

# NOTES

## BEYOND CREDIBLE FEAR: ENFORCEMENT OF THE LEAHY LAW AND THE ROLE THE ASYLUM SYSTEM SHOULD PLAY

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## I. INTRODUCTION

The United States faces a difficult challenge of navigating geopolitical affairs while upholding the values and principles that are central to America's being: democracy, liberty, equality, and the reception of "your tired, your poor, your huddled masses yearning to breathe free. . . ." This is especially challenging considering the dynamic nature of geopolitics and the notion that America's role in the world cannot always conform fully to its values.

A notable effort to conform U.S. foreign interests to its values is the Leahy Law. Named after outspoken human rights advocate and the bill's chief sponsor, Senator Patrick Leahy (D-VT)<sup>1</sup>, the Leahy Law prohibits the U.S. government from providing assistance to foreign security units that have committed gross violations of human rights.<sup>2</sup> The law was inspired by efforts to curtail U.S. military aid to Colombia in the late 1990s.<sup>3</sup> During this time, Plan Colombia was coming to fruition. This was a contentious U.S. initiative aimed at curtailing drug trafficking and conflict in Colombia. The plan included providing financial and security assistance to better train law enforcement and encourage economic growth. The U.S. military assistance helped the Colombian government's struggle against the FARC and various drug cartels.<sup>4</sup> Amnesty International and other human rights organizations

1. See generally U.S. SENATOR PATRICK LEAHY OF VERMONT, <https://www.leahy.senate.gov/issues/human-rights> (last visited May 10, 2020).

2. See 22 U.S.C. § 2378 (1996); 10 U.S.C. § 362 (2016); see also *Leahy Law Fact Sheet*, U.S. DEP'T OF STATE (Jan. 22, 2019), <https://www.state.gov/key-topics-bureau-of-democracy-human-rights-and-labor/human-rights/leahy-law-fact-sheet>.

3. Nate Smith, *Deconstructing the Leahy Law: Fact vs Fiction*, AMNESTY INT'L (July 9, 2013), <https://www.amnestyusa.org/deconstructing-the-leahy-law-fact-vs-fiction>.

4. See *Plan Colombia: A Development Success Story*, U.S. GLOB. LEADERSHIP COAL., <http://www.usglc.org/media/2017/04/USGLC-Plan-Columbia.pdf>; Natalio Cosoy, *Has Plan Colombia really worked?*, BBC (Feb. 4, 2016), <https://www.bbc.com/news/world-latin-america-35491504>.

raised concerns about alleged violations that the Colombian military and police were committing.<sup>5</sup> These allegations included “collaboration between Colombian security forces and paramilitary groups, as well as ‘false positive cases’ (where civilians were killed by the army and passed as rebel fighters) and abuses by the intelligence services,” all funded, at least in part, by the United States.<sup>6</sup>

Although the Leahy Law has impacted decisions surrounding U.S. foreign assistance, its implementation can be strengthened, particularly by improving communication between the agencies that administer U.S. asylum law and those that enforce the Leahy Law. Advocating for improved communication, this Note first explains the contours of the Leahy Law in Part II. In Part III, this Note will discuss the history and nuances of U.S. foreign assistance. These sections, which at times pull in different directions, come together in Part IV. Part IV addresses U.S. asylum law and examines the significant number of asylees from countries like Egypt and Saudi Arabia that also receive substantial amounts of U.S. foreign assistance. Part V argues that increased coordination between overseers of asylum proceedings and officials who perform Leahy vetting via a cross-agency taskforce would help provide notice to the U.S. government that these recipients of foreign assistance are committing gross human rights violations. Nevertheless, there are challenges and ramifications resulting from the inevitable tensions between geopolitical goals and securing human rights. These are addressed in Part VI, alongside recommendations and conclusions.

## II. WHAT IS THE LEAHY LAW?

What the government and commentators have dubbed the “Leahy Law” refers to two statutory provisions, one applying to the Department of State and the other to the Department of Defense.<sup>7</sup> On its face, the Leahy Law prohibits the U.S. government from providing assistance to foreign security units when there is credible information connecting those units to gross violations of human rights.<sup>8</sup> Prior to assisting foreign security units via training, providing equipment, or by other means, the Secretary of Defense and the Secretary of State must ensure that “full consideration is given to any credible information available to the Department of State relating to human rights violations by such unit.”<sup>9</sup> However, this prohibition does not apply if, after consulting with one another, the two Secretaries conclude that the government of the recipient country “has taken all necessary corrective steps.”<sup>10</sup> Furthermore, the

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5. See Cosoy, *supra* note 4; *Deconstructing the Leahy Law: Fact vs Fiction*, AMNESTY INT’L, *supra* note 3; Steven Cohen, *Rewriting the History of Plan Colombia*, N. AM. CONG. ON LATIN AM. (July 17, 2015), <https://nacla.org/news/2015/07/17/rewriting-history-plan-colombia>.

6. Cosoy, *supra* note 4.

7. See 22 U.S.C. § 2378 (1996); 10 U.S.C. § 362 (2016); see also *Leahy Law Fact Sheet*, *supra* note 2.

8. See *id.*

9. 10 U.S.C. § 362(a)(2) (2016).

10. *Id.* § 362(b).

Department of Defense may waive the prohibition after consulting with the State Department if extraordinary circumstances require it,<sup>11</sup> and the State Department may waive it if the President deems the assistance to be important to the United States' interest.<sup>12</sup> If the latter waiver occurs, the President must provide a report within fifteen days to the appropriate committees of Congress with a detailed explanation of the national interests in question.<sup>13</sup>

When it implements the Leahy Law, “[t]he U.S. government includes torture, extrajudicial killing, enforced disappearance, and rape under color of law as GVHRs [gross violations of human rights]. . . .”<sup>14</sup> Historically, the State Department and Department of Defense have applied the Leahy Law to most forms of military training.<sup>15</sup>

### A. *Defining the Foreign Unit*

The Leahy Law prohibition is imposed when the U.S. has credible information that “*the unit* has committed a gross violation of human rights.”<sup>16</sup> What constitutes a unit has been the subject of much debate with respect to statutory interpretation and public policy concerns. The State Department has taken a narrow interpretation, defining “unit” as “the lowest organizational element of a security force capable of exercising command discipline over its members. . . .”<sup>17</sup> Senator Leahy seems to have envisioned a broader interpretation that consists of a whole government, as evinced when he rhetorically asked then-Secretary of State John Kerry in a 2015 letter whether Egypt was violating the law.<sup>18</sup> Moreover, in February 2016, Senator Leahy and ten other Members of Congress sent a letter to the State Department inquiring about allegations of gross violations of human rights by Egyptian and Israeli security forces.<sup>19</sup> The language used to describe the security units was broad, referring to “incidents that may have involved recipients, or potential recipients, of U.S. military assistance.”<sup>20</sup>

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11. *Id.* § 362(c).

12. 22 U.S.C. § 2378(b) (1996).

13. *Id.*

14. *Leahy Law Fact Sheet*, *supra* note 2.

15. Daniel R. Mahanty, *The “Leahy Law” Prohibiting US Assistance to Human Rights Abusers: Pulling Back the Curtain*, JUST SEC. (June 27, 2017), <https://www.justsecurity.org/42578/leahy-law-prohibiting-assistance-human-rights-abusers-pulling-curtain>.

16. 10 U.S.C. § 362(a)(2) (2016) (emphasis added).

17. CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3207.01C, DEPARTMENT OF DEFENSE SUPPORT TO HUMANITARIAN MINE ACTION (Apr. 18, 2020), [https://www.jcs.mil/Portals/36/Documents/Library/Instructions/3207\\_01.pdf](https://www.jcs.mil/Portals/36/Documents/Library/Instructions/3207_01.pdf); *see also* NINA M. SERAFINO, JUNE S. BEITTEL, LAUREN PLOCH BLANCHARD, AND LINA ROSEN, CONG. RESEARCH SERV., R43361, “LEAHY LAW” HUMAN RIGHTS PROVISIONS AND SECURITY ASSISTANCE: ISSUE OVERVIEW, (2014), <https://fas.org/sgp/crs/row/R43361.pdf>.

