned protestor has to challenge a GAO sanction. The article concludes by recommending statutory changes to ensure greater oversight of the GAO in the bid protest arena.

II. Background

In fiscal year 2017, the United States obligated over $507 billion through contracts.[18] The majority of these contracts are awarded through a competitive, transparent bidding process.[19] This competitive process seeks to ensure that the U.S. Government is getting a fair price for the contracted procurement and that all potential contractors have an equal opportunity to bid on the procurement.[20] Given the amount of money at stake each fiscal year, it is no surprise that disputes arise over whether a contract was properly awarded.[21] There are several fora where contractors can protest an agency's award of a contract: with the agency itself[22]; at the GAO;[23]and to the United States Court of Federal Claims (COFC).[24]

The GAO, a legislative agency, was established as the General

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[18] *Contract Explorer–Contract Spending in Fiscal Year 2017*, DATALAB. USASPENDING.GOV, https://datalab.usaspending.gov/contract-explorer.html (last visited Feb. 22, 2019).

[19] *See* KATE M. MANUEL, CONG. RESEARCH SERV., R40517, COMPETITION IN FEDERAL CONTRACTING: AN OVERVIEW OF THE LEGAL REQUIREMENTS (2011). The Competition in Contracting Act of 1984 (CICA), which governs the majority of procurements in the federal government, "requires that contracts be entered into after 'full and open competition through the use of competitive procedures' unless certain circumstances exist that would permit agencies to use noncompetitive procedures." *Id.* at 7 (quoting 10 U.S.C. § 2304(a)(1)(A) (2018)).

[20] *See* 10 U.S.C. § 2304 (2018).

[21] *See generally* U.S. GOV'T ACCOUNTABILITY OFF., B-158766, GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2018 3 (2018) (bid protest statistics from fiscal years 2014-2018 reveal that between 2561 and 2789 protests were filed each fiscal year).

[22] The agency protest forum was established by Executive Order in 1995. Exec. Order No. 12979, 60 Fed. Reg. 55,171 (Oct. 27, 1995). "Inexpensive, informal, and procedurally simple," the interested party files the protest with the contracting officer who awarded the disputed contract. FAR 33.103 (2019).

[23] 31 U.S.C. §§ 3551-53 (2018).

[24] 28 U.S.C. § 1491(b)(1) (2018); s*ee* Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 2007 Wisc. L. Rev. 1225-27 (2007).

Accounting Office in 1921 by the Budget and Accounting Act of 1921.[25] Originally, there was no express statutory authorization for the GAO to hear bid protests. Instead, that authority was interpreted to arise from the GAO's authority to settle all claims and accounts of the United States.[26] In 1984, the Competition in Contracting Act of 1984 (CICA) was enacted.[27] This statute granted the GAO express statutory authority to hear bid protests.[28]

Any disappointed offeror may protest an agency's award of a contract to the GAO.[29] The GAO's procedures include a limited right for a protestor to challenge an unfavorable decision from the GAO.[30] A protestor may request reconsideration of a bid protest decision, but the request for reconsideration must be filed with the GAO "not later than 10 days after the basis for reconsideration is known or should have been known"[31] and must be based on new facts or law that were not known to the party at the time of the protest.[32] This is the only mechanism to review a bid protest decision of the GAO.

From 1970 to 2001, federal district courts had jurisdiction over bid protests.[33] The Administrative Dispute Resolutions Act of 1996

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[25] Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20 (1921); *see also* James M. Weitzel Jr., *GAO Bid Protest Procedures Under the Competition in Contracting Act: Constitutional Implications After Buckley and Chadha*, 34 Cath. U. L. Rev.485 n.1 (1985). The GAO describes itself as "an agency within the legislative branch of the federal government." *Office of the Comptroller General*, U.S. GOV'T ACCOUNTABILITY OFFICE, http://www.gao.gov/about/workforce/ocg.html (last visited Feb. 22, 2019).

[26] Weitzel, *supra* note 26, at 496 n.77 (quoting the Budget and Accounting Act: "[a]ll claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government . . . is concerned . . . shall be settled and adjusted in the General Accounting Office.").

[27] Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984); Weitzel, *supra* note 26 at 486; Metzger & Lyons, *supra* note 25, at 1230.

[28] Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984).

[29] 31 U.S.C. §§ 3551-53 (2018).

[30] *See* 4 C.F.R. § 21.14 (2019).

[31] *Id.* § 21.14(b).

[32] *See id.* § 21.14.

[33] KATE M. MANUEL & MOSHE SCHWARTZ, CONG. RESEARCH SERV., R40228, GAO BID PROTESTS: AN OVERVIEW OF TIME FRAMES AND PROCEDURES 3 n.13 (2016); *see also* Scanwell Laboratories, Inc. v. John H. Shaffer, 424 F.2d 859, 865-69 (D.C. Cir. 1970); Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996). This jurisdiction was first identified by the federal courts in *Scanwell Laboratories* in 1970. *Scanwell*, 424 F.2d at 865-69. *Scanwell* jurisdiction, as it became

(ADRA) expanded the COFC's "jurisdiction to encompass all bid protests" and imposed a sunset provision on federal district court's jurisdiction over bid protests.[34] This sunset provision took effect in 2001.[35] As a result, federal district courts no longer have jurisdiction to hear bid protests.[36]

A disappointed offeror also has the right to file a protest with the COFC.[37] The COFC does not act as an appellate court for GAO decisions. Rather, a disappointed offeror has the right to protest to both the GAO and the COFC.[38] Decisions by the COFC may be appealed to the U.S. Court of Appeals for the Federal Circuit (CAFC).[39]

III. Questioning GAO's Authority to Impose Sanctions in *Latvian*

In the *Latvian* decisions, the GAO grounded its authority to impose sanctions against vexatious litigants in its "inherent right . . . to impose sanctions against a protestor [whose] actions undermine the integrity and effectiveness of [GAO's] process."[40] Before examining whether the GAO possesses this inherent authority, and if so, whether as applied to the facts in the *Latvian* decisions, its exercise of that inherent authority was appropriate, it is necessary to examine whether there is any statutory or regulatory authority for GAO's actions.

A. Statutory Authority

The GAO's bid protest authority is codified at 31 U.S.C. §§ 3551-57. While there is no explicit statutory authority for the GAO to impose sanctions on protestors, there is authority for the GAO to dismiss a protest

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known, was codified in 1996. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996).

[34] Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996); Metzger & Lyons, *supra* note 25, at 1225-26 n.7.

[35] Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996); Metzger & Lyons, *supra* note 25, at 1225-26 n.7.

[36] Metzger & Lyons, *supra* note 25, at 1225-26 n.7.

[37] 28 U.S.C. § 1491(b)(1) (2018); s*ee* Metzger & Lyons, *supra* note 25, at 1225-27.

[38] Metzger & Lyons, *supra* note 25, at 1225-27; *see also* 31 U.S.C. § 3556 (2018).

