


Walking the Talk:

2021 Blueprints for a Human Rights-Centered U.S. Foreign Policy





human rights *first*

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Acknowledgments

Human Rights First is a nonprofit, nonpartisan human rights advocacy and action organization based in Washington D.C., New York, and Los Angeles.

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Human Rights First challenges the United States of America to live up to its ideals. We believe American leadership is essential in the struggle for human dignity and the rule of law, and so we focus our advocacy on the U.S. government and other key actors able to leverage U.S. influence. When the U.S. government falters in its commitment to promote and protect human rights, we step in to demand reform, accountability, and justice.

When confronting American domestic, foreign, and national security policies that undermine respect for universal rights, the staff of Human Rights First focus not on making a point, but on making a difference. For over 40 years we've built bipartisan coalitions and partnered with frontline activists, lawyers, military leaders, and technologists to tackle issues that demand American leadership.

Human Rights First is led by President and Chief Executive Officer Mike Breen and Chief Operating Officer Nicole Elkon.

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This and other reports are available online at humanrightsfirst.org.

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Photo by Ted Eytan

Table of Contents and Key Outcomes

Introduction

American leadership on human rights has gone missing. As autocracies grow in strength and in number around the world, many have faced little, if any, pressure from the United States to curb their abuses. On the contrary, all too often in recent years what they've received from Washington has been a green light, at times in the form of a bad example.

During its time in office, the Trump administration has pursued policies grounded in cruelty and xenophobia, from "Muslim bans" and family separation to a multi-pronged assault on the right to seek asylum.[1] It has abandoned treaty obligations, disparaged international institutions, and derided America's closest democratic allies, all the while embracing many of the world's most odious dictators.[2] Its senior-most leaders have expressed open disdain for institutions foundational to functioning democracy and freedoms enshrined in both the U.S. Constitution and the Universal Declaration of Human Rights, such as a free press and an independent judiciary.[3] America's president has equivocated on white nationalism, employed racist language against African Americans and other racial minorities, and trafficked in antisemitic stereotypes.[4]

For the sake of every American and the millions abroad who continue to look to the United States as a beacon of hope, the presidential administration that assumes office in January 2021 should place high on its agenda a commitment to rebuild America's international stature.

Protests roiling America's streets in the wake of the killing by law enforcement of George Floyd and other Black Americans remain a stark reminder of the chasm between the nation's ideals and the lived experience of many of its people. From systemic inequities in criminal justice to brutal treatment of asylum seekers, human rights and equal treatment under law remain, for many within the United States, a promise unfulfilled. Administration policies that seek to diminish protestors' legitimate grievances have done little to improve matters, while the deployment of militarized federal agents to cities over the objections of local officials has exacerbated unrest.

At the same time, across the globe, autocratic leaders are expanding their power, eroding the rule of law, and obscuring the line between truth and fiction. For the first time since 2001, a majority of the world's population lives under non-democratic, rights-violating governments.[5] This trend, which encompasses hardened dictatorships and backsliding liberal democracies alike, threatens the lives and livelihoods of millions, while undermining the world's ability to meet today's foremost global challenges, from climate

1 *See* Natasha Ampriester, Olga Byrne, Human Rights First, *Punishing Refugees and Migrants: The Trump Administration's Misuse of Criminal Prosecutions* (Jan. 2018) available at https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf; *see also* Human Rights First, *Fact Sheet: Grant Rates Plummet as Trump Administration Dismantles U.S. Asylum System, Blocks and Deport Refugees* (Jun. 2020) available at https://www.humanrightsfirst.org/sites/default/files/AdministrationDismantlingUSAsylumSystem.pdf.

2 *See, e.g.*, Zachary B. Wolf, JoElla Carman, *Here are all the treaties and agreements Trump has abandoned*, CNN (Feb. 1, 2019) available at https://www.cnn.com/2019/02/01/politics/nuclear-treaty-trump/index.html; Michael Pompeo, *Remarks on the UN Human Rights Council*, (Jun. 19, 2018) available at https://www.state.gov/remarks-on-the-un-human-rights-council/; David M. Herszenhorn, *Trump's Europe strategy: Nothing*, POLITICO (Jun. 4, 2020) available at https://www.politico.eu/article/donald-trump-eu-strategy-nothing-g7-summit-angela-merkel/; Lia Savillo, *Trump Phone Call to Duterte Left White House Staff 'Genuinely Horrified'*, Vice (Oct. 16, 2019) available at https://www.vice.com/en_in/article/3kxj49/trump-duterte-phone-call-drug-war-human-rights.

3 *See, e.g.*, Committee to Protect Journalists, *The Trump Administration and the Media: Attacks on press credibility endanger US democracy and global press freedom* (Apr. 16, 2020) available at https://cpj.org/reports/2020/04/trump-media-attacks-credibility-leaks/; Freedom House, *United States: Attacks on Voice of America Undermine Press Freedom* (Jun. 16, 2020) available at https://freedomhouse.org/article/united-states-attacks-voice-america-undermine-press-freedom; Garrett Epps, *Trump Is at War With the Whole Idea of an Independent Judiciary*, Atlantic (Mar. 4, 2020) available at https://www.theatlantic.com/ideas/archive/2020/03/trump-independent-judiciary/607375/; Charlie Savage, *Jeff Sessions Dismisses Hawaii as 'an Island in the Pacific'*, New York Times (Apr. 20, 2017) available at https://www.nytimes.com/2017/04/20/us/politics/jeff-sessions-judge-hawaii-pacific-island.html.

4 *See, e.g.*, Rosie Gray, *Trump Defends White-Nationalist Protesters: 'Some Very Fine People on Both Sides,'* Atlantic (Aug. 15, 2017) available at https://www.theatlantic.com/politics/archive/2017/08/trump-defends-white-nationalist-protesters-some-very-fine-people-on-both-sides/537012/; Spencer Kimball, *Trump calls Baltimore a 'disgusting, rat and rodent infested mess' in attack on Rep. Elijah Cummings*, CNBC (Jul. 27, 2019) available at https://www.cnbc.com/2019/07/27/trump-calls-baltimore-a-disgusting-rat-and-rodent-infested-mess-in-attack-on-rep-elijah-cummings.html; Jonathan Lemire, Darlene Superville, *Trump: Any Jew voting Democratic is uninformed or disloyal*, AP News (Aug. 21, 2019) available at https://apnews.com/1bc3065eb2e4414289ef0ac1ac4ebaf7.

5 Varieties of Democracy (V-Dem) Institute, Democracy Report 2020, *Autocratization Surges—Resistance Grows*, p. 4 (Mar. 2020) available at https://www.v-dem.net/media/filer_public/de/39/de39af54-0bc5-4421-89ae-fb20dcc53dba/democracy_report.pdf.

change to economic inequality to mass migration.

American respect for human rights and the rule of law—at home and abroad—has never been more vital. For the sake of every American and the millions abroad who continue to look to the United States as a beacon of hope, the presidential administration that assumes office in January 2021 should place high on its agenda a commitment to rebuild America's international stature.

America needs to live up to its ideals and to its rhetoric. It should commit to lead the international community's efforts to better protect and promote human rights. And it should do this as it pursues the promise of equal rights for all at home.

Doing so will take significant effort. Today, those within the U.S. government charged with protecting and advancing human rights face a landscape of frayed alliances, a gutted and demoralized diplomatic corps, emboldened dictatorial regimes, and impassioned calls for justice concerning systemic racism, police brutality, and deep inequity. Returning to the pre-2017 status quo will be insufficient.

Make no mistake: a foreign policy more firmly grounded in respect for human rights greatly benefits American security and prosperity. In an age of resurgent authoritarianism, populism, and xenophobic nationalism, policies that advance human rights and democracy don't stand in opposition to America's core interests, they reflect America's core interests. Respect for human rights underpins America's most durable alliances, its most dependable trading relationships, and its most reliable partners in addressing common problems.

The crucial question, then, is this: how can the United States best contribute to a world that upholds the dignity of every individual?

This document—a series of blueprints intended to guide a presidential administration taking office in January 2021—seeks to answer key portions of that question.

Photo by Michael Quinn/National Park Service

In the chapters that follow, Human Rights First provides a detailed, step-by-step instruction manual for how to build a foreign policy centered on promoting human rights, protecting the most vulnerable, and stemming corruption.

Based on the work of Human Rights First's staff and in-depth consultations with experts across the human rights, anti-corruption, and national security communities, these blueprints provide concrete, implementable recommendations. Congress has a vital role to play in each policy area addressed within, and where applicable, we urge passage of specific legislation. Yet much of the work to strengthen America's human rights leadership will inevitably and appropriately be led by the incoming administration. Mindful of this reality, the blueprints focus primarily on actions to be taken by the executive branch.

Our detailed recommendations fall into the 10 thematic categories ranging from holding human rights violators accountable through improved targeted sanctions; to upholding America's commitment to protecting asylum seekers and other refugees; to reengaging with key multilateral bodies; to curtailing the sale of advanced surveillance technologies to authoritarian states; to sharpening America's anti-money laundering toolkit.

In sum, the chapters that follow provide policymakers with the specific, actionable information they need to advance the United States' interests, uphold American ideals, and promote the universal values on which international security and prosperity rely.

Photo by Mobilus In Mobili

They include:

1. Holding Human Rights Abusers and Corrupt Actors Accountable Through Global Magnitsky and Other Targeted Sanctions
2. Confronting Digital Authoritarianism by Stemming the Proliferation of AI-Enabled Surveillance Technology
3. Upholding Refugee Protection and Asylum at Home
4. Addressing Racial Injustice, Demilitarizing Law Enforcement, and Refocusing the Military on Defense
5. Ending Endless Wars
6. Closing Guantanamo
7. Minimizing and Accounting for Civilian Harm in U.S. Military Operations
8. Overhauling Security Sector Assistance
9. Curbing Corruption at Home and Abroad
10. Rejoining the U.N. Human Rights Council while Advancing Real Reform

The steps outlined in this body of work are both meaningful and achievable. Implementing the policy recommendations highlighted in the pages that follow will leave Americans safer, our alliances more durable, our economy stronger, and our support for all people around the world more certain.

Throughout its history, the United States has always served as an essential, if flawed, champion of individual liberty. Now is the time to learn from our mistakes, redouble our efforts, and meaningfully reform. Now is the time to walk the talk.

Holding Human Rights Abusers and Corrupt Actors Accountable Through Global Magnitsky and Other Targeted Sanctions

Photo by The Project on Middle East Democracy (POMED)

Introduction

Human rights violations and corruption destroy lives, erode rule of law, undermine international security, and inhibit economic development. Foreign government officials and their enablers who exploit public office for private gain and maintain power through repression should not expect impunity. Yet all too often, the world's most corrupt actors and egregious human rights violators are shielded from accountability.

Cognizant of this reality, the United States and a growing number of likeminded governments have recently enacted, or are in the process of enacting, laws that enable targeted sanctions against individuals, corporations, security force units, and other organizations found to be involved in human rights violations and corruption. The United States pioneered the use of global targeted sanctions to hold accountable human rights violators and corrupt officials by passing, in late 2016, the Global Magnitsky Human Rights Accountability Act ("Global Magnitsky Act"), which enables visa restrictions and asset freezes against designated individuals and entities anywhere in the world.[1] Today, the Global Magnitsky Act, as implemented by Executive Order 13818, is perhaps the most well-known example of an expanding roster of targeted sanctions programs intended to address human rights violations and corrupt acts.[2] Internationally, Canada, Estonia, Kosovo, Latvia, Lithuania, and the United Kingdom have each passed their own "Magnitsky-like" targeted human rights sanctions regimes, though these programs vary widely in scope and implementation.[3] Similar laws are under consideration in Australia, the European Union, and Japan.[4]

As a diplomatic tool, all sanctions programs are a means to achieve policy ends, not an end unto themselves. Yet when included as one element in a larger diplomatic strategy, targeted human rights and anti-corruption sanctions offer a powerful means to contest impunity, weaken criminal networks, signal support for international legal obligations and standards of behavior, and protect journalists, activists, and others at risk for their work.[5] Additionally, by penalizing those directly responsible for human rights abuses and corruption, as well as their enablers, targeted sanctions sidestep many of the downsides inherent in embargoes and other comprehensive sanctions programs.[6] When managed and messaged adroitly, targeted human rights and anti-corruption sanctions can isolate individual actors and networks within foreign governments without rupturing bilateral relations, while greatly lessening the risk of penalizing the innocent.[7]

Despite a poor record of upholding America's commitment to human rights more broadly, the Trump

1 The Global Magnitsky Human Rights Accountability Act, 22 U.S.C. § 2656 note (2016) available at https://www.humanrightsfirst.org/sites/default/files/GMA-Law.pdf.

2 Similar programs include the 2012 Sergei Magnitsky Act, so-called Section 7031(c) visa restrictions (*see infra* note 5), Presidential Proclamation 7750 of 2004, and country-specific targeted sanctions programs intended to address human rights, democracy, and rule of law. Such programs are herein jointly referred to as U.S. targeted human rights and anti-corruption sanctions.

3 The three Baltic states' programs, though global in scope, focus on human rights abuses by Russian nationals, and are limited in penalty to travel ineligibilities. Canada's law, which includes both human rights violations and corruption, and includes both visa ineligibilities and asset blocking, is titled the Justice for Victims of Corrupt Foreign Officials Act (S.C., c. 21) (2017), and is available at https://laws.justice.gc.ca/eng/acts/J-2.3/. The United Kingdom's law is limited in scope to human rights violations, and includes both visa ineligibilities and asset blocking. It is titled the Global Human Rights Sanctions Regulations 2020, SI 2020/680, art. 55(3), Sanctions and Anti-Money Laundering Act, and is available at https://www.legislation.gov.uk/uksi/2020/680/made. Note that Kosovo has passed a Global Magnitsky Act, but the act has yet to be implemented by the new government. Xhorxhina Bami, *Outgoing Kosovo Govt Adopts Magnitsky Act*, Balkan Insight (Jan. 29, 2020) available at https://balkaninsight.com/2020/01/29/kosovo-to-adapt-magnitsky-act/.

4 *See* Australian Lawyers for Human Rights, *Inquiry into whether Australia should examine the use of targeted sanctions to address human rights abuses* (Feb. 7, 2020) available at https://www.aph.gov.au/DocumentStore.ashx?id=866bce8c-f689-44ed-9c42-e502cdf26aae&subId=678469 (recommending the Australian Parliament adopt a US-style Global Magnitsky law); Alexander Brzozowski, *EU ministers break ground on 'Global Magnitsky Act'*, EurActiv (Dec. 10, 2019) available at https://www.euractiv.com/section/justice-home-affairs/news/eu-ministers-break-ground-on-european-magnitsky-act/ (describing foreign ministers launching 'preparatory work' to enact a US-style Global Magnitsky sanctions regime); Narumi Ota, *Japan eyes bill to sanction human rights abuses in Hong Kong*, Asahi Shimbun (Jul. 30, 2020) available at http://www.asahi.com/ajw/articles/13591720 (detailing the formation of a group of lawmakers and activists designed to respond to human rights abuses in Hong Kong, and considering a bill that would allow for targeted sanctions against those who have committed human rights abuses).

5 In addition to the Global Magnitsky Act, the U.S. government has made significant use in recent years of visa restrictions authorized through Section 7031(c) of the annual appropriations bill for the Department of State, Foreign Operations, and Related Programs (SFOPS). For more information, see Congressional Research Service, R46362, Foreign Officials Publicly Designated by the U.S. Department of State on Corruption or Human Rights Grounds: A Chronology (May 18, 2020) available at https://crsreports.congress.gov/product/pdf/R/R46362. A comprehensive list of designations made under Section 7031(c) authority can be found on Human Rights First's targeted sanctions resources page, available at https://www.humanrightsfirst.org/topics/global-magnitsky/resources.

6 *See, e.g.,* Richard Haas, Brookings Institution, *Economic Sanctions: Too Much of a Bad Thing* (Jun. 1, 1998) available at https://www.brookings.edu/research/economic-sanctions-too-much-of-a-bad-thing/ (noting the adverse side effects of broad, non-targeted sanctions on innocent civilians); *see also* United Nations Office of the High Commissioner for Human Rights, *UN Experts: Sanctions proving deadly during pandemic, humanitarian exemptions not working* (Aug. 7, 2020) available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26155&LangID=E.

7 Collin Anderson et al., Enough Project, ***U.S. Sanctions Regimes & Human Rights Accountability Strategies*** (Jun. 2018) available at https://enoughproject.org/wp-content/uploads/2018/06/ToolsofTrade_Enough_ICAR_June2018.pdf.

administration has implemented targeted human rights and anti-corruption sanctions robustly. In December 2017, it significantly expanded the Global Magnitsky Act's scope and potential utility through the issuance of Executive Order 13818.[8] At the same time, it designated 52 serious human rights abusers and corrupt actors in countries ranging from China to Myanmar to Nicaragua to the Democratic Republic of the Congo. As of mid-September 2020, the U.S. government has sanctioned 214 individuals and entities, from 27 countries, under the Global Magnitsky program; 127 for corruption, 72 for human rights abuses, and 15 on both grounds.[9] Many of these designations were made in consultation with, or based on inputs from, non-governmental organizations specializing in documenting human rights violations and corrupt activity. Noteworthy designations include those against persons involved in atrocities perpetrated against the Rohingya in Myanmar,[10] corrupt mining contracts in the DRC,[11] the assassination of Jamal Khashoggi by Saudi government agents,[12] the Odebrecht bribery and money laundering scandal,[13] and the ethnic cleansing of Uyghurs and other minority groups in the Xinjiang region of China.[14] These designations are complemented by new, country-specific targeted sanctions programs, such as those addressing the situations in Hong Kong and Nicaragua, as well as the robust use of Section 7031(c) visa restrictions.

[I]n keeping with its broader approach to human rights, the Trump administration frequently implemented sanctions in a highly selective manner.

Notwithstanding this activity, the administration's implementation of targeted human rights and anti-corruption sanctions has been met with criticism in certain cases. Most notably, although the administration sanctioned 17 Saudi government officials and agents for the premeditated killing of Saudi dissident and *Washington Post* columnist Jamal Khashoggi, it declined to sanction Saudi Crown Prince Mohammed bin Salman, despite credible reports from U.S. intelligence agencies that the Crown Prince likely ordered the killing.[15] Furthermore, in keeping with its broader approach to human rights, the Trump administration frequently implemented sanctions in a highly selective manner. The administration declined to impose targeted sanctions against, and in some instances openly supported, foreign government officials credibly documented to have systematically engaged in sanctionable activities. For example, the administration took no action to designate the architects of kleptocratic systems and brutal repression in countries including Azerbaijan, Bahrain, Egypt, the Philippines, Tajikistan, the United Arab Emirates, and Uzbekistan, among others. This inaction endured despite overwhelming, credible documentation of systematic rights violations and theft that in many instances threatened U.S. interests on matters ranging from counterterrorism to energy security.[16]

In some instances, sanctions decisions appear to have also been influenced by political considerations. In mid-August 2018, the Trump administration sanctioned two senior Turkish officials for what it described

8 For a detailed explanation of EO 13818, see Rob Berschinski, *Trump Administration Notches a Serious Human Rights Win.* No, really, Just Security (Jan. 10, 2018) available at https://www.justsecurity.org/50846/trump-administration-notches-human-rights-win-no-really/.

9 All figures provided are current as of September 15, 2020. See Human Rights First, Global Magnitsky Designations, available at https://www.humanrightsfirst.org/sites/default/files/200113-USG-GMA-Designations.xlsx.

10 U.S. Department of the Treasury, *United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe* (Dec. 21, 2017) available at https://home.treasury.gov/news/press-releases/sm0243; U.S. Department of the Treasury, *Treasury Sanctions Commanders and Units of the Burmese Security Forces for Serious Human Rights Abuses* (Aug. 17, 2018) available at https://home.treasury.gov/news/press-releases/sm460; U.S. Department of the Treasury, *Treasury Sanctions Individuals for Roles in Atrocities and Other Abuses* (Dec. 10, 2019) available at https://home.treasury.gov/news/press-releases/sm852.

11 *United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe, supra* note 10; U.S. Department of Treasury, *Treasury Sanctions Fourteen Entities Affiliated with Corrupt Businessman Dan Gertler Under Global Magnitsky* (Jun. 15, 2018) available at https://home.treasury.gov/news/press-releases/sm0417.

12 U.S. Department of the Treasury, *Treasury Sanctions 17 Individuals for Their Roles in the Killing of Jamal Khashoggi* (Nov. 15, 2018) available at https://home.treasury.gov/news/press-releases/sm547.

13 *United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe, supra* note 10.

14 U.S. Department of the Treasury, *Treasury Sanctions Chinese Entity and Officials Pursuant to Global Magnitsky Human Rights Accountability Act* (Jul. 9, 2020) available at https://home.treasury.gov/news/press-releases/sm1055.

15 ***See supra*** note 12; Shane Harris, Greg Miller, Josh Dawsey, *CIA concludes Saudi crown prince ordered Jamal Khashoggi's assassination*, Washington Post (Nov. 16, 2018) available at 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.

16 For example, the administration refrained from sanctioning Egyptian officials central to that country's program of widespread torture, despite documentation of the links between the treatment of detainees and ISIS radicalization within Egypt's prison system. *See, e.g.,* Human Rights First, *Like a Fire in a Forest: ISIS Recruitment in Egypt's Prisons* (Feb. 2019) available at https://www.humanrightsfirst.org/sites/default/files/Like-a-Fire-in-a-Forest.pdf.

as their role in the unlawful detention of an American evangelical pastor.[17] Shortly thereafter, Turkish leaders released the pastor, at which point the administration lifted the sanctions.[18] The move, while illustrating the power of Global Magnitsky sanctions to achieve discrete U.S. foreign policy ends and successfully winning the welcome repatriation of a U.S. citizen, attracted criticism for ignoring other, widespread human rights abuses in Turkey—including the ongoing detention of Turkish-American dual citizens—while providing a marketable policy victory likely geared at President Trump's evangelical base.[19]

The Trump administration's mixed record concerning targeted human rights and anti-corruption sanctions leaves room for improvement. Most importantly, Global Magnitsky and similar human rights sanctions should be applied objectively and in a systematic manner. Further action should also be taken to bolster the credibility, robustness, and procedural safeguards of the sanctions regimes to assure their long-term viability. Thus, an administration that assumes office in January 2021 could improve upon the U.S. government's record to date through a series of executive actions and Congressional engagement in five key areas: growing capacity; minimizing charges of hypocrisy; ameliorating due process concerns; multilateralizing designations; and maintaining and codifying improvements.

Recommendations

✓ Maintain, clarify, and codify EO 13818's improvements to the Global Magnitsky Act

Despite being less well-known than the law it rests upon and implements, Executive Order 13818 significantly and beneficially expanded the scope, reach, and potential power of the Global Magnitsky Act.[20] In comparison with the Act itself, EO 13818 broadens the range of crimes subject to potential sanctions, eliminates key barriers to the imposition of sanctions related to the status of victims, and vastly increases the number of perpetrators who can be held at risk of sanction through so-called status-based targeting. As the vehicle by which all designations commonly referred to as "Global Magnitsky" sanctions are effectuated, EO

17 Adam Goldman, Gardiner Harris, *U.S. Imposes Sanctions on Turkish Officials Over Detained American Pastor,* New York Times (Aug. 1, 2018) available at https://www.nytimes.com/2018/08/01/world/europe/us-sanctions-turkey-pastor.html.

18 U.S. Department of the Treasury, *Global Magnitsky Designations Removals* (Nov. 2, 2018) available at https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20181102.

19 Rob Berschinski, *U.S. Sanctions Against Turkey Undercut a Key Human Rights Tool*, Just Security (Aug. 6, 2018) available at https://www.justsecurity.org/60039/u-s-sanctions-turkey-undercut-key-human-rights-tool/.

20 Executive Order 13,818, *supra* note 8. For a detailed analysis of the ways in which EO 13818 expanded upon and improves the Global Magnitsky Act, see Rob Berschinski, *Trump's surreptitious move against foreign human rights abusers*, Newsweek (Jan. 10, 2018) available at https://www.newsweek.com/trumps-surreptitious-move-against-foreign-human-rights-abusers-777186.

Photo by The Project on Middle East Democracy (POMED)

13818 has proven to be an important and flexible tool in America's human rights toolkit. Under any future administration, it should be maintained.

In so doing, the next administration should seek to clarify key terms. Among its other positive adaptations of the Global Magnitsky Act, EO 13818 altered the standard for sanctionable actions from "gross violations of internationally recognized human rights" (a term defined under U.S. law) to "serious human rights abuses" (a legally undefined concept). Beyond underscoring that Global Magnitsky sanctions may be applied against non-state actors in addition to state officials, the change in standard from "gross violations" to "abuses" remains vague and poorly understood. An incoming administration should therefore seek to remedy any uncertainty concerning this key definition. Doing so may improve the Global Magnitsky program's deterrent effect, while also resulting in more relevant sanctions recommendations from civil society.

Finally, recognizing that the Global Magnitsky Act is due to sunset (i.e., expire) in December 2022, a new administration should work with Congress to pass a reauthorization that incorporates EO 13818's beneficial elements.

✓ Minimize charges of selectivity and hypocrisy

As highly coercive measures, it is imperative to U.S. foreign policy that the government's human rights and anti-corruption sanctions be viewed as legitimate, credible, and fairly administered. The key to maintaining widespread support for sanctions, therefore, is for the U.S. government to minimize selectivity in its application of the tool, in line with the Global Magnitsky Act's rationale as reflected in EO 13818:

Human rights abuse and corruption undermine the values that form an essential foundation of stable, secure, and functioning societies; have devastating impacts on individuals; weaken democratic institutions; degrade the rule of law; perpetuate violent conflicts; facilitate the activities of dangerous persons; and undermine economic markets.[21]

The insights reflected in EO 13818 remain true no matter where sanctionable activity is found. Yet the tendency within the executive branch to value perceived stability and access over any action deemed likely to upset bilateral relations has remained difficult to dislodge, despite obvious harms to American credibility. Such a perception has endured despite mounting evidence that targeted sanctions can be beneficially applied to foreign nationals of countries with which the United States maintains positive relations.[22]

To decrease selectivity in application, therefore, the Secretary of State should establish a standing process by which representatives of the department's regional bureaus routinely coordinate with staff from the bureaus for Economic and Business Affairs (EB), Democracy, Human Rights, and Labor (DRL), and International Narcotics and Law Enforcement (INL) to jointly develop a human rights and anti-corruption targeting list informed by the State Department's annual Country Reports on Human Rights Practices and reporting from credible human rights and anti-corruption NGOs. Such a list should include inputs on meaningful targets supplied by U.S. diplomatic posts, each of which should be required by the Secretary to nominate potential targets on a recurring basis.[23]

21 Executive Order 13,818, *supra* note 8.

22 Examples include Global Magnitsky sanctions designating nationals of Israel, Mexico, and Saudi Arabia, among other close U.S. partners.

23 While in some cases it may be appropriate to exclude from this process embassies operating in countries with criminal justice systems functioning under rule of law, history has shown that actors in such countries may have transnational linkages to corrupt and/or human rights-abusing actors (such as through facilitation networks). In these instances, targeted sanctions may serve as a valuable accountability tool when implemented in close coordination with the host government.

Photo by Dmitry Rozhkov

✓ Multilateralize sanctions designations through information-sharing and coordination with key partners

Sanctions are most effective, and seen as most legitimate, when implemented multilaterally. As noted above, at present, Canada, the UK, the three Baltic states, and Kosovo each possess a rough equivalent to the Global Magnitsky Act, while the EU, Australia, and Japan, among other jurisdictions, are in varying stages of considering adopting similar laws.[24] In order to maximize the potential for coalition-based multilateral sanctions designations in the future, the next administration should build on efforts undertaken to date to routinize information sharing and sanctions-related decision-making.

With this goal in mind, the Secretaries of Treasury and State should announce an intention to create an information-sharing arrangement with Canada, the UK, and other like-minded jurisdictions as their "Magnitsky-like" laws are adopted, with the long-term goal of establishing a semi-permanent human rights and anti-corruption information fusion, targeting, and enforcement cell.[25] Leadership of this effort should be vested with a new office of the Coordinator for Sanctions Policy, in coordination with relevant regional and functional bureaus (see final recommendation below). Under such a model, likeminded governments could agree to share pre-decisional and enforcement-related information and analysis in accordance with pre-determined criteria, once certain notification thresholds had been crossed. Recognizing that the United States' tally of applicable designations under the Global Magnitsky program and related authorities far exceeds those of other countries, such an effort would also work to standardize past designations where applicable.

✓ Ameliorate due process concerns by enacting a more robust administrative review and appeals procedure

At present, the administrative process provided by the Treasury Department's Office of Global Targeting to persons seeking to challenge designations issued against them is not well understood by external audiences and arguably insufficient, leaving the U.S. government open to criticism that it is able to impose significant penalties with little meaningful opportunity for recourse. In keeping with the section above, improvements can and should be made to targeted sanctions' administrative appeals processes to minimize any risk—or even perception—of unjust implementation.

The next administration should therefore issue updated guidelines and processes for how a designated individual could seek removal from the Specially Designated Nationals and Blocked Persons (SDN) list.[26] Such reforms should include:

- **Providing more information to the public at the time of initial designation.** Under current practice, targeted sanctions designations are published as updates to the SDN list and announced via a press release issued by the Treasury Department. These statements generally provide a brief overview of the behavior that gave rise to the sanction, but do not provide an explanation of the actions that the U.S. government wishes to see the designated individual take so as to become eligible for removal from the SDN list. Notably, in the sole Global Magnitsky sanction whereby the Treasury Department used its designating press release to clearly signal the U.S. government's desired behavior modification, the desired change was made rapidly.[27] Subsequent to this action, the U.S. government promptly lifted sanctions from the designated persons.[28] As this single example demonstrates, transparency about the desired outcomes of targeted sanctions provides the sanctioned individual with a clear framework

24 ***See supra*** notes 3, 4, and accompanying text.

25 Differences in legal authorities will likely preclude fully coordinated action across national jurisdictions in some instances. Notwithstanding this fact, information sharing in the context of targeted human rights and anti-corruption sanctions is likely to involve fewer hurdles than similar programs focused on antiterrorism and non-proliferation, given that much of the information used to target human rights abusers and corrupt actors is open-source and thus unclassified.

26 For OFAC's current guidance on filing an appeal to remove sanctions, see *U.S. Department of the Treasury, Filing a Petition for Removal from an OFAC List*, available at https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-list-sdn-list/filing-a-petition-for-removal-from-an-ofac-list.

27 U.S. Department of the Treasury, *Treasury Sanctions Turkish Officials with Leading Roles in Unjust Detention of U.S. Pastor Andrew Brunson* (Aug. 1, 2018) available at https://home.treasury.gov/news/press-releases/sm453.

28 *Global Magnitsky Designations Removals, supra* note 18.

within which to consider modifications to his or her behavior, as well as any potential appeal on the merits of the designation. Incidentally, such guidance would also be of value to human rights and anti-corruption advocates, who could better monitor and assess the post-designation activities of sanctioned persons.

- **Making the administrative appeals process more robust.** All designated persons should be guaranteed a fair, clearly delineated, and well-understood opportunity for appeal. To do so, the Office of Global Targeting should initiate a review of best practices in administrative appeals procedures adopted by other government entities, and expand its processes accordingly. An example for consideration is to offer at least one in-person hearing to the designated individual, their appointed counsel, or both, to present their case to adjudicating officials. Such a meeting could be arranged by granting an allowance for the designated individual to appear in person at a U.S. diplomatic facility in their home country, or by allowing designated counsel to appear at government offices in Washington D.C. This meeting could be followed by a mandatory formal adjudication letter that clearly states the administration's position regarding the case following review of any information shared in the hearing, to include the provision of justification for either maintaining or lifting sanctions.

[T]ransparency about the desired outcomes of targeted sanctions provides the sanctioned individual with a clear framework within which to consider modifications to his or her behavior, as well as any potential appeal on the merits of the designation.

- **Instituting regular review.** Finally, any future administration should maintain current guidelines regarding accepting unlimited written appeals, and make an explicit commitment to periodic mandatory review of each designation (e.g., a designation is reviewed once every three years irrespective of any petition or request for review). Unlimited appeals and regular review guarantee sufficient opportunity for re-adjudication as circumstances change, helping better ensure accurate and fair designations that strengthen the U.S. sanctions regime as a whole.

✓ Grow capacity and coordination at State and Treasury

The U.S. government's ability to implement targeted human rights and anti-corruption sanctions is limited by staff and coordination constraints within the Treasury Department's Office of Foreign Assets Control (OFAC) and relevant bureaus within the State Department.[29] Over the past four years, both OFAC and the State Department have experienced staffing shortfalls linked to low morale, high workload, and significant private-sector demand.[30] In response to these shortfalls, in 2019 and 2020, Congress specifically appropriated funds to the Treasury Department to support targeted human rights and anti-corruption sanctions work.[31] This funding increase resulted in the Human Rights and Corruption Team at OFAC increasing in size from 6 to 11 officials, which has already led to perceptibly higher levels of critical civil society engagement. Even with this increase, however, the OFAC team is still limited to just two investigators each for Africa, Asia, Europe, and MENA, and just one for the entire Western Hemisphere—insufficient numbers to provide effective coverage of the abuses occurring in those regions and beyond.

As part of a larger effort to rebuild the diplomatic infrastructure weakened since 2017, the Secretaries

29 Executive Order 13818 authorizes the Secretary of the Treasury to act in consultation with the Secretary of State. Lead offices within the State Department for implementation of Global Magnitsky Act and several similar sanctions programs include the bureau for Economic and Business Affairs (EB), the bureau for Democracy, Human Rights, and Labor (DRL), and the bureau for International Narcotics and Law Enforcement (INL).

30 *See, e.g.,* Saleha Mohsin, T*rump's Sanctions Staff Defects as U.S. Expands Economic War,* Bloomberg (Mar. 22, 2019) available at https://www.bloomberg.com/news/articles/2019-03-22/trump-sanctions-staff-defects-even-as-u-s-expands-economic-war; Bethany Milton, *My Final Break with the Trump State Department,* New York Times (Aug. 26, 2019) available at https://www.nytimes.com/2019/08/26/opinion/trump-state-department.html.

31 H.R. Report No. 115-792 (2019) available at https://www.congress.gov/congressional-report/115th-congress/house-report/792/1; U.S. Government Accountability Office, GAO-20-324, *Economic Sanctions: Treasury and State Have Received Increased Resources for Sanctions Implementation but Face Hiring Challenges* (Mar. 2020) available at https://www.gao.gov/assets/710/705265.pdf.

of State and Treasury should work closely with Congress to reverse staffing shortfalls that have limited the government's ability to implement and robustly enforce human rights and anti-corruption sanctions. Through its annual budget request, the incoming administration should ask that Congress increase funding directed toward OFAC and relevant State Department bureaus for this work.

At the same time, the Secretary of State should reestablish the office of the Coordinator for Sanctions Policy, to be headed by an official with the rank of ambassador. This senior official should report directly to the Secretary. He or she should be tasked with coordinating sanctions actions across State's regional and functional bureaus, and integrating such actions with broader bilateral and multilateral diplomatic strategies. Likewise, regional bureaus should consider designating senior-level leads for sanctions integration, in coordination with applicable teams in the bureaus for Economic and Business Affairs (EB), Democracy, Human Rights, and Labor (DRL), and International Narcotics and Law Enforcement (INL).

Photo by Mattia Panciroli

2

Confronting Digital Authoritarianism By Stemming the Proliferation of AI-Enabled Surveillance Technology

Introduction

One of the most significant threats to the enjoyment of human rights in the world today is the proliferation of new and emerging surveillance technologies, including those that incorporate artificial intelligence (AI). AI-enabled surveillance technologies powered by big data analytics provide governments with the ability to identify, track, and monitor millions of individuals at a time.[1] By pairing complex computer algorithms with more traditional tools of surveillance, such as video cameras and microphones, AI-enhanced systems of surveillance facilitate the collection of massive quantities of personally identifiable information and enable governments to use that information to engage in the automated real-time monitoring of entire civilian populations.[2] These omnipresent systems of surveillance allow governments to repress political dissent, discriminate against ethnic and religious minorities, and violate the general privacy rights of their citizens. So far, the United States government has failed to adopt policies sufficient to confront potential abuse of AI-enabled surveillance tools by domestic law enforcement agencies, or the proliferation of such technologies that is fueling the rise of digital authoritarianism.[3] In order to minimize the long-term negative impact that these technologies can have on democracy, the rule of law, and the enjoyment of human rights around the world, the next administration must prioritize the implementation of a whole-of-government approach to stopping their proliferation and abuse.

[T]he United States government has failed to adopt policies sufficient to confront potential abuse of AI-enabled surveillance tools by domestic law enforcement agencies, or the proliferation of such technologies that is fueling the rise of digital authoritarianism.

AI-enabled surveillance technology is already directly contributing to the violation of human rights. Authoritarian regimes, including the Russian and Chinese governments, currently use or are in the process of establishing AI-enabled biometric data collection technologies, such as the hardware and software behind facial and voice recognition systems, to build systems of mass surveillance that can track and catalog the movements and activities of millions of people at a time.[4] Technologies that rapidly collect, capture, and enable the genetic profiling of ethnic groups via their DNA may lead to abuses heretofore unseen. Other states, such as the United Arab Emirates and Uganda, are employing AI-enabled surveillance technology in more limited ways, including by harnessing the technology to enhance the efficacy of pre-existing policies of political repression.[5] In such cases, the aggregation and exploitation of personal data is being used to silence political opposition, stifle free expression and the free exercise of religion, target minority populations, and eviscerate any semblance of privacy that previously existed.