18. *See* N.Y. Times Editorial Board, *The Questionable Legality of Military Aid to Egypt*, N.Y. TIMES (Aug. 19, 2015), [https://www.nytimes.com/2015/08/19/opinion/the-questionable-legality-of-military-aid-to-egypt.html?\\_r=0](https://www.nytimes.com/2015/08/19/opinion/the-questionable-legality-of-military-aid-to-egypt.html?_r=0).

19. Letter from Eleven Members of the U.S. Congress to John Kerry, Sec’y of State (Feb. 17, 2016), <https://www.politico.com/f/?id=00000153-c56c-d662-a75b-fcecc6be0000>.

20. *Id.*

### B. *Leahy Vetting Procedure*

“Leahy vetting” is imperfect as the search process does not capture all necessary information, and human rights violations can occur after the search is completed. The vetting begins at the U.S. embassy in the recipient country, but an additional review is often performed by State Department officials in Washington, D.C.<sup>21</sup> When assessing the credibility of the information gathered, the State Department considers the following factors:

- The source’s track record for accuracy and reliability;
- How the source came to know the information;
- The political agenda, if any, of the source, and its potential creation of bias;
- Information corroborating the allegation(s);
- Contradictory information;
- History of abuse by the alleged party;
- Level of detail of the allegation(s).<sup>22</sup>

The review also includes classified records.<sup>23</sup>

The U.S. government begins the procedure by performing a Google keyword search.<sup>24</sup> A shortcoming of this approach is that search engines do not capture information in PDFs, excluding them from the results.<sup>25</sup> Another clear shortcoming of the vetting process is that human rights violations can occur after the search is completed.<sup>26</sup> In other words, the prohibition imposed by the Leahy Law and its retrospective nature will not necessarily prevent violations before they occur. However, as a policy matter, the U.S. should avoid situations in which its forces train foreign security units and empowered by that training, those units subsequently commit gross violations of human rights.<sup>27</sup> Despite this prohibition and the risk of funding human rights violators, the United States has a troubling foreign assistance record.

### III. FOREIGN AID DISCUSSION

In the fiscal year 2018, the United States spent \$47 billion in foreign assistance, more than any other country in the world.<sup>28</sup> Of that amount, “21 percent of U.S. official development assistance went to governments, 20 percent to non-profit organizations, 34 percent to multilateral organizations, and

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21. *Leahy Law Fact Sheet*, *supra* note 2.

22. *Id.*

23. *Id.*

24. *Deconstructing the Leahy Law: Fact vs Fiction*, *supra* note 3.

25. *Id.*

26. Mahanty, *supra* note 15.

27. *See id.*

28. George Ingram, *What Every American Should Know About US Foreign Aid*, BROOKINGS (Oct. 2, 2019), <https://www.brookings.edu/opinions/what-every-american-should-know-about-u-s-foreign-aid/>; *Foreign Aid Explorer*, USAID, <https://explorer.usaid.gov/aid-trends.html> (Sept. 2, 2020).

25 percent elsewhere.”<sup>29</sup> This aid goes to various foreign recipients, including governments, local businesses, charities, and international nongovernmental organizations.<sup>30</sup> The 1961 Foreign Assistance Act defines aid as “the unilateral transfers of U.S. resources by the U.S. government to or for the benefit of foreign entities.”<sup>31</sup> This includes goods, funds, technical assistance, military training, educational programs, and health care.<sup>32</sup>

The origins of modern U.S. aid can be traced back to Cold War politics surrounding the Marshall Plan, the effort to rebuild Europe in a manner that halted the expansion of Communism throughout the continent.<sup>33</sup> Though the Cold War eventually came to an end, U.S. national security concerns lived on. This is especially true in a post-9/11 world, where it is widely understood that problems abroad can and do have tragic, far-reaching impacts on domestic soil.<sup>34</sup> President George W. Bush recognized, “Poverty does not make poor people into terrorists and murderers. Yet poverty, weak institutions, and corruption can make weak states vulnerable to terrorist networks and drug cartels within their borders.”<sup>35</sup>

The politics surrounding decisions on foreign aid are complex. The issues of who should benefit, how they should benefit, and how much are all subjects of great contention. President Trump has declared his opinion on the matter, but it leaves more questions than answers as he has only vaguely described what good allies look like: “The United States is the world’s largest giver in the world, by far, of foreign aid. But few give anything to us . . . Moving forward, we are only going to give foreign aid to those who respect us and, frankly, are our friends.”<sup>36</sup> In that 2018 address at the United Nations General Assembly, the President offered his unapologetic rejection of globalism, sticking to his Administration’s “America First” rhetoric.<sup>37</sup> “We will examine what is working, what is not working, and *whether the countries who receive our dollars and our protections also have our interests at heart.*”<sup>38</sup>

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29. *Id.*

30. *Id.*

31. James McBride, *How Does the U.S. Spend Its Foreign Aid?*, COUNCIL ON FOREIGN RELATIONS (Oct. 1, 2018), <https://www.cfr.org/backgrounder/how-does-us-spend-its-foreign-aid>.

32. *Id.*

33. *Id.* (citing CAROL LANCASTER, *FOREIGN AID: DIPLOMACY DEVELOPMENT, DOMESTIC POLITICS* (2007)).

34. See CAROL LANCASTER & ANN VAN DUSEN, *ORGANIZING U.S. FOREIGN AID: CONFRONTING THE CHALLENGES OF THE TWENTY-FIRST CENTURY* 2 (2005).

35. The National Security Strategy of the United States of America, President Bush White House Archives, (Sept. 17, 2002), <https://georgewbush-whitehouse.archives.gov/nsc/nssall.html>.

36. President Donald Trump, Address to the 73<sup>rd</sup> Session of the United Nations General Assembly (Sept. 25, 2018) (transcript available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/>).

37. See *id.*; Thomas Wright, *Trump’s Mystifying Victory Lap at the UN*, THE ATLANTIC (Sept. 26, 2018), <https://www.theatlantic.com/international/archive/2018/09/trump-united-nations-bolton-foreign-policy-iran-north-korea-russia/571339>.

38. *Supra* note 36 (emphasis added).

Since then, the Trump administration has suggested on multiple occasions that massive cuts or freezes of U.S. foreign aid were forthcoming.<sup>39</sup> While his comments implied that major changes were on the horizon, the countries that top the list of recipients of U.S. foreign aid have remained the same.

#### A. *Egypt*

Despite its human rights record, Egypt is one of the biggest recipients of U.S. aid. A lower middle-income country, Egypt received \$1.25 billion in U.S. foreign assistance in FY2018.<sup>40</sup> Of that amount, \$1 billion went towards foreign military financing.<sup>41</sup> Over the last 70 years, it has received over \$80 billion in U.S. foreign assistance,<sup>42</sup> and it has requested \$1.38 billion for FY 2020.<sup>43</sup> While it remains a key foreign aid recipient, Egypt's human rights record is disturbing.<sup>44</sup>

The Egyptian state has tortured suspects, implemented mass trials against children, and executed detainees. In January 2002, Mr. Ahmad El-Maati, a falsely accused terrorist suspect, was tortured by Egyptian security officials:

[a]n electric prod was used on [El-Maati's] hands, legs and genitals during interrogations. His hands were cuffed so tightly that his wrists bled. . . . He was kept blindfolded and handcuffed in a hallway with other prisoners for what he estimates was about two weeks. It was

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39. See Carol Morello, *Trump Administration Again Proposes Slashing Foreign Aid*, WASH. POST (Feb. 10, 2020, 6:02 PM), [https://www.washingtonpost.com/national-security/trump-administration-again-proposes-slashing-foreign-aid/2020/02/10/2c03af38-4c4c-11ea-bf44-f5043eb3918a\\_story.html](https://www.washingtonpost.com/national-security/trump-administration-again-proposes-slashing-foreign-aid/2020/02/10/2c03af38-4c4c-11ea-bf44-f5043eb3918a_story.html); Jeff Mason, *Exclusive: Trump Proposes 21% Cut in U.S. Foreign Aid in Budget Proposals – Officials*, REUTERS (Feb. 9, 2020, 2:45 PM), <https://www.reuters.com/article/us-usa-trump-budget-foreign-exclusive/exclusive-trump-proposes-21-cut-in-u-s-foreign-aid-in-budget-proposal-officials-idUSKBN2030Q5>.