[39] 28 U.S.C. § 1295(a)(3) (2018).

[40] Latvian Connection LLC (*Latvian I*), B-413442, 2016 CPD ¶ 194, 6 (Comp. Gen. Aug. 18, 2016); Latvian Connection LLC – Reconsideration (*Latvian II*), B-415043.3, 2017 CPD ¶ 354, 12 (Comp. Gen. Nov. 29, 2017).

that is either frivolous or fails to state a valid basis for protest.[41] However, there is no express statutory support for the GAO to sanction protestors by barring them from its forum.

On the contrary, the statute requires the GAO to consider every protest filed by an interested party, stating that "a protest concerning an alleged violation of a procurement statute or regulation shall be decided by the Comptroller General if filed in accordance with [the CICA statutes governing the GAO]" [42] and that "[pursuant to regulations promulgated by the GAO] the Comptroller General shall decide a protest submitted to the Comptroller General by an interested party."[43] In other words, if a protest is filed in accordance with the statute or the regulations promulgated by the GAO, then the GAO must decide the protest. This necessarily requires the GAO to at least review the protest to determine whether it is in compliance. Prospectively dismissing future protests, which is the practical effect of the suspensions in the *Latvian* decisions, conflicts with these requirements. Thus, not only is there no express statutory authority for the sanctions in the *Latvian* decisions, the sanctions themselves violate two provisions within the statute.[44]

B. Regulatory Authority

If the statutes governing the GAO's bid protest function do not authorize the sanctions levied against Latvian Connection, is there regulatory support for the GAO's actions? The statutes that codified the GAO's bid protest authority specifically authorized the GAO to promulgate regulations to govern its bid protest process.[45] Those regulations are codified at 4 C.F.R. Part 21.[46]

These implementing regulations focus on the procedures for

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[41] 31 U.S.C. § 3554(a)(4) (2018).
[42] *Id.* § 3552(a).
[43] *Id.* § 3553(a).
[44] *See id.* §§ 3552(a), 3553(a).
[45] *Id.* § 3555.
[46] The Federal Acquisition Regulation (FAR) also includes regulations governing bid protest procedures at the GAO. FAR 33.104 (2019). These regulations are nearly identical to those found at 4 C.F.R. Part 21. Additionally the FAR states that "[i]n the event guidance concerning GAO procedures in this section conflicts with 4 CFR part 21, 4 CFR part 21 governs." FAR 33.104.

filing, responding to, and adjudicating a bid protest. As a result, these regulations flesh out and identify the contours of the GAO's bid protest authority to a greater degree than the statutes mentioned above.[47] However, they only authorize sanctions in one limited circumstance: as punishment for violating the terms of a protective order.[48]

The GAO may admit counsel to protective orders if the GAO deems it necessary for a party to view protected information in order to resolve the protest.[49] If the terms of the protective order are violated, the GAO may impose "such sanctions as GAO deems appropriate, including referral to appropriate bar associations or other disciplinary bodies, restricting the individual's practice before GAO, prohibition from participation in the remainder of the protest, or dismissal of the protest."[50] These sanctions primarily focus on punishing the offending attorney; the only sanction that would directly punish the protestor itself provides for dismissal of that protest.[51]

There is no enumerated authority to sanction the protestor by suspending its access to the GAO forum; however, the authority is drafted as being non-exhaustive, which provides some support for a *Latvian*-style sanction for violating a protective order.[52] But the *Latvian* decisions did not involve a violation of a protective order. As such, the sanctions listed in 4 C.F.R. § 21.4(d) were not triggered by Latvian Connection's conduct, and 4 C.F.R. Part 21 does not provide any other regulatory basis to sanction a protestor.

C. Inherent Authority

The GAO justified the sanctions in the *Latvian* decisions not by

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[47] For instance, the regulations at 4 C.F.R. Part 21 detail a number of scenarios, not mentioned in statute, where the GAO may dismiss a protest. *Compare* 4 C.F.R. § 21.5 (2019) *with* 31 U.S.C. §§ 3551-53 (2018).

[48] *See id.* § 21.4(d).

[49] *Id.* § 21.4(a). Protected information includes "proprietary, confidential, or source-selection-sensitive material, as well as other information the release of which could result in a competitive advantage to one or more firms." *Id.*

[50] *Id.* § 21.4(d).

[51] *Id.*

[52] Violation of the protective order "may result in the imposition of such sanctions as the GAO deems appropriate, including referral to appropriate bar associations or other disciplinary bodies, restricting the individual's practice before the GAO, prohibition from participation in the remainder of the protest, or dismissal of the protest." *Id.* § 21.4(d).

recourse to statutory or regulatory authority, but instead to an "inherent right of dispute forums to levy sanctions in response to abusive litigation practices."[53] To support this assertion, the GAO cited to a previous bid protest decision, *PWC Logistics Servs. Co. KSC(c)*, and a 1980 United States Supreme Court decision, *Roadway Express, Inc. v. Piper*.[54] The former is readily distinguishable from the facts in the *Latvian* decisions, while the latter raises significant questions as to whether the claimed authority extends to a quasi-judicial administrative body.[55] This section argues that (1) the GAO as a quasi-judicial administrative agency is not empowered with the inherent powers of a court that it claims in the *Latvian* decisions; (2) even if the GAO is so empowered, it does not possess power to suspend protestors from its forum; and (3) even if the GAO does possess this specific power, Latvian Connection was afforded insufficient due process to justify its use in the *Latvian* decisions.

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[53] Latvian Connection LLC (*Latvian I*), B-413442, 2016 CPD ¶ 194, 6 (Comp. Gen. Aug. 18, 2016); Latvian Connection LLC – Reconsideration (*Latvian II*), B-415043.3, 2017 CPD ¶ 354, 12 (Comp. Gen. Nov. 29, 2017).

[54] *Latvian I*, 2016 CPD ¶ 194, at 6 (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980); PWC Logistics Servs. Co. KSC(c), B-310559, 2008 CPD ¶ 25 (Comp. Gen. Jan. 11, 2008)); *Latvian II*, 2017 CPD ¶ at 12 (citing PWC Logistics Servs. Co. KSC(c), B-310559, 2008 CPD ¶ 25 (Comp. Gen. Jan. 11, 2008)).

[55] It is unnecessary to devote much time distinguishing *PWC Logistics* from *Latvian I* because in both cases the GAO, in claiming an inherent authority to police its forum, cited to the same United States Supreme Court precedent. *Latvian I*, 2016 CPD ¶ 194, at 6; *PWC Logistics*, 2008 CPD ¶ 25, at 12. Additionally, the *Latvian II* suspension was rooted in the same authority identified in *Latvian I*. Compare *Latvian I* at 6 with *Latvian II* at 12. As a result, a conclusion that the authority identified in the cited line of cases does not extend to the GAO nullifies the precedential weight that would be afforded to *PWC Logistics*.