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1 Paul Mozur, *One Month, 500,000 Face Scans: How China Is Using A.I. to Profile a Minority*, New York Times (Apr. 14, 2019) available at https://www.nytimes.com/2019/04/14/technology/china-surveillance-artificial-intelligence-racial-profiling.html.

2 Jay Stanley, American Civil Liberties Union (ACLU), *The Dawn of Robot Surveillance: AI, Video Analytics, and Privacy*, p. 5 (2019) available at https://www.aclu.org/sites/default/files/field_document/061119-robot_surveillance.pdf.

3 In 2018, the Department of Commerce acknowledged the lack of export restrictions on certain "new and emerging" technologies, including enhanced surveillance technologies, and signaled that new restrictions may be imposed; however, as of this writing, no such restrictions have been introduced. *See* Review of Controls for Certain Emerging Technologies, 83 Fed. Reg. 58201 (Nov. 19, 2018) (to be codified at 15 C.F.R. § 744) available at https://www.federalregister.gov/documents/2018/11/19/2018-25221/review-of-controls-for-certain-emerging-technologies. The Department of State has similarly demonstrated concern over the unregulated export of surveillance technology but has also failed to take any concrete action beyond the publishing of a non-binding guidance document intended to help exporters comply with the U.N. Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises. *See* U.S. Department of State, *Draft U.S. Government Guidance for the Export of Hardware, Software and Technology with Surveillance Capabilities and/or Parts/Know-How* (Oct. 29, 2019) available at https://www.eff.org/files/2019/10/29/draft-guidance-for-the-export-of-hardware-software-and-technology-with-surveillance-capabilities.pdf.

4 The Chinese government has used biometric data collection technology to track and catalog the movement of the country's minority Uyghur population. *See supra* note 1. The Russian government is currently building a nation-wide facial recognition network that will soon rival China's network in size. *See* Felix Light, *Russia is building one of the world's largest facial recognition networks*, Coda (Nov. 8, 2019) available at https://codastory.com/authoritarian-tech/russia-facial-recognition-networks/.

5 National police in the UAE, a country with the highest rate of political prisoners per capita in the world, have been working toward the creation of a nation-wide facial recognition network that will undoubtedly be used to target the regime's political opponents. Megha Rajagopalan, *Facial Recognition Technology Is Facing A Huge Backlash In The US. But Some Of The World's Biggest Tech Companies Are Trying To Sell It In The Gulf.*, BuzzFeed (May 29, 2019) available at https://www.buzzfeednews.com/article/meghara/dubai-facial-recognition-technology-ibm-huawei-hikvision. In Uganda, shortly after Huawei technicians helped government officials spy on the government's political opponents, the Ugandan government entered into a $126 million agreement with Huawei to purchase the company's AI-powered facial recognition system. Steven Feldstein, Carnegie Endowment for International Peace, *The Global Expansion of AI Surveillance*, p. 14 (Sep. 2019) available at https://carnegieendowment.org/files/WP-Feldstein-AISurveillance_final1.pdf.

The speed with which this technology is proliferating amongst the world's worst human rights violators is staggering. Since the Arab Spring, popular protests have eclipsed military coups as the principle threat to authoritarian and autocratic regimes.[6] Recognizing this, autocrats and authoritarians have further concentrated their domestic policing efforts on repressing the civil liberties of their citizens.[7] According to experts at the Carnegie Endowment for International Peace, as of 2019, AI-enabled surveillance technology has been incorporated into these systems of political repression in 37 percent of "closed autocratic states" and 41 percent of countries identified as "electoral autocratic/competitive autocratic states."[8]

As a critical element in curtailing the spread of AI-powered human rights abuse, the next administration should adopt policies aimed at preventing the further proliferation of AI-enabled surveillance and biometric data collection technologies to countries where these technologies are likely to be abused. The U.S. is far from the world's only proliferator of such technologies to repressive regimes. China, a government that makes no claim to upholding individual rights, is arguably the world's leading supplier of AI-powered surveillance technologies to both repressive and non-repressive governments.[9] Companies based in France, Germany, and Japan also export similar technologies.[10] As a world leader in the development and export of cutting-edge technology, and a nation that benefits strategically from the maintenance of rights-respecting democratic governance abroad, the United States maintains a special interest in limiting the extent to which its products can be used for repressive purposes.

The first step in this effort should focus on preventing companies and private institutions, both inside and outside the United States, from selling these technologies to known human rights abusers. Currently, U.S. agencies do not

6 Andrea Kendall-Taylor, Erica Frantz, Joseph Wright, *The Digital Dictators: How Technology Strengthens Autocracy*, Foreign Affairs (Mar. 2020) available at https://www.foreignaffairs.com/articles/china/2020-02-06/digital-dictators.

7 As popular protests have become the primary threat to authoritarian regimes, there has been a global rise in the repression of civil liberties. *Id.*

8 Feldstein, *supra* note 5, at p. 2.

9 *Id.* at p. 8-9.

10 *Id.* at p. 8.

Photo by Studio Incendo

effectively use existing authorities to regulate these types of items and services, and several U.S. technology companies have sold such software to governments with well-established records of systemic gross violations of human rights, including China, Egypt, Russia, Saudi Arabia, Singapore, Turkey, the UAE, and the Philippines.[11] U.S.-based financial institutions have also played a role in the proliferation of this technology by investing in foreign companies that develop and sell AI-enabled surveillance products to authoritarian regimes.[12] On the international stage, the U.S. government has failed to use its geopolitical influence to push the international community to modernize and amend multilateral export control regimes that could limit the global spread of AI-enabled surveillance technologies.

In order to remedy these flaws in U.S. policy, the next administration should use existing executive authorities to prevent private U.S. entities from contributing to the spread of AI-enabled surveillance technologies used for repressive purposes and establish an international consensus regarding surveillance-related export restrictions. To achieve these goals, the next administration should begin by establishing domestic "end-use" and/or "end-user" export controls on the specific technologies used in AI-enhanced systems of mass surveillance, such as the hardware and software that facilitates the collection and analysis of surveillance images and biometric data. Properly crafted, such export restrictions could help prevent U.S. technology from facilitating human rights abuses while allowing U.S. companies to remain competitive in the global AI market. Additionally, in order to address the flow of American financing and intellectual property to the foreign firms that are helping build authoritarian systems of surveillance, the next administration should use targeted human rights sanctions to prevent such firms from doing business with U.S. persons or entities. With these domestic measures in place, the next administration should turn its attention toward the inclusion of AI-enhanced surveillance-related technologies on multilateral export control lists, such as the Dual Use List of the Wassenaar Arrangement.

To prevent U.S. firms from actively facilitating human rights abuses abroad, the next administration should impose restrictions on the export of AI-enabled surveillance technology under the Export Controls Act of 2018.

Recommendations

✓ Impose licensing requirements on the export of U.S. origin AI surveillance and biometric data collection technologies by amending the Export Administration Regulations

To prevent U.S. firms from actively facilitating human rights abuses abroad, the next administration should impose restrictions on the export of AI-enabled surveillance technology under the Export Controls Act of 2018 (ECA).[13] The Department of Commerce regulates the export of so-called "dual-use" items, products that have both a civilian and military or police application, through the Export Administration Regulations

11 *Id.* at p. 25-28; Sui-Lee Wee, *China Is Collecting DNA From Tens of Millions of Men and Boys*, Using U.S. Equipment, New York Times (Jun. 17, 2020) available at https://www.nytimes.com/2020/06/17/world/asia/China-DNA-surveillance.html?referringSource=articleShare; Emile Dirks, Dr. James Leibold, International Cyber Policy Centre, Australian Strategic Policy Institute (ASPI), *Genomic Surveillance: Inside China's DNA dragnet* (Jun. 2020) available at https://www.aspi.org.au/report/genomic-surveillance.

12 During a 2018 fundraising round for the Chinese company SenseTime, the principle architect of China's oppressive AI-powered surveillance network in Xinjiang, some of the largest investors were American firms, including Fidelity International, Qualcomm, and Silver Lake. *See* Jon Russell, *China's SenseTime, the world's highest-valued AI startup, closes $620M follow-on round*, TechCrunch (May 30, 2018) available at https://techcrunch.com/2018/05/30/even-more-money-for-senstime-ai-china/. Additionally, U.S.-based private equity and venture capital firms have funneled millions of dollars of their clients' money into foreign companies that are selling enhanced surveillance technology to human rights abusers. Ryan Mac, Rosalind Adams, Megha Rajagopalan, *US Universities And Retirees Are Funding The Technology Behind China's Surveillance State*, BuzzFeed (last updated Jun. 5, 2019) available at https://www.buzzfeednews.com/article/ryanmac/us-money-funding-facial-recognition-sensetime-megvii.

13 The Human Rights Committee, the treaty body that interprets the obligations of states parties to the International Covenant on Civil and Political Rights (ICCPR), has stated that Article 2(1) of the treaty requires state parties to take affirmative steps to prevent both public and private actors from violating the rights and obligations of the ICCPR. *See* U.N. Human Rights Committee, *General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 8, U.N. Doc CCPR/C/21/Rev.1/Add.13 (May 26, 2004) available at https://undocs.org/CCPR/C/21/Rev.1/Add.13.

(EAR).[14] Items that are controlled for national security or foreign policy purposes are listed under the Commerce Control List (CCL) of the EAR.[15] One of the primary "foreign policy" considerations that can lead to the inclusion of an item on the CCL is the "protection of human rights and the promotion of democracy."[16] In the 2019 National Defense Authorization Act (NDAA), Congress specifically authorized the executive branch to impose new regulations on the export of "emerging and foundational technology."[17] In November 2018, the Department of Commerce published an advanced notice of proposed rulemaking that signaled the Department's intention to promulgate new rules under the CCL for the export of various emerging technologies, including technologies related to "advanced surveillance."[18] Since this announcement, the Department of Commerce has refrained from placing any new restrictions on the export of AI-powered surveillance technologies. The Department of Commerce should use existing regulatory authorities to restrict the export of AI-enabled surveillance technologies to countries where human rights abuse is likely to occur.

- In order to immediately impose restrictions on the export of AI-enabled surveillance technology, the next administration should promulgate an interim final rule pursuant to § 742.6(a)(7) of the EAR and temporarily classify certain AI-enabled surveillance technologies under the Export Control Classification Number (ECCN) 0Y521 series.[19] By classifying AI surveillance technology under the 0Y521 series of the ECCNs, the Department of Commerce will have the authority to immediately impose licensing requirements on the export of such technology for up to one year.[20] Export licenses for items classified under the 0Y521 series are reviewed on a case-by-case basis.[21]

14 Congressional Research Service, R41916, *The U.S. Export Control System and the Export Control Reform Initiative*, p. 2 (last updated Jan. 28, 2020) available at https://fas.org/sgp/crs/natsec/R41916.pdf.

15 Ian F. Fergusson, Congressional Research Service, RL31832, *The Export Administration Act: Evolution*, Provisions, and Debate, p. 10 (Jul. 15, 2009) available at https://fas.org/sgp/crs/secrecy/RL31832.pdf.

16 *See* 50 U.S.C. § 4811(2)(D) available at https://www.law.cornell.edu/uscode/text/50/4811.

17 John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1703(a)(6), 132 Stat. 1636 (2018).

18 Review of Controls for Certain Emerging Technologies, *supra* note 3.

19 An item may be added to the 0Y521 series of ECCNs if the Department of Commerce, in concurrence with the Departments of Defense and State, determines that "foreign policy reasons justify control." *See* Addition of Software Specially Designed To Automate the Analysis of Geospatial Imagery to the Export Control Classification Number 0Y521 Series, 85 Fed. Reg. 459 (Jan. 6, 2020) (to be codified at 15 C.F.R. § 744) available at https://www.federalregister.gov/documents/2020/01/06/2019-27649/addition-of-software-specially-designed-to-automate-the-analysis-of-geospatial-imagery-to-the-export.

20 *Id.*

21 *Id.*

Photo by Codelco

- To permanently control the export of AI-enabled surveillance technology, the next administration should use the notice and comment rulemaking process and amend the list of items that are controlled under the "Crime Control and Detection" provision of the CCL (15 CFR § 742.7) to include all devices, technology, and software that are used for the identification or analysis of human biometric features, including but not limited to facial recognition technology, DNA sequencing, iris and retinal recognition, and speech recognition.[22] Under § 742.7, export license applications are "considered favorably" unless "there is evidence that the government of the importing country may have violated internationally recognized human rights."[23] As such, this effort should also provide a comprehensive, regularly updated list of countries and entities for whom a license application would be subject to a presumption of denial due to the risks of implication in human rights abuse. The proposed expansion of § 742.7 will provide predictability and clarity to American exporters, and thereby facilitate business planning in emerging markets while protecting American companies from inadvertently supplying end users that are likely to engage in human rights abuse.

Finally, in line with the actions above and the final recommendation below, the new administration should work with like-minded allies to coordinate multilateral arrangements for any new controls directed against end-users presenting high risk of human rights abuse.

✓ Use the Global Magnitsky Act and E.O. 13818 to prevent U.S. firms from providing financial support to foreign companies that manufacture AI-enhanced surveillance technology for authoritarian regimes

The next administration should identify foreign companies that are developing and selling AI-enabled surveillance and biometric data collection technologies to authoritarian regimes and, where appropriate on the basis of support to sanctionable activity, designate those companies under the Global Magnitsky Human Rights Accountability Act and Executive Order 13818.[24] (For a detailed analysis of and recommendations concerning the Global Magnitsky Act and similar targeted human rights and anti-corruption sanctions,

22 One of the stated goals of the "Crime Control and Detection" provision of the CCL is to prevent human rights abuse abroad. *See* 15 C.F.R. § 742.7 (b) (noting that "[t]he judicious use of export controls is intended to deter the development of a consistent pattern of human rights abuses, distance the United States from such abuses and avoid contributing to civil disorder in a country or region.").

23 *Id.*

24 The Global Magnitsky Human Rights Accountability Act, 22 U.S.C. § 2656 note (2016) available at https://www.humanrightsfirst.org/sites/default/files/GMA-Law.pdf; Executive Order 13,818, Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption, 82 Fed. Reg. 60839 (2017) available at https://www.humanrightsfirst.org/sites/default/files/eo-13818-glomag.pdf.

see the *Walking the Talk* chapter entitled "2021 BLUEPRINT FOR POLICYMAKERS: Targeted Human Rights and Anti-Corruption Sanctions Programs.") Foreign firms that are "designated" under E.O. 13818 are added to the Department of Treasury's Specially Designated Nationals and Blocked Persons (SDN) list. Under existing law, U.S. persons and companies are prohibited from "making any contribution or provision of funds, goods, or services" to a listed entity.[25] By using E.O. 13818 to sanction foreign firms that are selling AI-enabled surveillance technology to known human rights abusers, the next administration will prevent these companies from accessing the highly sought-after financing of U.S. based private equity and venture capital firms. Additionally, such sanctions will bar U.S.-based academic institutions, such as research universities, from collaborating or otherwise partnering with designated foreign companies. Related actions should include:

- Establishing an inter-agency team comprised of representatives of the Departments of Commerce, Treasury, and State to publish predictable, credible thresholds of sales or export activity that could trigger designation for sale or transfer of AI surveillance-related technology to human rights abusers likely to have committed sanctionable acts under the Global Magnitsky Act and E.O. 13818, and to monitor the global AI-powered surveillance market and identify incidents of such activity warranting designation.

- Designating under Section 1(a)(iii)(A) of E.O. 13818 any foreign entity that is identified by the interagency task force as having provided goods or services, including but not limited to devices, technology, or software that are used for the identification or analysis of human biometric features, to a government entity that has engaged in sanctionable violations of internationally recognized human rights.

✓ Negotiate additions to Wassenaar Arrangement (WA) on export controls for conventional arms and dual-use goods and technologies

Export controls are only effective when they substantially limit the global availability of the controlled product. In the case of advanced surveillance technology, Chinese firms account for the majority of global exports (with American companies coming in a distant second place).[26] According to the Carnegie Endowment for International Peace, Huawei alone has exported advanced surveillance products to 50 different countries.[27] Due to China's dominance of the global market for advanced surveillance tech, export controls imposed unilaterally by the United States will have only limited impact on the proliferation of these technologies. In addition to the steps outlined above, therefore, the next administration will have to rely on U.S. diplomacy to push the international community to adopt a global control regime for the export of AI-enabled surveillance technology. This diplomatic effort should begin with the modernization of the Wassenaar Arrangement (WA) on Export Controls for Conventional Arms and Dual-Use Goods and Technologies. The WA is a voluntary multilateral export control framework that establishes guidelines for the creation of national export restrictions on goods that have a foreseeable impact on international security and stability.[28] Forty-two countries participate in the

[T]he next administration will have to rely on U.S. diplomacy to push the international community to adopt a global control regime for the export of AI-enabled surveillance technology.

25 Executive Order 13,818, *supra* note 24, at § 4(a).

26 Feldstein, *supra* note 5, at p. 9.

27 *Id.*

28 The Wassenaar Arrangement On Export Controls for Conventional Arms and Dual-Use Goods and Technologies, *About us*, available at https://www.wassenaar.org/about-us/. Although human rights impact is not a traditional criterion for listing, advanced surveillance technologies could be covered under several existing categories due to the potential military application of such technologies. *See* Tim Maurer, Edin Omanovic, Ben Wagner, New America Foundation, *Uncontrolled Global Surveillance: Updating Export Controls to the Digital Age*, p. 28 (Mar. 2014) available at https://cihr.eu/wp-content/uploads/2014/06/Uncontrolled-Surveillance_March-2014.pdf. In 2017, the head of the Wassenaar Arrangement, Philip Griffiths, stated in an interview that "new technologies," such as AI, "remain [a] focus" of the WA. See Rainer Himmelfreundpointner, *Wassenaar Arrangement: "Global risks have greatly expanded."*, Cercle Diplomatique, Issue 01/2017, p. 63 (2017) available at https://www.wassenaar.org/app/uploads/2019/consolidated/CD_012017_Interview.pdf.

WA and coordinate their export controls with the WA's Dual Use and Munitions List.[29] Although China is not one of the 42 participants, the country's conventional weaponry control list mirrors the Wassenaar Arrangement's Munitions List.[30] By amending the WA's Dual Use List to include technologies that are critical to the creation or maintenance of AI-enhanced systems of surveillance, the international community will limit the export of these technologies by WA participants and pressure non-WA participants, such as China, to adopt similar restrictions. Related actions should include:

- Working with members of civil society and the U.S. tech industry, the next administration should draft a narrowly tailored amendment that would expand the WA Dual Use List to control devices, technology, and software that enable the identification or analysis of human biometric features, including but not limited to facial recognition technology, DNA sequencing, iris and retinal recognition, and speech recognition; spyware powered by deep learning algorithms; and tools used to surveil social media for the purpose of persecuting government critics and dissidents.
- At the next meeting of WA members, the U.S. delegation should propose the adoption of the draft additions, either under an existing category of the WA Dual Use List or through the establishment of an entirely new category.

29 The 42 participants include the United States, all EU member states (with the exception of Cyprus), and other major tech exporters, such as Russia, Turkey, Canada, Mexico, South Africa, Japan, and South Korea. *See* Maurer et al., *supra* note 28, at p. 27.

30 *See id.*

Upholding Refugee Protection and Asylum at Home

Photo by Ggia

Introduction

The United States was once a global leader in shielding refugees fleeing persecution. The nation led efforts to draft the Refugee Convention in the wake of World War II and, with bipartisan support, enshrined its commitments into law when it enacted the Refugee Act. For decades, Republican and Democratic administrations recognized the moral and strategic importance of a strong commitment to providing refuge to the persecuted. But the Trump administration has trampled on these commitments to the detriment of both refugees and U.S. national interests.

Through a barrage of policies denying refugees safety in the United States, the Trump administration has decimated both the U.S. asylum and resettlement systems. The administration has banned refugees from Muslim-majority countries, reduced resettlement to all-time lows, forced asylum seekers to "wait" in notoriously violent parts of Mexico, taken children from their parents, sent asylum seekers to unsafe countries, refused to release asylum seekers from detention, and used the pandemic to illegally expel asylum seekers and unaccompanied children to highly dangerous places. Over and over, the administration has banned refugees from asylum and used these bans to evade legally-mandated protections and separate refugees from their families. Instead of effectively managing cases, the administration has implemented punitive policies that have spurred chaos, bottlenecks, kidnappings, attacks, and horrific detention conditions.

The next presidential administration must make clear—through actions as well as words—that restoring U.S. leadership in protecting the persecuted is a top priority.

Administration officials have also rigged the adjudication system against refugees. They have elevated immigration judges with high asylum denial rates, directed Border Patrol officers to conduct interviews in place of asylum officers, and rendered many refugees ineligible for asylum through Attorney General rulings and regulations that seek to rewrite the law. Predictably, the rates at which U.S. adjudicators grant asylum have plummeted, leaving many refugees unprotected.[1]

Not only have thousands had their lives devastated, but the global humanitarian and human rights systems, essential to safeguarding stability world-wide, are threatened by America's blatant violations of its refugee and human rights treaty obligations—illegalities that have sparked condemnations from the U.N. Refugee Agency (UNHCR), human rights officials, and a Canadian Court, which found U.S. mistreatment of asylum seekers inconsistent with the Refugee Convention and the norms of free and democratic societies.[2] Such policies set a poor example for other countries, including the small number of developing nations that actually host the vast majority of the world's refugees.[3] Moreover, as one legal scholar has warned, the Trump administration's dismissal of U.S. international legal obligations threatens to render a host of treaties meaningless, "take a wrecking ball to U.S. international legal relationships," and "deal a death blow" to the United States' "capacity to engage in international diplomacy for decades to come."[4]

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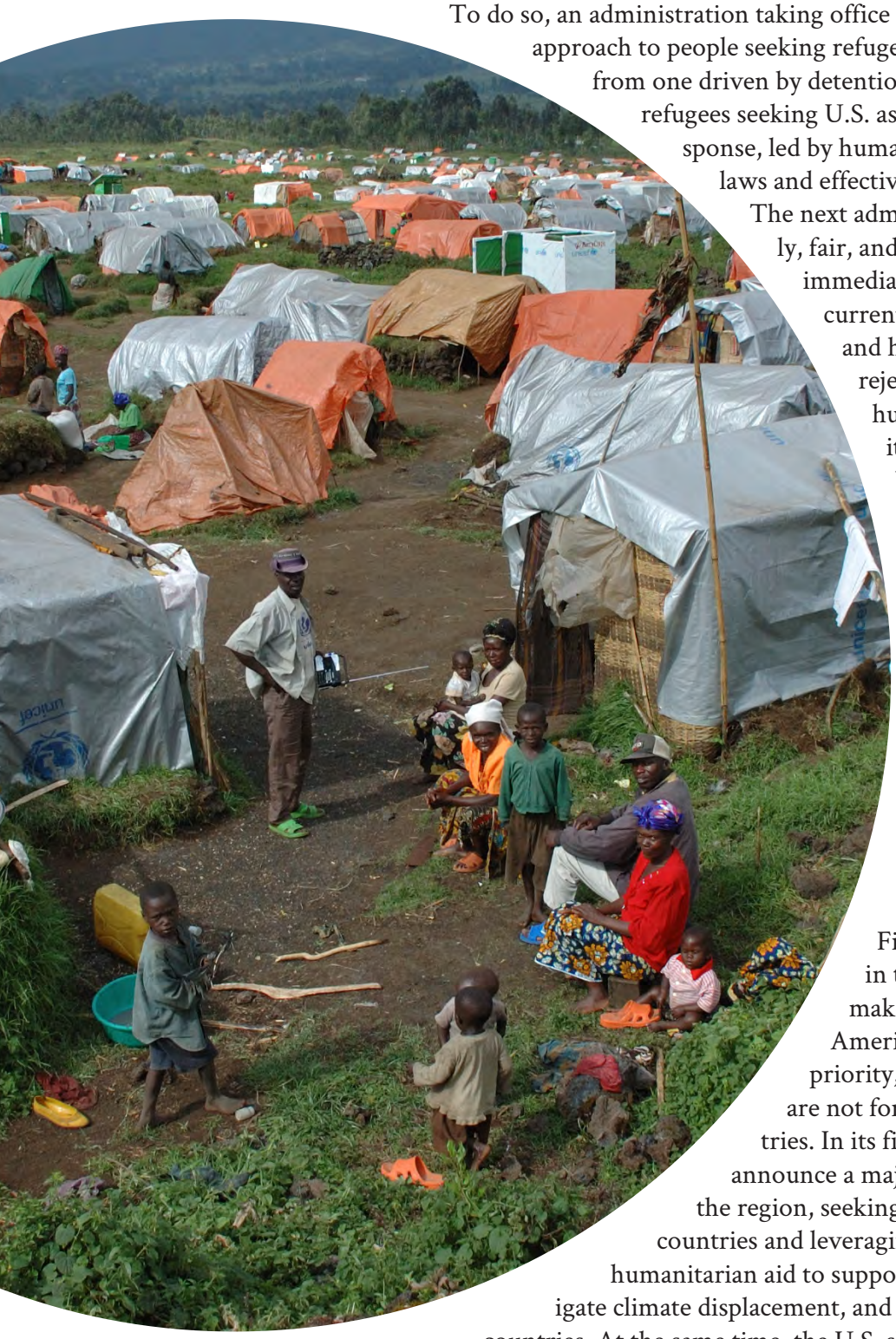
1 Human Rights First, *Fact Sheet: Grant Rates Plummet as Trump Administration Dismantles U.S. Asylum System, Blocks and Deport Refugees* (Jun. 2020) available at https://www.humanrightsfirst.org/sites/default/files/AdministrationDismantlingUSAsylumSystem.pdf.

2 *See* Office of the U.N. High Commissioner for Refugees, *UNHCR deeply concerned about new U.S. asylum restrictions* (Jul. 15, 2019) available at https://www.unhcr.org/en-us/news/press/2019/7/5d2cdf114/unhcr-deeply-concerned-new-asylum-restrictions.html; Brief of the Office of the U.N. High Commissioner for Refugees as Amicus Curiae in Support of Plaintiffs and Affirmance, O.A. v. Trump, No. 19-5272 (D.C. Cir. filed Aug. 13, 2020) available at https://www.refworld.org/type,AMICUS,UNHCR,USA,5f-3f90ea4,0.html [*hereinafter UNHCR Amicus Brief in O.A. v. Trump*]; *see also Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015) available at https://www.refworld.org/pdfid/550824454.pdf; Office of the U.N. High Commissioner for Human Rights, *Arbitrary detention: UN expert group urges the USA to abolish the mandatory detention of migrants* (Oct. 24, 2016) available at https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20749&LangID=E; Catherine Kim, *UN human rights chief is "deeply shocked" by US treatment of migrants*, Vox (Jul. 9, 2019) available at https://www.vox.com/policy-and-politics/2019/7/9/20687495/us-migrant-detention-michelle-bachelet-un-high-commissioner-human-rights; Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship), 2020 F.C. 770 (Can.) available at https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/482757/index.do.

3 According to the U.N. Refugee Agency, developing countries are host to 85 percent of the world's refugees. *See* Office of the U.N. High Commissioner for Refugees, *Refugee Population Statistics Database* (2019) available at https://www.unhcr.org/refugee-statistics/.

4 Oona Hathaway, *The Trump Administration's Indefensible Legal Defense of Its Asylum Ban*, Just Security (May 15, 2020) available at https://www.justsecurity.org/70192/the-trump-administrations-indefensible-legal-defense-of-its-asylum-ban/.

The United States must change course before the damage becomes irreversible. The next presidential administration must make clear—through actions as well as words—that restoring U.S. leadership in protecting the persecuted is a top priority. Leading by example, the next administration must uphold U.S. refugee laws and treaties at home, while encouraging other countries to uphold their own asylum obligations.



To do so, an administration taking office in 2021 should transform America's approach to people seeking refugee protection, shifting the paradigm from one driven by detention and attempts to deter and turn away refugees seeking U.S. asylum to a genuine humanitarian response, led by humanitarian agencies, that upholds refugee laws and effectively and fairly manages asylum cases. The next administration should implement orderly, fair, and timely processes for asylum claims, immediately end illegal policies executed by the current administration, and employ effective and humane case management strategies, rejecting costly mass detention that violates human rights treaties. It should restore its global leadership on resettlement by rescinding discriminatory bans and policies, ramping up the numbers provided refuge, and working to make the program even stronger. And in the wake of the novel coronavirus pandemic, it should end efforts to exploit COVID-19 as a pretext to violate laws protecting asylum seekers. As public health experts have stressed, the United States can and must "both safeguard public health and uphold laws requiring the protection of asylum seekers and unaccompanied children."[5]

Finally, in tandem with the steps outlined in this paper, a next administration must make the human rights of people in Central America and Mexico a primary foreign policy priority, so that families, adults, and children are not forced to seek protection in other countries. In its first week, the administration should announce a major initiative to uphold human rights in the region, seeking input from rights defenders in these countries and leveraging U.S. diplomacy, development, and humanitarian aid to support systems that combat corruption, mitigate climate displacement, and help people secure protection in home countries. At the same time, the U.S. should direct its diplomacy and aid to expand the capacity of Mexico, Belize, Costa Rica, Panama, Colombia, and other countries to host, safeguard, and provide asylum to refugees.

5 Letter from Leaders of Public Health Schools, Medical Schools, Hospitals, and other U.S. Institutions to Alex Azar, Secretary, Department of Health and Human Services, and Robert R. Redfield, Director, Centers for Disease Control and Prevention (May 18, 2020) available at https://www.publichealth.columbia.edu/sites/default/files/public_health_experts_letter_05.18.2020.pdf *[hereinafter May 2020 Letter from Public Health Experts].*

Photo by Julien Harneis

Along with launching these regional initiatives, the next administration should also, during its first week, convene a White House Humanitarian Protection Task Force and issue an executive order or directives on its first day instructing U.S. agencies to take steps to restore U.S. asylum and refugee protection leadership—and law—at home. Key steps for a next administration include:

- **Ending policies that endanger refugees, create chaos, and violate law and treaties, including:**
  - Remain in Mexico; asylum entry, transit, and public health bans; deals with unsafe countries; "metering" reductions at border ports-of-entry; and fast-track deportation programs blocking legal counsel;
  - Rules, rulings, and policies to deny refugees asylum, including Attorney General rulings targeting family groups, women subjected to violence, and victims of armed groups; and
  - Mass detention, family separation, and criminal prosecution for improper entries.
- **Managing asylum arrivals in orderly, effective, and humane ways that uphold U.S. law, including by:**
  - Launching a humanitarian response via a White House task force, coordinated by a White House senior coordinator or advisor for refugee and humanitarian protection and staffed by humanitarian agencies and ultimately a new or reconfigured and elevated U.S. agency with a humanitarian protection mission, expertise, and capacities;
  - Providing timely, humane, safe, and orderly processing at U.S. ports-of-entry; transferring asylum seekers to orientation/reception sites and shelters within several hours, not days; and employing health safeguards; and
  - Referring asylum seekers into case management with legal representation to humanely, successfully, and cost-effectively manage cases while they shelter with family in communities.
- **Upgrading adjudication systems to provide timely, fair, and accurate refugee decisions, including by:**
  - Ramping up asylum officer hiring to conduct more asylum interviews, enabling more asylum cases to be accurately resolved at the USCIS asylum division, and reducing referrals to courts;
  - Swiftly remedying politicized hiring, conducting fair and increased hiring and reducing backlog while working to make courts independent; and
  - Rescinding policies, rules, and rulings that rig the system against refugees and improperly deny them protection.
- **Strengthening and rebuilding the U.S. resettlement system, including by:**
  - Rescinding discriminatory bans, increasing the presidential determination to 100,000 for fiscal year 2021 and 125,000 for fiscal year 2022, fixing delays, strengthening outcomes and support; and
  - Improving resettlement of U.S.-affiliated Iraqis, and Afghans via Special Immigrant Visas (SIVs), creating a priority path for Syrian refugees who assisted the U.S., launching initiatives for Central American and Venezuelan refugees, and preparing for Hong Kong refugee resettlement.

Recommendations

✓ End policies that endanger refugees, create chaos, and violate law

The next administration must immediately end current administration policies that brazenly violate laws passed by Congress by expelling and blocking people seeking U.S. protection. These policies have harmed families, adults, and children seeking refuge, all the while generating chaos, confusion, and unnecessary costs. Human Rights First has tracked over 1,100 reports of kidnappings, sexual assaults, and other attacks on adults and children turned away under the Remain in Mexico policy.[6] The actual number of attacks is certainly higher, as most victims have not been interviewed by human rights researchers or journalists. In addition, the Trump administration has used the pandemic as a pretext to expel asylum seekers and unaccompanied children to dangerous places where their lives are at risk.[7]

[T]he Trump administration has used the pandemic as a pretext to expel asylum seekers and unaccompanied children to dangerous places where their lives are at risk.

On its first day, a future administration should issue an order or directives revoking presidential orders and proclamations relating to asylum, and instructing DHS and DOJ to take steps to: uphold U.S. refugee law and treaties at the border; immediately end Remain in Mexico, "asylum cooperation agreement" transfers to unsafe countries, expulsions relying on the debunked and dangerous CDC order,[8] and removals under secretive programs that block legal counsel; swiftly transition to U.S. safety asylum seekers stranded under Remain in Mexico; ramp-up hiring for asylum interviews and hearings; rescind Trump administration rules and rulings blocking refugees from asylum including the asylum entry and transit bans and other rules; and settle lawsuits in which the government is defending illegal asylum policies. Priority policies to end include:

- **The specious public health bans.** The next administration should immediately direct the Centers for Disease Control (CDC), Department of Health and Human Services (HHS), and DHS to rescind policies—including the much-criticized March 20 CDC order, the related rule, the May 19 order extending the ban indefinitely, and any agency guidance[9]—used to expel thousands of asylum seekers and unaccompanied children to places where their lives are at risk, as detailed in a May 2020 Human Rights First report and media reports confirming expulsions of children and asylum seekers, including Nicaraguan political dissidents.[10] Similarly, a next administration should rescind the sweeping July 9, 2020 proposed rule that would label refugees as national security threats, ban them from asylum and other protection, and summarily deport many without asylum hearings on sham "public health" grounds such as passing through a country where COVID-19—or a potentially vast array of other treatable communicable diseases, should DHS and DOJ declare them security threats—are prevalent or simply

6 Human Rights First, *Delivered to Danger: Trump Administration sending asylum seekers and migrants to danger* (last updated May 13, 2020) available at https://www.humanrightsfirst.org/campaign/remain-mexico.

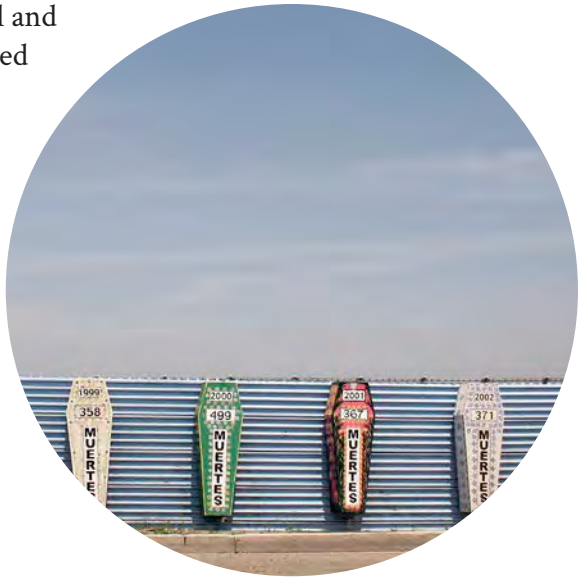
7 *See* Kevin Sieff, *She fled detention and torture in Nicaragua for asylum in the United States. The government put her on a plane back home.*, Washington Post (Aug. 28, 2020) available at https://www.washingtonpost.com/world/the_americas/nicaragua-asylum-us-border/2020/08/27/9aaba414-e561-11ea-970a-64c73a1c2392_story.html; Catherine E. Shoichet, Geneva Sands, *The US detained hundreds of migrant children in hotels as the pandemic flared*, CNN (Sep. 3, 2020) available at https://www.cnn.com/2020/09/03/us/migrant-children-detained-hotels/index.html; Human Rights First, *Pandemic as Pretext: Trump Administration Exploits COVID-19, Expels Asylum Seekers and Children to Escalating Danger* (May 13, 2020) available at https://www.humanrightsfirst.org/resource/pandemic-pretext-trump-administration-exploits-covid-19-expels-asylum-seekers-and-children.

8 *See May 2020 Letter from Public Health Experts, supra* note 5; *see also* Sieff, *supra* note 7.

9 Order Suspending Introduction of Persons From a Country Where a Communicable Disease Exists, 85 Fed. Reg. 16567 (Mar. 20, 2020) (to be codified at 42 C.F.R. § 71) available at https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf; Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Ref. 16559 (Mar. 24, 2020) (to be codified at 42 C.F.R. § 71) available at https://www.federalregister.gov/documents/2020/03/24/2020-06238/control-of-communicable-diseases-foreign-quarantine-suspension-of-introduction-of-persons-into; Amendment and Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 31503 (May 26, 2020) available at https://www.cdc.gov/quarantine/pdf/CDC-265-Order-Renewal_5-19-20-p.pdf?ftag=MSF0951a18; Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately — Ignoring Asylum Law*, ProPublica (Apr. 2, 2020) available at https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law.

