

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

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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

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

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 itself²²; 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

¹⁸ *Contract Explorer—Contract Spending in Fiscal Year 2017*, DATA LAB. 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); see 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

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

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); *see* 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

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

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.

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

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’

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

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; see 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

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:

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 Clause⁸⁷

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

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

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

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

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.

. . . 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

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); cf. *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

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; *see 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

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

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

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

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

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

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.

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.