40. *U.S. Foreign Aid by Country: Egypt*, USAID, <https://explorer.usaid.gov/cd/EGY> (April 23, 2020).

41. *Id.*

42. U.S. SENATOR PATRICK LEAHY OF VERMONT, Press Conference On The Death Of Mustafa Kassem (Jan. 15, 2020), <https://www.leahy.senate.gov/press/press-conference-on-the-death-of-mustafa-kassem>.

43. *Egypt Foreign Assistance*, FOREIGN ASSISTANCE, <https://www.foreignassistance.gov/explore/country/Egypt> (Oct. 23, 2020).

44. See generally *Egypt Events of 2019*, HUM. RIGHTS WATCH, <https://www.hrw.org/world-report/2020/country-chapters/egypt>; UN: *States must denounce Egypt's disastrous human rights record*, AMNESTY INT'L (Nov. 12, 2019), <https://www.amnesty.org/en/latest/news/2019/11/un-states-must-denounce-egypts-disastrous-human-rights-record>; UN *Experts Urge Egypt to End Crackdown on Protesters and Human Rights Defenders*, UNITED NATIONS HUM. RIGHTS OFFICE OF THE HIGH COMM'R (Oct. 28, 2019), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25217&LangID=E>; Katherine R. Hawkins, *The Promises of Torturers: Diplomatic Assurances and the Legality of "Rendition,"* 20 GEO. IMMIGR. L.J. 213 (2006); UN *Human Rights Office Urges Egypt to Immediately Release Detained Protestors*, UN NEWS (Oct. 18, 2019), <https://news.un.org/en/story/2019/10/1049581>; Rasha Younes, *Egypt's Denial of Sexual Orientation and Gender Identity*, HUM. RIGHTS WATCH (Mar. 20, 2020), <https://www.hrw.org/news/2020/03/20/egypts-denial-sexual-orientation-and-gender-identity#>; *Egypt: Human Rights Organization Records 100 Cases of Extrajudicial Killings in 2020*, MIDDLE EAST MONITOR (Apr. 9, 2020), <https://www.middleeastmonitor.com/20200409-egypt-human-rights-organisation-records-100-cases-of-extrajudicial-killings-in-2020>.

during this time, Mr. El-Maati says, that he developed anal bleeding. Canadian doctors later diagnosed an anal fissure requiring surgery.<sup>45</sup>

Since 2013, the Egyptian government's use of mass trials and death sentences against children have skyrocketed; these include death sentences issued by military courts<sup>46</sup> – the same military that has received billions of dollars in assistance from the U.S. government.<sup>47</sup> The U.S.-based human rights organization, Belady, puts the number of children arrested by the current regime for political reasons at over 2,000.<sup>48</sup> Since former General el-Sisi assumed office, Egypt has been among the ten countries with the highest numbers of executions per year.<sup>49</sup> At an Arab-EU summit in 2019, el-Sisi stood by his government's actions, arguing that executing detainees is part of "our humanity," distinguishing it from "your [European] humanity."<sup>50</sup> Yet, Article 2 of the Egyptian Constitution states that Islam is the official state religion and that the primary source of legislation is Sharia law.<sup>51</sup> The Quran forbids unjust killing, including judicially mandated death sentences that lack due process.<sup>52</sup> El-Sisi's use of "our humanity" as justification for mass trials, death sentences in absentia, and sham military trials should sound the alarms for a White House that claims to be sending aid to "those who respect us."<sup>53</sup>

In April 2019, the Egyptian Constitution was amended to lengthen el-Sisi's term from four to six years and to allow him to run for an additional term, solidifying his ability to remain in power until 2030; it also gave him far greater control over the judicial branch.<sup>54</sup> The fairness of the referendum on these amendments was widely criticized. Websites that encouraged people to vote "no" were blocked by the government, and Egyptian citizens living abroad were given very little notice to travel to a consulate to vote.<sup>55</sup>

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45. Hawkins, *supra* note 44, at 220 (quoting Jeff Sallott, *Once a Muhajed Who Took Flying Lessons, Ahmad El-Maati Seemed to Fit the Profile of a Terrorist*, GLOBE & MAIL (Toronto) (Aug. 29, 2005) at A1).

46. *Egypt Events of 2019*, *supra* note 44.

47. *U.S. Foreign Aid by Country: Egypt*, *supra* note 40.

48. Aya Hijazi & Bill Van Esveld, *Coronavirus Adds Urgency to Ending Egypt's Detention and Torture of Children*, JUST SEC. (May 5, 2020), <https://www.justsecurity.org/69852/coronavirus-adds-urgency-to-ending-egypts-detention-and-torture-of-children>.

49. Amr Magdi, *Why Executions in Egypt are Skyrocketing and Why They Should End*, HUM. RIGHTS WATCH (Mar. 25, 2019), <https://www.hrw.org/news/2019/03/25/why-executions-egypt-are-skyrocketing-and-why-they-should-end>.

50. *Id.*

51. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 2.

52. Quran 17:33; *see also* William A. Schabas, *Islam and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 223, 230-34 (2000) (analyzing Islamic law doctrine on the death penalty).

53. Address by President Donald Trump, *supra* note 36.

54. *See* Merrit Kennedy, *Egypt Approves Constitutional Changes That Could Keep Sissi In Office Until 2030*, NPR (Apr. 23, 2019), <https://www.npr.org/2019/04/23/716408260/egypt-approves-constitutional-changes-that-could-keep-el-sissi-in-office-until-2>; *Egyptian Voters Back Constitutional Changes Giving More Power to President Sisi*, REUTERS (Apr. 23, 2019), <https://www.reuters.com/article/us-egypt-election/egyptian-voters-back-constitutional-changes-giving-more-power-to-president-sisi-idUSKCN1RZ229>.

55. Kennedy, *supra* note 54.



Between 2017 and 2019, the Egyptian government blocked over 600 news, political, and human rights websites without judicial authorization.<sup>56</sup> It was also among the four worst countries for journalists in 2018, with twenty-five journalists arrested that year, nineteen of which detained for “spreading false news.”<sup>57</sup> In August 2020, Egypt’s “special counterterrorism courts” sentenced in absentia Bahey eldin Hassan, a prominent human rights activist, to fifteen years in prison for criticizing President Sissi’s regime on Twitter.<sup>58</sup>

In May 2015, the State Department informed Congress that it was in the national interest to continue assisting Egypt, but it also highlighted many of the country’s violations that year, writing: “Government forces have committed arbitrary or otherwise unlawful killings during dispersal of demonstrators, of persons in custody, and during military operations in the northern Sinai Peninsula.”<sup>59</sup> This was not an isolated incident. Public Law 115-141 states that of the \$1.3 billion in assistance to Egypt, \$300 million must be withheld until the Secretary of State certifies that Egypt is taking effective steps on various human rights.<sup>60</sup> However, it also states that the Secretary may waive the certification requirement if he or she determines that doing so is important to the national security interest of the U.S.<sup>61</sup> In August 2019, a year full of gross violations of human rights by the Egyptian government, Secretary Pompeo invoked the national security interest waiver.<sup>62</sup> Judging by the broad power vested in the Secretary of State by the statute, it is fairly straightforward for the Secretary to override the recommendations of DRL officials and investigators on the ground at U.S. embassies abroad; he or she merely has to declare that it is in the national security interest of the U.S. to do so.<sup>63</sup>

Despite Egypt’s troubling track record (these are only a few examples), the Trump administration has been outspoken in its support of the Egyptian dictatorship.<sup>64</sup> On April 3, 2017, President Trump welcomed Egyptian President Abdel Fattah el-Sisi to the White House.<sup>65</sup> During an interview in the Oval

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56. *Egypt Events of 2019*, *supra* note 44, at 9.