10 For Human Rights First's report, see *Pandemic as Pretext, supra* note 7; for relevant media reports, *see* Sieff, *supra* note 7; National Immigrant Justice Center, *A Timeline Of The Trump Administration's Efforts To End Asylum* (last updated Aug. 2020) available at https://immigrantjustice.org/issues/asylum-seekers-refugees.

exhibiting a cough or other potential symptoms.[11] Medical and public health experts have concluded that both the proposed rule, and the orders and expulsions, are "xenophobia masquerading as a public health measure."[12] Public health experts have also explained that the U.S. has the ability to both safeguard public health and safeguard the lives of men, women, and children seeking asylum at the U.S. border and have recommended measures, outlined below, to protect law enforcement officials, those exercising their legal right to request protection in the United States, and public health.[13] Legal experts have concluded that the CDC order does not override U.S. laws and treaties protecting refugees and unaccompanied children.[14] UNHCR legal guidance on the pandemic confirms states may not impose measures that preclude refugees from admission or deny them an effective opportunity to seek asylum, and that "(d)enial of access to territory without safeguards to protect against refoulement cannot be justified on the grounds of any health risk."[15]



- **The dangerous Remain in Mexico policy (disingenuously titled "Migrant Protection Protocols" [MPP]).** The next administration should immediately end the illegal and chaotic MPP, revoking former DHS Secretary Kirstjen Nielsen's June 25, 2019 memorandum on day 1, and instead adjudicate cases from safety in the United States, consistent with U.S. refugee law.[16] Pending MPP cases should be swiftly transitioned from danger in Mexico, swiftly processed into the country using the public health measures detailed by experts, and paroled to family in the United States while their cases are adjudicated.[17] Not only is CBP able to process cases in a few hours, but MPP cases have previously undergone CBP processing. Moreover, the vast majority of MPP asylum seekers have U.S. family or other destination homes where they can shelter.[18] The MPP wind-down can be conducted in an orderly manner, communicating with attorneys, shelters, medical and humanitarian organizations that assist asylum seekers, and slating cases for swift transfer based, for instance, on the month they were referred into MPP.

  In addition to allocating sufficient U.S. government staff to transition these cases in within weeks, DHS and humanitarian agencies will need to set up an orderly process so that asylum seekers facing urgent risks can have their cases transferred to safety in the United States prior to their scheduled date.

11 Security Bars and Processing, 85 Fed. Reg. 41201 (Jul. 9, 2020) (to be codified at 8 C.F.R. §§ 208, 1208) available at https://www.federalregister.gov/documents/2020/07/09/2020-14758/security-bars-and-processing; 42 C.F.R. § 34.2(b)(2) available at https://www.law.cornell.edu/cfr/text/42/34.2; see Human Rights First, *New Asylum Ban, Recycled Pretext: Proposed Rule Would Illegally, Unjustly Bar Many Asylum Seekers on Public Health Grounds* (Jul. 2020) available at https://www.humanrightsfirst.org/sites/default/files/PublicHealthAsylumBanFactsheet_FINAL.pdf.

12 Letter from Leaders of Public Health Schools, Medical Schools, Hospitals, and other U.S. Institutions to Chad F. Wolf, Acting Secretary, U.S. Department of Homeland Security, and William Barr, Attorney General, U.S. Department of Justice (Aug. 6, 2020) available at https://www.publichealth.columbia.edu/sites/default/files/public_health_experts_letter_05.18.2020.pdf [hereinafter *August 2020 Letter from Public Health Experts*].

13 *May 2020 Letter from Public Health Experts, supra* note 5; Human Rights First et al., *Public Health Measures to Safely Manage Asylum Seekers and Children at the Border* (May 2020) available at https://www.humanrightsfirst.org/sites/default/files/PublicHealthMeasuresattheBorder.05.18.2020.pdf [hereinafter *Public Health Measures*].

14 Lucas Guttentag, *Coronavirus Border Expulsions: CDC's Assault on Asylum Seekers and Unaccompanied Minors*, Just Security (Apr. 13, 2020) available at https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/; Hathaway *supra* note 4.

15 U.N. High Commissioner for Refugees, *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response*, ¶ 6 (Mar. 16, 2020) available at https://www.refworld.org/docid/5e7132834.html.

16 Human Rights First, *A Sordid Scheme: The Trump Administration's Illegal Return of Asylum Seekers to Mexico* (Feb. 13, 2019) available at https://www.humanrightsfirst.org/resource/sordid-scheme-trump-administration-s-illegal-return-asylum-seekers-mexico; Memorandum from Kirstjen M. Nielson, Secretary, U.S. Department of Homeland Security, to L. Francis Cissna, Director, U.S. Citizenship and Immigration Services et al. on Policy Guidance for Implementation of the Migrant Protection Protocols (Jan. 25, 2019) available at https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.

17 *Public Health Measures, supra* note 13. These cases are already in immigration court proceedings and ICE and EOIR can facilitate venue transfers to immigration courts in destination locations. These cases could potentially be adjudicated more promptly by the USCIS asylum division if, after transfer into the U.S., MPP removal proceedings are terminated and cases referred to USCIS for asylum adjudications.

18 Amnesty International et al., *Responding to the COVID-19 Crisis While Protecting Asylum Seekers* (last updated Mar. 25, 2020) available at https://www.humanrightsfirst.org/sites/default/files/GroupStatementUpdated.pdf; Tom K. Wong, US Immigration Policy Center, *Seeking Asylum: Part 2*, at 13 (Oct. 29, 2019) available at https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf.

Photo by Tomas Castelazo

Going forward, U.S. agencies must comply with U.S. refugee law and allow people to seek asylum from safety in the United States. As UNHCR has explained, when a state is presented with an asylum request at its border, it must provide admission at least on a temporary basis while the asylum claim is examined "as the right to seek asylum and the non-refoulement principle would otherwise be rendered meaningless."[19] UNHCR's amicus brief in the case challenging MPP confirms the policy does not comply with the Refugee Convention and Protocol.[20] Given the illegality, dangers, and due process deficiencies that plague MPP, U.S. Immigration and Customs Enforcement (ICE) should be directed to request that immigration courts vacate all MPP in *absentia* orders and join in requests to vacate MPP removal orders that denied protection.

- **Asylum entry and transit bans and denials.** The next administration should rescind the November 2018 presidential proclamation and interim final rule that sought to bar from asylum people who cross into the United States between ports of entry without inspection.[21] Judge Moss of the D.C. federal district court directed the rule be vacated, finding it inconsistent with U.S. refugee law in *O.A. v. Trump*, a case brought by Human Rights First and other organizations on behalf of a nationwide class of asylum seekers.[22] In February 2020, the Court of Appeals for the Ninth Circuit concluded, in *East Bay Sanctuary Covenant v. Trump*,[23] that the rule unlawfully conflicts with the text and purpose of U.S. refugee law and is inconsistent with the Refugee Convention, affirming a district court injunction that had been in effect for over a year (after both the Ninth Circuit, in an opinion authored by Judge Jay Bybee, and the Supreme Court refused to stay the district court injunction).[24] A next administration should also rescind other Trump administration rule changes that attempt to get around these court rulings by denying asylum (proposed in June 2020) or work authorization (effective August 2020) to penalize asylum seekers who enter between ports of entry.[25] The asylum entry ban and other policies punishing refugees for improper entry violate U.S. law and Refugee Convention prohibitions against penalizing asylum seekers for improper entry or presence, as UNHCR confirmed in its amicus brief addressing the ban.[26]

The next administration should rescind the November 2018 presidential proclamation and interim final rule that sought to bar from asylum people who cross into the United States between ports of entry without inspection.

The next administration should also rescind rules that ban refugees from asylum, or direct or urge asylum denials, due to transit through other countries, including the July 2019 interim final rule (vacated and enjoined as of August 2020) and the June 2020 proposed rule that seeks to codify variations on that transit ban.[27] While the July 2019 ban was in effect, the United States barred from asylum

19 Office of the U.N. High Commissioner for Refugees, *Access to asylum further at stake in Hungary* (Jun. 29, 2020) available at https://www.unhcr.org/en-us/news/press/2020/6/5efa0f914/access-asylum-further-stake-hungary-unhcr.html.

20 U.N. High Commissioner for Refugees' Amicus Curiae Brief in Support of Appellees' Answering Brief, Innovation Law Lab v. Kevin M. McAleenan, 924 F.3d 503 (9th Cir. 2019) available at https://www.aclu.org/legal-document/innovation-law-lab-v-mcaleenan-amicus-brief-un-high-commissioner-refugees.

21 U.S. President Donald Trump, *Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States* (Nov. 9, 2018) available at https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/; Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55934 (Nov. 9, 2018) (to be codified at 8 C.F.R. §§ 208, 1003, 1208) available at https://www.federalregister.gov/documents/2018/11/09/2018-24594/aliens-subject-to-a-bar-on-entry-under-certain-presidential-proclamations-procedures-for-protection.

22 O.A. v. Trump, No. 18-02718, (D.D.C. Aug. 2, 2019) available at https://www.cnn.com/2019/08/02/politics/read-ruling-trump-asylum-ban/index.html.

23 East Bay Sanctuary Covenant v. Trump, No. 18-17274 (9th Cir. 2020) available at http://cdn.ca9.uscourts.gov/datastore/general/2020/02/28/18-17436_opinion.pdf.

24 Peter Margulies, *The Ninth Circuit's Asylum Ban Ruling Is a Message to Trump*, Lawfare (Dec. 10, 2018) available at https://www.lawfareblog.com/ninth-circuits-asylum-ban-ruling-message-trump; Peter Margulies, *Asylum Ban Litigation: Supreme Court Declines to Stay Injunction, Lawfare* (Dec. 21, 2018) available at https://www.lawfareblog.com/asylum-ban-litigation-supreme-court-declines-stay-injunction.

25 Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264 (Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, 1235) available at https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review; Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38532 (Jun. 26, 2020) (to be codified at 8 C.F.R. §§ 208, 274) available at https://www.federalregister.gov/documents/2020/06/26/2020-13544/asylum-application-interview-and-employment-authorization-for-applicants.

26 Brief of the Office of the United Nations High Commissioner for Refugees before the United States Court of Appeals for the District of Columbia Circuit, O.A. v. Trump, No. 19-5272 (Aug. 13, 2020) available at https://www.refworld.org/docid/5f3f90ea4.html.

27 These variations would, for instance, require a denial of asylum due to transit, or transit of over 14 days. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg.

refugees from Cuba, El Salvador, Eritrea, Guatemala, Honduras, Nicaragua, Venezuela, and other countries, as detailed by Human Rights First in its July 2020 report *Asylum Denied, Families Divided.*[28] Some were deported to countries where they fear persecution. Others were separated from their families, as such bans prevent refugees from bringing their children and spouse to safety as derivative asylees even when U.S. judges determine they qualify as refugees whose removal must be withheld.

Refugees who are denied asylum but qualify for "withholding of removal" are left in a limbo that blocks them from legal permanent residence, citizenship and integration. The transit ban violates U.S. law: refugees who travel through other countries are barred from asylum only if they are "firmly resettled" in a transit country, or if the United States has a formal agreement with a country where refugees are both safe from persecution and provided access to full and fair asylum procedures.[29] On June 30, 2020, in a case brought by Human Rights First and other counsel, a court in Washington D.C. vacated the transit ban, finding it was issued in violation of the Administrative Procedure Act (APA).[30] On July 6, 2020, in a separate lawsuit, the Ninth Circuit found the ban violates U.S. asylum law because the rule "does virtually nothing to ensure that a third country is a 'safe option,'" and was arbitrary and capricious under the APA.[31] The court upheld a preliminary injunction issued by a district court that concluded the ban "is likely invalid because it is inconsistent with the existing asylum laws."[32] UNHCR confirmed the transit ban is not consistent with U.S. legal obligations.[33] If any transit rule is in effect or becomes final, a new interim final rule reverting to the prior rule can be quickly issued. DHS leaders should direct ICE attorneys to join case re-openings for those whose cases were denied based on the transit ban and stipulate to asylum grants for persons already determined by immigration courts to be refugees who met the withholding of removal standard.[34]

- **The "deals" that send asylum seekers to unsafe countries.** The next administration should immediately stop all transfers under, and terminate, Trump administration agreements with El Salvador, Guatemala, and Honduras, as well as the related rules through which the United States

33829 (Jul. 16, 2019) (to be codified at 8 C.F.R. §§ 208, 1003, 1208) available at https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications, *vacated* in Capital Area Immigrants' Rights Coalition v. Trump, No. 19-2115 (D. D.C. 2020) available at https://www.humanrightsfirst.org/sites/default/files/CAIR%20Coalition%20Opinion%20%281%29.pdf, *enjoined* by East Bay Sanctuary Covenant v. Barr, No. 19-16487 (9th Cir. 2020) available at https://www.aclu.org/legal-document/order-east-bay-v-barr; Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, *supra* note 25. For Human Rights First's commentary on these developments, *see* Human Rights First, *Comment on Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review* (Jul. 15, 2020) available at https://www.humanrightsfirst.org/resource/comment-procedures-asylum-and-withholding-removal-credible-fear-and-reasonable-fear-review.

28 Human Rights First, *Asylum Denied, Families Divided: Trump Administration's Illegal Third-Country Transit Ban* (Jul. 2020) available at https://www.humanrightsfirst.org/sites/default/files/AsylumDeniedFamiliesDivided.pdf.

29 8 U.S.C. § 1158(a)(2)(A), 1158(b)(2)(A)(vi) available at https://www.law.cornell.edu/uscode/text/8/1158.

30 Capital Area Immigrants' Rights Coalition v. Trump, No. 19-2115 (D. D.C. 2020) available at https://www.humanrightsfirst.org/sites/default/files/CAIR%20Coalition%20Opinion%20%281%29.pdf.

31 East Bay Sanctuary Covenant v. Barr, No. 19-16487 (9th Cir. 2020) available at https://www.aclu.org/legal-document/order-east-bay-v-barr.

32 That injunction had previously been stayed by the U.S. Supreme Court in September 2019 pending appeal. East Bay Sanctuary Covenant v. Barr, No. 19-04073 (N.D. Cal. Jul. 24, 2019) (order granting preliminary injunction) available at https://assets.documentcloud.org/documents/6213167/7-24-19-East-Bay-Sanctuary-Asylum-TRO.pdf; Barr v. East Bay Sanctuary Covenant, No. 19A230 (S. Ct. Sep. 11, 2019) (order granting application for stay) available at https://www.supremecourt.gov/opinions/18pdf/19a230_k53l.pdf.

33 *UNHCR deeply concerned about new U.S. asylum restrictions, supra* note 2; *see also UNHCR Amicus Brief in O.A. v. Trump, supra* note 2 (stating that "[t]here is no obligation under international law for a person to seek asylum at the first effective country," and that "asylum should not be refused solely on the ground that it could have been sought from another State.").

34 *See* Asylum Eligibility and Procedural Modifications, *supra* note 27.

has sent people seeking U.S. asylum to some of the most dangerous countries in the world—places from which people have been fleeing.[35] Perversely labeled "Asylum Cooperative Agreements," these agreements violate U.S. refugee law and treaty commitments.[36] In fact, all three countries fall far short of the U.S. law requirements that would permit U.S. officials to treat them as a "safe third country" to which asylum seekers could be sent.[37] The UNHCR has expressed "serious concerns" about the deals.[38] A Human Rights Watch/Refugees International report concluded the Guatemala deal does not meet U.S. law criteria for a Safe Third Country Agreement.[39] Given this illegality, expedited removal orders issued based on this transfer arrangement should be vacated. These transfer schemes prompted a lawsuit filed in federal court in Washington D.C.[40] The United States should also not attempt to designate Mexico a "safe third country" as it does not meet the applicable legal standards given deficiencies in its asylum system and the dangers refugees face there.[41] Instead, a next administration should leverage aid and diplomacy to strengthen asylum and safety for refugees in Mexico and across the region, and rights protections in Central America so people are not forced to flee.

- **Fast-track secretive deportation programs that block access to legal counsel.** The next administration should end fast-track deportation programs launched by the current administration that block asylum seekers from legal representation and rig protection screening interviews against them. Dubbed the Prompt Asylum Claim Review (PACR) and, when applied to families from Mexico, the Humanitarian Asylum Review Process (HARP), these programs prevent asylum seekers from meeting with legal counsel prior to credible fear screening interviews and prevent lawyers from attending interviews. Instead, asylum seekers undergo these screenings while held, often for five to seven days, in the notorious "hieleras" (CBP facilities known as "iceboxes" due to cold temperatures and inhumane conditions), blocked from in-person legal consultations and limited to a very brief potential phone call to a family member or lawyer.[42] Given the deprivation of counsel and inhumane conditions used, DHS should vacate resulting expedited removal orders and instruct that they not be reinstated.

  In addition, a next administration should not revive the slow-downs and reductions in asylum processing at ports of entry—which CBP dubbed "metering," but which actually acted as a monthly cap on processing asylum seekers.[43] This policy not only generated disorder by causing bottlenecks, back-ups, and dangerous waits in Mexico, but it also encouraged crossings between ports of entry, as CBP officers and the DHS OIG confirmed.[44] The next administration should direct CBP to rescind the April

35 Human Rights First, Press Release: *El Salvador Agreement a Fatal Deal for Asylum Seekers* (Sep. 20, 2019) available at https://www.humanrightsfirst.org/press-release/el-salvador-agreement-fatal-deal-asylum-seekers; Human Rights First, *Fact Sheet: Is Guatemala Safe for Refugees and Asylum Seekers?* (Jul. 1, 2019) available at https://www.humanrightsfirst.org/resource/guatemala-safe-refugees-and-asylum-seekers; Human Rights First, *Fact Sheet: Is Honduras Safe for Refugees and Asylum Seekers?* (May 1, 2020) available at https://www.humanrightsfirst.org/resource/honduras-safe-refugees-and-asylum-seekers; Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63994 (Nov. 19, 2019) (to be codified at 8 C.F.R. §§ 208, 1003, 1208, 1240) available at https://www.federalregister.gov/documents/2019/11/19/2019-25137/implementing-bilateral-and-multilateral-asylum-cooperative-agreements-under-the-immigration-and; Security Bars and Processing, *supra* note 11.

36 *See Guatemala Fact Sheet, supra* note 35; *see also* Office of the U.N. High Commissioner for Refugees, *Statement on new U.S. asylum policy* (Nov. 19, 2019) available at https://www.unhcr.org/en-us/news/press/2019/11/5dd426824/statement-on-new-us-asylum-policy.html.

37 *See Honduras Fact Sheet, supra* note 35; *see also* Ramon Taylor, *US-Guatemala Asylum Deal Advances Without UN Refugee Agency*, VOA (Jul. 12, 2019) available at https://www.voanews.com/usa/immigration/us-guatemala-asylum-deal-advances-without-un-refugee-agency.

38 Kevin Sieff, *The U.S. is putting asylum seekers on planes to Guatemala–often without telling them where they're going,* Washington Post (Jan. 14, 2020) available at https://www.washingtonpost.com/world/the_americas/the-us-is-putting-asylum-seekers-on-planes-to-guatemala--often-without-telling-them-where-theyre-going/2020/01/13/0f89a93a-3576-11ea-a1ff-c48c1d59a4a1_story.html; UNHCR *Statement on U.S. asylum policy, supra* note 36.

39 Human Rights Watch, *Deportation with a Layover: Failure of Protection under the US-Guatemala Asylum Cooperative Agreement* (May 19, 2019) available at https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative.

40 The lawsuit, U.T. v. Barr, was filed by The American Civil Liberties Union, National Immigrant Justice Center, Center for Gender & Refugee Studies, and Human Rights First. Complaint for Declaratory and Injunctive Relief, U.T. v. Barr, No. 20-00116 (D.D.C. Jan. 15, 2020) available at https://www.aclu.org/legal-document/complaint-ut-v-barr.

41 Human Rights First, *Fact Sheet: Is Mexico Safe for Refugees and Asylum Seekers?* (Nov. 1, 2018) available at https://www.humanrightsfirst.org/resource/mexico-safe-refugees-and-asylum-seekers.

42 American Immigration Council, *Fact Sheet: Policies Affecting Asylum Seekers at the Border* (Jan. 29, 2020) available at https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border; First Amended Complaint for Declaratory and Injunctive Relief, Las Americas Immigrant Advocacy Center v. Wolf, No. 20-03640 (D. D.C. Dec. 5, 2019) available at https://www.aclutx.org/sites/default/files/pacr_harp_complaint_.pdf.

43 Human Rights First, *With Asylum Effectively Blocked at Southern Border, Those Seeking Safety Face Escalating Violence, Punishing Conditions* (May 13, 2020) available at https://www.humanrightsfirst.org/press-release/asylum-effectively-blocked-southern-border-those-seeking-safety-face-escalating.

44 *See* Human Rights First, *Barred at the Border: Wait "Lists" Leave Asylum Seekers in Peril at Texas Ports of Entry* (Apr. 2019) available at https://www.humanrightsfirst.org/sites/default/files/BARRED_AT_THE_BORDER.pdf; U.S. Department of Homeland Security, Office of Inspector General, OIG-18-81, *DHS Support Components Do Not Have Sufficient Processes and Procedures to Address Misconduct* (Sep. 26, 2018) available at https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-81-Sep18.pdf;

2018 memorandum purporting to authorize this practice as well as any related guidance.[45] Instead, as outlined below, the next administration should ensure timely, orderly, and appropriately staffed processing that upholds U.S refugee law.

Moreover, as explained in the third section of this paper, the next administration should overturn, withdraw, or vacate other policies, rules, and Attorney General rulings that rig the system against refugees and render refugees ineligible for asylum. These include rule changes proposed in June 2020, the ruling in *Matter of A-B-* targeting women seeking protection from violence, and efforts to replace adjudicators that rule in favor of asylum seekers with those who rule against them.

✓ Manage arrivals in orderly, humane ways that uphold refugee law

Both the overarching paradigm and the structure of America's response to people seeking protection has been wildly off kilter. Both must change. The United States should transform its approach to people seeking refuge through a genuine humanitarian response and structure—led by humanitarian agencies with humanitarian expertise and capacities—that upholds U.S. refugee laws. Instead of counterproductive and dysfunctional policies that generate chaos and punish people seeking refuge, a next administration should implement fair and effective initiatives to manage asylum arrivals. These strategies include case management programs and legal representation initiatives—measures that lead to very high immigration court appearance rates, fiscal savings, and compliance with U.S. laws and treaties.[46] Nativist, racist rhetoric that tries to paint asylum seekers as threats, invaders, or a "security" problem will be overcome by strong leadership that affirms America's moral commitment to once again shine as a beacon that welcomes the persecuted.

David J. Bier, CATO Institute, *Obama Tripled Migrant Processing at Legal Ports—Trump Halved It* (Feb. 8, 2019) available at https://www.cato.org/blog/obama-tripled-migrant-processing-legal-ports-trump-halved-it. The policy is being challenged in court. First Amended Complaint for Declaratory and Injunctive Relief, Al Otro Lado, Inc. v. McAleenan, No. 17-02366 (S.D. Cal. Oct. 12, 2018) available at https://ccrjustice.org/sites/default/files/attach/2018/10/AmendedComplaint.pdf.

45 Memorandum from Todd C. Owen, Executive Assistant Commissioner, Office of Field Operations, U.S. Customs and Border Protection on Metering Guidance (Apr. 27, 2018) available at https://www.docketbird.com/court-documents/Al-Otro-Lado-Inc-et-al-v-McAleenan-et-al/Exhibit-1-Memorandum-from-Todd-C-Owen-Apr-27-2018-jah/casd-3:2017-cv-02366-00283-001.

46 *See* John D. Montgomery, NERA Economic Consulting, *Cost of Counsel in Immigration: Economic Analysis of Proposal Providing Public Counsel to Indigent Persons Subject to Immigration Removal Proceedings* (May 28, 2014) available at https://www.nera.com/content/dam/nera/publications/archive2/NERA_Immigration_Report_5.28.2014.pdf; *see also* Ingrid V. Eagly, Steven Shafer, *Measuring In Absentia Removal in Immigration Court,* 168 U. Penn. L. Rev. 817 (2020) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3633267; *see also* U.S. Department of Homeland Security, Office of Inspector General, OIG-18-22, *U.S. Immigration and Customs Enforcement's Award of the Family Case Management Program Contract (Redacted)* (Nov. 30, 2017) available at https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-22-Nov17.pdf; *see also* Jane C. Timm, *This Obama-era pilot program kept asylum-seeking migrant families together. Trump canceled it.*, NBC (Jun. 24, 2018) available at https://www.nbcnews.com/storyline/immigration-border-crisis/obama-era-pilot-program-kept-asylum-seeking-migrant-families-together-n885896; *see also* Eleanor Acer, Studies: *Mass Detention of Migrant Families is Unnecessary, Inefficient*, Just Security (Jul. 5, 2018) available at https://www.justsecurity.org/58897/studies-show-mass-detention-family-migrants-unnecessary-inefficient/.

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The refusal to employ case management and other legal strategies for asylum seekers in removal proceedings—and the insistence on mass detention—has led to lengthy, costly, arbitrary, and dysfunctional detentions. The mass detention policy has sparked hunger strikes, protests by jailed asylum seekers, and a massive spread of coronavirus in facilities and jails in the wake of ICE's refusal to release significant numbers of legally eligible asylum seekers and immigrants—despite warnings from public health experts and former immigration officials.[47] To shift from a punitive response to a humanitarian management and refugee protection structure, the next administration should:

- **Reshape the U.S. response to lead a humanitarian management initiative.** In its first week, the next administration should establish and convene a White House Humanitarian Protection Task Force comprised of relevant U.S. government agencies and including U.N. agencies and U.S. civil society organizations with refugee protection and management expertise and capacities. The Task Force requires high-level White House leadership, and should be managed by a White House Coordinator or Senior Advisor to the President for Refugee and Humanitarian Protection—an office that must be well-staffed to help ensure effective cooperation between U.S. agencies as they implement the reforms identified in this paper. The Task Force will need to meet at least weekly for some time. DHS, CBP, and ICE, which have treated refugees seeking asylum as "border enforcement" or "national security" problems to be deterred, turned away, penalized and denied protection, have failed to uphold U.S. refugee laws and human rights treaties, and proven ill-equipped to lead the U.S. response to people seeking protection.

  [T]he next administration should work with Congress to create a new Refugee and Humanitarian Protection Agency, or reconfigure, elevate, and strengthen an existing agency, to manage U.S. refugee protection, asylum, and humanitarian protection matters.

  To enhance this effort, the next administration should galvanize and leverage a network of humanitarian organizations, including faith-based groups, the American Red Cross, legal nonprofits, and refugee assistance agencies with offices across the country. A number of faith-based groups and shelters, as well as refugee organizations, have experience providing assistance to new arrivals and long track records of working with CBP and/or other U.S. government agencies. Some provide refugee assistance and management around the world. The next administration should request Congressional appropriations to support this public-private initiative.

  As it examines issues relating to DHS mission, structure and functions, the next administration should work with Congress to create a new Refugee and Humanitarian Protection Agency, or reconfigure, elevate, and strengthen an existing agency, to manage U.S. refugee protection, asylum, and humanitarian protection matters. Such an agency, preferably independent of DHS, should be led by an official of cabinet rank. The agency should have relevant rule-making authority relating to U.S. asylum and refugee law and adjudications; house asylum office adjudicators; have oversight of the management of the cases of asylum seekers; and the have authority to intercede in any attempt to deprive an asylum seeker of liberty via administrative detention. Additionally, the administration should take steps to reshape agency missions and responsibilities so that the leaders and staff of all agencies that play a role in interacting with children, adults, and families seeking refuge understand that they are clearly charged with upholding U.S. refugee law and treaties—and will be held accountable for refusing or failing to perform these legal responsibilities.

- **Safeguard the health of asylum seekers, U.S. staff, and the public.** In the midst of COVID-19,

47 Human Rights First, P*ublic Health Experts, Medical Doctors, Prison Experts, and Former ICE Officials Urge Releases from Immigration Detention Facilities to Control the Spread of COVID-19* (Apr. 2020) available at https://www.humanrightsfirst.org/sites/default/files/ExpertsUrgeReleaseICEDetaineesCOVID19.pdf.

leading public health experts have stressed that the United States has the ability to use proven measures to safeguard public health and the lives of men, women, and children seeking protection at the U.S. southern border.[48] Indeed, UNHCR has reported that over 20 European countries explicitly exempted asylum seekers from entry bans and border closures, and the European Union included an exemption within its travel restrictions for persons seeking protection.[49] In addition to ending the Trump administration's specious disease-linked bans on asylum (i.e., the March 20 CDC order, its May 2020 indefinite extension, the related rule, and the July 9 proposed rule[50]), a next administration should immediately direct use of measures—recommended by leading public health experts for people crossing the border—that protect law enforcement officials, those exercising their legal right to request protection in America, and the public health of our nation.[51]

These evidence-based measures include: "[d]uring border processing, facilitate social distancing through demarcations and the use of outdoor and other areas; require wearing of masks or similar cloth coverings over the face and nose for both officers and persons crossing into the United States; use plexiglass barriers and/or face shields for officers during interviews and identity-checks; provide hand-sanitizer and other handwashing for both officers and other persons; and provide requisite distance, as well as masks and other measures, in transport."[52] CBP officers have reported that the vast majority of ports of entry are able to maintain proper social distancing during processing.[53] In addition, health screenings can be conducted, including temperature checks and testing as it becomes more available.[54] As leading health experts recommend, "rather than detaining asylum seekers in congregate settings, allow asylum seekers to wait for their court hearings with their families or other contacts in the United States through parole, case management and other alternatives to detention."[55]

Moreover, should individuals crossing the southern border be required to self-quarantine as a precaution for 14 days like other international travelers, asylum seekers can do so at the homes of family or at other destination locations.[56] An asylum seeker who is ill should be referred to isolate at a family home or other accommodations as outlined in these public health recommendations (unless referred to immediate medical care), and not denied the right to seek asylum.[57] Ironically, DHS has been using COVID-19 tests and non-congregate accommodations to remove and expel people in ways that violate U.S. refugee and anti-trafficking laws, rather than using public health measures to uphold U.S. refugee laws and treaties.[58]

48 *See May 2020 Letter from Public Health Experts, supra* note 5.

49 Office of the U.N. High Commissioner for Refugees, Regional Bureau for Europe, *Practical Recommendations and Good Practice to Address Protection Concerns in the Context of the COVID-19 Pandemic* (Apr. 2020) available at https://www.unhcr.org/cy/wp-content/uploads/sites/41/2020/04/Practical-Recommendations-and-Good-Practice-to-Address-Protection-Concerns-in-the-COVID-19-Context-April-2020.pdf.

50 Order Suspending Introduction of Persons From a Country Where a Communicable Disease Exists, *supra* note 9; Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, *supra* note 9; Amendment and Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, *supra* note 9; Security Bars and Processing, *supra* note 11.

51 *May 2020 Letter from Public Health Experts, supra* note 5; *Public Health Measures, supra* note 13.

52 *Id.*

53 U.S. Department of Homeland Security, Office of Inspector General, OIG-20-69, *Early Experiences with COVID-19 at CBP Border Patrol Stations and OFO Ports of Entry* (Sep. 4, 2020) available at https://www.oig.dhs.gov/sites/default/files/assets/2020-09/OIG-20-69-Sep20.pdf.

54 *Public Health Measures, supra* note 13.

55 *May 2020 Letter from Public Health Experts, supra* note 5.

56 *Id.; Public Health Measures, supra* note 13.

57 *Public Health Measures, supra* note 13.

58 Lomi Kriel, Dara Lind, *ICE is making sure migrant kids don't have COVID-19, then expelling them to "prevent the spread" of COVID-19,* Texas Tribune (Aug. 10, 2020) available

- **Provide timely, humane, and orderly asylum processing at U.S. border posts.** The next administration's Secretary of Homeland Security and CBP Commissioner, working with humanitarian agency leads, should make it a top priority to conduct timely, humane, and orderly asylum processing at U.S. ports of entry and to immediately restore compliance with U.S. anti-trafficking and refugee law. CBP has the capacity to process asylum cases in a timely manner at both ports of entry and border patrol posts, and a next administration should immediately direct DHS and CBP to allocate sufficient staff to these responsibilities.[59] In fact, a December 2019 CATO Institute analysis concluded that the agency had staff capacity to process at least twice as many asylum seekers as it had processed in 2019, noting that in October 2016, CBP had processed twice as many asylum seekers as the monthly "metering" cap imposed under the Trump administration.[60] Initial border processing can be conducted within two to four hours so CBP can promptly transfer asylum seekers from CBP custody within several hours to the reception/orientation sites described below.[61] A next administration should authorize deployment of monitors from the DHS office of Civil Rights and Civil Liberties, and access for independent legal monitors and outside observers such as UNHCR.

  Once an individual is identified as an asylum seeker or unaccompanied child, their processing should be shifted to specifically trained humanitarian response officers. These officers should ultimately be employed by an agency with a humanitarian mission, or at least by USCIS with expanded asylum authorities. Unaccompanied children must be screened and transferred to ORR custody as required by U.S. law.[62] In addition to CBP officers and humanitarian response officers, border facilities should be staffed with case workers, health care staff, social workers, and child welfare specialists with the HHS Office of Refugee Resettlement. UNHCR should have open access to these facilities. Attorneys should no longer be blocked from these facilities and should be allowed to accompany asylum seekers during initial border processing interviews. A next administration should direct the new leadership of DHS and CBP to upgrade and build out ports of entry and Border Patrol facilities so they have sufficient space and structure to briefly host families, adults, and children for the few hours needed to conduct initial processing in a humane manner with sufficient space, normal temperatures, appropriate conditions, and social distancing, when needed.

  An incoming administration's DHS and CBP leaders must make clear to front-line officers that people seeking or indicating fear of harm cannot be expelled, turned away, or summarily removed under U.S. laws without assessments of their eligibility for asylum or other protection, conducted by asylum officers and immigration judges.

  With specialized staff trained to deal with humanitarian needs and processing, CBP officers can better focus on timely and safe front-line processing and security checks. An incoming administration's DHS and CBP leaders must make clear to front-line officers that people seeking or indicating fear of harm cannot be expelled, turned away, or summarily removed under U.S. laws without assessments of their eligibility for asylum or other protection, conducted by asylum officers and immigration judges. The use of flawed expedited removal should be ended and not used against asylum seekers (and the 2019 rule expanding its reach rescinded[63]), allowing more merits adjudications as asylum seekers are referred to

at https://www.texastribune.org/2020/08/10/coronavirus-texas-ice-migrant-children-deport/; Nicole Narea, *DHS is holding migrant children in secret hotel locations and rapidly expelling them*, Vox (Aug. 21, 2020) available at https://www.vox.com/2020/8/21/21377957/migrant-children-unaccompanied-hotels-dhs-expulsion.

59 David J. Bier, CATO Institute, *Legal Immigration Will Resolve America's Real Border Problems*, Policy Analysis No. 879 (Aug. 20, 2019) available at https://www.cato.org/publications/policy-analysis/legal-immigration-will-resolve-americas-real-border-problems.

60 *Id.*

61 Human Rights First, *Fact Sheet: CDC Relied on False Assertions in Issuing COVID-19 Order Being Used to Illegally Override U.S. Asylum Laws* (Jun. 2020) available at https://www.humanrightsfirst.org/sites/default/files/CDCReliedonFalseAssertionsinIssuingOrderUsedtoIllegallyOverrideAsylumLaw.pdf.

62 *See* 8 U.S.C. § 1232(b) & (c) available at https://www.law.cornell.edu/uscode/text/8/1232.

63 Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (Jul. 23, 2019) available at https://www.federalregister.gov/documents/2019/07/23/2019-15710/designating-aliens-for-expedited-removal.

file and have asylum applications assessed on the merits as outlined below.

- **Launch legal and case management programs to effectively manage cases.** Instead of costly, wasteful, and inhumane mass detention, a next administration must shift to effective and fiscally prudent case management and legal support strategies that comply with and uphold U.S. laws and human rights treaties. Adults and families with children seeking refuge should not be held in detention after their brief initial border custody. Instead, they should be swiftly referred to a reception/orientation site run by a local shelter, refugee assistance provider, or other humanitarian organization where they can be placed into an appearance management program and referred to legal representation. U.S. humanitarian processing and/or case management officers can meet with asylum seekers in a designated area at these sites to the extent necessary to conduct follow-up case processing, such as to confirm accurate information on destination locations or referrals to the appropriate destination immigration court. At these sites, asylum seekers should be provided necessary information about their immigration appearance obligations through highly effective Legal Orientation Programs or similar legal information presentations; referred for medical services and trauma support (locally if urgent, or in their destination locations); registered into a community-based case management program with offices in the destination location where they will be staying while their asylum and removal proceedings are pending; and referred for legal representation in these destination locations. These orientation activities and referrals should be completed within a few days.

Multiple studies have confirmed that case management and other alternatives to detention are highly effective at supporting appearance and compliance with immigration hearings and appointments.[64] A family case management program piloted by DHS from January 2016 to June 2017 demonstrated high

64 *See* OIG-18-22, *supra* note 46; *see also* Timm, *supra* note 46; *see also* U.N. High Commissioner for Refugees, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, PPLA/2011/01.Rev.1 (Apr. 2011) available at https://www.unhcr.org/4dc949c49.pdf; *see also* International Detention Coalition, *There are alternatives: A handbook for preventing unnecessary immigration detention (revised edition)* (2015) available at https://idcoalition.org/wp-content/uploads/2016/01/There-Are-Alternatives-2015.pdf.