It is important to note that *PWC Logistics* involved a violation of a protective order, while the *Latvian* decisions did not. *PWC Logistics*, 2008 CPD ¶ 25, at 6-8. As discussed above, the regulations that govern GAO bid protest procedures explicitly authorize the GAO to sanction protestors and counsel who violate protective orders by, *inter alia*, dismissing the protest. This is exactly the sanction imposed by the GAO in *PWC Logistics*. *PWC Logistics*, 2008 CPD ¶ 25, at 14. In other words, *PWC Logistics* concerns a protective order violation for which an explicitly authorized sanction was imposed whereas the *Latvian* decisions involve an amorphous abuse of process and sanctions that both far exceeded the sanction imposed in *PWC Logistics* and for which the GAO lacks statutory or regulatory authority to impose.

1. A Federal Court's Inherent Authority to Police its Forum Does Not Extend to the GAO

The United States Supreme Court first identified an inherent power residing within the federal judiciary in 1812, holding that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution . . . . [O]ur Courts no doubt possess powers not immediately derived from statute."[56] Virtually every United States Supreme Court case that confronts the scope of a court's inherent power, to include *Roadway Express*, cites back to *Hudson*.[57] Justice Antonin Scalia described this inherent power thusly:

> Article III courts, as an independent and coequal Branch of Government, derive from the Constitution itself, once they have been created and their jurisdiction established, the authority to do what courts have traditionally done in order to accomplish their assigned tasks. Some elements of that inherent authority are so essential to '[t]he judicial Power,' U.S. Const., Art. III, § 1, that they are indefeasible, among which is a court's ability to enter orders protecting the integrity of its proceedings.[58]

In every opinion, this power is framed as inherent to federal courts. In *Roadway Express*, the Court speaks of "federal courts."[59] In *Chambers*, it is "federal courts" and "Article III courts."[60] In *Link*, it is "federal trial court," and in *Dietz* it is "federal district court."[61] This frame makes sense when *Hudson* is read in conjunction with Justice Scalia's dicta above. The inherent power identified in *Hudson* stems from Article III of the U.S. Constitution, and by extension applies to the federal judiciary.[62] The Court in Degen expressed this most clearly: "Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of

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[56] United States v. Hudson, 7 Cranch 32, 34 (1812).
[57] *E.g.*, Dietz v. Bouldin, 138 S. Ct. 1885 (2016); Degen v. United States, 517 U.S. 820 (1996); Chambers v. NASCO, Inc., 501 U.S. 32 (1991); *Roadway Express*, 447 U.S. 752; Link v. Wabash R. Co., 370 U.S. 626 (1962).
[58] *Chambers*, 501 U.S. at 58 (Scalia, J., dissenting).
[59] *Roadway Express*, 447 U.S. at 764.
[60] *Chambers*, 501 U.S. at 44-46, 58.
[61] *Dietz*, 136 S. Ct. at 1891, 1893; *Link*, 370 U.S. at 629.
[62] *See Degen*, 517 U.S. 820; *Chambers*, 501 U.S. 32; United States v. Hudson, 7 Cranch 32 (1812).

discharging their traditional responsibilities."[63]

However, the GAO is not part of the federal judiciary. When acting in its bid protest capacity it is not a federal court.[64] It derives no authority from Article III of the U.S. Constitution. The GAO implicitly acknowledges this in *Latvian I* by recasting the inherent power it claims as belonging to "dispute forums" instead of courts.[65] This term does not appear anywhere else in the case law. There is no support in *Hudson* or its progeny, to include *Roadway Express*, for such an expansion of the fora that can claim this inherent power.[66] Without explanation or justification, the GAO has claimed, and exercised, a power belonging to the federal judiciary and rooted in Article III of the U.S. Constitution. The GAO has failed to demonstrate that this inherent power extends to administrative agencies, and the case law that the GAO relies on explicitly limits this power to the federal judiciary.

2. The GAO Does Not Possess An Inherent Authority to Bar Protestors From Its Forum

Assuming *arguendo* that the GAO can claim the inherent powers of a federal court, were the imposed sanctions, a one-year suspension from its bid protest forum followed by a two-year suspension, permissible? In 2016, the United States Supreme Court in *Dietz v. Bouldin* grappled with the limits of a federal court's inherent powers.[67] In so doing, the Court established a two-part test to determine whether a court possesses a given inherent power:

> First, the exercise of an inherent power must be 'a reasonable response to the problems and needs'

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[63] *Degen*, 517 U.S. at 823 (citing *Chambers*, 501 U.S. at 43–46; *Link*, 370 U.S. at 630–631; *Hudson*, 7 Cranch at 34).

[64] In a 2009 report to Congress, the GAO explicitly acknowledged that, when acting in its bid protest capacity, it was not a court. U.S. GOV'T ACCOUNTABILITY OFF., B-401197, REPORT TO CONGRESS ON BID PROTESTS INVOLVING DEFENSE PROCUREMENTS 4 n.6 (2009) ("Because GAO is not a court, it cannot (unlike the Court of Federal Claims) direct executive-branch agencies to take corrective action.").

[65] Latvian Connection LLC (*Latvian I*), B-413442, 2016 CPD ¶ 194, 6 (Comp. Gen. Aug. 18, 2016).

[66] *See e.g.*, Dietz v. Bouldin, 138 S. Ct. 1885 (2016); *Degen*, 517 U.S. 820; *Chambers*, 501 U.S. 32; Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); *Link*, 370 U.S. 626; *Hudson*, 7 Cranch 32.

[67] *Dietz*, 138 S. Ct. 1885.

> confronting the court's fair administration of justice. Second, the exercise of an inherent power cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute.[68]

It is clear from the records in the *Latvian* decisions that the GAO was confronted with a litigant who was imperiling the fair administration of justice.[69] Agency and GAO attorneys were devoting significant resources towards unmeritorious protests brought by Latvian Connection.[70] What is less clear is whether the severe sanctions imposed, a one-year suspension from filing bid protests at the GAO followed by a two-year, were reasonable responses to the problem. If a court were to review the sanctions levied by the GAO it would apply an abuse of discretion standard of review.[71] Given this standard of review and a pattern of vexatious litigation, a court may conclude that the sanctions levied in the *Latvian* decisions were reasonable responses to the specific problem facing the GAO. On the other hand, courts have recognized that dismissal is itself a severe sanction and the orders in the *Latvian* decisions go far beyond a mere dismissal.[72]

While it is possible that a court will conclude that the GAO's sanctions in the *Latvian* decisions were reasonable responses to the problem confronted, the specific power claimed in the *Latvian* decisions clearly fails the second prong of the *Dietz* test, which requires that "the exercise of an inherent power cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute."[73] This is because the specific power claimed in the *Latvian* decisions runs