57. *CPJ: 19 of 25 Detained Journalists in Egypt in 2018 Charged Over ‘False News’*, MADA MASR (Dec. 20, 2018), <https://madasr.com/en/2018/12/20/news/u/cpj-19-of-25-detained-journalists-in-egypt-in-2018-charged-over-false-news>.

58. See Elisa Massimino & Neil Hicks, *It’s Official: In Egypt, You Can Now Get 15 Years in Jail For a Tweet*, WASH. POST (Aug. 31, 2020), <https://www.washingtonpost.com/opinions/2020/08/31/its-official-egypt-you-can-now-get-15-years-jail-tweet>.

59. Memorandum From U.S. Dep’t of State on Justification for Certification Under Section 7041(a)(6)(C) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, DIV. J, P.L. 113-235 (2015).

60. Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, § 7041(a)(3)(A) (2018).

61. *Id.* § 7041(a)(3)(B).

62. Determination Pursuant to Section 7041 (a)(3)(B) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2018, 84 Fed. Reg. 49,783 (Aug. 8, 2019).

63. *Id.*; see also 22 U.S.C. § 2378(b); 10 U.S.C § 362(c).

64. See, e.g., Nancy A. Youssef, Vivian Salama & Michael C. Bender, *Trump, Awaiting Egyptian Counterpart at Summit, Called Out for ‘My Favorite Dictator’*, WALL ST. J. (Sept. 13, 2019), <https://www.wsj.com/articles/trump-awaiting-egyptian-counterpart-at-summit-called-out-for-my-favorite-dictator-11568403645>.

65. Peter Baker & Declan Walsh, *Trump Shifts Course on Egypt, Praising Its Authoritarian Leader*, N.Y. TIMES (Apr. 3, 2017), <https://www.nytimes.com/2017/04/03/world/middleeast/-egypt-sisi-trump-white-house.html>.

Office, President Trump spoke highly of his Egyptian counterpart: “We are very much behind President el-Sisi. He’s done a fantastic job . . . And I just want to say to you, Mr. President, that you have a great friend and ally in the United States and in me.”<sup>66</sup> Just eighteen days later, on April 21, 2017, President Trump welcomed to the White House Ms. Aya Hijazi, an Egyptian-American humanitarian worker who was incarcerated by el-Sisi’s regime for three years without a trial.<sup>67</sup> During the televised meeting, no mention was made of the Egyptian government’s treatment of Ms. Hijazi, and the President refused to take any questions.<sup>68</sup> Ironically, while in the Oval Office, she sat in the same chair that was occupied by her authoritarian persecutor eighteen days earlier.<sup>69</sup> Furthermore, at the G7 Summit in France in September 2019, President Trump notoriously called out, “Where’s my favorite dictator?” while awaiting a meeting with his Egyptian counterpart.<sup>70</sup> “Egypt has a great leader, he’s highly respected, he’s brought order,” President Trump said at a meeting with el-Sisi during the UN General Assembly in September 2019.<sup>71</sup> That same week, el-Sisi’s regime arrested more than 2,000 peaceful protesters throughout the country.<sup>72</sup>

## B. *Saudi Arabia*

Another recipient of substantial U.S. foreign assistance that also has a troubling human rights record is the Kingdom of Saudi Arabia. A high-income country, Saudi Arabia received a modest \$909,085 in U.S. foreign assistance in FY2018.<sup>73</sup> While most of that went towards countering violent extremism in the region, \$9,738 went towards military education and training, for which the U.S. government has not and will not be reimbursed.<sup>74</sup> Additionally, since 1950, U.S. arms sales to the Kingdom have surpassed \$90 billion.<sup>75</sup>

Saudi Arabia has oppressive laws on many rights that should concern the U.S. government and American taxpayers. In Saudi Arabia,

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66. *U.S.-Egypt Relations*, C-SPAN (Apr. 3, 2017), <https://www.c-span.org/video/?426439-1/president-trump-meets-egyptian-president>.

67. Michael D. Shear & Declan Walsh, *Trump Welcomes American Aid Worker, Freed by Egypt, to Oval Office*, N.Y. TIMES (Apr. 21, 2017), <https://www.nytimes.com/2017/04/21/world/middleeast/trump-welcomes-american-aid-worker-freed-by-egypt-to-oval-office.html>.

68. *Aya Hijazi at White House*, C-SPAN (Apr. 21, 2017), <https://www.c-span.org/video/?427356-1/president-trump-meets-freed-egyptian-american-prisoner>.

69. *Id.*; see also *U.S.-Egypt Relations*, *supra* note 66.

70. *Id.*

71. Josh Wingrove & David Wainer, *Trump Backs Egypt’s Sisi After Rare Protests Spark Crackdown*, BLOOMBERG (Sept. 23, 2019), <https://www.bloomberg.com/news/articles/2019-09-23/trump-shrugs-off-egypt-protests-says-el-sisi-highly-respected>.

72. Ellen Ioanes, *Trump’s ‘Favorite Dictator’ Just Rounded Up 2,000 People Peacefully Calling For an End to Military Rule*, BUS. INSIDER (Sept. 27, 2019), <https://www.businessinsider.com/egypt-2000-protesters-jail-trump-sisi-2019-9>.

73. *U.S. Foreign Aid by Country: Saudi Arabia*, USAID, <https://explorer.usaid.gov/cd/SAU> (April 23, 2020).

74. *Id.*

75. See *U.S.-Saudi Arabia Relations*, COUNCIL ON FOREIGN RELS. (Dec. 7, 2018), <https://www.cfr.org/backgrounder/us-saudi-arabia-relations>.

homosexuality,<sup>76</sup> and atheism are punishable by death.<sup>77</sup> Until 2017, women could not travel without a male guardian's permission, nor were they allowed to drive.<sup>78</sup> In October 2018, Jamal Khashoggi, a journalist and contributing columnist to the Washington Post who was critical of the Saudi regime, was assassinated and dismembered in the Saudi Arabian consulate in Istanbul.<sup>79</sup> According to the C.I.A., Saudi Crown Prince Mohammed bin Salman personally ordered the murder of Khashoggi, a lawful permanent resident of the United States.<sup>80</sup> The U.S. Senate also concluded that the Crown Prince was responsible for Khashoggi's murder.<sup>81</sup> President Trump has been privately shown evidence of the Crown Prince's involvement, but he continues to deny that Mohammed bin Salman was involved.<sup>82</sup> The President has since praised the Crown Prince on many occasions, referring to him as his friend and congratulating him on doing "a spectacular job" in Saudi Arabia.<sup>83</sup>

Additionally, Saudi Arabia is leading a coalition that has been carrying out air strikes in Yemen for several years, killing 75,000 civilians as of September 2019 (though several groups have reported much higher numbers).<sup>84</sup> These numbers only represent *air strike* fatalities; thousands more have died from malnutrition, disease, and other preventable health issues.<sup>85</sup> Approximately 85,000 children in Yemen have died from starvation between

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76. Susan M. Finegan, Meredith M. Leary, Kaitlyn A. Crowe & Glenn Magpantay, *The Supreme Court's Upcoming Decision in the DACA Cases Could Place LGBTQ Recipients at Serious Risk*, 44 HARBINGER 23, 27 (2019).