Photo by Nina Robinson

levels of success, including a 99 percent appearance rate for hearings.[65] These programs support asylum seekers and migrants to attend required immigration court hearings and immigration appointments; assist them to find legal representation; and refer them to medical, trauma-related, or other resources in order to proactively address challenges that could otherwise derail asylum seekers from appearing for immigration appointments. Case management is also more fiscally prudent than detention. For example, the DHS case management program cost about $36 a day per family while family detention costs almost $320 a day per person.[66] Community-based nonprofits and faith-based organizations with strong community ties are best placed to operate such programs given their deep ties to local legal, medical, and other critical support services.

The next administration should launch a major legal orientation and representation initiative to ensure due process, accurate decision-making and high appearance rates.[67] This initiative should be integrated with the case management program outlined above, which can assist asylum seekers in securing legal representation. Asylum seekers represented by counsel overwhelmingly appear for their immigration court hearings, as statistical studies have repeatedly confirmed.[68] Indeed, legal representation leads to 97 percent appearance rates for immigration hearings.[69] Legal representation is also a more fiscally prudent expenditure than detention, and when provided at initial adjudications will help ensure eligible refugees receive protection at the earliest stages of the process, making the adjudication process more efficient.[70]

A next administration should act swiftly to jump start this major legal representation initiative, encouraging continued support from state and local governments, private donors, and pro bono lawyers while working with Congress to provide strong federal support to supplement these limited resources, in order to ensure all asylum seekers and immigrants, including those in removal proceedings, are provided legal representation and legal orientations. Congressional funding for universal legal orientation presentations and representation should, in addition to children and detainees, include families and others placed into case management

- **End arbitrary, unjust, and costly ICE mass incarceration.** The next administration should rescind current administration executive orders, policies, and guidelines[71] directing or encouraging that asylum

65 Aria Bendix, *ICE Shuts Down Program for Asylum Seekers,* Atlantic (Jun. 9, 2017) available at https://www.theatlantic.com/news/archive/2017/06/ice-shuts-down-program-for-asylum-seekers/529887/.

66 *Id.*

67 Legal orientation programs explain appearance obligations, the legal system, and how to secure counsel, and enhance the efficiency of the immigration courts. See Nina Siulc et al., Vera Institute of Justice, *Legal Orientation Program: Evaluation and Performance and Outcome Measurement Report, Phase II* (May 2008) available at https://storage.googleapis.com/vera-web-assets/downloads/Publications/legal-orientation-program-evaluation-and-performance-and-outcome-measurement-report-phase-ii/legacy_downloads/LOP_evalution_updated_5-20-08.pdf; *see also* U.S. Department of Justice, Executive Office for Immigration Review, *Cost Savings Analysis–The EOIR Legal Orientation Program* (last updated Apr. 4, 2012) available at https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP_Cost_Savings_Analysis_4-04-12.pdf.

68 Ingrid Eagly, Steven Shafer, Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention,* 106(3) Cal. L. Rev. 785 (2018) available at http://www.californialawreview.org/wp-content/uploads/2018/06/4-Eagly_Shafer_Whalley.pdf; *see* Eagly, Shafer, *supra* note 46; *see also* OIG-18-22, *supra* note 46.

69 *See* Eagly, Shafer, Whalley, *supra* note 68.

70 New York City Bar, *City Bar Welcomes NERA Report Finding Appointed Immigration Counsel Would Pay for Itself* (May 30, 2014) available at https://www.nycbar.org/media-listing/media/detail/city-bar-welcomes-nera-report-finding-appointed-immigration-counsel-would-pay-for-itself.

71 U.S. President Donald Trump, Executive Order: Border Security and Immigration Enforcement Improvements (Jan. 25, 2017) available at https://www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/; Memorandum from Matthew T. Albence, Executive Associate Director, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, Implementing the President's Border Security and Interior Immigration Enforcement Policies (Feb. 21, 2017) available at https://www.docketbird.com/court-documents/Damus-et-al-v-Nielsen-et-al/Exhibit-4-Albence-Memo-Feb-2017/dcd-1:2018-cv-00578-00104-008; U.S. President Donald Trump, Executive Order: Affording Congress an Opportunity to Address Family Separation (Jun. 20, 2018)

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seekers and immigrants be held in detention and not released, and shift instead to case management and other effective, humane strategies. Costly mass detention and non-release policies waste resources and violate America's refugee and human rights treaty obligations due to unnecessary, disproportionate, and otherwise arbitrary detention and lack of prompt court review.[72] In fact, a DHS advisory committee recommended the use of community-based case management programs, rather than detention.[73] Medical studies confirm detention harms asylum seeker health, while harms escalate as detention time lengthens.[74] The American Academy of Pediatrics has repeatedly confirmed detention harms children.[75]

The next administration should rescind current administration executive orders, policies, and guidelines directing or encouraging that asylum seekers and immigrants be held in detention and not released, and shift instead to case management and other effective, humane strategies.

Case management should replace—not supplement—detention. The next administration should end family and other unnecessary and inhumane migration detention that violates U.S. human rights legal commitments, and shift to a presumption of liberty. It should immediately vacate the Attorney General's decision preventing immigration judges from issuing bonds to asylum seekers;[76] revise regulatory language to provide prompt access to custody hearings (with affordable or no bond when warranted) for "arriving" asylum seekers and migrants; and codify asylum parole into regulations as ICE ignores parole directives. As outlined above, adults and children seeking refuge should not be sent to ICE detention facilities after initial border custody but should, if determined to need appearance support, be placed into community-based case management programs.

- **End criminal prosecutions for improper entry and family separation.** The next administration should revoke President Trump's January 2017 order designating prosecution of immigration offenses a "high priority"[77] as well as subsequent memoranda and agency directives,[78] and abstain from referring parents with children, asylum seekers and migrants for criminal prosecutions for improper entry/re-entry, instead using the administrative immigration removal and asylum processes designed for such cases. A next administration should work with Congress to repeal and revise laws so these matters

available at https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/; Ending ``Catch and Release" at the Border of the United States and Directing Other Enhancements to Immigration Enforcement, 83 Fed. Reg. 16179 (Apr. 13, 2018) available at https://www.federalregister.gov/documents/2018/04/13/2018-07962/ending-catch-and-release-at-the-border-of-the-united-states-and-directing-other-enhancements-to; U.S. Department of Homeland Security, *Acting Secretary McAleenan Announces End to Widespread Catch and Release* (Sep. 23, 2019) available at https://www.dhs.gov/news/2019/09/23/acting-secretary-mcaleenan-announces-end-widespread-catch-and-release; U.S. Immigration and Customs Enforcement, Directive: Identification and Monitoring of Pregnant Detainees (last updated Mar. 29, 2018) available at https://www.ice.gov/directive-identification-and-monitoring-pregnant-detainees; Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44392 (Aug. 23, 2019) (to be codified at 8 C.F.R. §§ 212, 236, 410) available at https://www.federalregister.gov/documents/2019/08/23/2019-17927/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children.

72 U.N. High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) available at https://www.refworld.org/docid/503489533b8.html; OHCHR, *Arbitrary Detention, supra* note 2; Méndez, *supra* note 2; U.N. Human Rights Committee, *General Comment No. 35 on Article 9 (Liberty and security of person)*, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en.

73 U.S. Department of Homeland Security, *Report of the DHS Advisory Committee on Family Residential Centers* (Sep. 30, 2016) available at https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf.

74 Craig Haney, *Conditions of Confinement for Detained Asylum Seekers Subject to Expedited Removal* (Feb. 2005) available at https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/conditionConfin.pdf.

75 Julie M. Linton, Marsha Griffin, Alan J. Shapiro, American Academy of Pediatrics, Council on Community Pediatrics, *Detention of Immigrant Children*, 139(4) Pediatrics (2017) available at https://pediatrics.aappublications.org/content/139/5/e20170483.

76 *See* Matter of M-S-, 27 I&N Dec. 509 (A.G. 2019) available at https://www.justice.gov/eoir/file/1154747/download; *see also* Padilla v. ICE, No. 19-35565 (9th Cir. 2020) available at https://www.aclu.org/legal-document/appeals-court-opinion-padilla-v-ice (upholding portion of district court injunction of Matter M-S- that found that the class of asylum seekers is constitutionally entitled to bond hearings).

77 U.S. President Donald Trump, Executive Order: Border Security and Immigration Enforcement Improvements (Jan. 2017) available at https://www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/. The executive order triggered a sharp increase in prosecutions, leading more asylum seekers and initial entrants to be targeted for prosecution, as Human Rights First reported. Human Rights First, *Punishing Refugees and Migrants: The Trump Administration's Misuse of Criminal Prosecutions* (Jan. 2018) available at https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf.

78 Memorandum from the U.S. Attorney General to All Federal Prosecutions on Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017) available at https://www.justice.gov/opa/press-release/file/956841/download; Ending ``Catch and Release" at the Border of the United States and Directing Other Enhancements to Immigration Enforcement, 83 Fed. Reg. 16179 (Apr. 13, 2018) available at https://www.federalregister.gov/documents/2018/04/13/2018-07962/ending-catch-and-release-at-the-border-of-the-united-states-and-directing-other-enhancements-to; U.S. Department of Justice, *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry* (Apr. 6, 2018) available at https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry; U.S. President Donald Trump, Executive Order, Affording Congress an Opportunity to Address Family Separation (Jun. 20, 2018) available at https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/.

are handled through civil laws, and asylum seekers are not subjected to such prosecutions.[79] After the administration announced its infamous "zero tolerance" policy, criminal prosecutions of asylum seekers and migrants escalated sharply and over 5,400 children were ultimately taken from parents subjected to these prosecutions.[80] Such prosecutions thwart due process, divert prosecutorial resources, and violate the Refugee Convention, which prohibits the United States from penalizing asylum seekers for illegal entry or presence in most cases, as the DHS OIG warned in 2015.[81] Human Rights First researchers observed countless prosecutions of asylum seekers that violated the Refugee Convention.[82] Seventy former U.S. Attorneys issued a letter objecting to the zero tolerance prosecutions and family separations, explaining that "[i]t is a simple matter of fact that the time a Department [of Justice] attorney spends prosecuting misdemeanor illegal entry cases, may be time he or she does not spend investigating more significant crimes like a terrorist plot, a child human trafficking organization, an international drug cartel or a corrupt public official."[83]

✓ Upgrade asylum adjudication systems to provide timely and fair decisions

The Trump administration has weaponized USCIS, its asylum division, and the DOJ immigration courts to deny refugees asylum. Since January 2017, administration officials have taken countless steps to push adjudicators to rule against refugees seeking asylum. These include repeatedly encouraging asylum officers and immigration judges to deny asylum by falsely painting asylum cases as meritless;[84] replacing asylum officers with Border Patrol officers to decrease credible fear pass rates (a policy preliminarily enjoined by a federal judge in August 2020);[85] elevating immigration judges who deny asylum at high rates;[86] and using the Attorney General's "certification" power to issue precedential decisions attempting to unilaterally rewrite U.S. law to render many refugees ineligible for asylum.[87] It should be no surprise, in light of these actions, that the rate at which asylum officers and immigration judges grant asylum has plummeted under the Trump administration.[88] Moreover, administration policies and mismanagement have exacerbated backlogs at the asylum office and immigration courts, leaving many waiting years longer for asylum decisions and undermining the integrity of the adjudication system.[89]

79 *See* Eleanor Acer, *Criminal Prosecutions and Illegal Entry: A Deeper Dive, Just Security* (Jul. 18, 2019) available at https://www.justsecurity.org/64963/criminal-prosecutions-and-illegal-entry-a-deeper-dive/; *see also Punishing Refugees and Migrants, supra* note 77*; National Immigrant Justice Center, A Legacy of Injustice: The U.S. Criminalization of Migration* (Jul. 23, 2020) available at https://immigrantjustice.org/research-items/report-legacy-injustice-us-criminalization-migration.

80 Human Rights First, *Zero-Tolerance Criminal Prosecutions: Punishing Asylum Seekers and Separating Families* (Jul. 18, 2018) available at https://www.humanrightsfirst.org/sites/default/files/Zero_Tolerance_Border_Report.pdf; *More than 5,400 children split at border, according to new count,* NBC News (Oct. 25, 2019) available at https://www.nbcnews.com/news/us-news/more-5-400-children-split-border-according-new-count-n1071791.

81 *Punishing Refugees and Migrants, supra* note 77; *Criminal Prosecutions and Illegal Entry, supra* note 79; Department of Homeland Security, Office of Inspector General, OIG-15-95, *Streamline: Measuring Its Effect on Illegal Border Crossing* (May 15, 2015) available at https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf.

82 *Punishing Refugees and Migrants, supra* note 77; *Zero-Tolerance Criminal Prosecutions, supra* note 80.

83 *Bipartisan Group of Former United States Attorneys Call on Sessions to End Family Separation*, Medium (Jun. 18, 2018) available at https://medium.com/@formerusattorneys/bipartisan-group-of-former-united-states-attorneys-call-on-sessions-to-end-child-detention-e129ae0df0cf.

84 Jeff Sessions, U.S. Attorney General, Remarks to the Executive office for Immigration Review (Oct. 12, 2017) available at https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review; Eleanor Acer, Human Rights First, *Sessions Presses Bogus Asylum Narrative at the Immigration Courts* (Oct. 12, 2017) available at https://www.humanrightsfirst.org/blog/sessions-presses-bogus-asylum-narrative-immigration-courts.

85 Human Rights First, *Fact Sheet: Allowing CBP to Conduct Credible Fear Interviews Undermines Safeguards to Protect Refugees,* (Apr. 2019) available at https://www.humanrightsfirst.org/sites/default/files/CBP_Credible_Fear.pdf; Anne Bloomberg, *Federal judge blocks Customs and Border Patrol from screening asylum seekers*, Jurist (Sep. 2, 2020) available at https://www.jurist.org/news/2020/09/federal-judge-blocks-customs-and-border-patrol-from-screening-asylum-seekers/.

86 American Immigration Lawyers Association, AILA Doc. No. 20042931, *AILA and the American Immigration Council Obtain EOIR Hiring Plan via FOIA Litigation* (May 5, 2020) available at https://www.aila.org/EOIRHiringPlan.

87 Innovation Law Lab, Southern Poverty Law Center (SPLC), *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool* (Jun. 2019) available at https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf.

88 TRAC Immigration, Record Number of Asylum Cases in FY 2019 (Jan. 8, 2020) available at https://trac.syr.edu/immigration/reports/588/; *Grant Rates Plummet, supra* note 1; *see* TRAC Immigration, *Asylum Decisions and Denials Jump in 2018* (Nov. 29, 2018) available at https://trac.syr.edu/immigration/reports/539/; *see also* TRAC Immigration, *Asylum Decisions by Custody, Representation, Nationality, Location, Month and Year, Outcome and more* (through Aug. 2020) available at https://trac.syr.edu/phptools/immigration/asylum/; *see also* TRAC *Immigration, Details on MPP (Remain. In Mexico)* (through Aug. 2020) available at https://trac.syr.edu/phptools/immigration/mpp/.

89 Fernanda Echavarri, *"A Fucking Disaster That is Designed to Fail": How Trump Wrecked America's Immigration Courts*, Mother Jones (Feb. 6, 2020) available at https://www.motherjones.com/politics/2020/02/trump-immigration-court-backlog-migrant-protection-protocols/; U.S. Department of Homeland Security, Citizenship and

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While working with Congress to secure systemic reforms and make the immigration court system independent, the next administration should quickly reverse policies that rig adjudications against refugees, ensure swift increases in staffing for asylum interviews and hearings, and otherwise take steps toward providing timely, fair, and effective asylum decisions that grant protection to refugees promptly. Key steps include:

- **Immediately vacating and reversing administration rulings and policies that rig asylum decisions.** The next administration should quickly, within the first two weeks, vacate Attorney General rulings that prevent refugees from receiving asylum in the United States. Most critically, a next administration's Attorney General or properly-appointed Acting Attorney General should immediately vacate the decision issued by former Attorney General Jeff Sessions in *Matter of A-B-*, which aims to deny refuge to women subjected to violent attacks in cases where national authorities refuse or fail to protect them, and victims of armed groups in countries that refuse and fail to protect.[90] The Attorney General should declare *Matter of A-B-* to be without precedential force and reinstate the precedent of *Matter of A-R-C-G-*.[91] U.S. agencies should issue a new proposed rule that makes clear that a "particular social group" is, without any additional requirements, a group whose members: share a characteristic that is immutable or fundamental to identity, conscience, or the exercise of human rights; share a past experience or voluntary association that due to its historical nature cannot be changed; or are perceived as group by society. The next Attorney General should also vacate Attorney General Bill Barr's ruling in *Matter of L-E-A-*, in which he attempted to block from asylum members of persecuted family groups, and Sessions' ruling in *Matter of E-F-H-L-*, which opened the door for immigration judges to deny asylum without full evidentiary hearings.[92] As noted above, the next administration should withdraw the June 15, 2020 proposed rule that would render many refugees ineligible for asylum—including refugees who suffered gender-based persecution or refugees from Hong Kong or other places if they transit other countries on their way to the United States, if their persecutors detained them for only brief periods, or if their persecutors were not able to carry out their threats before the asylum seeker fled to the United States.[93] (As it moves forward, the next administration should work with Congress to safeguard asylum by passing the Refugee Protection Act.)[94] In addition, the next administration should rescind the August 26, 2020 proposed rule that would rig the appellate process against asylum seekers and immigrants and make it more difficult for them to retain legal counsel and to file appeals.[95]

[T]he next administration should quickly reverse policies that rig adjudications against refugees, ensure swift increases in staffing for asylum interviews and hearings, and otherwise take steps toward providing timely, fair and effective asylum decisions that grant protection to refugees promptly.

Immigration Services Ombudsman, Annual Report 2020 (Jun. 30, 2020) available at https://www.dhs.gov/sites/default/files/publications/20_0630_cisomb-2020-annual-report-to-congress.pdf; Marissa Esthimer, Migration Policy Institute (MPI), *Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?* (Oct. 3, 2019) available at https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point; TRAC Immigration, *Backlog of Pending Cases in Immigration Courts* (last updated Aug. 2020) available at https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php; TRAC Immigration, *Immigration Court Backlog Tool* (through Aug. 2020) available at https://trac.syr.edu/phptools/immigration/court_backlog/; Human Rights First, *Tilted Justice: Backlogs Grow While Fairness Shrinks in U.S. Immigration Courts* (Oct. 2017) available at https://www.humanrightsfirst.org/sites/default/files/hrf-tilted-justice-final%5B1%5D.pdf.

90 Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018) available at https://www.justice.gov/eoir/page/file/1070866/download.

91 Matter of A-R-C-G-, 26 I&N Dec. 388 (B.I.A. 2014) available at https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/26/3811.pdf. This is not a complete list of all Attorney General rulings that should be vacated. For instance, the next administration should also vacate decisions that violate the U.N. Convention Against Torture (UNCAT) by putting torture survivors in danger of refoulement. *See* Matter of J-R-G-P-, 27 I&N Dec. 482 (B.I.A. 2018) available at https://www.justice.gov/eoir/page/file/1106661/download; *see also* Matter of R-A-F-, 27 I&N Dec. 778 (A.G. 2020) available at https://www.justice.gov/eoir/page/file/1252416/download; *see also* Matter of O-F-A-S-, 28 I&N Dec. 35 (A.G. 2020) available at https://www.justice.gov/eoir/page/file/1294101/download. The next administration should also rescind all rules and proposed rules that violate the UNCAT, including those proposed on June 15, 2020, see Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, *supra* note 27, and on July 9, 2020, *see* Security Bars and Processing, *supra* note 11.

92 Matter of L-E-A-, 27 I&N Dec. 581 (A.G. 2019) available at https://www.justice.gov/file/1187856/download; Matter of E-F-H-L-, 27 I&N Dec. 226 (A.G. 2018) available at https://www.justice.gov/eoir/page/file/1040936/download.

93 Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, *supra* note 27; Comment on Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, *supra* note 27.

94 Refugee Protection Act of 2019, S. 2936, 116th Cong. available at https://www.congress.gov/bill/116th-congress/senate-bill/2936?s=1&r=3.

95 Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52491 (Aug. 26, 2020) (to be codified at 8 C.F.R. §§ 1003, 1240) available at https://www.govinfo.gov/content/pkg/FR-2020-08-26/pdf/2020-18676.pdf.

The next administration should end other Trump administration policies that rig the system to deny refugees asylum. DHS and USCIS leaders should direct that trained USCIS asylum officers—not Border Patrol or other immigration enforcement officers—conduct protection screening interviews.[96] The next administration should also rescind training and guidance that attempted to improperly heighten the statutory credible fear standard to prevent refugees from applying for asylum;[97] and rescind the Trump administration policy of conducting assessments relating to potential bars to asylum, which involve complex legal and factual determinations, during preliminary screening interviews where asylum seekers do not generally have legal counsel, and instead revert to the long-standing prior practice of conducting these assessments during asylum hearings.[98] New leaders at DHS, USCIS, and EOIR should direct the revision of all guidance and training materials that have been influenced by flawed Trump administration rulings, directives and policies so that all guidance and training materials—including those relating to credible fear and reasonable fear assessments, asylum eligibility, and interviews, and the conduct of hearings—is consistent with U.S. law and U.S. legal obligations under refugee and human rights treaties.

The next administration's Attorney General should take swift steps to address unfair and politicized immigration judge hiring and BIA appointments. The next Attorney General should direct a review of the agency's decisions to hire new BIA members with some of the highest asylum denial rates in the nation.[99] In addition, a next administration should reverse rules that deprive asylum seekers of legal work authorization for even longer and impose fees on their asylum applications and initial work applications.[100]

96 *Allowing CBP to Conduct Credible Fear Interviews Undermines Safeguards to Protect Refugees, supra* note 85.

97 Memorandum from John Lafferty, Chief, Asylum Division, U.S. Citizenship and Immigration Services to All Asylum Office Personnel on Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plans, Credible Fear of Persecution and Torture Determinations, and Reasonable Fear of Persecution and Torture Determinations (Feb. 13, 2017) available at https://drive.google.com/file/d/0B_6gbFPjVDoxY0FCczROOFZ4SVk/edit; American Immigration Lawyers Association, AILA Doc. No. 19050602, *USCIS Updates Officer Training on Credible Fear of Persecution and Torture Determinations* (Apr. 30, 2019) available at https://www.aila.org/infonet/uscis-updates-officer-training-credible-fear; CLINIC, *Credible Fear Lessons Plan Comparison Chart* (last updated Oct. 4, 2019) available at https://cliniclegal.org/resources/asylum-and-refugee-law/credible-fear-lesson-plans-comparison-chart; Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, *supra* note 27; Grace v. Barr, No. 19-05013 (D.C. Cir. 2020) available at https://www.cadc.uscourts.gov/internet/opinions.nsf/E3495F5ED3B288FA852585A80052C7FF/$file/19-5013-1852194.pdf.

98 Asylum Eligibility and Procedural Modifications, *supra* note 27; Security Bars and Processing, *supra* note 11; Procedures for Asylum and Bars to Asylum Eligibility, 85 Fed. Reg. 69640 (Dec. 19, 2019) (to be codified at 8 C.F.R. §§ 208, 1208) available at https://www.federalregister.gov/documents/2019/12/19/2019-27055/procedures-for-asylum-and-bars-to-asylum-eligibility; *see* former 8 C.F.R. 208.30(e)(5); AILA Doc. No. 19050602, *supra* note 97.

99 AILA Doc. No. 20042931, *supra* note 86.

100 Asylum Application, Interview, and Employment Authorization for Applicants, *supra* note 25; U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 Fed. Reg. 46788 (Aug. 3, 2020) (to be codified at 8 C.F.R. 103 et seq.) available at https://www.govinfo.gov/content/pkg/FR-2020-08-03/pdf/2020-16389.pdf.

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- **Overhauling USCIS asylum adjudications to provide more timely and fair asylum decisions.** The next administration should take steps to enable the USCIS asylum division to play a strong role in promptly recognizing refugee cases, reducing backlogs, and minimizing the number of cases unnecessarily referred into the immigration court system. The next administration should also quickly ramp up asylum officer hiring to conduct asylum interviews and remedy backlogs, while preparing to further increase asylum officers if and as needed to promptly conduct full asylum interviews as circumstances evolve, for instance in response to upticks in refugees seeking asylum from Central America and/or Venezuela, or the arrival of refugees fleeing Hong Kong.

  The next president should direct that DHS and USCIS leaders enhance the ability of the USCIS asylum division to better contribute to the prompt resolution of asylum applications and minimize the number of cases—of individuals ultimately determined to be refugees who meet asylum eligibility requirements—unnecessarily referred into the immigration court removal system. Agency leaders should affirm that one of the primary purposes of the asylum division is to recognize refugee cases promptly without requiring time of other agencies (EOIR, ICE) when not needed. Officers should of course refer cases barred from or ineligible for asylum. But officers and officials should not view it as imperative to refer a large percentage of cases into removal proceedings. To the extent decision-making quotas contribute to the referral of asylum-eligible cases into removal proceedings, USCIS should review and revise those quotas. It will ultimately save government funds if more asylum-eligible cases are accurately resolved at an early stage by asylum officers.

  In addition, a next administration should provide initial decision-making authority to the asylum office in asylum cases, including those originating at ports of entry and along the border. This approach will allow more cases to be granted efficiently at the USCIS asylum office, provided asylum seekers are afforded sufficient time to secure legal counsel, gather evidence, and prepare their cases—steps that will help assure legally accurate decisions.[101] Such an approach would reduce the number of cases (of individuals eligible for asylum) referred for immigration court removal proceedings, while also preserving the right of (the much-reduced number of) asylum seekers ultimately referred into removal proceedings to asylum hearings in immigration court.

  Given long backlogs and delays, USCIS should create a formal process for asylum seekers to request prompt interviews due to pressing humanitarian challenges, such as family stranded in danger. A next administration should also create an application process for "cancellation of removal" relief, such as through a separate USCIS application and adjudication unit, so that applicants for this humanitarian relief can be provided the necessary referral so their eligibility can be assessed, and do not add to asylum backlogs through asylum filings made to secure such referrals. This reform could be implemented under existing statutory authority, as the Migration Policy Institute has explained.[102]

101 In cases where asylum seekers are put into removal proceedings, such proceedings can be terminated and referred initially for asylum office interviews, so lesser numbers will ultimately require removal hearings. As noted above, the use of expedited removal should be rolled back and ended. The Migration Policy Institute has recommended asylum officers be afforded the ability to conduct full asylum interviews for asylum seekers who have passed credible fear interviews, Doris Meissner, Faye Hipsman, T. Alexander Aleinikoff, Migration Policy Institute *(MPI), The U.S. Asylum System in a Crisis: Charting a Way Forward* (Sep. 2018) available at https://www.migrationpolicy.org/research/us-asylum-system-crisis-charting-way-forward.

102 *Id.*

While the practice of deploying some asylum officers to conduct refugee resettlement interviews, and vice versa, is a constructive management tool that can strengthen rather than weaken each system, DHS and USCIS leaders should ensure sufficient numbers of both asylum division and refugee corps officers to conduct interviews timely in both systems.

- **Overhauling, transforming, and updating the immigration courts.** Trump administration policies have rigged immigration court hearings against asylum seekers and exacerbated the court's counterproductive delays and backlogs.[103] The manipulation of the immigration courts by administration officials has made it abundantly clear that the system itself is fatally flawed, lacking in judicial independence, and highly vulnerable to politicization. While working with Congress to enact legislation to transform the immigration courts into independent courts,[104] the next administration should quickly launch the administrative reforms outlined below, including:
    - **Implementing safeguards against politicized hiring and interference** at the immigration courts.[105] These measures should include placing career professionals without political interests in control of, and staffing, the hiring process; requiring significant prior immigration law experience of various backgrounds for new hires; selecting immigration judges through fair and objective hiring and elevating judges based on experience and performance; reviewing the process and reassessing the validity of appeals Board appointments of immigration judges with high asylum denial rates and/or an established history of abusive behavior on the bench; ensuring professional

103 Julia Preston, Andrew R. Calderón, Marshall Project, *Trump Tried to Deport People Faster. Immigration Courts Slowed Down Instead.* (Jul. 16, 2019) available at https://www.themarshallproject.org/2019/07/16/trump-tried-to-deport-people-faster-immigration-courts-slowed-down-instead.

104 A recent TRAC analysis of immigration court data confirmed that the Trump administration's elimination of administrative closures greatly exacerbated the backlog. *Backlog of Pending Cases in Immigration Courts, supra* note 89; *Immigration Court Backlog Tool, supra* note 89. In addition to safeguarding due process, this reform would also eliminate an Attorney General's ability to issue his or her own decisions to essentially re-write asylum law and overturn court decisions. The American Bar Association, Federal Bar Association, National Association of Immigration Judges, and other organizations have recommended that Congress separate the courts from DOJ to ensure impartiality and shield against political manipulation. The ABA detailed its recommendation for Article I courts in a 2019 report. American Bar Association (ABA), Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, Vol. 1 (Mar. 2019) available at https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf.

105 Human Rights First, *Immigration Court Hiring Politicization*, available at https://www.humanrightsfirst.org/sites/default/files/DOJ-FOIA-Immigration-Judges.pdf; *The Attorney General's Judges, supra* note 87.

Photo by Ted Eytan

diversity on the bench and addressing the excessive hiring of judges previously affiliated with ICE (the prosecuting agency) or other prosecutorial entities;[106] reviewing the selection process for chief immigration judge and EOIR director to remedy, and safeguard against, politicized hiring; appointing new, highly experienced Board members and/or tapping retired Board members or Board attorneys to serve as temporary Board members; abolishing the court "office of policy" created under the Trump administration, and powers given to the Director, so courts are controlled by statute, regulation, and higher court case law, rather than politically influenced quotas, policy office outputs, and trainings.

- **Terminating current administration policies that pressure judges to deny asylum cases**—including case quotas, rushed rocket-dockets, and Board processing deadlines.[107] Asylum adjudications must allow sufficient time to secure pro bono legal representation and gather evidence for hearings while providing timely resolution of cases (both asylum grants and removals of those fairly determined to be ineligible for relief).

- **Reducing all-time high immigration court backlogs**, including by: (1) keeping thousands of cases out of the backlogged courts by reversing former Attorney General Sessions' directive to add administratively closed cases back on to the court's docket, withdrawing his ruling in *Matter of Castro-Tum*;[108] (2) working with ICE to terminate cases where USCIS action could resolve the cases due to pending USCIS petitions—such as cases for Special Immigrant Juveniles, U-visa applicants, and I-130 petitions for people married to U.S. citizens or legal permanent residents (USCIS can put such cases back in to immigration court removal proceedings if USCIS should deny the petition); (3) working with DHS to terminate cases involving people granted TPS protection, if they so request, to facilitate their adjustment before USCIS (through recognition, by the DHS Office of General Counsel, that a grant of TPS constitutes inspection and admission, an issue on which the federal courts are currently divided);[109] (4) working with DHS to identify additional cases that should be administratively closed or terminated, including through restored prosecutorial discretion; and (5) requesting funding from Congress to increase immigration court interpreters and support staff, BIA legal and administrative staff, and, with reforms to eliminate politicized hiring, immigration judges and Board members fairly and objectively selected.

- **Support stronger complementary humanitarian protection mechanisms.** A next administration should work with Congress to provide complementary humanitarian protections for people who face serious harms not covered by U.S. refugee law and strengthen Temporary Protected Status (TPS). A complementary protection status could, for instance, protect people facing cruel, inhuman, or degrading treatment or punishment.[110] Protections from return would in some cases be warranted for people in need of international protection due to climate displacement.[111] Temporary Protected Status should be strengthened to include rather than separate families, provide a route to more stable permanent legal residence, and assure designation determinations are based on objective assessments of conditions in countries rather than politicized considerations.[112]

106 Tanvi Misra, *DOJ hiring changes may help Trump's plan to curb immigration*, Roll Call (May 4, 2020) available at https://www.rollcall.com/2020/05/04/doj-hiring-changes-may-help-trumps-plan-to-curb-immigration/.

107 Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, *supra* note 95.

108 Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018) available at https://www.justice.gov/eoir/page/file/1064086/download.

109 Flores v. USCIS, 718 F.3d 548 (6th Cir. 2013); Ramirez v. Brown, 852 F.3d 954 (9th Cir. 2017); Medina v. Beers, 65 F.Supp. 3d 419 (E.D. Pa. 2014); Bonilla v. Johnson, 149 F.Supp.3d 1135 (D. Minn. 2016); cf. Serrano v. United States Attorney General, 655 F.3d 1260 (11th Cir. 2011); Sanchez v. Sec'y United States Dept. of Homeland Sec., No. 19-1311, 2020 U.S. App. LEXIS 22845 (3d Cir. 2020); Matter of H-G-G-, 27 I&N Dec. 617 (BIA 2019); *see* American Immigration Council, AILA, *Practice Advisory: Adjustment Eligibility of TPS Holders After Return With Advance Parole, Even When Initial Entry Without Inspection* (Dec. 13, 2019) available at https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/adjustment_eligibility_of_temporary_protected_status_holders_after_return_with_advance_parole_even_when_initial_entry_without_inspection.pdf.

110 Bill Frelick, *What's Wrong with Temporary Protected Status and How to Fix It: Exploring a Complementary Protection Regime*, 8(1) J. on Migration & Hum. Sec. 42 (2020) available at https://journals.sagepub.com/doi/pdf/10.1177/2331502419901266.

111 Bill Frelick, Human Rights Watch, *It's Time to Change the Definition of Refugee* (Jan. 28, 2020) available at https://www.hrw.org/news/2020/01/28/it-time-change-definition-refugee; Kayly Ober, Refugees International (RI), *Climate, Migration, and Displacement–What Are the Implications for Human Rights Law?* (May 7, 2020) available at https://www.refugeesinternational.org/reports/2020/5/7/climate-migration-and-displacement-what-are-the-implications-for-human-rights-law.

112 Frelick, *supra* note 110; Donald Kerwin, Center for Migration Studies (CMS), *The Besieged US Refugee Protection System: Why Temporary Protected Status Matters* (Dec. 20,

✓ Rebuild and strengthen U.S. leadership on refugee resettlement

Just as it has decimated asylum to block refugees from the United States, so too has the Trump administration dismantled U.S. refugee resettlement. The administration issued discriminatory bans blocking refugees from African and Muslim-majority countries, drastically cut annual resettlement goals to all-time lows, and failed to meet its own meager goals. The United States has resettled only about 9,000 refugees this fiscal year, far below its exceedingly low annual goal of 18,000 refugees—a goal that amounts to an 80 percent decline from the U.S. historic average of 95,000 refugees. These moves have left refugees stranded in dangerous situations, hampered UNHCR's ability to address crises globally, undermined U.S. national interests, and sent the wrong signal to front-line countries hosting the vast majority of the world's refugees.[113]

The United States has resettled only about 9,000 refugees this fiscal year, far below its exceedingly low annual goal of 18,000 refugees—a goal that amounts to an 80 percent decline from the U.S. historic average of 95,000 refugees.

Resettlement is often a critical component of effective strategies to address refugee challenges globally—along with increased humanitarian assistance, development investment, upholding the right of refugees to access protection across borders and to work, and addressing the root causes of human rights abuses and conflicts that force refugees to flee. Former U.S. national security officials and military leaders have repeatedly explained that resettling refugees advances U.S. national security interests and supports the stability of front-line refugee hosting states, including U.S. allies and partners.[114] Simply put, a next administration should restore U.S. resettlement leadership, including by:

- **Taking immediate steps to rebuild resettlement leadership and capacity.** During its first week, the next administration should rescind the discriminatory Muslim, African, and refugee bans;[115] issue an executive order to increase the fiscal year 2021 admissions goal to 100,000, while restoring regional allocations based on need and notifying Congress; and direct DOS/PRM and DHS to work with UNHCR to restore its referrals of vulnerable refugees, ramp up capacity to conduct pre-screening, processing, and refugee corps interviews, and take other steps necessary to build U.S. capacity to increase resettlement to 125,000 for fiscal year 2022. The administration should also, during its first month, request Congressional funding for this rebuilding.

- **Strengthening U.S. resettlement.** A next administration should build capacity to conduct more timely, and in urgent cases, expedited resettlement; reduce delays in security check and other processing;[116] improve integration and support, including by scaling-up the match grant program, employment, case management and other support, maintaining 18-month assistance period, and

2017) available at https://cmsny.org/publications/besieged-us-refugee-protection-system-temporary-protected-status-matters/.

113 Human Rights First, *U.S. Leadership Forsaken: Six Months of the Trump Refugee Bans* (Jul. 2017) available at https://www.humanrightsfirst.org/sites/default/files/HRF-US-Leadership-Forsaken-FINAL.pdf.

114 *Id.*; National Security Leaders Statement of Principles on America's Commitment to Refugees (Jun. 23, 2016) available at https://www.humanrightsfirst.org/sites/default/files/STATEMENT-ON-AMERICAS-COMMITMENT-TO-REFUGEES.pdf.

115 U.S. President Donald Trump, Presidential Proclamation 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats (Sep. 24, 2017) available at https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/; U.S. President Donald Trump, Presidential Proclamation 9822, Addressing Mass Migration Through the Southern Border of the United States (Nov. 8, 2018) available at https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/; U.S. President Donald Trump, Presidential Proclamation 9842, Addressing Mass Migration Through the Southern Border of the United States (Feb. 7, 2019) available at https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states-2/; U.S. President Donald Trump, Presidential Proclamation 9983, Improving Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry (Jan. 31, 2020) available at https://www.aila.org/infonet/presidential-proclamation-improving-vetting; U.S. President Donald Trump, Executive Order 13,769, Protecting the Nation from Foreign Terrorist Entry into the United States (Jan. 27, 2017) available at https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states/; U.S. President Donald Trump, Executive Order 13,780, Protecting The Nation From Foreign Terrorist Entry Into The United States (Mar. 6, 2017) available at https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/; U.S. President Donald Trump, Executive Order 13,815, Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities (Oct. 24, 2017) available at https://www.whitehouse.gov/presidential-actions/presidential-executive-order-resuming-united-states-refugee-admissions-program-enhanced-vetting-capabilities/. The administration should also rescind Executive Order 13,888, Enhancing State and Local Involvement in Refugee Resettlement, 84 Fed. Reg. 52355 (Oct. 1, 2019) available at https://www.federalregister.gov/documents/2019/10/01/2019-21505/enhancing-state-and-local-involvement-in-refugee-resettlement.