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[68] *Id.* at 1892 (quoting *Degen*, 517 U.S. at 823-24) (internal citations omitted).
[69] *See Latvian I*, 2016 CPD ¶ 194, at 6-7.
[70] Latvian Connection filed 150 bid protests in fiscal year 2016, or 5.3 percent of all bid protests filed at the GAO in fiscal year 2016. *Id.* at 2; s*ee* GAO FY16 REPORT, *supra* note 2. Only one of those protests was decided on the merits. *Latvian I*, 2016 CPD ¶ 194, at 2. Most of the remaining protests were dismissed because Latvian Connection was not an interested party. *Id.* In the three months between Latvian Connection's first and second suspension, it filed ten bid protests, and the GAO held that there was a "reasonable basis to conclude that Latvian Connection is not an interested party to perform any of these contracts." Latvian Connection LLC – Reconsideration (*Latvian II*), B-415043.3, 2017 CPD ¶ 354, 8 n.11 (Comp. Gen. Nov. 29, 2017).
[71] *Chambers*, 501 U.S. at 55.
[72] *See e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980); Zaczek v. Fauquier County, Va., 764 F.Supp. 1071, 1077 (E.D. Va. 1991) ("[D]ismissal is a severe sanction which must be exercised with restraint, caution and discretion.").
[73] *Dietz*, 136 S. Ct. at 1892.

contrary to the statute governing bid protests at the GAO.[74] That statute requires that "a protest concerning an alleged violation of a procurement statute or regulation shall be decided by the Comptroller General if filed in accordance with [the CICA statutes governing GAO]"[75] and that "[pursuant to regulations promulgated by the GAO], the Comptroller General shall decide a protest submitted to the Comptroller General by an interested party."[76] These statutory provisions require the GAO to decide protests filed by interested parties. As discussed in Section IIIA, the sanctions in the *Latvian* decisions are contrary to these statutory mandates because, by barring Latvian Connection from its forum, the GAO is blocking a potentially interested party from filing a protest and, by extension, avoiding its statutory obligation to decide such protests.[77] As a result, even if the GAO can claim the inherent powers of a federal court, it does not possess the inherent power to bar protestors from its forum as a sanction for abuse of process.

3. The GAO's Bid Protest Forum Lacks Sufficient Due Process Protections to Permit the Sanction in the Latvian Decisions

If the GAO does possess the inherent power to sanction protestors by suspending them from its forum, was the exercise of that power in the *Latvian* decisions appropriate? Courts have repeatedly held that a "court's inherent powers must be exercised with restraint"[78] and "must comply with the mandates of due process."[79] Further, such sanctions "should not be assessed lightly or without fair notice and an

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[74] 31 U.S.C. §§ 3551-57 (2018).
[75] *Id.* § 3552(a).
[76] *Id.* § 3553(a).
[77] *See e.g.*, Bank of Nova Scotia v. United States., 487 U.S. 250, 254 (1988) ("[A] federal court may not invoke [inherent] power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)."); Carlisle v. United States, 517 U.S. 416 (1996). In *Carlisle*, the trial court granted a defendant's motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29(c) that was filed one day outside the time limit stated in that Rule. *Id*. at 416. The Court held that a court may not invoke its inherent authority to circumvent the Federal Rules of Criminal Procedure. *Id.* The court's action contradicted the plain language of Rule 29(c) and was therefore an impermissible exercise of the court's inherent power. *See id*. at 417.
[78] *E.g.*, Dietz v. Bouldin, 138 S. Ct. 1885, 1893 (2016); *see also* Chambers v. NASCO, Inc, 501 U.S. 32, 44 (1991) ("Because of their very potency, inherent powers must be exercised with restraint and discretion.").
[79] *Chambers*, 501 U.S. at 50.

opportunity for a hearing on the record."[80] This necessarily begs three related questions: (1) does Latvian Connection have a cognizable liberty or property interest under the Fifth Amendment of the U.S. Constitution; (2) if so, what process is due; and (3) was Latvian Connection afforded that process?

The Fifth Amendment of the U.S. Constitution states, in part, that "no person shall be . . . deprived of life, liberty, or property, without due process of law."[81] As a threshold matter, there must be a cognizable life, liberty, or property interest to trigger procedural due process protections under the Fifth Amendment.[82] A contractor suffers a deprivation of a liberty interest when an agency makes a stigmatizing finding that negatively affects the contractor's legal rights or status such that a right or privilege once available is no longer available.[83]

In *Paul v. Davis*, the United States Supreme Court addressed whether a police department's decision to label members of the community as shoplifters constituted a deprivation of those individuals' property or liberty interests under the Fourteenth Amendment of the U.S. Constitution because it imposed upon those individuals a social stigma.[84] While *Davis* dealt with the Due Process Clause of the Fourteenth Amendment, the Court noted that the analysis would be identical for the Due Process Clause of the Fifth Amendment.[85] The Court held that state action that imposed a social stigma, without additional harm, was insufficient to trigger due process protections.[86] In so holding, the Court discussed what would be necessary to invoke procedural due process protections:

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[80] Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980); *see also* Societe Internationale v. Rogers, 357 U.S. 197, 208 (1958) ("[T]here are constitutional limitations upon the power of courts . . . to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.").

[81] U.S. Const. amend. V.

[82] *See id*.

[83] *See* Old Dominion Dairy Prods. Inc. v. Sec'y of Def., 631 F.2d 953, 962-66 (1980); *cf.* Paul v. Davis, 424 U.S. 693, 711-12 (1976).

[84] *Davis*, 424 U.S. at 696-7.

[85] *Id*. at 702 n.3 ("If . . . defamation by a state official is actionable under the Fourteenth Amendment, it would of course follow that defamation by a federal official should likewise be actionable under the . . . Fifth Amendment. . . . We thus consider this Court's decisions interpreting either Clause as relevant to our examination of respondent's claim.").

[86] *See id.* at 711-13.

> In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which was found sufficient to invoke the procedural guarantees contained in the Due Process Clause . . . .[87]

Several years later the United States Court of Appeals for the District of Columbia Circuit identified a liberty interest where a contractor was denied a contract without notice or an ability to respond based solely on a stigmatizing finding that the contractor lacked integrity.[88] In *Old Dominion*, the plaintiff placed the lowest bid for a contract and, as acknowledged by the contracting officer, would have been awarded the contract, but for the fact that the contracting officer determined that the plaintiff was not responsible due to a lack of integrity.[89] The plaintiff, and the court, styled this determination by the contracting officer a Government defamation.[90] The plaintiff was not informed of the first contracting officer's finding until after another contracting officer in a subsequent procurement used that finding as the sole basis to reject the plaintiff's bid.[91] As a result, the plaintiff was denied award of two contracts and "effectively . . . put out of business" based on a finding that it lacked integrity.[92] The court held that a stigmatizing Government defamation against a company that results in an immediate and tangible effect on its ability to do business constituted a deprivation of a liberty interest that triggered procedural due process protections.[93] The court stated that *Paul v. Davis* supported this finding because "it is precisely the 'accompanying loss of government