77. *Saudi Arabia: Categorizing Feminism, Atheism, Homosexuality as Crimes Exposes the Kingdom's Dangerous Intolerance*, AMNESTY INT'L (Nov. 12, 2019), <https://www.amnesty.org/en/latest/news/2019/11/saudi-arabia-categorizing-feminism-atheism-homosexuality-as-crimes-exposes-the-kingdoms-dangerous-intolerance>.

78. Rosie Perper & James Pasley, *Saudi Arabian Women No Longer Need a Man's Permission to Travel. Here Are the Biggest Changes They've Seen in the Last 2 Years*, BUS. INSIDER (Aug. 2, 2019), <https://www.businessinsider.com/womens-rights-in-saudi-arabia-driving-ban-2018-3> (stating that women over the age of 21 can now apply for passports and cross borders without a male guardian's permission).

79. See Beth Van Schaack & Edward Crouse, *Saudi Crackdown on Dissent Violates Kingdom's International Legal Obligations*, JUST SEC. (Jan. 29, 2020), <https://www.justsecurity.org/68303/saudi-crackdown-on-dissent-violates-kingdoms-international-legal-obligations>; Laura King, 'Cut It Into Pieces': Jamal Khashoggi's Dismemberment Was Methodically Planned, U.N. Report Says, L.A. TIMES (Jun. 19, 2019), <https://www.latimes.com/world/la-fg-saudi-arabia-jamal-khashoggi-un-investigation-20190619-story.html>.

80. See Shane Harris, Greg Miller & Josh Dawsey, *CIA Concludes Saudi Crown Prince Ordered Jamal Khashoggi's Assassination*, WASH. POST (Nov. 16, 2018), [https://www.washingtonpost.com/world/national-security/cia-concludes-saudi-crown-prince-ordered-jamal-khashoggis-assassination/2018/11/16/98c89fe6-e9b2-11e8-a939-9469f1166f9d\\_story.html](https://www.washingtonpost.com/world/national-security/cia-concludes-saudi-crown-prince-ordered-jamal-khashoggis-assassination/2018/11/16/98c89fe6-e9b2-11e8-a939-9469f1166f9d_story.html); David Herszenhorn, *Trump Praises Saudi Crown Prince, Ignores Questions on Khashoggi Killing*, POLITICO (Jun. 29, 2019), <https://www.politico.com/story/2019/06/29/trump-mbs-khashoggi-g20-1390412>.

81. S.J. Res. 69, 115th Cong. (2018).

82. See Harris et al., *supra* note 80.

83. See Herszenhorn, *supra* note 80; Valentina Pop, *Trump Praises Saudi Crown Prince for Doing 'Spectacular Job'*, WALL ST. J. (Jun. 29, 2019), <https://www.wsj.com/articles/trump-praises-saudi-crown-prince-for-doing-a-spectacular-job-11561778810>.

84. *Yemen Crisis: Why is There a War?*, BBC (Feb. 10, 2020), <https://www.bbc.com/news/world-middle-east-29319423>.

85. *Id.*

April 2015 and October 2018.<sup>86</sup> Despite this, the U.S. is by far the biggest supplier of weapons to the Saudi-led coalition in Yemen.<sup>87</sup> Moreover, the coalition has reportedly transferred U.S.-made weapons to terrorist-linked fighters, including some linked to al-Qaeda, the orchestrators of the 9/11 attacks on the World Trade Center.<sup>88</sup> Despite these troubling reports, President Trump used the second veto of his presidency to strike down a resolution passed by Congress to end military assistance to Saudi Arabia's aggression in Yemen.<sup>89</sup> According to multiple critics, "[t]here is a serious danger that the conduct of some U.S. officials meets at least the relaxed tests for aiding and abetting under international law and perhaps even the more stringent ones."<sup>90</sup>

#### IV. ASYLUM DISCUSSION

The standard that the U.S. government uses for asylum determinations is similar to the aforementioned Leahy vetting standard, suggesting that there should be greater interaction between the officials who administer both. This Note is not intended by any means to criticize or discourage grants of asylum. At the time of writing, the author of this Note is in the process of completing his immigration to the United States and knows firsthand how impactful this area of the law is on people's lives. America's asylum system, however flawed it may be, remains a life-saving avenue that should be protected at all costs. It is an unmistakable display of patriotism to welcome those who fear persecution into this country with open arms; it is one of the things that makes this nation of immigrants so great.

##### A. Eligibility

To be eligible for asylum, a petitioner must meet the definition of a refugee in section 101(a)(42)(A) of the Immigration and Nationality Act (INA). Namely, they must be:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country *because of persecution or a*

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86. *Yemen: 85,000 Children May Have Died from Starvation Since Start of War*, SAVE THE CHILDREN (Nov. 20, 2018), <https://www.savethechildren.org/us/about-us/media-and-news/2018-press-releases/yemen-85000-children-may-have-died-from-starvation>.

87. Nima Elbagir, Salma Abdelaziz, Mohamed Abo El Gheit & Laura Smith-Spark, *Sold to an Ally, Lost to an Enemy*, CNN, <https://edition.cnn.com/interactive/2019/02/middleeast/yemen-lost-us-arms> (last visited Sept. 27, 2020).

88. *Id.*

89. S.J. Res. 7, 116th Cong. (2019); see also Deb Riechmann, *Trump Vetoes Measure to End US Involvement in Yemen War*, AP (Apr. 16, 2019), <https://apnews.com/1b17cee217b344d8a3a03642139fb606>.

90. Oona Hathaway, *The Missing State Department Memo on US Officials' Possible Aiding and Abetting Saudi War Crimes*, JUST SEC. (July 24, 2019), <https://www.justsecurity.org/65041/the-missing-state-department-memo-on-us-officials-possible-aiding-and-abetting-saudi-war-crimes>.

*well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .*<sup>91</sup>

### B. *What Counts as Persecution?*

The Immigration and Nationality Act mentions “persecution” in its definition of “refugee,” but like many areas of the law, the definition itself contains a term of art that also requires interpretation.<sup>92</sup> Case law tells us that the term encompasses a wide range of harms and that the analysis is very fact-dependent.<sup>93</sup> It can include harms or acts that are not necessarily physical.<sup>94</sup> According to a majority of the circuits, to constitute persecution, the “actions “must rise above unpleasantness, harassment and even basic suffering.”<sup>95</sup>

To meet the statutory threshold of being well-founded, the claimed fear must pass both a subjective and objective analysis: the petitioner’s fear must be subjectively genuine and objectively reasonable.<sup>96</sup> The petitioner must satisfy the subjective component through his or her own credible testimony as determined by the asylum officer tasked with conducting an interview.<sup>97</sup> The objective component is met if “a reasonable person in the asylum applicant’s circumstances would fear persecution on account of a statutorily protected ground.”<sup>98</sup>

Table 1: Individuals Granted Asylum Affirmatively or Defensively by Country of Nationality from 2016-2018

**Individuals Granted Asylum Affirmatively or Defensively by Country of Nationality:  
FY 2016 to 2018**

(Ranked by 2018 country of nationality)

Country	2016		2017		2018	
	Number	Percent	Number	Percent	Number	Percent
Total . . . . .	20,362	100.0	26,509	100.0	38,687	100.0
China, People’s Republic . . . . .	4,495	22.1	5,615	21.2	6,905	17.8
Venezuela . . . . .	343	1.7	549	2.1	6,087	15.7
El Salvador . . . . .	2,144	10.5	3,476	13.1	2,963	7.7
Guatemala . . . . .	1,921	9.4	2,949	11.1	2,358	6.1
Honduras . . . . .	1,474	7.2	2,045	7.7	2,029	5.2
Egypt . . . . .	827	4.1	1,161	4.4	1,591	4.1
Mexico . . . . .	904	4.4	1,042	3.9	1,361	3.5
India . . . . .	479	2.4	685	2.6	1,327	3.4
Russia . . . . .	284	1.4	344	1.3	906	2.3
Syria . . . . .	724	3.6	758	2.9	714	1.8
All other countries, including unknown	6,767	33.2	7,885	29.7	12,446	32.2

Note: Data exclude follow-to-join asylees.