116 The new White House Coordinator or Senior Advisor for Refugee and Humanitarian affairs must have high-level security clearance to oversee improvements to and coordination of security check processes.

conducting a study to identify steps to improve outcomes for refugees; expand community support, encourage co-sponsorship initiatives, and explore potential private sponsorship over and above the annual presidential determination.

- **Protecting U.S.-affiliated Iraqis and SIVs.** A next administration should promptly improve the pace of initiatives to bring to safety Iraqis and Afghans at risk due to their work with the U.S. military or other U.S. entities, including by: scaling up Iraqi resettlement and fixing processing delays, remedying backlogs and implementing reforms to SIV processing as recommended in a report issued by IRAP,[117] encouraging Congress to authorize 4,000 Afghan visas annually until backlog and projected needs are met; and designating refugees who assisted the U.S. in Syria for P-2 priority resettlement.

- **Launching resettlement in the Americas.** The next administration should lead a regional strategy to bring some Central American and Venezuelan refugees to safety through safe and orderly routes, while working with UNHCR and other resettlement countries. To succeed, the U.S. must resettle significant numbers in a timely manner, forge a multi-year commitment, and recognize Central American refugee claims, including those persecuted by deadly gangs or domestic violence perpetrators, with an acceptance rate commensurate to the gravity of the protection needs. This strategy should not undermine development of asylum in the region and must safeguard asylum for those who seek protection at the U.S. border. Key steps by DOS and DHS should include:

  - Creating a P-1 priority initiative for Honduran, Guatemalan, and Salvadoran refugees who have fled their home countries, and for Venezuelan refugees. Resettlement processing centers should be located in Mexico and other countries to which refugees have fled. The initiative should resettle vulnerable cases, including unaccompanied children, women at risk, LGBTQI+ persons, and refugees facing acute danger or risk in the country where they are located. The next administration should improve the pace of resettlement and strengthen support for UNHCR efforts to protect waiting refugees.

  - Resettling refugees with U.S. family by creating P-2 priority resettlement for nationals of Honduras, Guatemala, and El Salvador, as well as Venezuela, with approved I-130 relative petitions.

  - Launching an enhanced initiative, building on a restored CAM program, to bring children in danger in Northern Triangle countries to U.S. safety through an orderly program that provides permanent residency protection, ensuring emergency transit or transfers for children in danger during processing.

  - Identifying extremely urgent protection cases inside Northern Triangle countries but, given the acute dangers, expanding support for emergency transfer of people in danger. Without strong emergency evacuation capacity, this "in-country" effort must remain limited.

- **Preparing for resettlement of refugees from Hong Kong.** The next administration must prepare to launch a substantial resettlement initiative for Hong Kong refugees, in addition to the annual Presidential Determination goal. In so doing, the next administration should rescind the June 2020 rule and other policies that deny refugees—including those who suffer brief arrests—U.S. refugee protection.[118]

117 International Refugee Assistance Project (IRAP), *Recommendations on the Reform of the Special Immigrant Visa Program for U.S. Wartime Partners* (Jun. 2020) available at https://refugeerights.org/wp-content/uploads/2020/06/IRAP_SIV_Report_2020.pdf.

118 Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, *supra* note 25.

Photo by National Police of Colombia

4

Addressing Racial Injustice, Demilitarizing Law Enforcement, and Refocusing the Military on Defense

Introduction

Building on "tough on crime" policies from the 1960s and beyond, and accelerated by militarized post-9/11 "War on Terror"[1] national security policies, several consecutive presidential administrations have presided over the steady militarization of immigration enforcement and domestic policing.[2] Most recently, displays of heavily militarized law enforcement responses to racial justice protests have spotlighted the relationship between systemic racism and America's approach to policing.

The current administration has exacerbated preexisting trends by controversially and unnecessarily using the U.S. military in a number of domestic contexts. This includes deploying U.S. military personnel to the U.S.-Mexico border to reinforce Customs and Border Protection's (CBP) implementation of harmful immigration policies against asylum seekers;[3] increasing the flow of military equipment and other key Department of Defense (DoD) resources to federal, state, and local law enforcement agencies under the so-called "1033 program," "1122 program," and Homeland Security grants;[4] and using the military and highly militarized federal law enforcement personnel to police racial justice protests in Washington, D.C., Portland, Oregon, and elsewhere.[5] Several of these policy choices have exacerbated, rather than mitigated, tensions between local authorities and the citizens they vow to serve and protect,[6] while increasing the politicization of an otherwise proudly and appropriately nonpartisan military.[7] As retired Admiral Michael Mullen—the 17th Chairman of the Joints Chiefs of Staff—stated in response to the recent deployment of military personnel to address racial justice protests: "[t]oo many foreign and domestic policy choices have become militarized; too many military missions have become politicized."[8]

[D]isplays of heavily militarized law enforcement responses to racial justice protests have spotlighted the relationship between systemic racism and America's approach to policing.

The reasons for reform are compelling. From a pragmatic standpoint, the trend of militarized policing undermines public and officer safety. Research demonstrates that militarized law enforcement not only "fails to enhance officer safety or reduce local crime" but also "may diminish police reputation in the mass

1 *See* Alka Pradhan, *"Head-On Into Peril": Connecting 9/11 and Law Enforcement Abuses in Portland*, Just Security (Aug. 19, 2020) available at https://www.justsecurity.org/72061/head-on-into-peril-connecting-9-11-and-law-enforcement-abuses-in-portland/. For a longer discussion of how the post-9/11 wars have contributed to militarized policing in the U.S., *see* Jessica Katzenstein, Watson Institute for International and Public Affairs, *The Wars Are Here: How the United States' Post-9/11 Wars Helped Militarize U.S. Police* (Sep. 16, 2020) available at https://watson.brown.edu/costsofwar/files/cow/imce/papers/2020/Police%20Militarization_Costs%20of%20War_Sept%2016%202020.pdf.

2 Alex Horton, *Trump claimed his plan to put troops on the border is extraordinary. It was routine for Obama.*, Washington Post (Apr. 5, 2018) available at https://www.washingtonpost.com/news/checkpoint/wp/2018/04/04/trump-claimed-his-plan-to-put-troops-on-the-border-is-extraordinary-it-was-routine-for-obama/.

3 Katzenstein, *supra* note 1, at pp. 7-12; Michael D. Shear, Thomas Gibbons-Neff, *Trump Sending 5,200 Troops to the Border in an Election-Season Response to Migrants, New York Times* (Oct. 29, 2018) available at https://www.nytimes.com/2018/10/29/us/politics/border-security-troops-trump.html; Paul D. Shinkman, *Pentagon Deploys 2,100 More Troops to Southern Border*, US News (Jul. 17, 2019) available at https://www.usnews.com/news/national-news/articles/2019-07-17/pentagon-deploys-2-100-more-troops-to-southern-border; Zolan Kanno-Youngs, *Military to be Sent to Border Before Supreme Court's 'Remain in Mexico' Ruling*, New York Times (Mar. 6, 2020) available at https://www.nytimes.com/2020/03/06/us/politics/remain-in-mexico-military.html.

4 Allison McCartney, Paul Murray, Mira Rojanasakul, *After Pouring Billions Into Militarization of U.S. Cops, Congress Weighs Limits*, Bloomberg (Jul. 1, 2020) available at https://www.bloomberg.com/graphics/2020-police-military-equipment/; *see* Federal Emergency Management Assistance (FEMA), *Homeland Security Grant Program* (last updated Aug. 18, 2020) available at https://www.fema.gov/grants/preparedness/homeland-security (tracking funding increases in three Homeland Security Grant Programs between 2016 and 2020); Spencer Ackerman, *US police given billions from Homeland Security for 'tactical' equipment*, Guardian (Aug. 20, 2014) available at https://www.theguardian.com/world/2014/aug/20/police-billions-homeland-security-military-equipment.

5 Zolan Kanno-Youngs, Katie Benner, *Trump Deploys the Full Might of Federal Law Enforcement to Crush Protests*, New York Times (last updated Jun. 12, 2020) available at https://www.nytimes.com/2020/06/02/us/politics/trump-law-enforcement-protests.html.

6 For instance, a 2017 study found that transfers of military equipment under the 1033 program correlated with increased civilian killings by police. Casey Delehanty et al., *Militarization and police violence: The case of the 1033 program*, 4(2) Research & Politics 1 (2017) available at https://journals.sagepub.com/doi/10.1177/2053168017712885; *see also* Katzenstein, *supra* note 1, at p. 18. Protestors have found the use by law enforcement officers of riot gear and armored vehicles, also procured under the 1033 program, to be "intimidating, frightening, and escalatory"; and the concentration of militarized force, attention, and resources in racialized communities has "reinforce[ed] the idea that hyperpoliced communities of color are internal enemies." Katzenstein, *supra* note 1, *Id.* at pp. 18-20; *see also* Eliav Lieblich, Adam Shinar, *The Case Against Police Militarization*, 23 Mich. J. Race & L. 105 (2018) available at https://repository.law.umich.edu/mjrl/vol23/iss1/4/.

7 Jim Golby, Mara Karlin, Brookings, *The case for rethinking the politicization of the military* (Jun. 12, 2020) available at https://www.brookings.edu/blog/order-from-chaos/2020/06/12/the-case-for-rethinking-the-politicization-of-the-military/.

8 Mike Mullen, *I Cannot Remain Silent*, Atlantic (Jun. 2, 2020) available at https://www.theatlantic.com/ideas/archive/2020/06/american-cities-are-not-battlespaces/612553/.

public."[9] Analysis of the limited data available to researchers on police violence against the public has found "a positive and strategically significant relationship between . . . transfers [of military-grade weapons to law enforcement] and fatalities from officer-involved shootings."[10]

Beyond potentially undermining its effectiveness, law enforcement's militarization threatens human rights, particularly racial equality, and erodes democratic norms. For example, research shows that militarized policing disproportionately impacts communities of color. Militarized police units are more likely to be deployed to communities of color, even in areas that have low rates of crime.[11] In one study in Maryland, every 10 percent increase in the number of African Americans living in an area corresponded with a 10 percent increase in SWAT deployments per 100,000 residents.[12]

Stated plainly, police should not engage with the communities they are sworn to serve and protect as if they are battlefield enemies. Such policing is reminiscent of the relationship between citizen and state in authoritarian countries that draw rebuke from the United States on human rights grounds, and undermines the country's high public trust in the armed forces.[13] As former Secretary of Defense and retired General James Mattis stated compellingly:

We must reject any thinking of our cities as a "battlespace" that our uniformed military is called upon to "dominate." At home, we should use our military only when requested to do so, on very rare occasions, by state governors. Militarizing our response, as we witnessed in Washington D.C., sets up a conflict—a false conflict—between the military and civilian society. It erodes the moral ground that ensures a trusted bond between men and women in uniform and the society they are sworn to protect, and of which they themselves are a part. Keeping public order rests with civilian state and local leaders who best understand their communities and are answerable to them.[14]

The militarization of immigration policy and border operations is equally problematic. Asylum-seeking families and adults arriving at the U.S. southern border require humanitarian responses, not militarized shows of force. Involving military personnel in immigration and border operations has accomplished little other than diverting funding and personnel from important military operations.[15] Asylum seekers arriving at America's border are frequently fleeing unimaginable violence and persecution, often at the hands of militaries and highly-militarized law enforcement in their countries of origin, or paramilitary non-state actors. A militarized atmosphere on the U.S. border serves no discernable U.S. interest, while potentially retraumatizing those fleeing persecution and potentially compromising their ability to pursue their asylum claims.

In parallel with comprehensive domestic policing and racial justice reform measures, the next administration should take swift and decisive action to rapidly demilitarize domestic law enforcement and reinstitute the bright line between military and law enforcement functions. This blueprint outlines concrete actions the administration could take to do so, consistent with an effective, rights-based approach to policing.

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9 Jonathan Mummolo, *Militarization fails to enhance police safety or reduce crime but may harm police reputation*, 115(37) Nat'l Acad. Sci. 9181, p. 9181 (Sep. 2018) available at https://www.pnas.org/content/pnas/115/37/9181.full.pdf.

10 Delehanty et al., *supra* note 6, at p. 1.

11 See Mummolo, *supra* note 9, at p. 9181.

12 *Id.* at p. 9183.

13 Brian Kennedy, Pew Research Center, *Most Americans trust the military and scientists to act in the public's interest* (Oct. 18, 2016) available at https://www.pewresearch.org/fact-tank/2016/10/18/most-americans-trust-the-military-and-scientists-to-act-in-the-publics-interest/.

14 Jeffrey Goldberg, *James Mattis Denounces President Trump, Describes Him as a Threat to the Constitution*, Atlantic (Jun. 3, 2020) available at https://www.theatlantic.com/politics/archive/2020/06/james-mattis-denounces-trump-protests-militarization/612640/.

15 Christine Wormuth, RAND Corporation, *Commentary: The U.S. Military's Border Enforcement Role* (Nov. 19, 2018) available at https://www.rand.org/blog/2018/11/the-us-militarys-border-enforcement-role.html; Claudia Grisales, *These Are The Military Projects Losing Funding To Trump's Border Wall*, NPR (Sep. 4, 2019) available at https://www.npr.org/2019/09/04/757463817/these-are-the-11-border-projects-getting-funds-intended-for-military-constructio.

Photo by Thomas Hawk

Recommendations

✓ End the federalized and militarized response to protests

- **Establish transparent criteria for deploying federal law enforcement personnel under 40 U.S.C. § 1315 and other authorities and prohibit federal law enforcement agents from unlawfully being used to respond to or otherwise interfere with First Amendment-protected activities.**[16] In 2020, the Trump administration used federal law enforcement personnel, including members of CBP and the obscure Federal Protective Service, to physically confront peaceful protesters exercising their constitutionally protected rights. In several well-documented instances, these federal agents assaulted protestors,[17] indiscriminately fired crowd-control munitions and tear gas into non-violent crowds (including one containing Portland Mayor Ted Wheeler[18]), and detained individuals without probable cause.[19] The next administration should use existing executive authority to prohibit federal law enforcement agents from being used in unwarranted circumstances, including responding to or otherwise interfering with First Amendment-protected activities. The administration should also develop a transparent methodology for how the Secretary of Homeland Security might invoke 40 U.S.C. § 1315 and other authorities for deploying federal law enforcement while protecting these rights.

In the vast majority of circumstances, instruments of the federal government should not be involved in policing protests. However, where state and local authorities are unwilling or unable to protect U.S. government property or address flagrant violations of U.S. federal law, it may be appropriate in certain exceptional circumstances to deploy U.S. law enforcement personnel to states and localities in a limited, non-escalatory way that facilitates and protects rather than inhibits or infringes on constitutional rights.

Whenever federal law enforcement agents are used in such a manner, the administration should provide the public, Congress, and state and local authorities with a full factual, legal, and policy justification for their presence, as well as information on the expected scope and duration of their activities. The administration should also clearly state whether circumstances exist under which law enforcement elements meant to protect federal property are permitted to conduct law enforcement activity outside the immediate vicinity of the property in question. The next administration should also support legislation that prohibits the use of federal law enforcement agents

16 40 U.S.C. § 1315 (2002) available at https://www.law.cornell.edu/uscode/text/40/1315.

17 Adam Gabbatt, *Protests about police brutality are met with wave of police brutality across US*, Guardian (Jun. 6, 2020) available at https://www.theguardian.com/us-news/2020/jun/06/police-violence-protests-us-george-floyd.

18 Mike Baker, *Federal Agents Envelop Portland Protest, and City's Mayor, in Tear Gas*, New York Times (Jul. 23, 2020) available at https://www.nytimes.com/2020/07/23/us/portland-protest-tear-gas-mayor.html.

19 *See* Conrad Wilson, Dirk Vanderhart, Suzanne Nuyen, *Oregon Sues Federal Agencies For Grabbing Protesters Off The Streets*, NPR (Jul. 18, 2020) available at https://www.npr.org/2020/07/18/892617402/oregon-to-sue-federal-agencies-over-protest-enforcement; *see also* Dave Biscobing, Melissa Blasius, *Phoenix police arrest dozens with copy-and-paste evidence*, ABC15 Arizona (last updated Jun. 2, 2020) available at https://www.abc15.com/news/local-news/investigations/phoenix-police-arrests-dozens-with-copy-and-paste-evidence.

Photo by Alisdare Hickson

or funds to counter or intimidate peaceful protests and assemblies. For situations where certain law enforcement activity may be appropriate, the next administration should support passage of legislation codifying limits, using a 2020 proposal by federal lawmakers from Oregon as a guide.[20]

- **Require federal law enforcement agents and military personnel to wear clearly identifiable agency insignia, as well as some other unique identifier such as a name plate or badge number when operating domestically.** While responding to protests during the summer of 2020, some federal law enforcement agents were deployed clad in camouflage, military-style uniforms with no identifiable agency insignia or any other unique identifier, such as a name plate or badge number. In some instances, these unidentifiable agents used unmarked vehicles to patrol the city and apprehend protestors.[21] The use of anonymous law enforcement personnel to confront predominantly peaceful protests increases the likelihood of violence by creating a heightened state of fear and anxiety. Protestors confronted by unidentifiable armed individuals might reasonably mistake them for non-state militia members or other non-state actors.[22] Additionally, officers who cannot be identified cannot be held accountable for their actions, which in turn renders unlawful uses of force more likely.[23] The next administration should therefore require federal law enforcement agents and military personnel to wear clearly identifiable agency insignia and a name plate or badge number when operating domestically. It should also prohibit the use of unmarked vehicles for the purpose of transporting detained individuals. These requirements should apply to federal employees regardless of the invoked legal authorities—e.g., the Insurrection Act, another statute, or some other form of authority. Finally, to further differentiate U.S. military from law enforcement personnel, the administration should prohibit federal law enforcement agents from wearing military-style camouflage when deployed domestically.

- **Prevent future abuse of the Insurrection Act.** In June of 2020, the Trump administration threatened to invoke the Insurrection Act to deploy active-duty military service members in response to people protesting racial injustice.[24] This contemplated move prompted swift backlash from retired military and national security leaders, and eventually opposition from Secretary of Defense Mark Esper.[25] Deploying active-duty service members against protesters exercising their Constitutionally-protected rights would likely have escalated tensions, undermined civil-military relations, and eroded democratic norms. To avoid such a scenario in the future, the next administration should adopt an official policy that strictly constrains the invocation of the Insurrection Act to respond to protests or assemblies; mandates consultation with Congress prior to invoking the Act; and requires reporting to Congress and the public on the factual, legal, and policy justification for any invocation of the Insurrection Act; the expected scope and duration of any such deployment; and certification that the state authorities are unwilling or unable to enforce federal law. The administration should also support Congressional efforts to reform the Insurrection Act so that it cannot be abused by future administrations.[26]

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20 Jeff Merkley, U.S. Senator for Oregon, *Press Release: Senators, Representatives Announce Legislation to Block Federal Paramilitary Occupations in Portland and Other American Cities* (Jul. 20, 2020) available at https://www.merkley.senate.gov/news/press-releases/senators-representatives-announce-legislation-to-block-federal-paramilitary-occupations-in-portland-and-other-american-cities-2020.

21 Laurel Wamsley, *'They Just Started Waling On Me': Violence in Portland As U.S. Agents Clamp Down*, NPR (Jul. 20, 2020) available at https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/20/893082598/they-just-started-whaling-violence-tension-as-u-s-agents-clamp-down-in-portland; Katie Bo Williams, *Who Are They? Unmarked Security Forces in DC Spark Fear,* Defense One (Jun. 3, 2020) available at https://www.defenseone.com/threats/2020/06/who-are-they-unmarked-security-forces-dc-spark-fear/165892/.

22 See, e.g., Julie Bosman, Sarah Mervosh, *Justice Dept. to Open Investigation Into Kenosha Shooting*, New York Times (last updated Sep. 2, 2020) available at https://www.nytimes.com/2020/08/26/us/kenosha-shooting-protests-jacob-blake.html.

23 Philip Bump, *How the federal police in Portland are avoiding accountability*, Washington Post (Jul. 23, 2020) available at https://www.washingtonpost.com/politics/2020/07/23/how-federal-police-portland-are-avoiding-accountability/.

24 Christine Hauser, *What Is the Insurrection Act of 1807, the Law Behind Trump's Threat to States?*, New York Times (Jun. 2, 2020) available at https://www.nytimes.com/article/insurrection-act.html.

25 Tom O'Connor, *More Than 280 Former Military Officials, Diplomats Call on Donald Trump Not to Use Troops Against Protests*, Newsweek (Jun. 5, 2020) available at https://www.newsweek.com/more-280-military-officials-diplomats-call-donald-trump-not-use-troops-against-protests-1509052; David Welna, *Pentagon Chief Rejects Trump's Threat To Use Military To Quell Unrest*, NPR (Jun. 3, 2020) available at https://www.npr.org/2020/06/03/868929288/pentagon-chief-rejects-trumps-threat-to-use-military-to-quell-unrest.

26 Legislation introduced by Sen. Richard Blumenthal is one potential approach to Insurrection Act legislative reform. *See* Richard Blumenthal, U.S. Senator for Connecticut, *Press Release: Blumenthal Introduces Legislation to Limit Unchecked Presidential Authority under the Insurrection Act* (Jun. 4, 2020) available at https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-introduces-legislation-to-limit-unchecked-presidential-authority-under-the-insurrection-act.

- **Close the loophole used to deploy out-of-state National Guard troops to Washington D.C.** Also in June 2020, in response to largely peaceful racial justice protests held across the nation, the Trump administration deployed out-of-state National Guard troops to Washington D.C. These service members were deployed without the consent of D.C.'s[27] mayor and appear to have been mobilized under federal control, taking orders from the Secretary of Defense. The National Guard troops were engaged in policing activities in direct violation of the bedrock principle, codified in the Posse Comitatus Act, that the federal military should not be engaged in domestic policing absent Congressional authorized exceptions for extraordinary circumstances.[28] In response to an inquiry from D.C. Mayor Muriel Bowser, who called the deployment of troops to D.C. for law enforcement purposes "an invasion,"[29] Attorney General Barr cited a training provision in Section 502(f) of Title 32 of the U.S. code[30] as the basis for deploying out-of-state National Guard troops to police the District.[31] Under Barr's controversial and troubling interpretation of Section 502(f), the federal government may deploy—under federal control—National Guard troops from one state to another, without the latter state's consent, for any purpose and without complying with the constraints in the Posse Comitatus Act.[32] The next administration should withdraw this troubling interpretation of federal law and work with Congress to amend Section 502(f) to ensure it is never abused in this manner again.[33]

✓ End militarization within law enforcement

Beyond addressing the events of 2020, it is also clear that a more comprehensive approach is needed to demilitarize federal, state, and local law enforcement agencies. Comprehensive reform will require Congressional action in the form of legislation like the George Floyd Justice in Policing Act of 2020, which passed the House of Representatives in June 2020 but has not been advanced by the Senate.[34] Yet an incoming administration has within its existing authority tools to accomplish significant steps toward reform. Accordingly, the next administration should:

- **Building from the findings of the Task Force on 21st Century Policing,[35] establish a commission of experts and public officials to study the nationwide problem of militarization and racial injustice in law enforcement and, within one year, present recommendations to both Congress and the president.** Topics covered by these recommendations should include, but not be limited to, recruiting, training, and equipping law enforcement at the federal, state, and local levels. In keeping with applicable law, commission membership should be drawn from individuals of diverse

27 Lara Lakes, Helene Cooper, *Trump Orders Troops to Leave D.C. as Former Military Leaders Sound Warning*, New York Times (Jun. 7, 2020) available at https://www.nytimes.com/2020/06/07/us/politics/trump-military-troops-protests.html.

28 Senator Tom Udall, Representative Jim McGovern, *Trump and Barr used a loophole to deploy the National Guard to U.S. cities. It's time to close it*, NBC (Aug. 7, 2020) available at https://www.nbcnews.com/think/opinion/trump-barr-used-loophole-deploy-national-guard-u-s-cities-ncna1236034?cid=sm_npd_nn_fb_ma&fbclid=IwAR2xuJHDl-53Ht-5oIyU4aTTtoHPm24NJitiffi5ViUh5cd-qbJNrU99R408.

29 Lakes, Cooper, *supra* note 27.

30 32 U.S.C. § 502, available at https://www.law.cornell.edu/uscode/text/32/502.

31 Letter from William P. Barr, U.S. Attorney General, to Muriel Bowser, Mayor, Washington, D.C., and Karl A. Racine, Attorney General, Washington, D.C. (Jun. 9, 2020) available at https://twitter.com/KerriKupecDOJ/status/1270487263324049410.

32 Steve Vladeck, *Why Were Out-of-State National Guard Units in Washington, D.C.? The Justice Department's Troubling Explanation*, Lawfare (Jun. 9, 2020) available at https://www.lawfareblog.com/why-were-out-state-national-guard-units-washington-dc-justice-departments-troubling-explanation.

33 Senator Tom Udall, Representative Jim McGovern, *supra* note 28.

34 George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020) available at https://www.congress.gov/bill/116th-congress/house-bill/7120/all-actions.

35 U.S. Department of Justice, Office of Community Oriented Policing Services, President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing* (May 2015) available at https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

background and experience, and include law enforcement officials and practitioners, human rights and racial justice advocates, and legal and policy experts.

- **Secure federal funding for, or otherwise support, third-party training programs designed to demilitarize and promote racial justice within law enforcement agencies.** According to researchers, many police academies continue to train new recruits as if they are joining the military.[36] By contrast, there are proven, effective law enforcement training programs that emphasize de-escalation,[37] treating individuals humanely, and other approaches that engage constructively with the communities within which police operate. The administration should implement such training programs at the federal level and explore ways to incentivize state and local law enforcement organizations to adopt similar approaches. Moreover, while some progress has been made in addressing implicit bias within law enforcement agencies, some law enforcement officers continue to exhibit explicitly racist or militant behavior and views toward the communities they are sworn to serve. The Brennan Center outlines many steps the administration can and should take to collect and evaluate the data needed, and to ensure that policies are in place to effectively address racist behaviors in police departments.[38]

✓ Directly confront racism and bigotry within the military

Racism within the U.S. military undermines unit cohesion and threatens the successful accomplishment of the Department of Defense's (DOD) mission. In parallel to adopting comprehensive reform of law enforcement agencies, the federal government must build on recent steps to curb racism and bigotry within DOD. Accordingly, the next administration should:

- **Mandate that within one year DoD rename all remaining assets, facilities, and installations named after the Confederacy, Confederate soldiers, or Confederate leaders.** Through executive order and/or the enactment of formal DoD guidance, DoD should clearly and conclusively break with all names meant to honor members of a racist rebellion intended to overthrow the government of the United States.[39] Continuing to maintain commemorations of the Confederacy is racist and undermines national unity, harms military readiness, and affronts servicemembers of color who selflessly serve the United States. As Human Rights First President Michael Breen and Vice-Chair of the House Armed Services Committee Representative Anthony Brown stated:

In parallel to adopting comprehensive reform of law enforcement agencies, the federal government must build on recent steps to curb racism and bigotry within DOD.

> ***For a nation founded on ideas, symbols are substance, whom we choose to memorialize speaks to what values we honor. Our military should celebrate those who fought for freedom, not those who led the effort to tear our country apart in the name of chattel slavery and white power. There's no non-racist reason that our armed forces should be shackled to the symbolism of the Confederacy.[40]***

To ensure longevity of the policy, the next administration should also urge Congress to pass legislation requiring the military to take similar action. Legislation on this issue has passed as part of the Fiscal

36 Rosa Brooks, *Stop Training Police Like They're Joining the Military*, Atlantic (Jun. 10, 2020) available at https://www.theatlantic.com/ideas/archive/2020/06/police-academies-paramilitary/612859/.

37 Kimberly Kindy, *Creating Guardians, Calming Warriors*, Washington Post (Dec. 10, 2015) available at https://www.washingtonpost.com/sf/investigative/2015/12/10/new-style-of-police-training-aims-to-produce-guardians-not-warriors/.

38 Michael German, Brennan Center for Justice, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement* (Aug. 27, 2020) available at https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law.

39 *See*, e.g., Barbara Salazar Torreon, Congressional Research Service, IN10756, *Confederate Names and Military Installations* (Jun. 16, 2020) available at https://fas.org/sgp/crs/natsec/IN10756.pdf (describing naming policies of bases, facilities and installations within each branch of the military).

40 Anthony Brown, Michael Breen, *Commentary: Righting the military's role in our democracy*, Baltimore Sun (Jul. 20, 2020) available at https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0721-defense-bill-20200720-koohxon56jfcfisaqiavyhndsi-story.html.

Year 2021 National Defense Authorization Act (NDAA) process, but it is not yet clear whether it will remain in the final bill that is signed into law.[41] In replacement, the next administration should consider renaming these entities after the many diverse heroes in United States history who represent the U.S. military's values.[42]

- **Direct the Secretary of Defense to prohibit the public display of white supremacist symbols, including flags, posters, and the like, from all military bases, installations, ships, and facilities, and all Department of Defense workspaces and common access areas.**

A 2019 *Military Times* survey found that 36 percent of troops who responded personally saw "evidence" of white supremacy and racist ideologies in the military.[43] This is an affront to servicemembers of color, and it actively undermines military readiness and national security. Despite this, while effectively banning the Confederate flag, Defense Secretary Mark Esper's July 15, 2020 guidance to DoD failed to explicitly ban white supremacist symbols. Instead, it provides an exhaustive list of all of the flags that shall be permitted in public spaces in military installations and Department of Defense workplaces and common access areas.[44] While a step forward, this guidance should be improved to explicitly prohibit public displays of white supremacist symbols from all military bases, installations, ships, and facilities, and from all Department of Defense workplaces and common access areas.

✓ End the flow of military resources to law enforcement

The next administration should put an end to the flow of military equipment provided to local law enforcement, including under the decades-old so-called "1033 program." This program has rightly come under scrutiny in the wake of the heavily militarized police response to recent racial justice protests. A product of the 1997 National Defense Authorization Act (NDAA), the 1033 program authorizes the Defense Logistics Agency (DLA) to transfer surplus military equipment to federal, state, and local law enforcement agencies at

41 The Senate version came as an amendment to the NDAA sponsored by Senator Elizabeth Warren (D-MA), and is available at https://www.armed-services.senate.gov/imo/media/doc/S4049%20-%20FY%202021%20NDAA.pdf. The House version also came as an amendment to the NDAA, was co-sponsored by Reps. Anthony Brown (D-MD) and Don Bacon (R-NE), and is available at https://www.congress.gov/bill/116th-congress/house-bill/7155/text?r=41&s=1.

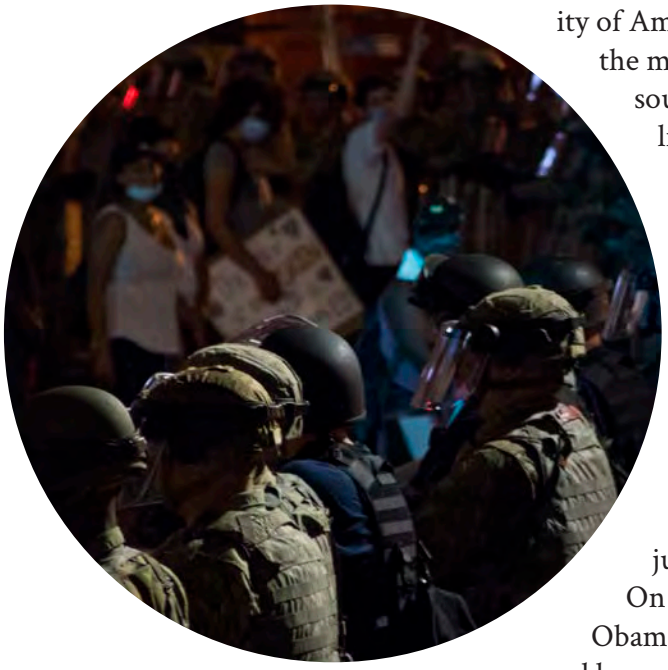
42 Bishop Garrison, Benjamin Haas, *At Confederate-Named Army Bases, Highlight US Ideals By Renaming Them for Honorable Figures*, Just Security (Jun. 10, 2020) available at https://www.justsecurity.org/70714/at-confederate-named-army-bases-highlight-us-ideals-by-renaming-them-for-honorable-figures/.

43 Leo Shane III, *Signs of white supremacy, extremism up again in poll of active-duty troops*, Military Times (Feb. 6, 2020) available at https://www.militarytimes.com/news/pentagon-congress/2020/02/06/signs-of-white-supremacy-extremism-up-again-in-poll-of-active-duty-troops/.

44 Ryan Browne, Barbara Starr, *Esper unveils guidance effectively banning Confederate flag on military installations*, CNN (Jul. 17, 2020) available at https://www.cnn.com/2020/07/17/politics/esper-pentagon-flag-policy/index.html; U.S. Department of Defense, Memorandum, Public Display or Depiction of Flags in the Department of Defense (Jul. 16, 2020) available at https://media.defense.gov/2020/Jul/17/2002458783/-1/-1/1/200717-FLAG-MEMO-DTD-200716-FINAL.PDF.

Photo by Ted Eytan

virtually no cost.[45] Since the program's enactment, DLA has used 1033 authority to transfer more than $7.4 billion worth of excess military equipment—including bayonets, rifles, armored vehicles, and aircraft—to more than 8,000 law enforcement agencies around the country.[46] Immigration and Customs Enforcement (ICE) and CBP—both of which were involved in recent protest responses—are also substantial beneficiaries of this program.[47]



The 1033 program presents a significant threat not only to the safety of Americans but also to the country's democratic norms and institutions. According to public polling, the majority of Americans support curtailing the program.[48] In 2015, following the murder of Michael Brown and civil unrest in Ferguson, Missouri, President Obama issued an executive order that established a working group to review the program and create a set of criteria for identifying the types of equipment that should be transferred and the conditions that must be present for a transfer to be authorized.[49] The working group's recommendations resulted in the halt of transfers of certain military equipment, including rifles, grenade launchers, and ammunition over a certain caliber, as well as the recall of some previously transferred military equipment, including tracked armored personnel carriers, grenade launchers, and bayonets.[50] The working group's recommendations also resulted in police departments being required to provide justifications for acquiring certain weapons and equipment.[51] On August 28, 2017, the Trump administration rescinded the Obama executive order and made both tracked armored vehicles and bayonets available for transfer.[52]

The Department of Defense also distributes military-grade equipment to law enforcement through its "1122 program." This program allows law enforcement agencies to use their funding to purchase new military equipment for the same discounted price enjoyed by the federal government, in order to support counter-drug, homeland security, and emergency response activities. Under the program, law enforcement agencies can buy equipment through three different agencies—the Defense Logistics Agency, Department of the Army, and the General Services Administration—each of which provides various forms of equipment for sale. The 1122 program catalog lists available equipment, which includes items such as rifles and armored vehicles.[53] Because the 1122 program is not a transfer or grant program, the federal government is not currently required to monitor it.[54]

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45 Kyle Mizokami, *U.S. Lawmakers Want to Curb Transfers of Military Hardware to Police*, Popular Mechanics (Jun. 11, 2020) available at https://www.popularmechanics.com/military/weapons/a32827563/police-militarization/.

46 Brooks, *supra* note 36; Brian Barrett, *The Pentagon's Hand-Me-Downs Helped Militarize Police. Here's How*, Wired (Jun. 2, 2020) available at https://www.wired.com/story/pentagon-hand-me-downs-militarize-police-1033-program/.

47 Open Letter to House Armed Services Committee Members In Support of Ending the 1033 Program (Jun. 30, 2020) available at https://s3.amazonaws.com/demand-progress/images/1033-HASC-letter.pdf; Noam Perry, Tori Bateman, *How the U.S. Southern Border Became a Militarized Zone*, YES! (Apr. 13, 2020) available at https://www.yesmagazine.org/opinion/2020/04/13/us-southern-border-militarized/; Spencer Ackerman, *ICE, Border Patrol Say Some 'Secret' Police Leaving D.C.*, Daily Beast (Jun. 8, 2020) available at https://www.thedailybeast.com/ice-border-patrol-say-some-secret-police-leaving-dc.

48 VoteVets, *NEW POLL: Most Americans Want to Demilitarize the Police* (Jun. 2020) available at https://www.votevets.org/press/new-poll-most-americans-want-to-demilitarize-the-police.

49 Executive Order 13,688, Federal Support for Local Law Enforcement Equipment Acquisition, 80 Fed. Reg. 3451 (Jan. 16, 2015) available at https://obamawhitehouse.archives.gov/the-press-office/2015/01/16/executive-order-federal-support-local-law-enforcement-equipment-acquisit.

50 Law Enforcement Equipment Working Group, *Recommendations Pursuant to Executive Order 13688: Federal Support for Local Law Enforcement Equipment Acquisition*, p. 12-13 (May 2015) available at https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/LE-Equipment-WG-Final-Report.pdf.