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[87] *Id.* at 711.
[88] *Old Dominion*, 631 F.2d 953.
[89] *Id.* at 956-58.
[90] *Id.* at 961-62, 965-66.
[91] *Id.* at 958-59.
[92] *Id.* at 956-59, 963.
[93] See *Id.* at 962-66. In reaching this holding the court spends a considerable amount of time discussing *Paul v. Davis*. *Id.* During that discussion the court stated, "the opinion in *Paul v. Davis* supports the claim of [plaintiff] in this case. For, as amply detailed earlier, it is precisely the 'accompanying loss of government employment' and the 'foreclosure from other employment opportunity' which is the injury resulting from the Government defamation complained of in this case." *Id*. at 966. The court characterized plaintiff's claim as follows: "[Plaintiff] claims in essence that [it] has a right to be free from 'stigmatizing' governmental defamation having an immediate and tangible effect on its ability to do business." *Id*. at 962-63.

employment' and the 'foreclosure from other employment opportunity' which is the injury resulting from the Government defamation complained of in [*Old Dominion*]."[94]

The harm identified in *Old Dominion*, loss of government employment by virtue of being denied award of government contracts, is greater than the harm in *Latvian*. The GAO's sanction does not prevent Latvian Connection from submitting bids or being awarded contracts; however, it still constitutes an injury resulting from a similar Government defamation as that found in *Old Dominion*. *Old Dominion* is best read as an application of the principle articulated by the Court in *Davis*: for a stigmatizing Government defamation to give rise to procedural due process protections there must also be a loss of a previously recognized right or status.[95] In *Old Dominion* that was a loss of several contracts.[96] In *Latvian*, it was the loss of a statutory right to access the GAO's bid protest forum.[97] While this loss of a right to access was only for a period of one year in *Latvian I*, the GAO increased the sanction to a two-year ban in *Latvian II*.[98] Most troublingly, the GAO put Latvian Connection, and the public at large, on notice that it was willing to impose a lifetime ban on vexatious litigants.[99] Under *Davis*, a permanent deprivation of a previously recognized right almost certainly triggers procedural due process protections.[100]

The GAO itself recognized that *Old Dominion* identified a liberty interest that is triggered when an agency sanctions a protestor on the basis of a stigmatizing finding.[101] In 2008 Congress was interested in giving the GAO greater sanction authority to deal with frivolous bid protests.[102] The GAO's response expressed reservations about finding protests frivolous, to include concerns that such a finding would trigger due process protections: "any system that imposes penalties on contractors for filing frivolous protests would require adequate due process protections to avoid

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[94] *Id.* at 966.
[95] *See* Paul v. Davis, 424 U.S. 693, 711-12 (1976); *Old Dominion*, 631 F.2d at 962-66.
[96] *Old Dominion*, 631 F.2d at 956-59.
[97] 31 U.S.C. §§ 3552-53 (2018); Latvian Connection LLC (*Latvian I*), B-413442, 2016 CPD ¶ 194, 7 (Comp. Gen. Aug. 18, 2016).
[98] *Latvian I*, 2016 CPD ¶ 194, at 6 ; Latvian Connection LLC – Reconsideration (*Latvian II*), B-415043.3, 2017 CPD ¶ 354, 12 (Comp. Gen. Nov. 29, 2017).
[99] *Latvian II*, 2017 CPD ¶ 354 at 12.
[100] *Cf*. Paul v. Davis, 424 U.S. 693, 711-12 (1976).
[101] *Cf*.U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 63, at 13 n.4.
[102] *Id.* at 1.

punishing a company for filing a good-faith but unmeritorious protest."[103] To support this assertion, a clear restatement of the above holding from *Davis*, the GAO cited to *Old Dominion*.[104] In sum, the GAO's sanctions in the *Latvian* decisions likely constitute a deprivation of a protected liberty interest that triggers due process protections under the Fifth Amendment, raising the question: what process is due?[105]

In *De Long v. Hennessey*, the Court of Appeals for the Ninth Circuit was confronted with the issue of what due process protections are required prior to sanctioning a vexatious litigant by restricting the litigant's ability to make any future filings without the court's permission.[106] The court in *De Long* affirmed a federal court's inherent authority to impose sanctions to regulate the practice of abusive litigants, but remanded to ensure adequate due process protections accompanied the sanction.[107] Specifically, the court held that the litigant should have been afforded notice and an opportunity to oppose the order before it was entered.[108]

These due process protections, notice, and an opportunity to oppose, were lacking in *Latvian I*. First, the specific sanction in *Latvian I*, a suspension from the GAO's bid protest forum, was

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[103] *Id.* at 13.

[104] *Id.* at 13 n.4 (citing *Old Dominion*, 631 F.2d 953).

[105] More recently, in 2013 the COFC held that "as a matter of law, accusations about business integrity require at least a modicum of due process." NEIE, Inc. v. United States, No. 13–164, 2013 WL 6406992, at *23 (Fed.Cl. Nov. 26, 2013) (citing *Old Dominion*, 631 F.2d at 968).

[106] De Long v. Hennessey, 912 F.2d 1144, 1146-47 (9th Cir. 1990).

[107] *Id.* "We recognize that '[t]here is strong precedent establishing the inherent power of federal courts to regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances.'" *Id*. at 1147 (citing Tripati v. Beaman, 878 F.2d 351, 352 (10th Cir.1989)).

[108] *See De Long*, 912 F.2d 1144. These are the same due process protections identified in *Old Dominion*. *Old Dominion*, 631 F.2d at 969. In addition to the due process requirements of notice and an opportunity to object prior to imposition of the sanction order, the Court in *De Long* also laid out three additional requirements. *De Long*, 912 F.2d at 1147-48. First, the trial court must provide an adequate record for review that documents the vexatious conduct of the sanctioned litigant. *Id*. Second, the trial court must make substantive findings of frivolousness. *Id.* at 1148. Third, the sanction must be narrowly tailored (i.e., not overbroad). *Id.* The GAO satisfied these three requirements in *Latvian* by clearly documenting the protestor's vexatious conduct, making specific findings identifying the vexatious conduct, and capping the suspension at one year. *See* Latvian Connection LLC, B-413442, 2016 CPD ¶ 194 (Comp. Gen. Aug. 18, 2016).

exercised for the first time in *Latvian I*.[109] Neither the implementing statutes nor regulations list suspension as a possible sanction; nor does the GAO's previous case law. As a result, Latvian Connection had no notice that its conduct could result in a suspension from the GAO.[110] Second, nothing in the record suggests that the GAO provided Latvian Connection with an opportunity to oppose the order prior to imposing the sanction.[111] On the contrary, the opinion itself states, "[b]y separate letter of today to Latvian Connection, we are advising the firm, and its principal, that both will be precluded from filing a protest in our Office for a period of one year from the date of this decision."[112] In other words, it appears that Latvian Connection received notice of the sanction after the order was imposed and the opinion released. As a result, in *Latvian I*, the GAO deprived Latvian Connection of the two foundational requirements of due process: notice and an opportunity to comment. In contrast, *Latvian I* provided Latvian Connection notice prior to the two-year ban in *Latvian II* that its conduct could result in a ban.