Source: U.S. Department of Homeland Security and U.S. Department of Justice.

91. Immigration and Nationality Act, 8 U.S.C. § 1101 (a)(42)(A) (emphasis added).  
 92. *See id.*  
 93. *See Cordon-Garcia v. INS*, 204 F.3d 985, 991 (9th Cir. 2000).  
 94. *See, e.g., INS v. Stevic*, 467 U.S. 407 (1984); *Surita v. INS*, 95 F.3d 814 (9th Cir. 1996).  
 95. *See Villafranca v. Lynch*, 797 F.3d 91, 95 (1st Cir. 2015); *Jorgji v. Mukasey*, 514 F.3d 53, 57 (1st Cir. 2008); *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000).  
 96. *See Villafranca*, 797 F.3d at 95 (citing *Orelien v. Gonzales*, 467 F.3d 67, 71 (1st Cir. 2006); *Lopez Perez v. Holder*, 587 F.3d 456, 461–62 (1st Cir. 2009)).  
 97. *See Villafranca*, 797 F.3d at 95 (citing *Makhoul v. Ashcroft*, 387 F.3d 75, 80–81 (1st Cir. 2004)).  
 98. *Makhoul*, 387 F.3d at 81.

The table,<sup>99</sup> above, made available online by the Department of Homeland Security and Department of Justice, lists the top countries of individuals who were successfully granted asylum from FY 2016 and 2018. In the three years represented in the table, 3,579 Egyptian applicants were granted asylum,<sup>100</sup> with 1,361 approvals in 2018 alone.<sup>101</sup> In other words, on 3,579 occasions between 2016 and 2018, the U.S. government found that Egyptian citizens had “a well-founded fear of persecution” in their country.<sup>102</sup>

One of those individuals was Mr. Ahmed Abdelbasit, a physics teacher living in New Jersey who was sentenced to death in absentia for his pro-democracy views.<sup>103</sup> Before leaving Egypt, Abdelbasit was a doctoral student and physics professor at Cairo University.<sup>104</sup> In July 2013, he helped organize peaceful demonstrations against the military’s removal of President Mohamed Morsi, the country’s first democratically elected leader.<sup>105</sup> Due to his activism, Abdelbasit was expelled from the university and fled to Qatar, where he also worked in academia.<sup>106</sup> In May 2016, Abdelbasit was tried in absentia and sentenced to death by a military court<sup>107</sup> – the same military that received \$1.1 billion in foreign military financing from the Department of Defense that year.<sup>108</sup> Human Rights Watch described his sentence as “completely baseless” and the evidence against him as “almost nonexistent.”<sup>109</sup>

## V. HOW THE ASYLUM SYSTEM CAN BOLSTER LEAHY ENFORCEMENT

### A. *Grants of Asylum by the U.S. Government Show that it is on Notice that the Recipients of its Foreign Assistance are Committing Gross Violations of Human Rights.*

As discussed in an earlier section, the Leahy Law precludes the U.S. government from providing assistance to foreign security forces if DoD has “credible information” that such unit has committed gross violations of human rights.<sup>110</sup> There is no question that the U.S. government has credible information that the foreign security forces it provides assistance to have committed and continue to commit gross violations of human rights. Not

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99. Nadwa Mossaad, *Annual Flow Report*, U.S. DEP’T OF HOMELAND SEC. (Oct. 2019), [https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/refugees\\_asylees\\_2018.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/refugees_asylees_2018.pdf).

100. *See id.*

101. *Id.*

102. *Id.*; 8 U.S.C. § 1101(a)(42)(A).

103. Rowaida Abdelaziz, *Students Celebrate As ICE Releases Teacher Sentenced To Death In Egypt*, HUFFINGTON POST (Aug. 24, 2018), [https://www.huffpost.com/entry/ice-teacher-ahmed-abdelbasit-released\\_n\\_5b803ccfe4b0cd327dfc7220?ncid=tweetInkushpmg00000067](https://www.huffpost.com/entry/ice-teacher-ahmed-abdelbasit-released_n_5b803ccfe4b0cd327dfc7220?ncid=tweetInkushpmg00000067).

104. Rowaida Abdelaziz, *ICE Detains A New Jersey Teacher Who’d Face a Death Sentence in Egypt*, HUFFINGTON POST (Apr. 12, 2018), [https://www.huffpost.com/entry/new-jersey-teacher-detained-egypt-death-sentence\\_n\\_5acfdbbee4b077c89ce6cd4f](https://www.huffpost.com/entry/new-jersey-teacher-detained-egypt-death-sentence_n_5acfdbbee4b077c89ce6cd4f).

105. *Id.*

106. *Id.*

107. *Id.*

108. *U.S. Foreign Aid by Country: Egypt*, *supra* note 40.

109. Abdelaziz, *supra* note 103.

110. 10 U.S.C § 362(a)(1).

only has the government been provided with the information, but it has expressly declared that that information is credible through “credible fear interviews” taking place in the asylum system.<sup>111</sup> In the case of Egypt, it has done so on 3,579 occasions between 2016 and 2018 alone – when it has granted asylum to those fleeing persecution.<sup>112</sup>

Every time the U.S. government has granted an asylum application, it has concluded that the applicant in question has a credible fear of persecution<sup>113</sup> – “credible” being the term of art used in *both* the asylum analysis and the Leahy Law prohibition. When it wrote the Immigration and Nationality Act, the government expressly defined “credible fear of persecution” as “a significant possibility, taking into account the credibility of the statements made by the alien in support of his or her claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under Section 208 [of the INA]. . . .”<sup>114</sup> This assessment could be used to provide notice in the context of the Leahy Law, where, in determining whether an actor has committed gross human rights violations, “full consideration is given to *any credible information available to the Department of State* relating to human rights violations by such unit.”<sup>115</sup> The information provided to immigration officials by successful asylum applicants is by definition credible – it passed the credible fear test.<sup>116</sup> A few thousand determinations per year would seem to evidence more than merely a “significant possibility,” but rather an absolute certainty.

According to a senior Hill staffer<sup>117</sup> familiar with the topic, the national interests and the information being investigated by immigration officials at DHS run parallel to those discussed by Leahy vetting officials at the State Department. They are similar inquiries that serve similar national interests. Why is there not a mechanism in place to ensure that the State Department benefits from the information being provided to DHS by those applicants? A cross-agency taskforce staffed by State Department and Homeland Security officials would provide that mechanism.

Furthermore, it is unlikely that the foreign governments in question are taking corrective measures to protect human rights. As discussed earlier, there is an exception to the statute’s prohibition in circumstances where the Secretary of Defense and Secretary of State determine that “the government of such country has taken all necessary corrective steps” in regards to their

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111. See generally Mossaad, *supra* note 99; 8 U.S.C. § 1101(a)(42)(A).

112. See Mossaad, *supra* note 99.

113. See 8 U.S.C. § 1225(b)(1)(B)(v) (defining credible fear of persecution as “a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.”).

114. *Id.*

115. 10 U.S.C. § 362(a)(2) (2016) (emphasis added).