51 *Id.* at p. 4.

52 Executive Order 13,809, *Restoring State, Tribal, and Local Law Enforcement's Access to Life-Saving Equipment and Resources*, 82 Fed. Reg. 41499 (Aug. 28, 2017) available at https://www.whitehouse.gov/presidential-actions/presidential-executive-order-restoring-state-tribal-local-law-enforcements-access-life-saving-equipment-resources/.

53 U.S. General Services Administration, *1122 Program Equipment and Supplies Catalog* (Feb. 2014) available at https://www.gsa.gov/cdnstatic/1122_CatalogFeb2014Finalv2.pdf.

54 Office of U.S. President Barack Obama, *Review: Federal Support for Local Law Enforcement Equipment Acquisition* (Dec. 2014) available at https://obamawhitehouse.archives.gov/sites/default/files/docs/federal_support_for_local_law_enforcement_equipment_acquisition.pdf.

Photo by SC National Guard

The separate Homeland Security Grant Program, which is of greater size and scope than the 1033 and 1122 programs, comprises a suite of grant programs that provides DHS funds to state, local, and tribal law enforcement agencies for the purpose of preventing and responding to terrorism and other related threats.[55] Two grant programs allot the majority of these DHS funds: the State Homeland Security Program, which provides funding to states, and the Urban Area Security Initiative, which provides funding to cities and metro areas directly.[56] Since 2003, states and metro areas have received $24.3 billion from these programs, often with minimal oversight.[57] As a result, these programs have funneled military-grade equipment, including armored vehicles, drones, tear gas, rubber bullets, and sophisticated surveillance equipment, to police forces across the country.[58] The new administration should curtail this flow of military equipment to local law enforcement by taking the following steps:

There is clear bipartisan support for curtailing the flow of military equipment to law enforcement.

- **Freeze the 1033 and 1122 programs.** The next administration should immediately issue an executive order halting the transfer of property by DLA to state, local, and federal law enforcement entities. This freeze of the 1033 and 1122 programs should remain in place pending an executive branch review of the impact of the program. Before any version of the program is restored, the executive branch should significantly restrict the type of equipment that can be transferred, and establish robust reporting requirements that will obligate participants in the 1033 and 1122 programs to provide written, public justifications for their transfer requests, as well as updates on how the equipment is used.

- **Work with Congress to codify legal restrictions on the 1033 and 1122 programs.** There is clear bipartisan support for curtailing the flow of military equipment to law enforcement. In considering possible legislative action, the administration should look to Congressman Hank Johnson's previously proposed legislation restricting the 1033 program as a model for the types of transfer restrictions and oversight measures it should work with Congress to enact.[59] Likewise, the next administration should support passage of the Stop Militarizing Law Enforcement Act,[60] which has already passed in the House of Representatives with bipartisan support as part of the George Floyd Justice in Policing Act.[61] Though a bipartisan bill in the Senate aimed at reforming the 1033 program recently secured a majority vote, it failed to meet a 60-vote threshold, despite endorsements from the Law Enforcement Action Partnership (LEAP) and several prominent conservative groups.[62]

- **Reform the Homeland Security Grant and Urban Area Security Initiative program.** The next administration should similarly freeze the transfer of, and take swift executive action to restrict, equipment available for purchase with DHS grant money, and should improve oversight to track how grant money is used. It should also encourage Congress to codify these provisions.

✓ End the military's role in immigration enforcement

In 2018, the current administration deployed active-duty military forces to the U.S.-Mexico border to address a claimed threat posed by a peaceful "caravan" of asylum seekers.[63] The U.S. military's presence at the border remains to this day.[64] Beyond politicization of the military, this action amounts to a direct

55 Homeland Security Grant Program, *supra* note 4.

56 Ackerman, *supra* note 4.

57 McCartney et al., *supra* note 4.

58 Barrett, *supra* note 46.

59 Amendment Offered by Mr. Johnson of Georgia, H.R. Rules Comm., 116th Cong., Comm. Print 116-57 (offered Jul. 8, 2020) available at https://amendments-rules.house.gov/amendments/JOHNGA_056_xml713201251435143.pdf. The legislation prohibits the transfer of equipment such as grenades, grenade launchers, and armed drones. Among other oversight measures, it also requires the Secretary of Defense to submit an annual report to Congress with a description of the property to be transferred along with verification that the transfer of the property would not violate the transfer restrictions.

60 Stop Militarizing Law Enforcement Act, H.R. 1714, 116th Cong. (2019) available at https://www.congress.gov/bill/116th-congress/house-bill/1714/text.

61 George Floyd Justice in Policing Act, *supra* note 34.

62 Full Endorsements, NDAA Amendment 2252, 1033 Reform and Oversight, available at https://www.schatz.senate.gov/imo/media/doc/Full Endorsements, NDAA Floor Amendment 2252 - 1033 Reform, 7-14-20.pdf.

63 Shear, Gibbons-Neff, *supra* note 3.

64 Alex Ward, Nicole Narea, *The US Military will stay on the US-Mexico border, even with migration falling,* Vox (Jun. 25, 2020) available at https://www.vox.

militarization of immigration enforcement. It has unnecessarily kept military service members away from their families and diverted funding and personnel from overseas missions, jeopardizing morale.[65] The next administration should immediately end the deployment of active-duty military forces to the U.S.-Mexico border and the military's involvement in immigration enforcement more generally. To do so, it should:

- **Commit to not using military personnel to police the southern border.** The next administration should pledge not to deploy active-duty military personnel for immigration enforcement purposes. The next administration should also establish a policy against federalizing (under Title 10) or funding (under Title 32) the National Guard for border operations, and it should discourage state governors from using the National Guard for border operations. If the administration needs to bolster support for CBP on the U.S.-Mexico border, it should provide a publicly available review of additional needs and rely on the appropriate personnel and resources, including humanitarian organizations or local law enforcement, instead of the military.

- **Reduce the size of the so-called "border zone."** Pursuant to 8 U.S.C. § 1357(a)(3), immigration officials have enhanced power to search and detain individuals "within a reasonable distance" of the U.S. border.[66] This has contributed to the militarization of immigration enforcement by enabling agents, border personnel, and active-duty military personnel to claim extraordinary powers within the border zone, and has provided them with legal cover for human and civil rights abuses.[67] To address this problem, the administration should reduce the size of the border zone, which under current regulations extends to anywhere within 100 miles of the border,[68] covering two-thirds of the American population.[69] The next administration should also urge Congress to revise 8 U.S.C. § 1357(a)(3), to, among other reforms, restrict authorization of warrantless searches and interrogations within the border zone.

com/2020/6/25/21303370/us-mexico-border-military-2020-immigration-coronavirus.

65 Thomas Gibbons-Neff, *Bad Food, Broken-Down Trucks: What It's Like to Be a U.S. Soldier on the Mexico Border*, New York Times (Apr. 5, 2019) available at https://www.nytimes.com/2019/04/05/magazine/mexico-border-troops-wall.html; Thomas Gibbons-Neff, Helene Cooper, *Deployed Inside the United States: The Military Waits for the Migrant Caravan*, New York Times (Nov. 10, 2018) available at https://www.nytimes.com/2018/11/10/us/deployed-inside-the-united-states-the-military-waits-for-the-migrant-caravan.html.

66 8 U.S.C. § 1357(a)(3) (1952) available at https://www.law.cornell.edu/uscode/text/8/1357.

67 According to the ACLU, the lack of oversight in CBP operations within the "border zone" enables CBP agents to "routinely ignore or misunderstand the limits of their legal authority in the course of individual stops, resulting in violations of the constitutional rights of innocent people." American Civil Liberties Union (ACLU), *The Constitution in the 100-Mile Border Zone* (2020) available at https://www.aclu.org/other/constitution-100-mile-border-zone. Among other abuses, Border Patrol operates some 170 "interior checkpoints" in the U.S., which the ACLU says "amount to dragnet, suspicionless stops that cannot be reconciled with Fourth Amendment protections." *Id.*

68 8 C.F.R. § 287.1(a)(2) (1957) available at https://www.law.cornell.edu/cfr/text/8/287.1.

69 American Civil Liberties Union (ACLU), ACLU Factsheet, *Customs and Border Protection's 100-Mile Rule* (2015) available at https://www.aclu.org/other/aclu-fact-sheet-customs-and-border-protections-100-mile-zone?redirect=immigrants-rights/aclu-fact-sheet-customs-and-border-protections-100-mile-zone.

- **Stop the diversion of DoD funds to the southern border or for any other immigration enforcement purpose.** The current administration has diverted to border wall construction over $10 billion in DoD funds that were intended for, among other things, aircraft, fighter jets, ships, updated Humvees, and new equipment for the National Guard and Reserves.[70] The diversion of DoD funds has drawn bipartisan Congressional criticism[71] and should end. DHS has by far the largest budget of any federal law enforcement agency[72] and has more than enough funds to humanely manage the migration flow on the southern border without the involvement of active-duty military or military-grade equipment. Specifically, the next administration should place restrictions on DoD to prevent it from loaning equipment or using resources for the purposes of immigration enforcement or border security. This should be done in the first instance as an executive action, and as a recommendation to Congress to amend 10 U.S.C. § 374,[73] which authorizes the Department of Defense to maintain and operate equipment to assist with immigration law enforcement, and 10 U.S.C. § 372,[74] which authorizes the DoD to loan equipment and facilities to border security agencies, to prohibit such DoD facilities, equipment, and personnel from being used in immigration enforcement.

- **Prohibit the military from using force against migrants.** There is no valid reason for the military to be involved in routine immigration enforcement actions, let alone enforcement actions that could involve using force. However, the current administration has issued a legal memo of questionable legality authorizing the military to use force against migrants at the border.[75] The next administration should revoke this memo and any other authorizations that could allow the military to use force against migrants.

- **Restrict the housing of migrant children in DoD facilities.** The Trump administration has repeatedly considered using DoD facilities to detain immigrants and unaccompanied children.[76] This idea is not new—the Obama administration briefly held roughly 7,700 unaccompanied children in military bases in 2014.[77] The military is not trained to, and should not be involved in, immigration detention. While DHS component agencies operate overcrowded detention facilities where asylum seekers are routinely mistreated, this is not a problem the military can or should fix. Instead, the administration should reform its immigration detention policies and practices to stop the harmful detention of refugees and asylum seekers. In especially exigent circumstances, if DoD assistance is necessary to house unaccompanied children in order to provide adequate shelter, access to counsel and the requirements of the Flores Settlement Agreement for detention centers must be met. Human Rights First discusses how the administration should address immigration detention in a separate 2021 blueprint in the *Walking the Talk* series entitled "Upholding Refugee Protection and Asylum at Home."

70 Brakkton Booker, *Trump Administration Diverts $3.8 Billion in Pentagon Funding To Border Wall*, NPR (Feb. 13, 2020) available at https://www.npr.org/2020/02/13/805796618/trump-administration-diverts-3-8-billion-in-pentagon-funding-to-border-wall; Emily Cochrane, *Administration to Divert Billions from Pentagon to Fund Border Wall*, New York Times (Feb. 13, 2020) available at https://www.nytimes.com/2020/02/13/us/politics/border-wall-funds-pentagon.html.

71 Cochrane, *supra* note 70.

72 Alice Speri, *Federal Agents at Protests Renew Calls to Dismantle Homeland Security*, Intercept (Jul. 30, 2020) available at https://theintercept.com/2020/07/30/dismantle-homeland-security/.

73 10 U.S.C. § 374 (2005) available at https://www.govinfo.gov/content/pkg/USCODE-2005-title10/pdf/USCODE-2005-title10-subtitleA-partI-chap18-sec374.pdf.

74 10 U.S.C. § 372 (2005) available at https://www.govinfo.gov/content/pkg/USCODE-2005-title10/pdf/USCODE-2005-title10-subtitleA-partI-chap18-sec372.pdf.

75 William Banks, *Legal Analysis of "Cabinet Memo" on the Military's Role at Southern Border*, Just Security (Nov. 26, 2018) available at https://www.justsecurity.org/61603/president-trumps-imaginary-invasion-analysis-white-house-memo-military-role-southern-border/.

76 W.J. Hennigan, *Shelters Are Overcrowded With Migrant Children. Now the Trump Administration is Scouting Military Bases*, Time (Jun. 5, 2019) available at https://time.com/5601439/migrant-children-military-bases/.

77 Nick Miroff, Paul Sonne, *Trump administration preparing to hold immigrant children on military bases*, Washington Post (May 15, 2018) available at https://www.washingtonpost.com/world/national-security/trump-administration-preparing-to-shelter-migrant-children-on-military-bases/2018/05/15/f8103356-584e-11e8-b656-a5f8c2a9295d_story.html.

Ending Endless War

Photo by New Zealand Defence Force

Introduction

For nearly 20 years, successive administrations have adopted a costly war-based approach to counterterrorism with no clear endgame in sight. This shortsighted strategy has led to egregious human rights violations; damaged the rule of law, international cooperation, and the reputation of the United States; set a dangerous precedent for other nations; fueled conflicts and massive human displacement; contributed to militarized and violent approaches to domestic policing; diverted limited resources from more effective approaches and other national priorities; and, most consequentially, destroyed hundreds of thousands of lives.

The American people have rightly grown skeptical of the war-centered approach of the last two decades,[1] and the presidential candidates for both parties have promised to end America's so-called "endless wars,"[2] beginning with drawing down forces in places like Afghanistan and Iraq.[3] Yet the problem of endless war goes well beyond the multigenerational conflicts in Afghanistan and Iraq. It also includes the United States' counterproductive approach to global counterterrorism, in which it has applied wartime rules for the use of lethal force, detention, and prosecutions far beyond the traditional boundaries for which those exceptional rules were designed.[4]

[T]he next presidential administration and Congress have a renewed opportunity and responsibility to place counterterrorism policy on a sustainable course, while shifting resources and attention toward the most pressing challenges of the future.

Continuing down the path of endless war is not only harmful and unpopular with the American people, it is also unnecessary. The United States maintains a robust array of diplomatic, law enforcement, intelligence, development, and other resources to mitigate security concerns abroad and at home, including those stemming from the threat of terrorism. The United States need not, therefore, remain locked in the harmful, counterproductive, and costly state that has defined the post-9/11 era to date.

With a growing recognition of other pressing global challenges—from the devastation of climate change to great power competition—the next presidential administration and Congress have a renewed opportunity and responsibility to place counterterrorism policy on a sustainable course, while shifting resources and attention toward the most pressing challenges of the future. What follows are recommendations for setting the nation on this new course.[5]

Recommendations

✓ End all operations under the 2001 and 2002 Use of Force Authorizations

The first step to ending endless wars is to cease all military operations under the 2001 and 2002 Authorizations for Use of Military Force (AUMF). Successive administrations have relied on these legal authorities in

1 For example, one recent survey found that 78 percent of Democrats, 64.5 percent of Republicans, and 68.8 percent of independents supported restraining military action overseas. "Rarely," noted the report, "does opinion research reveal issues that enjoy shared sentiments on a bi-partisan level." James Carden, *A New Poll Show the Public is Overwhelmingly Opposed to Endless US Military Interventions*, Nation (Jan. 9, 2018) available at https://www.thenation.com/article/archive/new-poll-shows-public-overwhelmingly-opposed-to-endless-us-military-interventions/.

2 Joseph R. Biden, *Why America Must Lead Again: Rescuing U.S. Foreign Policy After Trump*, Foreign Affairs (Mar./Apr. 2020) available at https://www.foreignaffairs.com/articles/united-states/2020-01-23/why-america-must-lead-again; Leo Shane III, *Trump's second-term plan includes stopping 'endless' wars, boosting military support*, Military Times (Aug. 24, 2020) available at https://www.militarytimes.com/news/pentagon-congress/2020/08/24/trumps-second-term-plan-includes-stopping-endless-wars-boosting-military-support/.

3 Lara Seligman, *General announces Iraq, Afghanistan troop drawdowns as Trump looks to fulfill campaign pledge*, Politico (Sep. 9, 2020) available at https://www.politico.com/news/2020/09/09/iraq-troop-withdrawl-410723.

4 Laurie R. Blank, *The Consequences of a "War" Paradigm for Counterterrorism: What Impact on Basic Rights and Values?*, 46(3) Ga. L. Rev. 719 (Mar. 2012) available at https://www.georgialawreview.org/article/3513-the-consequences-of-a-war-paradigm-for-counterterrorism-what-impact-on-basic-rights-and-values.

5 These recommendations, many of which were developed in partnership with experts from other human rights and civil society organizations, were previously published in substantially similar form at Just Security. *See* Rita Siemion, Scott Roehm, Hina Shamsi, Heather Brandon-Smith, Kate Kizer, Annie Shiel, Colleen Kelly, & Mandy Smithberger, *Toward a New Approach to National and Human Security: End Endless War*, Just Security (Sept. 11, 2020) available at https://www.justsecurity.org/72371/toward-a-new-approach-to-national-and-human-security-ending-endless-war/.

measure far beyond Congress's original purpose in enacting them. Continued reliance on the 2001 and 2002 AUMFs for military and other operations nearly two decades after their enactment has resulted in mission creep, relieved Congress of its responsibility to take hard votes regarding military engagements overseas, eroded public support for the operations themselves, and siphoned limited resources from other national priorities.

The 2001 AUMF authorized military force against those who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 or harbored such organizations or persons."[6] Nearly 20 years later, this AUMF has been used as the primary legal basis[7] for military operations against a number of different groups in at least 19 different countries around the world,[8] including against "associated forces" and "successor entities" of those responsible for the 9/11 attacks. Prior administrations have also claimed that the 2001 AUMF and the 2002 AUMF[9] (which authorized force against the Saddam Hussein regime in Iraq) provide authorization for using force against the Islamic State in Iraq and Syria (ISIS).[10] The current administration has even gone so far as to attempt to claim that Iran and groups affiliated with the Iranian regime are covered by the 2002 AUMF, including by citing the authorization as a legal basis for the targeted killing of Iranian general Qassem Soleimani in January 2020.[11]

The next president can and should retire these authorities without Congressional action. The president should immediately cease relying on the 2002 AUMF—which does not serve as the primary domestic legal basis for any current military operations—and set an end date for operations conducted under the 2001 AUMF. That end date should provide for only a brief wind-down period for operations currently underway pursuant to this authority. The administration should also publicly abandon prior executive branch legal interpretations that widened the scope of these authorities far beyond their original purpose.

To prevent future administrations from reviving these decades-old authorities, the next administration should furthermore urge Congress to rescind them, along with other outstanding war authorizations.

✓ Shift away from war-based detention, trial, and lethal force

Ending endless war will require shifting away from reliance on the tools of war and, in particular, away from reliance on a war-based legal framework for using force against, prosecuting, and detaining individuals suspected of terrorist activity. When legitimately and lawfully used in extraordinary circumstances, war-

6 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) available at https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf.

7 The executive branch has also relied on the 2002 Iraq AUMF to justify its counter-ISIL campaign. *See*, e.g., Stephen W. Preston, The Legal Framework for the United States' Use of Military Force Since 9/11, Speech at the Annual Meeting of the American Society of International Law (Apr. 10, 2015) available at https://www.defense.gov/News/Speeches/Speech-View/Article/606662/.

8 Matthew Weed, Congressional Research Service, *Memorandum: Presidential References to the 2001 Authorization for Use of Military Force in Publicly Available Executive Actions and Reports to Congress* (Feb. 16, 2018) available at https://fas.org/sgp/crs/natsec/pres-aumf.pdf.

9 Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002) available at https://www.congress.gov/107/plaws/publ243/PLAW-107publ243.pdf.

10 President Barack Obama, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* (Dec. 2016) available at https://fas.org/man/eprint/frameworks.pdf; Stephen T. Dennis, *Here's Obama's Legal Justification for ISIS War*, Roll Call (Sep. 11, 2014) available at https://www.rollcall.com/news/heres-the-administrations-legal-justification-for-isis-isil-war. ISIS is also commonly referred to as ISIL (Islamic State in Iraq and the Levant), IS (Islamic State), or Daesh.

11 H. Foreign Affairs Comm., *Notice on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* (released Feb. 14, 2020) available at https://foreignaffairs.house.gov/_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf.

Photo by The U.S. Army

time use of force and military detention and tribunals are aimed at balancing military necessity, humanity, and fundamental rights. Even so, wartime authorities can confer extraordinary powers that in peacetime are egregious human rights violations.[12] The record of the last 20 years shows without doubt that use of lethal force as a first—rather than last—resort can normalize accompanying harm to civilians, military trials, detention without charge or trial, and even torture.[13] These practices violate fundamental human rights protections against extrajudicial killing, detention without charge or trial, and fair trial guarantees.[14]

To move away from endless war and toward a sustainable approach to security, lethal force should be used only as a last resort and in compliance with peacetime use of force standards.[15] Guantanamo should be closed, and the use of indefinite detention and military commissions should be discarded in favor of utilizing the far more effective civilian courts.[16]

✓ Adopt an appropriately tailored and rights-respecting approach to security

The United States has at its disposal a host of tools and resources available for addressing security concerns, including those posed by transnational armed groups. The next administration should prioritize the non-militarized tools in the government's toolbox and utilize force only when it is lawful, and as a last resort. To do so, the administration should rely on law enforcement; lawful intelligence gathering; robust, accountable, and appropriately tailored foreign assistance; and diplomatic capabilities for addressing the drivers of conflict and violence.

In so doing, a future administration should reject the temptation to outsource the United States' own endless wars to foreign partners. Rather than continuing to prioritize foreign military engagement and capacity building as the primary tool toward addressing security challenges, the administration should expand and increase its engagement with civil society and other non-governmental actors, as well as its engagement with the non-security agencies of partner governments, to effectively support efforts to alleviate the conditions that contribute to organized violence—including political repression and lack of economic development. And it should do so without perpetuating policies and programs that view local communities solely or primarily through a security lens, undermining their rights and security.

✓ Use military force only as a last resort and with authorization from Congress

Should extraordinary new security challenges arise, the next administration should consider its full array of tools before considering the use of military force. As an overarching principle, only if an administration exhausts all non-military means and determines that military force is lawful under international law (including meeting the requirements of necessity and proportionality) and strategically effective should it seek authorization from Congress in the form of a new, narrowly tailored AUMF.

The administration should also consider support for the use of force by partner security forces only as a last resort, when non-military means are insufficient, and when military force is lawful, necessary, proportionate, and strategically effective. If it deems such operations necessary, it should secure appropriate Congressional authorization. The administration should also be transparent about such operations, proactively and thoroughly vet partner forces for human rights compliance, and insist on enforceable assurances from partners that they will comply with both human rights and humanitarian law, wherever applicable.

12 Scott Roehm, Rita Siemion, Hina Shamsi, *Toward a New Approach to National and Human Security: Introduction*, Just Security (Sep. 11, 2020) available at https://www.justsecurity.org/72359/toward-a-new-approach-to-national-and-human-security-introduction/.

13 Rita Siemion et al., *Toward a New Approach to National and Human Security: End Unlawful, Secret, and Unaccountable Use of Lethal Force*, Just Security (Sep. 11, 2020) available at https://www.justsecurity.org/72375/toward-a-new-approach-to-national-and-human-security-end-unlawful-secret-and-unaccountable-use-of-lethal-force/.

14 *Id.*

15 *Id.*

16 Hina Shamsi et al., *Toward a New Approach to National and Human Security: Close Guantanamo and End Indefinite Detention*, Just Security (Sep. 11, 2020) available at https://www.justsecurity.org/72367/toward-a-new-approach-to-national-and-human-security-close-guantanamo-and-end-indefinite-detention/.

✓ Insist on essential safeguards in any future AUMFs

If the next administration determines that the use of military force is necessary in the future, it must obtain prior authorization from Congress. In so doing, it should insist on the inclusion of essential safeguards in any new AUMF it seeks. Several safeguards have garnered bipartisan support[17] and reflect an effective approach to drafting an AUMF that permits the United States to address legitimate and exceptional security concerns while applying the hard lessons learned from overbroad and harmful interpretations of the 2001 and 2002 AUMFs. These include:

- **Clearly defining the enemy and mission objectives.** Specifying the nation or group(s) against which force is authorized and the objectives or purpose—i.e., the mission—for which force is authorized ensures that Congressional intent and the will of the American people cannot be overridden by subsequent, unintended interpretations and expansions of the use of force authority
- **Specifying the geographic scope of the authorization.** Explicitly limiting war authorities to declared theaters of actual armed conflict helps ensure compliance with U.S. obligations under the U.N. Charter and provides clarity regarding with whom the nation is at war and where.
- **Requiring robust transparency and reporting.** Regular and specific reporting requirements promote democratic accountability, ensure compliance with domestic and international law, and allow Congress to fulfill its oversight responsibilities by staying informed about the conflict, while providing a critical safeguard against endless war.
- **Obligating compliance with international law.** Any new AUMF should contain an explicit statement that its authorities may only be exercised in compliance with U.S. international legal obligations. The United States is already bound by international law regardless of whether an explicit statement is included in an AUMF, but its explicit inclusion will help restore domestic and global confidence in the United States as a nation that complies with the rule of law.
- **Including a supersession or sole source of authority provision.** Given prior administrations' assertions that the 2001 AUMF and 2002 Iraq AUMF authorize the use of force against ISIS—even though those authorizations were passed by Congress before ISIS existed—if Congress does not repeal both of these AUMFs, any new AUMF should make clear that it is the sole, superseding source of authority to use force against the nations or entity to which it applies. Without this clarifying language, the next administration could read the new authorization as expanding its war-making powers, rather than limiting them.[18]
- **Setting an expiration date.** Sunset clauses, which have been included in nearly one-third of prior AUMFs[19] and several post-9/11 national security statutes,[20] set a date for Congress and the executive branch to reexamine the AUMF in light of more recent conditions and, if necessary, reauthorize, refine, or narrow the legislation to suit those conditions.

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17 *See*, e.g., Jack Goldsmith, Ryan Goodman, Steve Vladeck, *Opinion: Five principles that should govern any U.S. authorization of force*, Washington Post (Nov. 14, 2014) available at https://www.washingtonpost.com/opinions/five-principles-that-should-govern-any-us-authorization-of-force/2014/11/14/6e278a2c-6c07-11e4-a31c-77759fc1e-acc_story.html; Jennifer Daskal, Benjamin Wittes, *The Intellectual–But Not Political–AUMF Consensus*, Just Security (Mar. 2, 2015) available at http://justsecurity.org/20546/intellectual-but-political-aumf-consensus/; Harold Koh et al., *Principles to Guide Congressional Authorization of the Continued Use of Force Against ISIL*, Just Security (Nov. 10, 2014) available at http://justsecurity.org/wp-content/uploads/2014/11/ISIL-AUMF-Statement-FINAL.pdf. These elements have also gained the support of a coalition of human rights, civil liberties, and faith groups. *See* Letter from NGO Coalition to Senators Bob Corker and Ben Cardin on Authorizing the Use of Military Force (Jun. 19, 2017) available at http://www.humanrightsfirst.org/sites/default/files/AUMF-letter-final-text-June-19-2017.pdf.

18 Jennifer Daskal, *Why Sunset and Supersession Provisions Are Both Needed in an Anti-ISIL AUMF*, Just Security (Mar. 18, 2015) available at https://www.justsecurity.org/21220/sunsets-supersession-alternatives-another-cpc/.

19 *See* Bill French, John Bradshaw, National Security Network, *Ending the Endless War: An Incremental Approach to Repealing the 2001 AUMF*, p. 24-26 (Aug. 2014) available at https://www.justsecurity.org/wp-content/uploads/2014/08/ENDING-THE-ENDLESS-WAR_FINAL.pdf.

20 Julian Hattem, *Obama signs NSA bill, renewing Patriot Act powers*, The Hill (Jun. 2, 2015) available at https://thehill.com/policy/national-security/243850-obama-signs-nsa-bill-renewing-patriot-act-powers; *Congress extends surveillance law*, Politico (Dec. 28, 2012) available at https://www.politico.com/story/2012/12/congress-extends-foreign-surveillance-law-085563.

✓ Support efforts in Congress to reform the War Powers Act

To secure lasting change for future generations, the administration should support structural reforms by Congress that protect against unilateral executive branch uses of force and restore the constitutional balance of war powers enshrined in the Constitution, including by reforming and modernizing the War Powers Act.

To secure lasting change for future generations, the administration should support structural reforms by Congress that protect against unilateral executive branch uses of force and restore the constitutional balance of war powers enshrined in the Constitution, including by reforming and modernizing the War Powers Act.

At a minimum, such reforms should:

- **Recognize that the Constitution vests the decision to go to war solely in Congress,** with only a narrow exception for the President to use force temporarily to repel a sudden attack if that force is necessary and there is no time to obtain advance authorization from Congress;
- **Require the president to report any such defensive use of force without advance Congressional authorization to Congress within 48 hours** of the actions taken with an explanation of the necessity to use force and a statement as to whether the hostilities are concluded or ongoing. Within seven days following the initial reporting deadline, the president should be required to submit a request for Congressional authorization if hostilities remain ongoing. If Congressional authorization is not provided within 20 days, there should be a mechanism for requiring the automatic termination of hostilities;
- **Define "hostilities," "imminent hostilities," and other ambiguities** in the existing law to ensure that the requirement for advance Congressional approval applies to all actions by U.S. forces that involve the use of deadly force;
- **Require the president to provide ongoing unclassified reports on current and possible engagement in hostilities whenever there is a material change,** or no less frequently than every 30 days to keep Congress fully and currently informed;
- **Recognize that introducing U.S. forces into hostilities** in any additional countries or against any additional nations, organized armed groups, or forces is only permitted when Congress has provided advanced authorization;
- **Provide expedited Congressional procedures for consideration of resolutions** to cease the use of U.S. Armed Forces in hostilities or situations where there is a serious risk of hostilities;
- **Provide judicial review** for non-compliance with resolutions to cease hostilities or automatic termination requirements, as well as for credibly alleged violations of international humanitarian law or human rights law; and
- **Prohibit funding for activities related to hostilities** that do not receive required authorization from Congress in advance.

The very notion of "endless war" serves as an indictment of 20 years of policy failures, and a reference to the devastating harms these failures have caused at home and abroad concerning peace, security, and the rule of law. American leaders need to move beyond promises to end the endless war paradigm by taking concrete and necessary actions, in line with clear public sentiment. A more secure and peaceful future for our collective security, one that better allows us to face other pressing challenges, depends on such action.

Closing Guantanamo

Photo by Stephen Melkisethian

Introduction

As the detention and trial facilities at Guantanamo Bay approach their 20th year of operations, the United States continues to detain 40 individuals,[1] including five men whose transfer has already been approved by the Department of Defense.[2] The base also hosts the military commissions system, where cases against seven of the detainees have remained stalled in the pretrial phase for years.

By any reasonable standard, the Guantanamo experiment has been a costly moral and strategic failure. Purportedly conceived to protect national security, the military commission and detention systems at Guantanamo have instead harmed national security by undermining efforts to cooperate with allies on global counterterrorism campaigns and feeding into the propaganda and recruitment efforts of terrorist groups.[3] Moreover, the human rights abuses at Guantanamo have tarnished the United States' reputation as a global leader on human rights[4] at a time when such leadership is being questioned more than ever. The most expensive prison in the world,[5] the crumbling detention facility and ineffectual commissions have also cost American taxpayers more than $7 billion since opening in 2002.[6]

While Congressional restrictions make closing Guantanamo more difficult, it has never been more important or achievable.

Because of these harms, both Republican and Democratic administrations have sought to close Guantanamo. Five Secretaries of Defense, eight Secretaries of State, six National Security Advisors, five Chairmen of the Joint Chiefs of Staff, and dozens of retired generals and admirals have supported closing Guantanamo.[7] President George W. Bush aimed to close the facility during his second term, acknowledging that "the detention facility had become a propaganda tool for our enemies and a distraction for our allies."[8] President Obama, when asked in 2015 what advice he would give himself at the beginning of his first term, replied, "I think I would have closed Guantanamo on the first day."[9] President Trump has to-date declined to send additional detainees to Guantanamo, noting that allies should take responsibility for detention and trial of their citizens, and emphasizing that it's "crazy" how much the United States spends to detain individuals at the facility.[10]

The incoming administration can and should take swift and decisive action to finally end detention operations and shut down the failed military commissions. While Congressional restrictions make closing Guantanamo more difficult, it has never been more important or achievable. Only 40 detainees remain at the prison, the lowest number the facility has held since its earliest days. The last time a detainee was sent to Guantanamo was in 2008—12 years ago. The start of a new administration presents a renewed opportunity to shut down the prison, once and for all. What follows is a blueprint for how the next presidential administration can take immediate action to close Guantanamo and end the military commissions.

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1 Carol Rosenberg, *The Cost of Running Guantánamo Bay: $13 Million Per Prisoner*, New York Times (last updated Sep. 19, 2019) available at https://www.nytimes.com/2019/09/16/us/politics/guantanamo-bay-cost-prison.html.

2 Missy Ryan, Julie Tate, *The Trump era has stranded these five men at Guantanamo Bay*, Washington Post (Jan. 22, 2017) available at https://www.washingtonpost.com/news/checkpoint/wp/2017/01/22/the-trump-era-has-stranded-these-five-men-at-guantanamo-bay/.

3 Mehdi Hasan, Dina Sayedahmed, *Blowback: How Torture Fuels Terrorism Rather Than Reduces It*, Intercept (Feb. 12, 2018) available at https://theintercept.com/2018/02/12/torture-terrorists-guantanamo-abu-ghraib/.

4 Nick Gass, *Colin Powell: Gitmo was always closing*, Politico (Feb. 24, 2016) available at http://www.politico.com/story/2016/02/colin-powell-guantanamo-bay-219739.

5 Rosenberg, *supra* note 1.

6 *Id.;* Peter Baker, *Trump Says 'It's Crazy' to Spend $13 Million Per Inmate at Guantánamo*, New York Times (Sep. 19, 2019) available at https://www.nytimes.com/2019/09/19/us/politics/trump-guantanamo.html.

7 Human Rights First, *Fact Sheet: Former Top U.S. Officials Who Support Closing Guantanamo* (Nov. 18, 2016) available at https://www.humanrightsfirst.org/resource/former-top-us-officials-who-support-closing-guantanamo; Human Rights First, *Quote Sheet: National Security Leaders Support Closing Guantanamo*, available at https://www.humanrightsfirst.org/sites/default/files/Quotes-National-Security-Leaders-Support-Closing-Guantanamo.pdf; *Retired Generals and Admirals Letter to Senate and House Armed Services Committees on Closing Guantanamo* (Mar. 1, 2016) available at https://www.humanrightsfirst.org/sites/default/files/GeneralsAdmiralslettertoHASCSASC.pdf.

8 George W. Bush, *Decision Points*, p. 179-180 (2010).

9 U.S. President Barack Obama, *Remarks by the President to the City Club of Cleveland* (Mar. 18, 2015) available at https://www.whitehouse.gov/the-press-office/2015/03/18/remarks-president-city-club-cleveland.

10 Baker, *supra* note 6.

Recommendations

✓ End indefinite detention at Guantanamo

The next administration should move quickly to end indefinite detention at Guantanamo. Despite Congressional restrictions on transferring detainees, numerous avenues remain for taking decisive action to end indefinite detention. The administration should begin by putting structures in place to keep the closure of Guantanamo on the agenda, and utilize all available pathways for transferring the remaining detainees. To achieve this objective without waiting on Congress to act, the incoming administration should:

- **Establish senior positions at both the State Department and White House tasked with negotiating and implementing transfers.** The next president should appoint a senior State Department official whose sole responsibility is to negotiate and implement transfers from Guantanamo. The president should also direct the Department of Defense to prioritize approving such transfers. Additionally, the new administration should designate a senior official within the White House able to convene agency deputies with the primary responsibility of closing Guantanamo.

- **Convene a recurring principals meeting on closing Guantanamo.** Within 30 days of taking office, the next president should authorize and direct principals of all relevant stakeholder agencies to develop and implement plans to close Guantanamo. In order to effectuate closure as rapidly as possible, the next president should direct the national security advisor and senior official described above to convene principal-level meetings on a recurring basis (ideally, monthly), until all detainees have been transferred or released.

- **Begin transfers of uncharged detainees immediately.** The new administration should make transferring the remaining uncharged detainees—all of whom have been imprisoned without charge or trial for well over a decade—a top priority. Not only will this be the first step in correcting the injustice of their prolonged detention, but it will also significantly reduce the detainee population, making it more feasible to find dispositions for the remaining detainees.

  - All detainees who were previously approved for transfer should be transferred immediately. Five of the detainees at Guantanamo have already been approved for transfer by the Justice Department, Defense Department, State Department, Department of Homeland Security, Office of the Director of National Intelligence, and the Joint Chiefs of Staff.[11] The Secretary of Defense also approved their transfers. This means that these U.S. agencies and offices have determined that these detainees do not pose a "continuing significant threat" to the United States.

  - The administration should also immediately transfer any uncharged detainees who can be prosecuted in foreign courts, which may have jurisdiction over crimes the detainees allegedly committed before capture.

  - All other uncharged detainees should be transferred as soon as possible, but no later than within the

11 *The Guantanamo Docket*, New York Times, available at https://www.nytimes.com/interactive/projects/guantanamo/detainees/current.

Photo by Victoria Pickerin

first 180 days.

- The United States must ensure that these transfers, to either the detainees' home countries or third countries, adhere to international law and respect non-refoulement obligations. Detainees may not be transferred to countries where there are substantial grounds for believing the detainees would be in danger of being subjected to torture or other forms of mistreatment.[12]
- The administration should also ensure any detainees who are transferred for prosecution in foreign courts are guaranteed access to a free and fair trial.