The GAO's 2009 response to a Congressional mandate to recommend additional Congressional or Executive actions to disincentive frivolous bid protests suggests that the GAO does not believe that its forum has sufficient due process protections to sanction protestors for filing frivolous protests.[113] The GAO replied to Congress that they did not feel that additional authority to disincentivize frivolous protests was necessary because the current system was adequate.[114] In other words, the GAO declined the offer of additional statutory or regulatory sanctioning authority.[115] The GAO did so, in part, out of a concern that the due process requirements that would come with the additional authority would be an unnecessary burden to the GAO.[116] This was a recognition that greater sanctions would require greater due process rights to be fairly imposed, or, put another way, that the due process in place at the time was insufficient to support greater sanctions.[117]

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[109] *See Latvian I*, 2016 CPD ¶ 194.
[110] *See id.*
[111] *See id.*
[112] *Id.*
[113] *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 65.
[114] *Id.* at 15.
[115] *See id.* at 12-15.
[116] *See id.*
[117] *See id.*

> Importantly, any system that imposes penalties on contractors for filing frivolous protests would require adequate due process

In sum, the GAO as a quasi-judicial administrative agency is not empowered with the inherent powers of a court that it claims in the *Latvian* decisions. Even if it is, it does not possess the specific power exercised in the *Latvian* decisions. Even if it did possess this power, Latvian Connection was afforded insufficient due process to justify the exercise of that power.

IV. Lack of Oversight and Inability to Challenge Agency Actions

If the GAO acted outside its authority in imposing the sanctions handed down in the *Latvian* decisions, how can a sanctioned protestor challenge the sanction? This section argues that (1) there is no meaningful process to appeal collateral GAO decisions, and (2) the sanctioned protestor cannot challenge the GAO's actions in federal court.

A. Challenge of GAO Sanctions Is Limited To Requesting Reconsideration at the GAO

A protestor, intervenor, and the agency may request reconsideration of a bid protest decision.[118] This request must be filed "not later than 10 days after the basis for reconsideration is known or should have been known."[119] "To obtain reconsideration, the

> protections to avoid punishing a company for filing a good-faith but unmeritorious protest.
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> . . . As a general matter, a determination that a protest is frivolous would require an additional inquiry beyond our current practice of determining whether a protest meets the threshold requirements for filing a protest, and then determining the merits of that protest. Specifically, finding that a protest is frivolous would require a determination that the protest was brought in bad faith--an assessment of the subjective intent of the protester. Such a fact-specific inquiry could require substantial litigation, such as declarations, affidavits, or live testimony, to assess whether the protester possessed the intent required for our Office to conclude that its protest was filed in bad faith.

Id. at 13.

[118] 4 C.F.R. § 21.14(a) (2019).

[119] *Id.* § 21.14(b).

requesting party must show that [the] prior decision contains errors of either fact or law, or must present information not previously considered that warrants reversal or modification of our decision; GAO will not consider a request for reconsideration based on repetition of arguments previously raised."[120] This process is inadequate to ensure oversight of the GAO because it is unlikely that the same entity that issued a sanction for which they have no authority will reverse that decision so soon after claiming the power in the first place.

This concern is heightened in light of the process's low reversal rate, which also raises questions about its legitimacy. From fiscal year 2001 to fiscal year 2014 over 1,000 requests for reconsideration were filed with the GAO; only one of those requests was sustained, a sustain rate of less than 0.1 percent.[121] This raises concerns both about the review itself and the perception of the fairness of the review.

Beyond this limited right to request reconsideration at the GAO, there is no mechanism to appeal a GAO decision. While a protestor can file a bid protest with the COFC, this is not an appeal of the GAO decision, but instead a new protest in a different forum.[122] Additionally, that protest would only look at the merits of the COFC protest, not the GAO protest decision or any collateral rulings.[123] Nor can a protestor appeal a GAO decision to federal district court.[124] In short, a request for reconsideration is the only means to challenge a GAO decision.

B. The Sanction Imposed in *Latvian* Cannot Be Challenged in Federal Court

Can a sanctioned protestor challenge the GAO's actions in federal court? To successfully pursue a cause of action in federal court the sanctioned protestor will have to overcome the doctrine of federal sovereign immunity. "The basic rule of federal sovereign immunity is that

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120 *Id.* § 21.14(c).
121 *See* MOSHE SCHWARTZ & KATE M. MANUEL, CONG. RESEARCH SERV., R40227, GAO BID PROTESTS: TRENDS AND ANALYSIS 6 n.28 (2015).
122 *See* Health Sys. Mktg. & Dev. Corp. v. United States, 26 Cl.Ct. 1322, 1325 (1992) ("Nor do we act as an appeals court for the Comptroller General's decisions.").
123 *See* 28 U.S.C. § 1491(b)(1); c*f.* Analyt. & Research Tech., Inc. v. United States, 39 Fed.Cl. 34, 41 (1997) ("In bid protest cases . . . it is the agency's decision, not the decision of the GAO, that is the subject of judicial review.").
124 *See* SCHWARTZ & MANUEL, *supra* note 122, at 2 n.7.

the United States cannot be sued at all without the consent of Congress."[125] This doctrine, which does not appear in the U.S. Constitution, has been traced back to English common law as well as the Congress' ability to control the jurisdiction of federal courts.[126] Over time, the doctrine of sovereign immunity has become interwoven with the concept of subject matter jurisdiction in federal courts, for which Congress has ultimate control, such that when the Court discusses sovereign immunity it is often referring to jurisdiction—whether Congress has provided a path to court for the cause of action at issue.[127] For purposes of the instant inquiry this is a distinction without a difference. One can frame the problem facing the litigant in the *Latvian* decisions as either a quest for a waiver of sovereign immunity or for a jurisdictional hook into court. In either framing, the litigant must walk the same path. This, then, is the question: has Congress provided a statutory waiver to federal sovereign immunity that would allow Latvian Connection to challenge the GAO's sanction

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[125] Block v. North Dakota, 461 U.S. 273, 287 (1983); *see also* United States. v. Lee, 106 U.S. 196 (1882).

[126] *Lee*, 106 U.S. at 205-07 (discussing federal sovereign immunity as originating in English common law); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 Geo. Wash. Int'l L. Rev. 521, 546-50 (2003) (conceptualizing the doctrine of federal sovereign immunity as a recognition that Congress controls the jurisdiction of federal courts).

> [I]t is necessary to ascertain, if we can, on what principle the exemption of the United States from a suit by one of its citizens is founded, and what limitations surround this exemption. In this, as in most other cases of like character, it will be found that the doctrine is derived from the laws and practices of our English ancestors . . . .

Lee, 106 U.S. at 205 (1882).

[127] Jackson, *supra* note 127, at 570; s*ee also Block*, 461 U.S. at 280 ("The States of the Union, like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress."); Lane v. Pena, 518 U.S. 187 (1996).