116. See 8 U.S.C. § 1101(a)(42)(A).

117. The interview I conducted with the senior Hill staffer was off the record.

human rights violations.<sup>118</sup> The State Department website has clarified that this determination is made in regards to the government of the implicated security unit; in other words, the foreign government has the burden of taking corrective steps, not the individual human rights violator.<sup>119</sup> This again raises the question of asylum. As a practical matter, it would certainly be challenging for U.S. officials to not only identify the requisite corrective steps but also to trace those steps from the foreign government to the individual perpetrator. But, when a foreign government's track record involves a bleak human rights record that has spurred its citizens to flee and seek asylum elsewhere, this should elicit deep concern. There is more than a "significant possibility" that a government that tortures its citizens, holds sham trials, incarcerates journalists, and produces 3,579 citizens capable of demonstrating a credible fear of persecution,<sup>120</sup> is probably not in the business of taking all the necessary corrective steps to protect human rights. If the violations are being committed at the behest of the foreign government itself, it is very unlikely that that same government is imposing corrective measures on the very individuals that carried out its orders.

The U.S. government has been directly involved with the stories of asylum applicants abroad as well. In September 2001, Egyptian national Ahmed Agiza applied for asylum in Sweden.<sup>121</sup> Agiza had previously been arrested and tortured by Egyptian security forces because of his cousin's alleged involvement in the assassination of President Anwar Sadat.<sup>122</sup> While Agiza's asylum application was pending, Swedish authorities handed him over to CIA agents who organized his expulsion back to Egypt.<sup>123</sup> President George W. Bush and CIA Director Porter Goss had previously stated that extraordinary rendition would only be done for countries that assure the U.S. that the suspects will not be tortured.<sup>124</sup> However, the United Nations Committee Against Torture found that Egypt's well-documented history of torture, as well as its specific interest in Agiza, should have been enough for a "natural conclusion" that he would be tortured upon return.<sup>125</sup> "During the eight hour flight to Egypt, in Egyptian custody, he allegedly was bound by hands and foot. Upon arrival, he was allegedly subjected to 'advanced interrogation methods' at the hand of Egyptian state security officers, who told him the guarantees provided by the Egyptian Government concerning him were

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118. 10 U.S.C. § 362(b).

119. See *Leahy Law Fact Sheet*, *supra* note 2.

120. See, generally Mossaad, *supra* note 99; *Egypt Events of 2019*, *supra* note 44; *CPI: 19 of 25 Detained Journalists in Egypt in 2018 Charged Over 'False News'*, *supra* note 57. Massimino & Hicks, *supra* note 58.

121. *Ahmed Agiza*, ACLU, <https://www.aclu.org/bio/ahmed-agiza>.

122. *Id.*

123. *Id.*; see also *Sweden Violated Torture Ban with U.S. Help*, HUM. RIGHTS WATCH (May 19, 2005), <https://www.hrw.org/news/2005/05/19/sweden-violated-torture-ban-us-help#>.

124. See Jane Mayer, *Outsourcing Torture*, THE NEW YORKER (Feb. 7, 2005), <https://www.newyorker.com/magazine/2005/02/14/outsourcing-torture>.

125. *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003m UN Committee Against Torture (CAT) (May 24, 2005), <https://www.refworld.org/cases,CAT,42ce734a2.html>.



useless. [Agiza] told his mother that a special electric device with electrodes connected to his body was utilized and that electric shocks were utilized if he did not respond properly to orders.”<sup>126</sup>

B. *Further Evidence of the U.S. Being on Notice that its Recipients of Foreign Aid are Committing Gross Violations of Human Rights*

The fact that the U.S. government only consents to extraordinary rendition when certain foreign governments provide diplomatic assurances is evidence that the U.S. is on notice of those countries’ track records. Extraordinary rendition refers to the Central Intelligence Agency’s practice of transferring foreign nationals to countries where interrogation methods do not meet the U.S. and international standards of due process.<sup>127</sup> The federal government has claimed that it only employs this practice in limited circumstances.<sup>128</sup> The Bush administration (43) conceded that it could not “fully control” what is done in foreign facilities but that it would seek diplomatic assurances that the individual being transferred would not be tortured.<sup>129</sup> But, an anonymous CIA official familiar with the matter referred to those assurances as “a farce.”<sup>130</sup>

Whether the assurances are, in fact, a farce could be the subject of a separate note. However, the fact that the U.S. asks for diplomatic assurances in the first place is evidence that it has reason to believe those assurances are necessary. Egypt is one of the biggest countries of origin for U.S. asylum applicants,<sup>131</sup> and the U.S. has repeatedly asked Egypt for diplomatic assurances.<sup>132</sup> It is also one of the biggest recipients of assistance from the United States.<sup>133</sup> If that math somehow adds up, it certainly should not.

## VI. CHALLENGES AND RAMIFICATIONS

The position of the U.S. is a difficult one as there are decades of diplomatic history between the U.S. and its foreign allies, and significant cutbacks in assistance would have geopolitical implications that may damage relations with those countries. Some allies, particularly Egypt and Israel, even view U.S. assistance as a *quid pro quo* for their strategic value to the Americans.<sup>134</sup>

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126. *Id.*

127. See Jay M. Zitter, *Challenges to Extraordinary Rendition*, 39 A.L.R. Fed 2d 1 (2009).

128. *Id.*

129. See Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 57 AM. U. L. REV. 1405, 1423 (2008).

130. Dana Priest, *CIA’s Assurances On Transferred Suspects Doubted*, WASH. POST (Mar. 17, 2005), <https://www.washingtonpost.com/archive/politics/2005/03/17/cias-assurances-on-transferred-suspects-doubted/d53c2203-6b48-41b5-ac44-44e9147aa21d>.

131. See Mossaad, *supra* note 99.

132. See Mayer, *supra* note 123; Fisher, *supra* note 128; Priest, *supra* note 129.

133. *U.S. Foreign Aid by Country: Egypt*, *supra* note 40.

134. See Duncan L. Clarke, *US Security Assistance to Egypt and Israel: Politically Untouchable?*, 51 MIDDLE EAST J. 200, 211 (1997) (describing Egypt’s and Israel’s view that they are entitled to American assistance).

There are vital geopolitical factors that the U.S. considers with Egypt and Saudi Arabia.

### A. *Geopolitical Considerations with Respect to Egypt*

A key consideration that makes Egypt a crucial player in world politics is geography. Stretching 120 miles, the Suez Canal is an essential link between Europe and Asia.<sup>135</sup> It connects the Mediterranean and the Red Seas, separating Africa from Asia, making it one of the most frequented shipping lanes in the world.<sup>136</sup> For decades, Egypt has been crucial for moving American military assets through the region, as it gives the U.S. preferential passage through the canal.<sup>137</sup> Geography also empowers Egypt with respect to its proximity to Israel.<sup>138</sup> The eastern border of the Egyptian Sinai Peninsula borders Israel. One city in particular, Rafah, borders the Gaza Strip, making it the only operational border crossing between Egypt and the Palestinian territories.<sup>139</sup> Because of the longstanding relationship between the U.S., Egypt, and Israel, the three countries have historically come to agreement on how “operational” that border crossing is.<sup>140</sup> For example, the Agreement on Movement and Access (AMA): Agreed Principles for Rafah Crossing allows EU monitors to be present and Israeli officials to oversee the crossing via video surveillance.<sup>141</sup> Moreover, Egypt and Israel cooperate in fighting terrorism in the Sinai Peninsula, which benefits U.S. counterterrorism efforts in the Middle East.<sup>142</sup> Finally, Egypt’s deployment of troops to Kuwait during the First Gulf War served as a “pan-Arab blessing for the [U.S.-led] operation,” which did not go unnoticed by the Bush administration (41), marking one of the high points of the two countries’ relationship.<sup>143</sup> These considerations

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135. See Steven A. Cook, *Why Suez Still Matters*, FOREIGN AFFS. (Dec. 3, 2013), <https://www.foreignaffairs.com/articles/middle-east/2013-12-03/why-suez-still-matters>; GOOGLE MAPS, <http://www.maps.google.com> (search “Suez Canal”).