- **Swiftly initiate new, full, in-person Periodic Review Board (PRB) hearings for all remaining detainees.**[13] In order to ensure that all uncharged detainees will be transferred within six months, the administration should conduct full, in-person hearings for all remaining uncharged detainees. In conducting these hearings, the administration should prioritize reviews for detainees still awaiting decisions from review hearings that took place during the Trump administration, two of whom have still not received final determinations more than two years after their full hearings were conducted.[14] In order to encourage detainee participation, it is critical that the new administration quickly demonstrate a good-faith commitment that transfers will occur and the PRB process will be taken seriously moving forward—for example, by transferring as quickly as possible the five detainees already approved for transfer. Two of these detainees were approved for transfer in 2016 by the PRB, and three of them have been approved for transfer since 2010—a decade ago.[15] These hearings should be conducted pursuant to new operating guidance that directs the board to:
  - Take into consideration factors such as the considerable passage of time since a detainee's capture;
  - not consider any lack of attendance or participation on the part of a detainee in previous or current PRB proceedings, nor any disciplinary issues while in detention, as factors in favor of continued detention;
  - not treat any denial of allegations as evidence of a lack of candor, nor treat any admission of allegations as evidence of reform;
  - screen out information that might have been derived from torture or other cruel, inhuman, or degrading treatment; and
  - subject to appropriate security clearance, provide each detainee, and their personal representative and private counsel, access to the record the PRB will consider when making its determination.

The White House should direct the Justice Department to cease opposing habeas corpus petitions for detainees the United States believes are no longer a threat or where any risk from transfer can be mitigated.

- **Stop opposing habeas petitions for certain classes of detainees.** The White House should direct the Justice Department to cease opposing habeas corpus petitions for detainees the United States believes are no longer a threat or where any risk from transfer can be mitigated. There is precedent for this from the Obama administration. In October 2013, the Obama administration withdrew its opposition to the habeas petition for Guantanamo detainee Ibrahim Osman Ibrahim Idris.[16] Following this decision,

12 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, art. 3, available at http://www.ohchr.org/en/ProfessionalInterest/pages/cat.aspx.

13 The PRB, designed to evaluate the threat posed by detainees slated for indefinite detention, is made up of high-level representatives from the same agencies and offices noted above. The PRB examines a detainee's history (including any updated intelligence), his conduct while imprisoned, the details of his possible release (including any support system or possible connections to terrorism awaiting him upon release), his outlook on the United States, and his health, among other factors. Periodic Review Secretariat, *About: The Periodic Review Board*, available at http://www.prs.mil/About-the-PRB/.

14 Periodic Review Secretariat, *Subsequent Full Review*, available at https://www.prs.mil/Review-Information/Subsequent-Full-Review/.

15 The Guantanamo Docket, *supra* note 11.

16 Ben Fox, *U.S. won't fight release of ill prisoner*, Miami Herald (Oct. 3, 2013) available at https://web.archive.org/web/20131005111335/http://www.miamiherald.

a judge recognized that Idris' physical and mental illnesses rendered him incapable of participating in terrorist or insurgent activities, and ordered him released.[17] When the Justice Department declines to oppose a detainee's habeas petition, the transfer of that detainee is not subject to the cumbersome foreign transfer requirements and the domestic transfer ban, providing the administration with greater flexibility to negotiate the transfer. The new administration should not oppose habeas petitions from Guantanamo detainees who:

- do not pose a threat to the United States due to their debilitating mental or physical health. These detainees should also be prioritized for transfers;
- the Guantanamo Review Task Force or the PRB have approved for transfer. As six national security and intelligence agencies—including the Justice Department—have already found that these detainees no longer pose a continuing significant threat to the United States, the Justice Department should not oppose their habeas petitions; or
- were detained in connection with an armed conflict that has ended with respect to the unit, cell, or organized armed group to which a detainee belongs, particularly as the new administration seeks to bring the conflict in Afghanistan to an end.

- **Utilize a medical review process to transfer detainees with special medical considerations.** The new administration should create a medical review commission charged with reviewing each detainee to determine if their physical or medical conditions render them incapable of participating in hostilities against the United States, prioritizing those who are victims of torture. If found by the commission to be incapable of rejoining the fight, a detainee should be approved for transfer.
- **Press for legislation to roll back foreign and domestic transfer restrictions.** The new administration should work with the new Congress to lift restrictions on transferring detainees to third countries, as well as the restrictions on bringing Guantanamo detainees to the United States. The president should veto any legislation that maintains or adds to existing restrictions. The administration should also support any interim changes in law that would allow transfers to the United States for medical treatment or access to the federal courts.

✓ End the military commissions

It is time to recognize that the experiment with military commissions in the counterterrorism context has failed.[18] In nearly 20 years, only eight cases have been concluded in the commissions, three of which have been completely overturned and one partially overturned because the crimes the defendants were charged

com/2013/10/03/3667663/us-wont-fight-release-of-ill-prisoner.html.

17 Jenifer Fenton, *Guantanamo hunger striker nearing death*, Al Jazeera (Aug. 12, 2015) available at https://www.aljazeera.com/indepth/features/2015/08/guantanamo-hunger-striker-nearing-death-150812101059995.html.

18 Steve Vladeck, *It's Time to Admit That the Military Commissions Have Failed*, Lawfare (Apr. 16, 2019) available at https://www.lawfareblog.com/its-time-admit-military-commissions-have-failed.

Photo by Medill DC

with were not war crimes at the time the conduct at issue occurred.[19] Nearly two decades after the attacks of September 11, 2001, the trial in the case against the alleged 9/11 co-conspirators has not even begun. That case is stalled in pretrial hearings, and although the trial date has been set for January 2021, it is likely to be pushed back at least several months, if not much longer.[20] Though the rules for the commissions have been revised twice, the system remains deeply flawed and inconsistent with fairness and justice. The pretrial hearings have become mired in dysfunction, unclear and changing rules and procedures, ethical issues, continued government interference, and over-classification—particularly of information related to the government's torture of the defendants.[21]

By contrast to the commissions' tragic circus, U.S. federal courts have effectively prosecuted more than 900 terrorism suspects since 9/11.

One example of the commissions' failure is the 2019 unanimous decision of the U.S. Court of Appeals for the D.C. Circuit throwing out three-and-a-half years' worth of pretrial rulings by the military commission judge in the USS Cole case, because that judge had been issuing rulings while secretly applying for a job as an immigration judge with the Department of Justice.[22]

By contrast to the commissions' tragic circus, U.S. federal courts have effectively prosecuted more than 900 terrorism suspects since 9/11, owning to clear rules and decades of precedent.[23] Of these, over 100 were captured overseas, including al Qaeda spokesman and Osama bin Laden's son-in-law Suleiman Abu Ghaith, who is currently serving a life sentence in U.S. federal prison.[24] Other individuals held in U.S. prisons include Zacarias Moussaoui, the 20th 9/11 hijacker; "shoe bomber" Richard Reid; and eight men involved in the 1998 bombings of U.S. embassies in Kenya and Tanzania.[25]

Given these stark facts, the next administration should take immediate executive action to end the military commissions by:

- Directing the Secretary of Defense to discontinue their use and order that no new military commissions charges be brought against any detainees;
- Tasking the Attorney General with pursuing Article III plea agreements, including in federal court via video conference, for any defendants currently in the military commissions system, which would allow those detainees to serve their sentences abroad;
- Charging current commission defendants in U.S. federal court where such trials would be consistent with justice and due process;
- Releasing or transferring any remaining detainees who have not been charged or convicted; and
- Rescinding all military commissions regulations and working with Congress to repeal the Military Commissions Act of 2009.

19 *Id.*

20 Carol Rosenberg, *Judge Excuses 9/11 Defense Lawyer and Postpones Torture Testimony*, New York Times (Feb. 19, 2020) available at https://www.nytimes.com/2020/02/19/us/politics/sept11-defense-lawyer-guantanamo.html.

21 Human Rights First, *Fact Sheet: Some Key Facts on Military Commissions v. Federal Courts*, available at http://www.humanrightsfirst.org/sites/default/files/KeyFactsMilitaryCommvFedCourts.pdf; Human Rights First, *Confusing Commission Rules Continue to Hamper 9/11 Case* (Oct. 29, 2015) available at http://www.humanrightsfirst.org/blog/confusing-commission-rules-continue-hamper-911-case; Spencer Ackerman, *Guantánamo hearings halted amid accusations of FBI spying on legal team*, Guardian (Apr. 14, 2014) available at https://www.theguardian.com/world/2014/apr/14/guantanamo-bay-hearing-halted-fbi-spying.

22 Steve Vladeck, *Al-Nashiri III: A No Good, Very Bad Day for U.S. Military Commissions*, Just Security (Apr. 16, 2019) available at https://www.justsecurity.org/63663/al-nashiri-iii-a-no-good-very-bad-day-for-u-s-military-commissions/.

23 Trevor Aaronson, Margot Williams, *Trial and Error*, Intercept (last updated Jul. 15, 2020) available at https://trial-and-terror.theintercept.com/.

24 Human Rights First, *Identified Foreign Captures*, available at http://www.humanrightsfirst.org/sites/default/files/Identified-Foreign-Captures.pdf.

25 *U.S. Prisons Can Safely Hold Guantanamo Bay Detainees: Hearing before the H. Homeland Sec. Subcomm. on Oversight & Management Efficiency*, 114th Cong. (Apr. 28, 2016) (statement of James A. Gondles Jr., Executive Director, American Correctional Association) available at http://www.humanrightsfirst.org/sites/default/files/Gondles-statement-for-the-record-April-2016.pdf; U.S. Department of Justice, *Attorney General Eric Holder Speaks at the American Constitution Society Convention* (Jun. 16, 2011) available at https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-theamerican-constitution-society-convention; *see also* U.S. Department of Justice, National Security Division, *Chart of Public/Unsealed International Terrorism and Terrorism-Related Convictions from 9/11/01 to 12/31/16* (last updated Feb. 10, 2017) available at http://www.humanrightsfirst.org/sites/default/files/NSD-Terrorism-Related-Convictions.pdf.

Minimizing and Accounting for Civilian Harm in U.S. Military Operations

Photo by New Zealand Defence Force

Introduction

Minimizing and addressing civilian harm is critical on humanitarian grounds and as the basis for the success and legitimacy of American military operations.[1] As General Stanley McChrystal (Ret.) has said, "We must avoid the trap of winning tactical victories—but suffering strategic defeats—by causing civilian casualties or excessive damage and thus alienating the people."[2] Civilian harm from U.S. strikes can fuel support for the opposition,[3] impede assistance from allies and partners, tarnish the reputation of the United States as a leader on human rights,[4] and set a dangerous precedent for other nations to follow.[5] That is why, as former Secretary of Defense General James Mattis has emphasized, the United States aims to do "everything humanly possible to prevent civilian deaths in war."[6]

The White House, Department of Defense, and Congress have recognized the moral and strategic imperative to prevent and address civilian harm, and have committed to reforming laws, policies, and practices to do so. In 2016, President Obama signed Executive Order 13732, which provided high-level guidance on pre- and post-strike measures for addressing civilian casualties.[7] Congress subsequently passed legislation on a bipartisan basis requiring structural and policy improvements, as well as detailed reporting on civilian casualties caused by U.S. military operations. In subsequent years, Congress strengthened those requirements via the annual National Defense Authorization Act (NDAA).[8] In the interim, the Department of Defense conducted an internal review of its civilian casualties tracking processes. At the conclusion of this review, then-Secretary of Defense Mattis responded to the new statutory requirements by initiating a process for developing Department of Defense-wide guidance on preventing, tracking, and responding to civilian harm across the Combatant Commands.[9] The outcome of this process, a forthcoming DOD Instruction (DOD-I), presents a unique opportunity to rectify shortcomings in current policies and operations and strengthen the U.S. military's commitment to minimize and account for civilian harm.

Several civil society organizations have set out priorities and expectations for a comprehensive policy on civilian harm in U.S. military operations and security partnerships during consultations with DOD in the run-up to the department's finalization of its new DOD-I. The recommendations in this blueprint closely track those made through that consultative process.[10] The next administration should make completion of this uniform policy a top priority and ensure that the policy meets the following requirements.

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1 *See, e.g.*, Christopher Kolenda et al., Open Society Foundations, *The Strategic Costs of Civilian Harm: Applying Lessons from Afghanistan to Current and Future Conflicts*, p. 9 (Jun. 2016) available at https://www.opensocietyfoundations.org/uploads/1168173f-13f9-4abf-9808-8a5ec0a9e4e2/strategic-costs-civilian-harm-20160622.pdf.

2 Gen. Stanley McChrystal, Commander of NATO's International Security Assistance Force, *Tactical Directive (releasable portions)* (Jul. 6, 2009) available at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf.

3 *See* Hassan Abbas, *How Drones Create More Terrorists*, Atlantic (Aug. 23, 2013) available at http://www.theatlantic.com/international/archive/2013/08/howdrones-create-more-terrorists/278743/.

4 *See* Owen Bowcott, *Drone strikes threaten 50 years of international law, says UN rapporteur*, Guardian (Jun. 21, 2012) available at https://www.theguardian.com/world/2012/jun/21/drone-strikes-international-law-un.

5 *See* Priyanka Boghani, *Who's Next to Borrow from America's Drone Strike "Playbook"?*, FRONTLINE (Aug. 11, 2016) available at https://www.pbs.org/wgbh/frontline/article/whos-next-to-borrow-from-americas-drone-strike-playbook/.

6 S. Armed Services Comm., 115th Cong., *Responses to Advance Policy Questions for James N. Mattis, Nominee to be Secretary of Defense* (Jan. 12, 2017) available at https://www.armed-services.senate.gov/imo/media/doc/Mattis%20APQ%20Responses_01-12-17.pdf.

7 Executive Order 13,732, United States Policy on Pre- and Post-Strike Measure To Address Civilian Casualties in U.S. Operations Involving the Use of Force, 81 Fed. Reg. 44485 (Jul. 1, 2016) (codified at 3 C.F.R. § 13732) available at https://www.gpo.gov/fdsys/pkg/FR-2016-07-07/pdf/2016-16295.pdf.

8 For instance, Section 1057 of the FY18 National Defense Authorization Act laid out detailed civilian casualty reporting requirements, while Section 1062 of the FY19 National Defense Authorization Act in turn clarified and strengthened those requirements in a number of ways. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115- 91, at § 1057 as amended (2017) available at https://www.congress.gov/bill/115th-congress/house-bill/2810/text; John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, at § 1062 (2018) available at https://www.congress.gov/bill/115th-congress/house-bill/5515/text; Rita Siemion, *Important New Civilian Casualties Provisions in the Defense Authorization Bill*, Just Security (Jul. 24, 2018) available at https://www.justsecurity.org/59695/important-civilian-casualties-provisions-congressional-bill-national-defense-authorization-act/.

9 The development of comprehensive DoD policy on civilian harm is pursuant to Section 936 of the FY19 National Defense Authorization Act (NDAA) enacted by Congress in 2018, which is available at https://www.congress.gov/bill/115th-congress/house-bill/5515/text.

10 The civil society recommendations in their original form and as joined by several organizations can be found here and here, along with additional recommendations addressing key issues affecting the protection of civilians. *See* Center for Civilians in Conflict, *Civil Society Guidance for a Model Policy*: *U.S. Department of Defense Policy on Civilian Harm* (Mar. 2020) available at https://civiliansinconflict.org/wp-content/uploads/2020/03/NGO-Recs-for-DoD-March-2020.pdf; *see also* InterAction, *Civil Society Guidance for a Model Policy: DOD Policy on Civilian Harm* (Mar. 2020) available at https://www.interaction.org/blog/civil-society-guidance-for-a-model-policy-dod-policy-on-civilian-harm/; *see also Center for Civilians in Conflict, Civil Society Guidance for a Model DoD Policy on Civilian Harm* (Mar. 12, 2020) available at https://civiliansinconflict.org/blog/civil-society-guidance-for-a-model-dod-policy-on-civilian-harm/.

Recommendations

✓ Strengthen the civilian harm mitigation policy framework by clarifying its purpose, the roles and responsibilities of key stakeholders, its terms of reference and standards, and the policy-implementation processes and mechanisms for consulting with civil society

For the forthcoming policy on civilian harm to be comprehensive and effective, the new DOD-I should:

- **Clearly and explicitly state that the Department's policy, strategic, legal, and institutional interests are served by minimizing civilian harm** in U.S. military operations and security partnerships. The policy must make a firm commitment to effectively respond to civilian harm where it occurs, and to take comprehensive steps to protect civilians in armed conflict. It is critical that the DOD-I include an overarching message—for U.S. military forces and for the public—that minimizing civilian harm is an essential moral value that the military should do everything it can to uphold; that taking precautions to minimize harm to civilians is a legal obligation; and that both civilian harm prevention and response are critical to the strategic and tactical success of U.S. operations;

- **Clarify roles and responsibilities and their delegation,** as well as clear scope of application to all DoD personnel;
- **Clearly define terms such as "civilian" and "non-combatant,"** consistent with the law of armed conflict, to reduce the likelihood that the spirit of the policy will be undermined by semantics or inconsistent interpretations;
- **Adopt a higher standard through uniformity (with adaptability),** reflecting consistent, systematically applied, and uniform guidance or protocols that elevate the overall performance of each military component, while allowing flexibility to actively encourage military forces to pioneer approaches that improve overall outcomes for civilians;
- **Recognize the value of external sources** for preventing and responding to civilian harm by ensuring effective access to—and communication channels with—external sources, including affected individuals, families, and communities; the media; humanitarian and human rights organizations; and international organizations;

Photo by Mohammed Al Baba/Oxfam

- **Conduct a candid assessment of resource requirements for each policy meant to address civilian harm,** so that the policy can be comprehensively and robustly carried out. This should include skills requirements for staffing offices and cells charged with civilian harm tracking and analysis; engagement with outside parties; and ensuring systematic lessons learned exercises;

- **Develop key considerations for standard operating procedures,** including either required or suggested elements, to ensure consistency in implementing the DOD-I while enabling operation-specific flexibility in the application of its requirements.

✓ Minimize and mitigate civilian harm across military operations

The optimal DOD-I should set forth an explicit objective of minimizing civilian harm, including direct harm resulting from hostilities, as well as direct and indirect harm arising from damage to civilian property and assets, public services, and critical infrastructure. It should make explicit the critical role and supporting functions of civilian objects for civilian populations. And it should delineate steps to anticipate potential harm and spare civilian lives and objects throughout military planning and decision-making processes.[11]

At minimum, the policy should do the following:

- **Make minimizing civilian harm an explicit objective, particularly during the planning and preparation phase of operations.** Minimizing civilian harm should be a distinct objective across all conflicts, regardless of type, duration, and level of intensity. Such an objective should include specific guidance to both minimize and mitigate physical harm during and from hostilities, as well as harm resulting from disruptions to or the destruction of civilian objects, including critical infrastructure systems, public services, and private property. Steps to minimize harm should include avoiding the use of indiscriminate weapons and munitions, precautions in attack, well-informed and accurate analysis, stronger preparation, and a command environment that prioritizes minimizing civilian harm. The DOD-I should also systematize and reinforce measures to minimize and mitigate civilian harm in military decision-making and operational planning.

Minimizing civilian harm should be a distinct objective across all conflicts, regardless of type, duration, and level of intensity.

- **Analyze civilian patterns of life and civilian objects accurately.** The DOD-I should take steps to more systematically integrate into operations and targeting decisions accurate analysis of civilian pattern of life, segments of society that are particularly vulnerable, and the presence of civilian objects critical to civilian life, including, but not limited to, medical care and educational facilities. In urban settings, the interconnected character of vital systems and knock-on effects of the destruction of critical infrastructure systems should be taken into account when planning or preparing operations. The policy should call attention to the possibility of errors, including positive identification errors, and establish steps commanders can take to reduce their prevalence.

- **Respond rapidly and adaptively to civilian harm escalations.** Given the often-significant lag between allegations and assessments, commanders should ensure timely information feedback loops on civilian harm in ongoing operations, including dynamic strikes. Commanders should also improve timely responses to local escalations in reported civilian harm claims, adapting tactics and strategies where necessary to minimize harm and suffering of civilian populations.

- **Anticipate the risk of forced displacement as a civilian harm.** The United States and partner forces must ensure that strategy, planning, targeting processes, and training anticipate and take steps

11 *See* NGO Recommendations for DoD Policy on Civilian Harm, *Protection of Civilian Objects including Critical Infrastructure in U.S. Military Operations* (Nov. 2019) available at https://www.interaction.org/wp-content/uploads/2020/03/1-Final-2020-02-03-NGO-recommendations-on-Civilian-Objects-for-DoD-Policy-Nov-2019-1.pdf; *see also* NGO Recommendations for DoD Policy on Civilian Harm, *Displacement and the Protection of Civilians in U.S. Military and Partnered Operations* (Dec. 2019) available at https://www.interaction.org/wp-content/uploads/2020/03/2-FINAL-2020-02-03-NGO-recommendations-on-Displacement-for-DoD-Policy-Dec-2019.pdf.

to avoid causing the displacement of civilian populations unless strictly necessary for their safety. The United States and partner forces should also anticipate the additional risks associated with forced displacement, and act to ensure that any population movements are undertaken in a safe and orderly manner.

- **Adapt training and professional military education to better incorporate civilian harm mitigation and response.** The DOD-I should delegate to responsible offices and components clear requirements to ensure measures to minimize civilian harm and undertake post-harm response are included in training and education for all levels of military personnel and civilian staff.

✓ Address civilian harm arising from partnered operations and security assistance

As the United States is likely to conduct military operations jointly with other security forces for the foreseeable future, the DOD-I should address civilian harm arising from, or incidental to, U.S. military security cooperation, assistance, and other partnerships with state military forces and non-state armed groups. From the onset of a security partnership and throughout its existence, the U.S. military should take the necessary steps to integrate the protection of civilians and respect for human rights in all settings and at all levels of engagement with partner forces. While the DOD-I may not necessarily address all policy and operational risks from a U.S. government perspective, DoD's role to help anticipate and avoid civilian harm through its security partnerships should be explicitly stated. The optimal policy should provide meaningful guidance to program managers who design, implement, and monitor U.S. military partnerships.[12] At minimum, the DOD-I should do the following:

- **Properly manage and assess risk.** The DOD-I should emphasize the value of risk assessments of partner capabilities and intentions in relation to compliance with international humanitarian law, the promotion of human rights, and the protection of civilians before and during security cooperation activities. Risk assessments should account not only for the conduct of hostilities, but also for human rights abuses such as gender-based violence and other forms of violence and coercion against civilian populations. The DOD-I should clearly delegate the development of risk assessment criteria and mitigation plans to the most relevant components and program managers (for example, within the Defense Security Cooperation Agency [DSCA] and Special Operations Command). It should also require consultation with relevant experts and counterparts at the State Department. The policy should clearly require reporting suspected or alleged civilian harm to the appropriate command authorities.

- **Include corresponding measures for partners to minimize civilian harm.** The DOD-I should emphasize that any U.S. support to a partner or coalition ought to be accompanied by a corresponding package of measures, including training, coaching, and mentoring, to ensure partner force capabilities for and commitment to the protection of civilians, and the necessary strategies and tools to minimize harm and address abuses. The U.S. military should also constantly monitor partner conduct and capabilities with respect to the protection of civilians to ensure the continued appropriateness of U.S.

12 *See* NGO Recommendations for DoD Policy on Civilian Harm, *U.S. Partnered Operations and the Protection of Civilians* (Dec. 2019) available at https://www.interaction.org/wp-content/uploads/2020/03/5-FINAL-2020-02-03-NGO-recommendations-on-Partnered-Operations-for-DoD-Policy-Dec-2019.pdf.

Photo by Mil.ru/Ministry of Defence of the Russian Federation

support, and be willing to modify, reduce, or end support when the risk of civilian harm is too high.

- **Develop "interoperable" means of minimizing civilian harm and responses to harm.** When working with partners, the DOD-I should include guidance for developing with them complementary and compatible means of minimizing, tracking, investigating, and responding to allegations of harm. This guidance should also include post-harm response and efforts to acknowledge harm and compensate survivors for their losses—for example, through condolences and other forms of amends. Finally, guidance should be provided for redressing violations of the laws of war.

The DOD-I should require that information related to civilian harm is provided to, exchanged with, and received from outside parties, including affected civilians, local civil society, non-governmental organizations, and the media.

- **Be transparent about security partnerships.** The DOD-I should establish parameters for clear communication on the nature, purpose, and scope of the partnership to the public in both the U.S. and the host-nation. The DOD-I should also clearly communicate ways the United States is ensuring the protection of civilians during its partnership activities.

✓ Facilitate information exchange with third parties

The DOD-I should require that information related to civilian harm is provided to, exchanged with, and received from outside parties, including affected civilians, local civil society, non-governmental organizations, and the media. The DOD-I should clarify the policy, strategic, and operational benefits of an exchange of information on civilian harm. While establishing the exchange of information as a uniform expectation across all U.S. military operations, the policy should also note the benefits of developing customized and context-specific channels and means most suited to fulfilling the purpose of dialogue and information exchange.

The optimal policy will recognize engagement with international and local non-governmental organizations, United Nations entities, and affected communities as an invaluable, critical, and standard feature of the Department and its military operations.[13] At minimum, the policy should do the following:

- **Recognize the value of external information and acknowledge the risk of internal bias.** The new policy should emphasize the probative value of information on civilian harm deriving from sources outside of the U.S. government, including for tracking, investigating, and responding to civilian harm, as well as operational and institutional learning. Conversely, the policy should caution commanders and other personnel against relying exclusively on internal sources, and establish affirmative measures to avoid bias in intelligence-gathering and fact-finding processes.

- **Expect engagement from commanders.** The policy should establish the expectation that commanders and their delegated personnel will communicate with willing groups and individuals within their area of operations that may have, or could facilitate access to, information about civilian harm. This should be done to make deconfliction arrangements to safeguard humanitarian operations, as well as to mitigate civilian harm.

- **Minimize and manage the risks of displacement.** The policy should require robust engagement with humanitarian and human rights organizations as well as civilian populations during planning and throughout the duration of hostilities to help minimize forced displacement and civilian harm during displacement, protect voluntary population movements, and develop contingency options.

13 *See* NGO Recommendations for *DoD Policy on Civilian Harm, DoD Engagement with Humanitarian and Human Rights Organizations on Civilian Harm in U.S. Military Operations* (Jul. 2019) available at https://www.interaction.org/wp-content/uploads/2020/03/3-FINAL-2020-02-03-NGO-recommendations-on-DoD-Engagement-on-Civilian-Harm-for-DoD-Policy-July-2019.pdf.

✓ Establish clear guidelines for assessing and investigating harm that prioritize outside consultations and transparency with the public

The DOD-I should emphasize and provide detailed guidance for assessing and investigating both internal and external reports of harm.[14] At minimum, the policy should:

- **Establish a uniform system for reporting and response.** The policy should clarify that any and all allegations of civilian casualties or other harm will be internally reported to an official in a position of command authority or his or her delegate, and assessed for purposes of further action.

- **Establish proactive consultation with outside sources.** The policy should require that the assessment and investigative processes around civilian harm will actively seek and consider outside sources of information. Thorough assessments and investigations should include engaging with affected civilians, non-governmental organizations, United Nations entities, and other sources. They should also include site visits, where warranted, to evaluate the facts of a report through interviews and other channels of communication. The policy should ensure that assessments and investigations are reopened if and when credible additional information has been received.

- **Establish parameters for transparency.** Finally, the policy should establish parameters for publicly sharing information about the assessment and investigations process, and enable outside parties to seek information about the status of specific cases of civilian harm, including their outcomes.

14 *See* NGO Recommendations for DoD Policy on Civilian Harm, *Military Assessments, Investigations, and Tracking of Civilian Harm* (Nov. 2019) available at https://www.interaction.org/wp-content/uploads/2020/03/6-FINAL-2020-02-18-NGO-White-Paper-DOD-Assessments-and-Investigations.pdf.

Photo by Mohammed Al Baba/Oxfam

✓ Prioritize condolence response and redress for those harmed

The DOD-I should recognize condolence response as critical to civilian harm mitigation. Such response should be without prejudice to the rights of victims of violations of international humanitarian law to full reparation. Acknowledgment of harm should be considered a bare minimum requirement across theaters and contexts. An optimal policy should offer guidance for developing consistent (but contextually appropriate and culturally sensitive) condolence options for every operation.[15] Additionally, in the case of violations of international humanitarian and human rights law, a means of access to redress should be provided. At minimum, the policy should:

- **Include a comprehensive and flexible framework of condolence response.** The policy must lay out a range of possible condolence options, including, but not limited to: financial remuneration or payment; public or private recognition or acknowledgment of harm to those affected, explanation, or formal apology; livelihood assistance; community-level support; restoration of damaged property or public infrastructure; and other tailored offerings or expressions of regret or contrition.
- **Develop a mechanism for offering financial payments and in-kind amends.** Although condolence responses need not be limited to ex gratia payments, these payments may be suitable under certain circumstances depending on the desires, needs, and concerns of those affected. The DOD-I should ensure that components have the administrative processes and resources in place to report on, receive, catalogue, manage, investigate, and act on claims of civilian harm. Further, the DOD-I should prioritize transparency to the public, making known who specifically should be contacted when such harm occurs, and how they can be reached.
- **Establish proper, timely, and comprehensive redress and reparations.** The new DOD-I should establish the means for timely and comprehensive redress, and, where appropriate, reparations for loss or injury caused in the case of violations of international humanitarian law and human rights law. The DOD-I should make clear to the public what those appropriate cases for reparations are, what the process for review is, and when reparations will be delivered, should they be found appropriate.

✓ Include processes for learning and good practice

The optimal policy should include lessons learned as a feature in each of its main sections. The DOD-I should establish the expectation that commanders' and headquarters' offices in the Department will regularly and systematically take steps to understand the causes of civilian harm and the means of minimizing it in both operations and security partnerships. At minimum, the policy should:

- **Integrate and apply lessons learned.** The policy should ensure that collateral damage estimations, pattern of life analysis, battle damage assessments, and investigations are not only regularly carried out, but that their findings are applied to inform planning and targeting processes. The capabilities and competencies of personnel charged with civilian harm mitigation tasks should be continually assessed and cultivated.
- **Conduct periodic internal evaluation.** The policy should require periodic and regular evaluation of policies and procedures, using both internal and independent sources of oversight and evaluation.
- **Replicate and sustain good practice.** The policy should ensure the regular distillation of good practice in civilian harm minimization, mitigation, and response, and ensure it is continually rolled out across military commands, missions, joint task forces, coalitions, and security partnerships.

15 *See* NGO Recommendations for DoD Policy on Civilian Harm, *The U.S. Military Post-Harm Amends Policy and Programs: Key Considerations and NGO Recommendations* (Mar. 2019) available at https://civiliansinconflict.org/wp-content/uploads/2020/03/4-FINAL-2020-02-03-NGO-recommendations-on-Ex-Gratia-Amends-for-DoD-Policy-March-2019.pdf.

Overhauling U.S. Security Sector Assistance

Photo by U.S. Department of State

Introduction

America's global network of formal allies and security partners provides the U.S. government with an unparalleled source of strength. Security partnerships, however, are only as strong as the common interests and values that bind them. Historically, U.S. alliances with other human rights-respecting, democratic states, such as NATO, have proven both durable and successful in advancing American interests over the long run. The opposite is also true. History is replete with examples of U.S. support for human rights-abusing allies and partners negatively impacting U.S. long-term interests.[1]

One of the primary tools the U.S. government uses to establish and maintain its security-based partnerships is the provision of defense-related goods and services, alternatively referred to as "security assistance," "security cooperation," and "security sector assistance."[2] According to the Congressional Research Service, this category of U.S. foreign assistance encompasses a "wide spectrum of activities, including the transfer of conventional arms, training and equipping regular and irregular forces for combat, law enforcement training, defense institution reform, humanitarian assistance, and engagement and educational activities."[3] Proponents of robust security assistance programs argue that such programming promotes regional stability, builds the capacity of partner militaries to confront shared threats, provides the United States with influence over foreign governments' policies (including with respect to human rights), and significantly benefits the U.S. economy.[4] Detractors of these programs point to the U.S. government's long history of arming and supporting human rights abusers and the negative impact that such support has had on U.S. strategic interests.[5] While it is difficult to quantify the extent to which such assistance has bought the United States access and influence with foreign partners, a wide range of analysts argue that U.S. security assistance programming is in need of reform.[6]

[T]he United States is today, by far, the world's largest arms exporter.

Since the attacks of September 11, 2001, the size of U.S. security assistance programming has increased dramatically, including to governments and groups with well-documented histories of systemic human rights violations.[7] As one element of the larger security assistance picture, the United States is today, by far, the world's largest arms exporter.[8] Since 2001, the United States has publicly acknowledged the sale of $560 billion in arms to 167 different countries.[9] Between 2014 and 2018, U.S. arms exports increased by 29 percent.[10] While many of the largest buyers of American-made arms are democratic allies such as Australia and Japan, many others are not. In fact, of the 10 largest recipients of U.S. arms exports between 2014 and 2018, half were rated "not free" by Freedom House in its annual analysis of worldwide political rights and civil liberties.[11]

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1 *See*, for example, U.S. government support for Iranian Shah Mohammad Reza Pahlavi, Cuban dictator Fulgencio Batista y Zaldívar, and Pakistani President Muhammad Zia-ul-Haq.

2 Definitions according to the Defense Security Cooperation Agency, *Security Assistance Management Manual*, available at https://www.samm.dsca.mil/chapter/chapter-1.

3 Susan Epstein, Liana Rosen, Congressional Research Service, R45091, *U.S. Security Assistance and Security Cooperation Programs: Overview of Funding Trends*, p. 1 (Feb. 1, 2018) available at https://fas.org/sgp/crs/natsec/R45091.pdf; *see also* Nina Serafino, Congressional Research Service, R44444, *Security Assistance and Cooperation: Shared Responsibility of the Departments of State and Defense* (May 26, 2016) available at https://fas.org/sgp/crs/natsec/R44444.pdf.

4 Melissa Dalton et al., Center for Strategic and International Studies (CSIS), *Oversight and Accountability in U.S. Security Sector Assistance*, p. 60 (Feb. 2018) available at https://www.csis.org/analysis/oversight-and-accountability-us-security-sector-assistance.

5 A. Trevor Thrall, Caroline Dorminey, CATO Institute, *Risky Business: The Role of Arms Sales in U.S. Foreign Policy*, p. 11 (Mar. 13, 2018) available at https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-836.pdf.

6 *See supra* notes 4, 5; Gordon Adams, Richard Sokolsky, *Governance and Security Sector Assistance: The Missing Link—Part II*, Lawfare (Jul. 19, 2015) available at https://www.lawfareblog.com/governance-and-security-sector-assistance-missing-link%E2%80%94part-ii; Mara Karlin, Brookings, *Why Military Assistance Programs Disappoint* (2017) available at https://www.brookings.edu/articles/why-military-assistance-programs-disappoint/.

7 For example, since 9/11, the United States government has sold an average of $1.8 billion in U.S. weapons to Libya, Iraq, Yemen, the Democratic Republic of Congo, and Sudan, all of which have egregious human rights records. *See* Thrall, Dorminey, *supra* note 5.

8 Stockholm International Peace Research Institute (SIPRI), Global Arms Trade: USA Increases Dominance; *Arms Flows to the Middle East Surge* (Mar. 11, 2019) available at https://sipri.org/media/press-release/2019/global-arms-trade-usa-increases-dominance-arms-flows-middle-east-surge-says-sipri.

9 A. Trevor Thrall, Jordan Cohen, *The False Promises of Trump's Arms Sales, Defense One* (Apr. 5, 2019) available at https://www.defenseone.com/ideas/2019/04/false-promises-trumps-arms-sales/156071/.

10 *Global Arms Trade, supra* note 8.

11 Per data compiled by the Stockholm International Peace Research Institute (SIPRI), leading recipients of U.S.-manufactured arms in 2014-2018 were Saudi Arabia, Australia, UAE, Iraq, Taiwan, South Korea, Turkey, Japan, Qatar, and Israel. *See* Stockholm International Peace Research Institute (SIPRI), *Importer/Exporter TIV Tables*,

Simply put, notwithstanding U.S. law, the history of American security assistance programming has, in many instances, been defined by the U.S. government's willingness to support foreign governments that do not share the United States' interest in the protection and promotion of human rights. Presidential administrations since the end of World War II have consistently prioritized perceived short-term objectives over long-term U.S. interests, a logic that has resulted in the provision of security assistance to dozens of dictatorial and authoritarian regimes. Some of the more familiar examples include U.S. support for the Iranian Shah in the run-up to that country's 1979 revolution, support for General Manuel Noriega in Panama before his U.S.-led ouster in 1989, and support for Iraq's Saddam Hussein during the Iran-Iraq war. In many such examples, apparent American indifference to the human rights record of its security partner resulted in not only foreseeable human rights abuses, but also in intense public backlash toward the United States, as well as adverse effects on regional security.