> Sorting out the independent effect of "sovereign immunity" apart from the question of congressional control of the federal courts' jurisdiction is difficult. What we call the "sovereign immunity" of the United States in many respects could be described instead as a particularized elaboration of Congress' control over the lower court's jurisdiction. . . . Federal sovereign immunity law is almost entirely statutory in its operation, in that Congress determines what claims against the United States can be heard in federal and state courts.

Jackson, *supra* note 127, at 570-71.

in federal court?

In answering this question, it is helpful to review the statutory waivers that allow litigants to pursue claims against the United States at the COFC.[128] 28 U.S.C. § 1491 outlines the COFC's jurisdiction. This statute permits claims against the United States for damages "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."[129] The statute also grants the COFC jurisdiction over disputes with a government contractor.[130] Finally, the statute grants the COFC jurisdiction to hear bid protests and grant declaratory, injunctive, and limited monetary relief.[131] Taken together, these statutory provisions permit the COFC to hear disputes arising from the bidding and award of a contract as well as disputes arising from the administration/termination of a contract, and provide for a range of remedies to include monetary, declaratory, and injunctive relief.[132]

However, these provisions do not waive sovereign immunity or grant jurisdiction for the issue facing Latvian Connection—a sanction handed down by the GAO—because the sanction itself does not involve a dispute over the bidding or award of a contract between the contracting agency and Latvian Connection; nor does it have anything to do with the administration of an existing contract. Further, the Tucker Act does not grant jurisdiction to courts "to issue declaratory and injunctive relief aimed at affecting the GAO's exercise of its own bid protest jurisdiction" or to review whether the GAO followed its bid

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[128] The statutory waivers discussed below arose over time. The Tucker Act, passed in 1887, waived federal sovereign immunity to allow actions seeking monetary relief against the United States for, *inter alia*, contract disputes. Tucker Act, ch. 359, 24 Stat. 505 (1887). The Federal Courts Improvement Act of 1982 expanded the COFC's jurisdiction by permitting broader relief for contractors, to include declaratory and injunctive relief. Federal Courts Improvement Act of 1982, Pub. L. No. 97-169, 96 Stat. 25 (1982). Finally, the Administrative Dispute Resolution Act (ADRA) of 1996 granted the COFC jurisdiction over bid protests. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996).

[129] 28 U.S.C. § 1491(a)(1) (2018).

[130] The COFC has jurisdiction to "render judgment upon any claim by or against . . . a contractor . . . including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued." *Id.* § 1491(a)(2).

[131] *Id.* § 1491(b).

[132] *Id.* § 1491.

protest procedures.[133] Instead, Latvian Connection would be challenging an illegal or arbitrary and capricious agency action and would be seeking injunctive relief to block the enforcement of the imposed suspension.

Congress granted judicial review of certain executive agency actions when it passed the Administrative Procedures Act (APA).[134] Included within the APA is a waiver of federal sovereign immunity permitting judicial review of final agency actions that are alleged to be illegal or arbitrary and capricious, provided that the litigant is not seeking monetary damages.[135] This judicial review would seem to permit Latvian Connection to challenge the GAO's sanction as illegal agency action and allow it to seek injunctive relief. However, this would only be the case if the APA's judicial review provisions apply to the GAO.

The judicial review provisions of the APA waive federal sovereign immunity with respect to final agency actions.[136] "Agency" is a term that has specific legal meanings within the context of these provisions.[137] Agency is defined as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include . . . the Congress . . . ."[138] Thus, for purposes of the judicial review provisions of the APA, the Congress is not an agency, and therefore the statutory waiver of federal sovereign immunity contained therein does not extend to the

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[133] Advance Constr. Servs. Inc. v. United States, 51 Fed. Cl. 362, 366 (2002).
[134] Administrative Procedures Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).
[135] *See* 5 U.S.C. §§ 702, 704 (2018).

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States . . . .

Id. § 702.
[136] *See id.* §§ 702, 704.
[137] *Id.* § 701.
[138] *Id.* § 701(b)(1).

Congress. Is the GAO, a legislative agency, an "agency" or "the Congress" within the meaning of 5 U.S.C. § 701(b)(1)? The answer to this question determines whether Latvian Connection can challenge the GAO's sanction in federal court.

In *Vanover v. Hantman*, the United States District Court for the District of Columbia confronted the issue of waiver of federal sovereign immunity as it related to judicial review of a legislative agency under the APA.[139] Vanover filed suit against his ex-employer, the Architect of the Capitol, challenging his termination from employment.[140] The Office of the Architect of the Capitol is a legislative agency.[141] While Vanover filed suit pursuant to a number of different statutes, he also sued the Architect in his official capacity.[142] The court noted that this claim was "subject to the sovereign immunity of the United States and its officers unless such immunity is waived by the [APA]."[143] The court then stated that the Court of Appeals for the District of Columbia Circuit in *Washington Legal Foundation v. United States Sentencing Commission* has "interpreted the APA exemption for 'the Congress' to mean the entire legislative branch [which includes] the Library of Congress . . . ."[144] The court then held that "[l]ike the Library of Congress, the Architect of the Capitol is considered part of the legislative branch" and dismissed Vanover's claim for injunctive relief because the APA's waiver of federal sovereign immunity did not apply to a legislative agency.[145]

More recently, in *Pond Constructors, Inc. v. Government Accountability Office*, the United States District Court for the District of Columbia confronted its jurisdiction under the APA to hear a challenge to GAO agency action within the context of a bid protest.[146] *Pond* concerned a dispute over the scope of redactions prior to the publication of a bid protest decision.[147] The court dismissed the case for lack of jurisdiction, holding that the GAO was "an entity within the legislative branch" and

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[139] Vanover v. Hantman, 77 F.Supp.2d 91 (D.C. Dist. Ct. 1999).
[140] *Id.* at 94-97.
[141] *Id.*
[142] *Id.*
[143] *Id.* at 99.
[144] *Id.* at 100 (quoting Wash. Legal Found. v. U.S. Sentencing Comm'n, 17 F.3d 1446, 1449 (D.C. Cir. 1994)) (internal citations omitted).
[145] *Vanover*, 77 F.Supp.2d at 100.
[146] Pond Constructors, Inc. v. United States Government Accountability Office, 2018 U.S. Dist. LEXIS 89414 (D.C. Dist. Ct. 2018) (memorandum opinion).
[147] *Id*.

therefore "not an agency under the APA."[148] In so holding, the court relied on, *inter alia*, the *Washington Legal Foundation* opinion.[149]

These holdings in *Vanover* and *Washington Legal Foundation* make it clear that legislative agencies are part of "the Congress" within the meaning of 5 U.S.C. § 701 and therefore are not subject to the APA's waiver of federal sovereign immunity. Additionally, the holding in *Pond* reiterates that the GAO is also a legislative agency and further clarifies that the GAO is not subject to the APA's waiver of federal sovereign immunity.[150] As such, any suit brought by Latvian Connection will be dismissed on the grounds of sovereign immunity.