136. See Charles Gordon Smith & William B. Fisher, *Suez Canal*, ENCYCLOPEDIA BRITANNICA, available at <https://www.britannica.com/topic/Suez-Canal>; GOOGLE MAPS, *supra* note 134; see also Stewart Sibert, Note, *Thinking Outside of the Icebox: Charting a New Course Through the Northwest Passage*, 36 B.U. INT’L L.J. 341, 360 (stating that the Suez Canal shortens voyages around the southern tip of Africa by 6,400 miles).

137. *Egypt and America: 5 Things You Need to Know*, FOREIGN POL’Y, <https://foreignpolicy.com/sponsored/egypt-and-america-5-things-you-need-to-know>.

138. See generally Maged Mandour, *Egypt’s Evolving Alliance with Israel*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Mar. 20, 2018), <https://carnegieendowment.org/sada/75840>.

139. GOOGLE MAPS, <http://maps.google.com> (search “Egypt”); see also Aeyal Gross, *Litigating the Right to Health Under Occupation: Between Bureaucracy and Humanitarianism*, 27 MINN. J. INT’L L. 421, 438 (2018).

140. See Gross, *supra* note 138 at 438-39; *Fact Sheet 2018*, THE EUROPEAN UNION BORDER ASSISTANCE MISSION FOR THE RAFAH CROSSING, available at: <https://documentcloud.adobe.com/link/track/?pageNum=1&uri=urn%3Aaaid%3Aascds%3AUS%3A0abc305a-a87a-46ca-8462-c42b8a57ff6e>.

141. Gross, *supra* note 138, at 438-39.

142. See JEREMY M. SHARP, CONG. RSCH. SERV., RL33003, EGYPT: BACKGROUND AND U.S. RELATIONS 13 (2020), <https://fas.org/sgp/crs/mideast/RL33003.pdf>.

143. See Trudy Kuehner, *The U.S. and Egypt Since the Suez Crisis*, FOREIGN POL’Y RSCH. INST. (Jul. 28, 2009), <https://www.fpri.org/article/2009/07/the-u-s-and-egypt-since-the-suez-crisis>.

would certainly make it challenging for any U.S. administration to turn its back on Egypt.

### B. *Geopolitical Considerations with Respect to Saudi Arabia*

Similar to Egypt, Saudi Arabia is an important geopolitical player. Providing between 123,000 and two million (the number fluctuates) barrels of oil per day to the U.S., Saudi Arabia is the nation's second-largest source of imported oil.<sup>144</sup> It is also the largest producer in the Organization of Petroleum Exporting Countries (OPEC), which controls forty percent of the world's oil.<sup>145</sup> The two countries are major trading partners, and Saudi Arabia has announced plans to increase trade with the U.S. as part of its Vision 2030 program.<sup>146</sup> Moreover, with Iran as a common enemy, the U.S.-Saudi relationship is crucial for their common objective of containing Iranian influence in the region.<sup>147</sup> Iran and Saudi Arabia have competed for regional influence for many years, and when it comes to the Middle East, the U.S. will choose just about any side that is not Iran's.<sup>148</sup> Furthermore, as mentioned in an earlier section, the U.S. supports Saudi Arabia's counterterrorism efforts in Yemen, where it leads a coalition fighting the Houthis, an Iranian-backed movement.<sup>149</sup>

### C. *Ensuring the Safety of Asylum Applicants*

Given the way countries from which asylum applicants flee typically treat them, it is crucial that any information sharing within a cross-agency taskforce be coordinated in a manner that does not jeopardize the safety of the asylees. Any information sharing must be done with the utmost confidentiality; it is not enough of a precaution to only share successful applicants' stories. Even if those asylees can now remain in the U.S., this does not mean they are completely safe from retaliation from the governments whose persecution they have fled. Take, for example, Jamal Khashoggi. Though he was not an asylee, he was killed and dismembered in Istanbul, far away from the

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144. See *U.S. Relations With Saudi Arabia*, U.S. DEP'T OF STATE (Nov. 26, 2019), <https://www.state.gov/u-s-relations-with-saudi-arabia>; *U.S. Imports from Saudi Arabia of Crude Oil*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=p&s=mcrimussa2&f=m>.

145. Matt Schiavenza, *Why the U.S. Is Stuck With Saudi Arabia*, THE ATLANTIC (Jan. 24, 2015), <https://www.theatlantic.com/international/archive/2015/01/why-the-us-is-stuck-with-saudi-arabia/384805>.

146. See *U.S. Relations With Saudi Arabia*, *supra* note 143; see generally VISION 2030, <https://vision2030.gov.sa/en>.

147. See Benjamin Moore, *Has the U.S.-Saudi Relationship Reached Its Breaking Point?*, COLUM. J. INT'L AFFS. (2020), <https://jia.sipa.columbia.edu/online-articles/has-us-saudi-relationship-reached-its-breaking-point>.

148. See Jackie Northam, *Saudi Arabia Sought Dialogue With Iran. Then The U.S.-Iranian Conflict Escalated*, NPR (Jan. 9, 2020), <https://www.npr.org/2020/01/09/794519810/saudi-arabia-sought-dialogue-with-iran-then-the-u-s-iranian-conflict-escalated>; Jonathan Marcus, *Why Saudi Arabia and Iran are Bitter Rivals*, BBC (Sept. 16, 2019), <https://www.bbc.com/news/world-middle-east-42008809>; Jared Malsin, *U.S. Forces Return to Saudi Arabia to Deter Attacks by Iran*, WALL ST. J. (Feb. 26, 2020), <https://www.wsj.com/articles/u-s-forces-return-to-saudi-arabia-to-deter-attacks-by-iran-11582713002>.

149. Riechmann, *supra* note 89.

government he was criticizing.<sup>150</sup> Moreover, nothing precludes asylees who become U.S. citizens from returning to their home countries to visit loved ones or tend to any outstanding affairs. When that happens, they could potentially face retaliation from those countries' governments for exposing their human rights violations. Therefore, the anonymity of the information sharing is crucial both for the safety of the individuals fleeing persecution and for faith in the asylum system, which ensures applicants can confidently share accurate accounts of their experiences.

One recommendation is that only the information provided by asylees whose applications are *granted* should be communicated to the State Department. This serves two purposes: first, it ensures that if the confidentiality of the information is compromised, then at least the asylee has a legal status in the U.S. and can remain here safely; and second, it ensures that only information that has already been screened and deemed credible makes its way to the State Department.

## VII. CONCLUSION

There is no doubt that eliminating or decreasing U.S. foreign assistance to the aforementioned countries would not be easy, nor would that be met without consequence. As for the adjustments that *can* be made at little cost, the U.S. must take a hard look. As mentioned at the outset of this note, the U.S. and its role in the world will not always conform fully to its values. But it can certainly keep trying.

President Joseph R. Biden Jr. should instruct his incoming Secretary of State to form a cross-agency taskforce dedicated to establishing a communication mechanism between USCIS and DRL. The task force should determine how information provided to USCIS by asylum applicants can be communicated to the State Department efficiently and in a manner that preserves the anonymity of the asylees. When DRL officials receive this information, they should include it in the Leahy vetting for each country. The Secretary of State would then be required to consider that information before certifying assistance to the country or waiving certification. In reality, even when provided with this additional information, the Secretary will probably continue waiving certification for countries like Egypt and Saudi Arabia due to the aforementioned geopolitical considerations. But perhaps the next Secretary will not. Perhaps the one after will not. At the very least, the State Department should be able to use this information to further pressure their foreign counterparts to improve their human rights records. The national interests of the State Department and DHS are not identical, but they bear enough similarities to warrant better communication. It is crucial that the White House take this into strong consideration.

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150. See King, *supra* note 79; Harris, *supra* note 80.