V. Recommended Statutory Changes

If the GAO lacks the authority to issue the sanctions in the *Latvian* decisions and there is no meaningful forum in which to challenge the sanction, what is to be done? The APA needs to be amended to permit judicial review in federal district court of collateral rulings by the GAO when acting in its bid protest capacity.

The APA was drafted, in part, to ensure oversight of agency

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[148] *Id*.

[149] Specifically, the court stated:

> More relevant here, the APA's definition of "agency" excludes "the Congress" but does not explicitly exclude an entity like GAO that is considered a "legislative branch agency," Chennareddy v. Bowsher, 935 F.2d 315, 319 . . . (D.C. Cir. 1991). The D.C. Circuit has concluded, however, that "the APA exemption for 'the Congress' mean[s] the entire legislative branch." Washington Legal Found. v. U.S. Sentencing Comm'n, 17 F.3d 1446, 1449, . . . (D.C. Cir. 1994). GAO is "part of the legislative branch." Chen v. General Accounting Office, 821 F.2d 732, 261 U.S. App. D.C. 244 (D.C. Cir. 1987). The APA, therefore, does not waive sovereign immunity for suits against GAO.

Id.

[150] *Id*. The GAO describes itself as "an agency within the legislative branch of the federal government." *Office of the Comptroller General*, *supra* note 26. Additionally, 5 U.S.C. § 109, the Definitions section for the statutes governing financial disclosure requirements for federal personnel, defines legislative branch to include, *inter alia*, the GAO, the Architect of the Capitol, and the Library of Congress. 5 U.S.C. § 109(11) (2018).

actions.[151] That concern applies with equal force to the GAO when it is acting in its bid protest capacity because it is behaving like an executive agency in that it issues decisions that have direct financial consequences on the interested party and intervenor.

As discussed at Section IV(B) *supra*, current precedent interprets the term "Congress" in 5 U.S.C. § 701 to include all legislative agencies.[152] The Congress can remove this definitional ambiguity and at the same time ensure oversight of the GAO by amending 5 U.S.C. § 701 and 31 U.S.C. § 3556 to permit judicial review of collateral rulings by the GAO when acting in its bid protest capacity.

To resolve these issues, two statutory changes are recommended: First, amend 5 U.S.C § 701 to add the following paragraph in the "for purposes of this chapter" subsection: "the Congress does not include the Government Accountability Office." And second, amend 31 U.S.C. § 3556, the section within CICA that states the GAO is not the exclusive forum for filing bid protests, by adding the following subsection: "The Comptroller General's decision to dismiss, deny, or sustain a protest may not be challenged in federal court."[153]

The first change explicitly permits judicial review of GAO agency actions. The second change, within the context of bid protests, limits judicial review to collateral agency actions. This is because the APA judicial review provisions apply to agency actions "except to the extent that . . . statutes preclude judicial review . . . ."[154] By precluding judicial

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[151] *See* Administrative Procedures Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

[152] *See e.g., Wash. Legal Found.*, 17 F.3d at 1449; *Vanover*, 77 F.Supp.2d 91.

[153] The proposed legislation would read as follows:

Section 701 of Title 5, United States Code, is amended --
in subsection (b) --
(A) by redesignating paragraph (2) as paragraph (3) and
(B) by inserting after paragraph (1) the following new paragraph: "(2) the Congress does not include the Government Accountability Office and"

Section 3556 of Title 31, United States Code, is amended –
(1) by redesignating the subsection as subsection (a) and
(2) inserting after subsection (a), as so redesignated, the following new subsection (b): "(b) The Comptroller General's decision to dismiss, deny, or sustain a protest may not be challenged in federal court."

[154] 5 U.S.C. § 701(a). The statute also limits judicial review where "agency action is committed to agency discretion by law." *Id.* § 701(a)(2).

review in the portion of the Code that governs GAO bid protests, the Congress can ensure greater oversight of the GAO while balancing floodgate of litigation concerns that may arise if too much agency action is opened to judicial review.

For purposes of this article, a collateral ruling by the GAO refers to any ruling that does not address the protest, as that term is defined at 31 U.S.C. § 3551.[155] Such collateral rulings include sanctions against protestors, rulings declining to extend a protective order to information within the protest, and rulings declining to admit an attorney to a protective order. They do not include rulings on whether a protestor is an interested party, whether a protest was timely filed, or whether the protest itself is meritorious. This distinction is drawn because the Congress has already provided an additional forum where contractors can submit bid protests: the COFC.[156] Contractors can also appeal unfavorable COFC decisions to the CAFC.[157] Expanding judicial review to permit review of GAO decisions on the merits of the protest would provide contractors with yet another forum in which to litigate bid protests. Not only is there no indication that this is necessary, the Congress explicitly closed the federal district court's doors to bid protests when it sunsetted *Scanwell* jurisdiction in 2001.[158] On the other hand, as discussed at length above, currently there is no forum to challenge collateral GAO rulings, which creates an inherent moral hazard that

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[155] The term "protest" means a written objection by an interested party to any of the following:

> (A) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.
>
> (B) The cancellation of such a solicitation or other request.
>
> (C) An award or proposed award of such a contract.
>
> (D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.
>
> (E) Conversion of a function that is being performed by Federal employees to private sector performance.

31 U.S.C. § 3551(1) (2018).

[156] Metzger & Lyons, *supra* note 25, at 1225-27; *see also* 31 U.S.C. § 3556 (2018).

[157] 28 U.S.C. § 1295(a)(3) (2018).

[158] Metzger & Lyons, *supra* note 25, at 1225-26 n.7.

the GAO may act outside its authority, secure in the knowledge that the sanctioned party has no judicial recourse.

VI. Conclusion

Latvian Connection does not make for a sympathetic figure. However, in seeking to reign in a vexatious litigant, and likely to send a message to future vexatious litigants, the GAO exceeded its authority. In so doing, the GAO inadvertently revealed a gap in judicial oversight of a legislative agency. That gap raises concerns, not because of any malintent on the part of the GAO—this article does not mean to suggest that at all—but because federal action without authority threatens both the legitimacy of the GAO bid protest forum and the appearance of fairness within that forum.

This is particularly concerning because in 2009 the GAO rebuffed Congressional efforts to expand the agency's sanction authority against frivolous protestors.[159] Yet a mere seven years later, the GAO has claimed as an inherent authority the type of sanction it originally declined as unnecessary.[160] The same due process concerns that underpinned the GAO's hesitation to request additional sanction authority apply with equal force to the agency's actions in the *Latvian* decisions. The Congress can close this gap and ensure greater oversight of the GAO through minor, narrowly tailored amendments to existing statutes.

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[159] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 65, at 12-15.

[160] *See* Latvian Connection LLC (*Latvian I*), B-413442, 2016 CPD ¶ 194, 6 (Comp. Gen. Aug. 18, 2016); U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 65, at 12-15.