Recognizing that American support for human rights abusers undermines U.S. interests, Congress has repeatedly attempted to restrict the executive branch's ability to provide security assistance to governments that have engaged in serious human rights abuse.[12] These statutory safeguards endeavor to limit executive discretion over the provision of security assistance by conditioning the receipt of such assistance on the human rights record of the recipient country. Congress has imposed human rights conditions on security assistance in various ways, including through broad statutory prohibitions on security assistance to known human rights abusers, targeted prohibitions on the provision of security assistance to units of foreign security forces deemed responsible for gross violation of human rights (so-called "Leahy Laws"), and country-specific prohibitions that ban the provision of assistance to individual governments, such as Egypt,[13] the Philippines,[14] and Indonesia.[15]

Though little-known and habitually ignored, the U.S. government's most important law related to human rights conditionality is the Foreign Assistance Act's Section 502B (codified at 22 U.S.C. § 2304(a)–(i)).[16]

Section 502B states that "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."[17] It goes on to direct the president "to formulate and conduct international security assistance programs of the United States in a manner which will promote and advance human rights and avoid identification of the United States, through such programs, with governments which deny to their people internationally recognized human rights and fundamental freedoms, in violation of international law or in contravention of the policy of the United States as expressed in this section or otherwise."[18]

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available at http://armstrade.sipri.org/armstrade/page/values.php; *see also* Freedom House, *Countries and Territories: Global Freedom Scores*, available at https://freedomhouse.org/report/freedom-world/freedom-world-2019/map.

12 *See* Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 Am. J. Int'l L. 246 (1982) available at https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2605&context=facpub.

13 *See* Congressional Research Service, RL33003, *Egypt: Background and U.S. Relations* (last updated May 27, 2020) available at https://fas.org/sgp/crs/mideast/RL33003.pdf.

14 *See* Cohen, *supra* note 12.

15 *See* Cohen, *supra* note 12 at p. 254; Murray Hiebert, Ted Osius, Gregory B. Poling, Center for Strategic and International Studies (CSIS), *A U.S.-Indonesia Partnership for 2020: Recommendations for Forging a 21st Century Relationship* (Sep. 2013) available at https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/130917_Hiebert_USIndonesiaPartnership_WEB.pdf. For a primer on the Leahy Laws, *see* U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Leahy Law Fact Sheet* (Jan. 22, 2019) available at https://www.state.gov/key-topics-bureau-of-democracy-human-rights-and-labor/human-rights/leahy-law-fact-sheet/.

16 22 U.S.C. § 2304(a)–(i), available at https://www.law.cornell.edu/uscode/text/22/2304.

17 *Id.* at § 2304(a)(1).

18 *Id.* at § 2304(a)(3).

In keeping with this intent, Section 502B prohibits the executive branch from providing security assistance to foreign governments that have engaged in a "consistent pattern of gross violations of internationally recognized human rights."[19] The president may waive the restriction only if he or she provides Congress with a written certification that "extraordinary circumstances" justify the action.[20] Additionally, the Secretary of State is obligated to submit an annual report to Congress that details the human rights record of each proposed recipient of security assistance for the following fiscal year—a requirement that has resulted, in part, in the State Department's annual *Country Reports on Human Rights Practices*, which are frequently referred to as the "Human Rights Reports."[21]

By both ignoring and circumventing Section 502B for nearly four decades, successive administrations have plainly undermined Congressional intent.

Section 502B establishes a clear, if also non-absolute, expectation that the U.S. government will not provide security assistance to habitual human rights violators. Importantly, the section allows for executive branch discretion in supplying military arms and training when warranted by circumstances deemed extraordinary. Yet in so doing, it implicitly imposes a check in the form of a certification required to be presented to the Speaker of the House and the chair of the Senate Foreign Relations Committee.[22] On balance, the section makes plain that the provision of weapons and other forms of security assistance to systemic abusers of human rights should be a rare occurrence.

Notwithstanding this plain intent, however, Section 502B's requirements and prohibitions have been almost completely ignored since the provision's enactment in 1976.[23] With the sole exception of the Carter administration, both Democratic and Republican presidents have generally disregarded Section 502B's statutory restrictions and have provided security assistance to known human rights abusers without submitting written notification to Congress.[24] According to a 2014 American Bar Association Center for Human Rights report, between 2010 and 2013, eleven recipients of U.S. security assistance were also identified in the State Department's annual human rights report as having perpetrated gross violations of human rights.[25] During that period, the Obama administration provided no written notification waiving Section 502B to Congress.[26] In fact, there is no record that any administration since Carter's has consistently complied with Section 502B's written certification requirement.[27] In response to a 2014 Congressional Research Service inquiry regarding executive branch invocation of 502B, the State Department replied that it could not provide "any instance in which Section 502B [had been] invoked," noting that the "provision has not been used because it is 'overly broad.'"[28]

In the view of current and former diplomats involved in U.S. government human rights policy, the executive branch's ability to circumvent Section 502B rests on a legal interpretation of the provision's language that defines away nearly all instances of applicable human rights violations as not constituting a "consistent pattern."[29] The Carter administration, although more willing than its successors to recognize Section 502B,

19 *Id.* at § 2304(a)(2).

20 *Id.*

21 *Id.* at § 2304(b). The "Country Reports on Human Rights Practices" are available at https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/.

22 The Senate report that accompanied 502B noted that the purpose of the provision was "to ensure that human rights considerations are brought to bear on decisions made within the Executive Branch . . . relating to the provision of . . . security assistance." S. Rep. No. 94–876, 94th Cong. 2d Sess. 14–15 (1976); *see also* American Association for the International Commission of Jurists, *Human Rights and U.S. Foreign Policy: The First Decade 1973-1983*, p. 12 (1984) available at https://thefactcoalition.org/wp-content/uploads/2020/07/FACT-Letter-Maloney-Amdt-1-NDAA-20200720-FINAL.pdf.

23 Brittany Benowitz, Alicia Ceccanese, *How States Supporting Armed Proxies Can Reduce Civilian Casualties and Protracted Hostilities*, Just Security (May 20, 2020) available at https://www.justsecurity.org/70222/how-states-supporting-armed-proxies-can-reduce-civilian-casualties-and-protracted-hostilities/.

24 *See* Cohen, *supra* note 12, at p. 254.

25 *See* Benowitz, Ceccanese, *supra* note 23.

26 Nina M. Serafino et al., Congressional Research Service, R43361, *"Leahy Law" Human Rights Provisions and Security Assistance: Issue Overview* (Jan. 29, 2014) available at https://fas.org/sgp/crs/row/R43361.pdf.

27 *Id.*

28 *Id.*

29 Interviews with one current and one former Deputy Assistant Secretary of State, September 2019

pioneered the practice of selectively interpreting the law's wording.[30] According to the Carter-era State Department, a "consistent pattern" of human rights abuse did not exist for purposes of 502B so long as there was some evidence that the government in question had taken steps to stop the abuse.[31] This narrow interpretation of the "consistent pattern" requirement, in conjunction with other restrictive interpretations of the statute's provisions, has allowed various administrations to dramatically narrow Section 502B's applicability and undermine Congressional intent.[32]

One recent, stark example of executive non-compliance with Section 502B and other human rights-related legal requirements has been the Trump administration's response to various human rights violations in Saudi Arabia under the leadership of Crown Prince Mohammed bin Salman (MBS). Despite the Saudi government's apparently premeditated murder of dissident *Washington Post* columnist Jamal Khashoggi, and its role in a military campaign in Yemen that has left millions on the brink of famine, the Trump administration has defied multiple Congressional attempts to prohibit arms sales to the Saudi government.[33] These efforts have included Secretary of State Mike Pompeo overruling State Department experts to exclude Saudi Arabia from a legally-mandated list of countries believed to use child soldiers,[34] Pompeo's widely-challenged certification that Saudi Arabia and the United Arab Emirates (UAE) had undertaken steps to reduce civilian harm in Yemen,[35] and Trump's invocation of emergency authorities, over bipartisan Congressional opposition, to sell weapons to Saudi Arabia and UAE.[36] In the case of the administration's use of emergency authorities, a recently published Office of Inspector General report revealed that the claimed emergency did not exist—the administration had spent a month formulating its plan to circumvent the law and execute the sale—and indicated that the State De-

30 *See* Cohen, *supra* note 12 (noting that "the Carter administration adopted a highly strained reading of the statute which, although not contrary to its literal terms, produced a result contrary to congressional intent").

31 Cohen, *supra* note 12.

32 Joe Renouard, *Human Rights in American Foreign Policy*, p. 132 (2016).

33 U.N. Office of the High Commissioner for Human Rights, *Khashoggi killing: UN human rights expert says Saudi Arabia is responsible for "premeditated execution"* (Jun. 19, 2019) available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24713&LangID=E.

34 Jonathan Landay, Matt Spetalnick, *Exclusive: Overruling his experts, Pompeo keeps Saudis off U.S. child soldiers list,* Reuters (Jun. 18, 2019) available at https://www.reuters.com/article/us-usa-saudi-childsoldiers-exclusive/exclusive-overruling-his-experts-pompeo-keeps-saudis-off-u-s-child-soldiers-list-idUSKCN1TJ25H.

35 This certification allowed the administration to avoid a moratorium on U.S. military refueling assistance to Saudi Arabia that was required under the McCain National Defense Authorization Act in the event that such a certification could not be made. *See* Ryan Goodman, *Annotation of Sec. Pompeo's Certification of Yemen: Civilian Casualties and Saudi-Led Coalition,* Just Security (Oct. 15, 2018) available at https://www.justsecurity.org/61053/annotation-sec-pompeos-certification-yemen-war-civilian-casualties-resulting-saudi-led-coalitions-operations/.

36 Matthew Lee, Susannah George, *Trump cites Iran to bypass Congress on Saudi arms sales,* AP News (May 24, 2019) available at https://apnews.com/4a1fef7a381045a783b27479f191809d.

Photo by U.S. State Department

partment failed to "assess risks and implement mitigation measures to reduce civilian casualties" prior to the sale's approval.[37] Throughout its tenure, the administration has made no Section 502B certifications related to Saudi Arabia. According to recent reporting, it is considering ending a long-standing informal notification process that has allowed members of Congress to place holds on proposed security assistance deals prior to the deal's approval.[38] Such a move would eliminate a process that has existed since the 1980s and has served as one of the only reliable methods of Congressional oversight of security assistance programs.[39]

As the next administration embarks on the necessary process of security assistance reform, it should recognize that implementing pre-existing, legally-mandated human rights conditions can help turn this critical foreign policy tool into a more effective mechanism for advancing U.S. interests.

As the Trump administration has demonstrated, executive branch adherence to the legal requirements governing the provision of security assistance is virtually nonexistent. By both ignoring and circumventing Section 502B for nearly four decades, successive administrations have plainly undermined Congressional intent with little repercussion.

In an era of growing authoritarianism and heightened geopolitical competition marked by stark ideological difference on matters of human rights, the next administration has an opportunity to reverse this history of executive branch non-compliance with U.S. law. To do so, a future president and secretary of state will need to clearly communicate to State Department officials that the new administration will comply with Section 502B's requirements and restrictions. As detailed below, such an undertaking will require new legal interpretations and bureaucratic changes within the State Department.

The next administration will also need to strengthen the executive branch's internal procedures for the review of proposed arms sales and transfers. In accordance with various provisions of both the Arms Export Control Act and the Foreign Assistance Act, every administration since Carter has established a framework for the review of proposed arms transfers known as its Conventional Arms Transfer (CAT) Policy.[40] A CAT policy establishes criteria that the Departments of State and Defense are required to consider when evaluating proposed arms sales and transfers.[41] The CAT policies of both the Obama and Trump administrations contained only weak commitments (the latter weaker than the former) to a review of the possible human rights implications of a proposed arms transfer.[42] In order to limit fully the potential that U.S. arms transfers do not facilitate human rights abuses abroad, the next administration should issue a new CAT policy that expressly prohibits the transfer of weapons in circumstances where human rights abuses are foreseeable.

Taking these steps will be worth the effort. Executive branch observance of other human rights conditionality provisions, such as the "Leahy Laws," demonstrates that meaningful human rights conditions can

37 Jacqueline Feldscher, Nahal Toosi, *State Department Did Not Consider Civilian Casualties When Sending Arms to the Middle East, Report Finds*, POLITICO (Aug. 11, 2020) available at https://www.politico.com/news/2020/08/11/state-department-civilians-middle-east-393584.

38 Michael La Forgia, Edward Wong, Eric Schmitt, *Trump Administration May End Congressional Review of Foreign Arms Sales,* New York Times (Jun. 25, 2020) available at https://www.nytimes.com/2020/06/25/us/politics/trump-congress-arms-sales.html.

39 *Id.*

40 U.S. Government Accountability Office, GAO-19-673R, Conventional Arms Transfer Policy: *Agency Process for Reviewing Direct Commercial Sales and Foreign Military Sales Align with Policy Criteria* (Sep. 9, 2019) available at https://www.gao.gov/assets/710/701248.pdf.

41 *Id.*

42 The Obama administration's CAT policy, promulgated in 2014 via PPD-27, only prohibited weapons transfers on human rights grounds in the event the administration had "actual knowledge at the time of authorization that the transferred arms will be used to commit" a narrow set of human rights violations. *See* Presidential Policy Directive (PPD-27), United States Conventional Arms Transfer Policy (Jan. 15, 2014) available at https://obamawhitehouse.archives.gov/the-press-office/2014/01/15/presidential-policy-directive-united-states-conventional-arms-transfer-p. In 2018, the Trump administration further sidelined human rights considerations by promulgating a new CAT Policy that retained the narrow "actual knowledge" standard of PPD-27 but removed the Obama-era commitment to prohibit arms transfers when such knowledge exists. *See* National Security Presidential Memorandum (NSPM-10) § 2(d)(ii) (Apr. 19, 2018) available at https://www.state.gov/united-states-conventional-arms-transfer-policy/.

alter partner behavior in ways that promote the U.S. national interest.[43] In Colombia, for example, human rights conditions on security assistance pushed the Colombian government to increase its prosecution of Colombian military personnel accused of human rights violations.[44] While in Afghanistan, various freezes on security assistance to specific Afghan military units accused of human rights violations have led directly to criminal prosecutions and convictions.[45]

As the next administration embarks on the necessary process of security assistance reform, it should recognize that implementing pre-existing, *legally-mandated* human rights conditions can help turn this critical foreign policy tool into a more effective mechanism for advancing U.S. interests. When U.S. security assistance supports likeminded partner governments that share U.S. interests with regards to human rights and the rule of law, the United States benefits. American security assistance to its NATO allies during the Cold War, for example, helped secure the birth of a democratic post-war Europe.[46] By establishing the bureaucratic systems necessary to facilitate executive compliance with Section 502B and other human rights conditionality provisions, and establishing a robust CAT policy, the next administration will substantially improve the efficacy and impact of U.S. security assistance programs by reducing the flow of U.S. assistance to human rights abusers.

Recommendations

✓ Adhere to existing law by establishing within the State Department an annual process to determine whether countries receiving U.S. security assistance are engaged in "a consistent pattern of gross violations of internationally recognized human rights," and cease providing security assistance to those found to be in violation, subject to waiver

It has long been held, on a bipartisan basis, that prioritizing the protection and promotion of human rights in U.S. foreign policy is, in the words of one House subcommittee report from 1974, "morally imperative and practically necessary."[47] As the Trump administration recently stated in an executive order:

Human rights abuse and corruption undermine the values that form an essential foundation of stable, secure, and functioning societies; have devastating impacts on individuals; weaken democratic institutions; degrade the rule of law; perpetuate violent conflicts; facilitate the activities of dangerous persons; and undermine economic markets.[48]

43 Lisa Haugaard, *The Law That Helps the U.S. Stops Heinous Crimes by Foreign Militaries*, Open Society Foundations Voices (May 22, 2015) available at https://www.opensocietyfoundations.org/voices/law-helps-us-stop-heinous-crimes-foreign-militaries.

44 *Id.; see also* Human Rights Watch, Press Release, Colombia: Aid Suspension Decision Welcome (Nov. 21, 2002) available at https://www.hrw.org/legacy/press/2002/11/colombia112102.htm.

45 *See* Dalton, *supra* note 4, at p. 60.

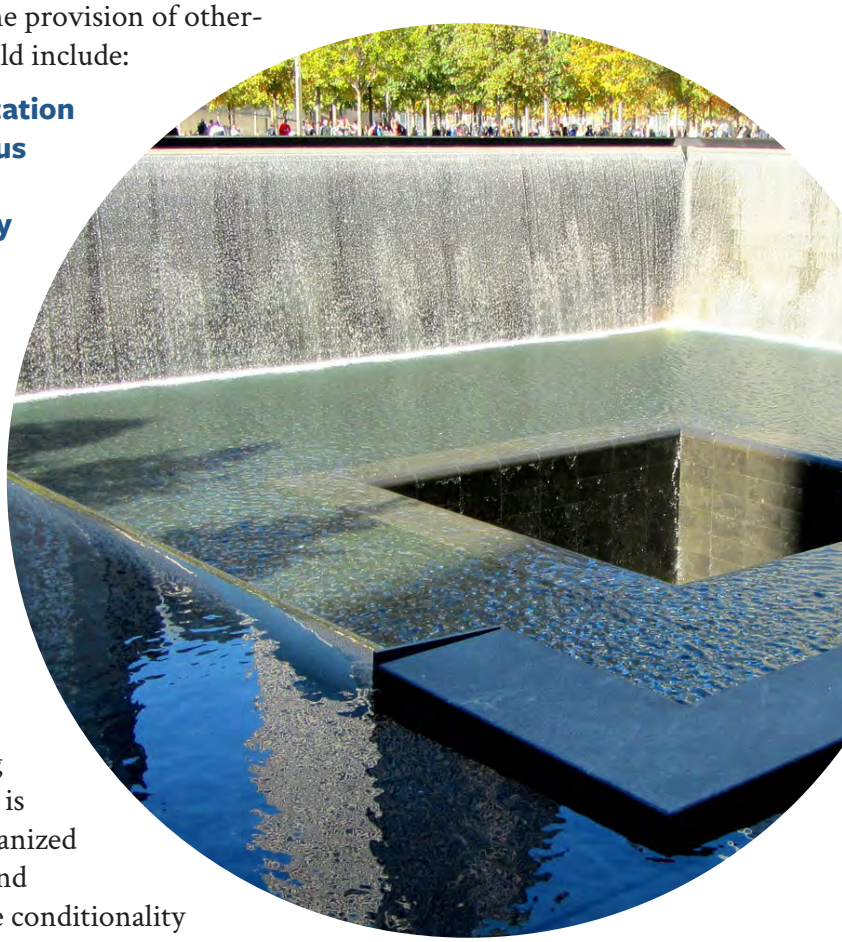
46 *See* Thrall, Dorminey, *supra* note 5, at p. 9.

47 Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs, *Human Rights in the World Community: A Call for U.S. Leadership*, 93d Cong., 2d Sess., at 9 (Comm. Print 1974) available at https://babel.hathitrust.org/cgi/pt?id=mdp.39015078590430&view=1up&seq=4.

48 Executive Order 13,818, Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption, 82 Fed. Reg. 60839 (2017) available at https://www.humanrightsfirst.org/sites/default/files/eo-13818-glomag.pdf.

Photo by U.S. Indo-Pacific Command

To ensure that U.S. security assistance programs assist in America's effort to uphold human rights, rather than to abet their violation, the next administration should establish and implement procedures necessary to comply with the existing human rights conditionality provisions of Section 502B. These should, at a minimum, establish a defensible definition for what constitutes a "consistent pattern" of "gross violations" of human rights, and result in the curtailment of security assistance in instances in which the U.S. government is providing such assistance to systemic human rights violators, absent certification and waiver. In instances in which the president certifies that extraordinary circumstances exist to warrant provision of assistance otherwise prohibited under Section 502B, he or she should provide such certification to specified members of Congress. Such notifications should contain a detailed, factual explanation of why certification is justified, identifying the important U.S. interests at stake, and explaining how those interests can only be promoted through the provision of otherwise-prohibited assistance. Related actions should include:



- **Establishing clear criteria for the application of 502B that defines the statute's various elements in a manner consistent with Congress' intent to restrict U.S. security assistance to systemic human rights abusers.** The next administration should refrain from adopting an artificially restrictive definition of what constitutes a "consistent pattern" of "gross violations" of human rights. To determine whether a foreign state's actions amount to a "consistent pattern," it could, for example, look to the International Law Commission's Draft Articles on State Responsibility, a document that reflects the consensus of the international legal community, and its framework for defining the analogous term "systematic."[49] According to Draft Article 40, a human rights violation is "systematic" when it is carried out in "an organized and deliberate way."[50] By establishing clear and transparent criteria for the application of the conditionality provision, the next administration will make it easier to avoid accusations of selective application of the statute and will make it easier for partners to identify how they can improve their human rights record and receive security assistance.

- **To better comply with the annual reporting requirement of Section 502B of the FAA (22 U.S.C. § 2304(b)), directing the Assistant Secretary of State for DRL to publish additional reporting on the human rights records of each recipient of U.S. security sector assistance.** Either by expanding the State Department's annual Country Reports, or through a new, stand-alone document, the next administration should complete an annual, public assessment of the human rights records of U.S. security partners. Such a report would rely upon information obtained from embassy personnel, as well as other relevant sources from both inside and outside the federal government. For each proposed recipient of U.S. security assistance, the report should clearly state whether the government has engaged in widespread gross violations of human rights.[51]

49 International Law Commission, Responsibility of States for Internationally Wrongful Acts, art. 40 (2001) available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

50 *Id.*

51 During the Carter administration's brief period of compliance with 502B, the State Department was reticent to formally state in writing that a security partner had

- **Requiring a senior-level decision on approval of security assistance.** To ensure that the human rights record of each U.S. security partner is fully considered prior to the sale of arms or provision of other forms of security assistance, the next administration should announce that either the Secretary of State or the Deputy Secretary of State will personally approve such assistance when relevant bureaus disagree on whether or not assistance should be provided. At present, when DRL objects to a given, proposed sale on human rights grounds, other bureaus have the ability to override that objection without the matter being elevated to more senior officials via a so-called "split memo." In accordance with Section 502B, DRL should be allowed to present its information and analysis to the Secretary of State or the Deputy Secretary of State concerning whether the proposed recipient has engaged in gross violations of human rights, and, in the event that it is deemed that they have, whether extraordinary circumstances nevertheless require the provision of such assistance.[52]

✓ Amend the Conventional Arms Transfer (CAT) Policy and prohibit the transfer of U.S. arms under circumstances in which there is a *reasonably foreseeable possibility* that the arms will aid and abet human rights abuse

Before approving an arms transfer to a foreign security partner, the executive branch has committed to consider whether the recipient country will use the arms to commit violations of international human rights law.[53] This prospective assessment of risk supplements the analysis of past conduct required by Section 502B, and is a product of the CAT Policy, which establishes criteria for evaluating a country's eligibility for arms transfers and is itself a regulation promulgated by the executive branch in accordance with the Arms Export Control Act and Foreign Assistance Act.[54] The CAT Policy is periodically amended by the executive branch through the issuance of a Presidential Memorandum, and has long included a mandatory evaluation of the human rights implications of the proposed transfer.[55] This human rights condition reflects both the domestic legal requirements pertaining to the vetting of prospective U.S. security partners and U.S. obligations under international law.[56]

Republican and Democratic administrations have used a narrow interpretation of U.S. obligations under both legal frameworks to reduce the likelihood that human rights considerations will impede arms transfers. Under the Obama administration's CAT Policy, promulgated in 2014 through PPD-27, weapons transfers were prohibited on human rights grounds only in the event that the administration had "actual knowledge at the time of authorization that the transferred arms will be used to commit" a narrow set of human rights violations.[57] Notwithstanding this policy, a threshold of "actual knowledge" is not supported by the standard for determining state responsibility under international law, as articulated by Common Article 1 of the Geneva Conventions[58] and the decision of the International Court of Justice in *Nicaragua v. United States of America*,[59] as well as the standard for determining liability under the domestic aider and abettor

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engaged in gross violations of human rights and was barred from receiving security assistance under 502B. This hesitation resulted in confusion over the application of the statute and questions about which security partners were engaged in covered rights abuses. Cohen, *supra* note 12, at p. 264.

52 By allowing DRL to elevate differences of analysis with other relevant bureaus, the next administration will provide additional teeth to a review process that was briefly instituted during the Carter administration. At that time, in order to ensure adherence to 502B, the Bureau of Human Rights reviewed the human rights record of each proposed recipient of security assistance and challenged decisions to provide assistance to known human rights abusers through an internal action memorandum process. Cohen, *supra* note 12, at p. 262 n. 82.

53 *See* Center for Civilians in Conflict, *With Great Power: Modifying US Arms Sales to Reduce Civilian Harm* (2018) available at https://civiliansinconflict.org/wp-content/uploads/2018/01/With-Great-Power.pdf.

54 *See id.* at p. 16; *see also* 22 U.S.C. § 2571, available at https://www.law.cornell.edu/uscode/text/22/2751.

55 *With Great Power, supra* note 53, at n. 13.

56 *See generally id.*

57 Presidential Policy Directive (PPD-27), United States Conventional Arms Transfer Policy (Jan. 15, 2014) available at https://obamawhitehouse.archives.gov/the-press-office/2014/01/15/presidential-policy-directive-united-states-conventional-arms-transfer-p.

58 Geneva Convention Relative to the Treatment of Prisoners of War, art. 1 (Aug. 12, 1949) available at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.32_GC-III-EN.pdf.

59 American Bar Association, Center for Human Rights & Rule of Law Initiative, *The Legal Framework Regulating Proxy Warfare*, p. 49 (Dec. 2019) available at https://www.americanbar.org/content/dam/aba/administrative/human_rights/chr-proxy-warfare-report-2019.pdf.

statute,[60] a law that expressly applies to the War Crimes Act.[61] Under U.S. law, an actor can be held liable for aiding and abetting violations of international law if, at the time the assistance was provided, there was a "reasonably foreseeable possibility" that the assistance would facilitate the unlawful act.[62]

In 2018, the Trump administration further sidelined human rights considerations by promulgating a new CAT Policy (NSPM-10) that retained the narrow "actual knowledge" standard of PPD-27 but removed the Obama-era commitment to prohibit arms transfers when such knowledge exists.[63] Under Trump's NSPM-10, "actual knowledge . . . that the transferred arms will be used to commit" human rights abuses is only one of several factors considered during the review of a proposed arms deal.[64] By removing PPD-27's commitment to "not authorize any transfer" when "actual knowledge" of future human rights abuses exists, the Trump administration weakened an already-feeble human rights restriction and effectively guaranteed that human rights considerations will not impede future arms transfers.[65]

In order to align U.S. regulations concerning arms transfers with both domestic and international law, the next administration should improve upon the CAT Policies of both the Obama and Trump administrations. The next CAT Policy promulgated by the executive branch should remove all mention of the "actual knowledge" standard and instead adopt a clear prohibition on the approval of arms transfers in circumstances where there is a "reasonably foreseeable possibility"—the standard consistent with international law—that the arms will facilitate serious human rights violations.

- **Issue a new presidential memorandum revising the CAT Policy to prohibit arms transfers in the event that there is a *reasonably foreseeable possibility* that the arms will facilitate human rights violations.** In order to fully comply with U.S. obligations under international law and effectuate the purpose of the Foreign Assistance Act,[66] the next administration should revise the Trump administration's CAT Policy and adopt an interpretation of the principle of state responsibility that is consistent with the ICJ's ruling in *Nicaragua v. United States of America*, Common Article 1 of the Geneva Conventions, and previous executive branch interpretations of the federal aider and abettor statute.[67] Under this new policy, the administration should make clear that arms transfers are prohibited on human rights grounds whenever there is a *reasonably foreseeable possibility* that the arms will be used to perpetrate human rights violations.

60 18 U.S.C. § 2, available at https://www.law.cornell.edu/uscode/text/18/2.

61 War Crimes Act, 18 U.S.C. § 2441 available at https://www.law.cornell.edu/uscode/text/18/2441; Ryan Goodman, *The Law of Aiding and Abetting (Alleged) War Crimes: How to Assess US and UK Support for Saudi Strikes in Yemen*, Just Security (Sep. 1, 2016) available at https://www.justsecurity.org/32656/law-aiding-abetting-alleged-war-crimes-assess-uk-support-saudi-strikes-yemen/.

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

63 National Security Presidential Memorandum (NSPM-10), U.S. Conventional Arms Transfer Policy, § 2(d)(ii) (Apr. 19, 2018) available at https://www.state.gov/united-states-conventional-arms-transfer-policy/.

64 *Id.*

65 *See* Benowitz, Ceccanese, *supra* note 23.

66 The Conference Committee report accompanying Section 502B in 1978 expressly stated that "human rights . . . must, as a matter of law, be taken into account in making security assistance decisions." H. R. Rep. No. 95-1546, 95th Cong., 2d Sess. 27 (1978).

67 *See, e.g.*, United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking, Memorandum Opinion for the Deputy Attorney General, Opinions of the Office of Legal Counsel (Jul. 14, 1994) available at https://www.justice.gov/sites/default/files/olc/opinions/1994/07/31/op-olc-v018-p0148.pdf (concluding that "USG agencies and personnel may not provide information… or other USG assistance… to Colombia or Peru in circumstances in which there is a *reasonable foreseeable possibility* that such information or assistance will be used in shooting down civil aircraft, including aircraft suspected of drug trafficking." [emphasis added]).

Photo by The U.S. Army

Curbing Corruption at Home and Abroad

Photo from kremlin.ru / Presidential Press and Information Office

Introduction

Corruption presents an existential threat to democratic governance, economic development, and the promotion and protection of human rights. Systems of grand corruption, when left uncontested, transform national resources and government institutions into tools of self-enrichment for the politically connected and economic elite.[1] In nearly every instance, these systems result in both direct and indirect violations of human rights, which frequently disproportionally impact the most vulnerable and traditionally marginalized groups of society, such as the poor, racial and ethnic minorities, women, and members of the LGBTQI+ community.[2] In recent decades, corruption has also been transformed into a geopolitical weapon that is being deployed by illiberal and kleptocratic regimes to expand their influence and undermine the world's democracies.[3]

As the U.N. Human Rights Council has recognized, "[i]t is difficult to find a human right that could not be violated by corruption."[4] When corruption manifests itself in the form of outright theft, such as the illicit diversion of resources intended to support various public services, the internationally recognized rights to healthcare, education, and life can be irreparably harmed.[5] Corruption in the form of bribes, whether paid by a facilitator of corruption or a victim of a corrupt demand, can result in a violation of nearly every recognized human right, including the right to freedom from discrimination, the right to a fair trial, the right to property, and the right to participate in self-governance.[6] Additionally, no matter the form it takes, corruption indirectly weakens democratic institutions and the rule of law.

Corruption likewise kneecaps the global economy. The Organization for Economic Cooperation and Development (OECD) has found that corruption increases transaction costs and decreases economic efficiency.[7] According to the World Economic Forum, the annual cost of corruption globally is at least $2.6 trillion, or five percent of the global domestic product.[8] The World Bank estimates that each year, individuals and businesses pay $1 trillion in bribes.[9]

[D]espite anti-money laundering (AML) regulations aimed at combating illicit finance, the U.S. economy remains a haven for ill-gotten gains.

With both the world's largest economy and the world's most frequently traded currency, the United States is an indispensable player in the global fight against corruption.[10] At times, the United States has played a leading role in advancing international anti-corruption efforts through the development and modeling of new accountability tools.[11] For example, in 1977, the U.S. government enacted the Foreign Corrupt Practices Act (FCPA) (15 U.S.C. §§ 78dd-1, et seq), becoming the first country to criminally prohibit its citizens and companies from bribing foreign officials

1 Transparency International defines grand corruption as "the abuse of high-level power that benefits the few at the expense of the many, and causes serious and widespread harm to individuals and society." Transparency International, *What is Grand Corruption and How Can We Stop It?* (Sep. 21, 2016) available at https://www.transparency.org/en/news/what-is-grand-corruption-and-how-can-we-stop-it#; Sarah Saadoun, *America once led anti-corruption fight. Now self-dealing Trump is kleptocrats' role model*, USA Today (Oct. 31, 2019) available at https://www.usatoday.com/story/opinion/2019/10/31/trump-boosts-kleptocrats-america-gives-up-corruption-fight-column/2476348001/.

2 World Bank, *Brief: Combating Corruption* (last updated Oct. 4, 2018) available at https://www.worldbank.org/en/topic/governance/brief/anti-corruption.

3 Ben Judah, Belinda Li, Hudson Institute, *Money Laundering for 21st Century Authoritarianism*, p. 9 (Dec. 2017) available at https://www.hudson.org/research/14020-money-laundering-for-21st-century-authoritarianism; *see also* Josh Rudolph, Thomas Morley, The Alliance for Securing Democracy, The German Marshall Fund of the United States, *Covert Foreign Money: Financial loopholes exploited by authoritarians to fund political interference in democracies* (Aug. 2020) available at https://securingdemocracy.gmfus.org/wp-content/uploads/2020/08/ASD-Covert-Foreign-Money.pdf.

4 U.N. Human Rights Council, *Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights, para.* 17, A/HRC/28/73 (Jan. 5, 2015) available at https://www.refworld.org/docid/550fef884.html.

5 *Id.*

6 *Id.; see also,* U4 Anti-Corruption Resource Centre, Chr. Michelsen Institute, *Corruption and Human Rights*, available at https://www.u4.no/topics/human-rights/basics.

7 Organization for Economic Co-operation and Development (OECD), CleanGovBiz, *Boosting Integrity, Fighting Corruption*, p. 2 (2012) available at https://www.oecd.org/competition/50350066.pdf.

8 Meetings Coverage, Security Council, *Global Cost of Corruption at Least 5 Per Cent of World Gross Domestic Product, Secretary-General Tells Security Council, Citing World Economic Forum Data,* U.N. Meetings Coverage SC/13493 (Sep. 10, 2018) available at https://www.un.org/press/en/2018/sc13493.doc.htm.

9 *Id.*

10 Jennifer L. Cook, *Six Most Popular Currencies for Trading*, Investopedia (last updated Mar. 10, 2020) available at https://www.investopedia.com/articles/forex/11/popular-currencies-and-why-theyre-traded.asp.

11 Saadoun, *supra* note 1.

abroad.[12] The success of the FCPA prompted the governments of other major economies, such as the United Kingdom, Canada, Brazil, and France, to adopt comparable measures.[13] Similarly, Congress' passage of the Global Magnitsky Human Rights Accountability Act of 2016 (Pub. L. 114-328, Subtitle F), a statute that gives the executive branch the ability to freeze the U.S.-based assets of non-U.S. persons who have engaged in corruption, has prompted the adoption or consideration of similar laws in Canada, the United Kingdom, and the European Union.[14]

Recently, however, the United States has failed to adequately prioritize anti-corruption efforts. Overseas, under-prioritization of anti-corruption programs has allowed foreign corruption to frustrate American foreign policy priorities. From Afghanistan to Iraq to Yemen, endemic corruption has undermined American strategic goals and resulted in a waste of U.S. taxpayer money.[15] At home, loopholes in America's domestic anti-corruption framework have allowed domestic markets to become the epicenter of global illicit finance.[16] Simply put, despite anti-money laundering (AML) regulations aimed at combating illicit finance, the U.S. economy remains a haven for ill-gotten gains.[17] According to the U.S. Treasury Department, approximately $300 billion is laundered through the United States each year.[18] American companies, according to the World Bank, are used for money laundering in grand corruption cases at a higher rate than companies from any other country in the world.[19]

12 U.S. Department of Justice, *Foreign Corrupt Practices Act: An Overview* (last updated Feb. 3, 2017) available at https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.

13 Saadoun, *supra* note 1.

14 Ewelina U. Ochab, *The Magnitsky Law is Taking Over the European Union*, Forbes (Dec. 10, 2018) available at https://www.forbes.com/sites/ewelinaochab/2018/12/10/the-magnitsky-law-is-taking-over-the-european-union/.

15 Colby Goodman, Christina Arabia, Security Assistance Monitor, Center for International Policy, *Corruption in the Defense Sector: Identifying Key Risks to U.S. Counterterrorism Aid*, p. 2 (Sep. 2018) available at https://securityassistance.org/sites/default/files/SAM%20Corruption%20Report%20Final_1.pdf.

16 Ben Judah, Nate Sibley, *The West is Open for Dirty Business*, Foreign Policy (Oct. 5, 2019) available at https://foreignpolicy.com/2019/10/05/eu-us-fight-corruption-kleptocracy/.

17 *Id.*

18 U.S. Department of the Treasury, *National Money Laundering Risk Assessment*, p. 2 (2018) available at https://home.treasury.gov/system/files/136/2018NMLRA_12-18.pdf.

19 Emile van der Does de Willebois, Emily M. Halter, Robert A. Harrison, Ji Won Park, J.C. Sherman, Stolen Asset Recovery Initiative, World Bank, *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About it* (2011) available at https://star.worldbank.org/sites/star/files/puppetmastersv1.pdf.

Photo by Rob Bulmahn

The United States' status as a destination for the proceeds of global corruption is, in no small part, the product of the country's limited approach to AML regulations and the ease with which corrupt actors can establish anonymous shell corporations in the United States.[20] While American banks are subject to strict compliance and enforcement rules, hedge funds, private equity firms, venture capital firms, and the real estate industry are not. Unlike most other major economies, the United States does not require disclosure of a corporation's true owners (beneficiaries), even to appropriate authorities, at the time of incorporation.[21] The absence of mandatory beneficial ownership reporting allows kleptocrats and other criminals to conceal ill-gotten gains via anonymous shell companies to avoid scrutiny from federal law enforcement.[22]

Taken together, America's outdated AML regulations and easily exploitable anonymous incorporation laws continue to make the U.S. economy an attractive destination for corrupt actors. These individuals use their access to U.S. markets to enrich themselves and perpetuate the systems of corruption in which they operate. Recognizing the role that the U.S. economy plays in enabling these systems of international corruption, it is vital that the United States reestablish itself as a leader in the fight against financial corruption at home and abroad.

[T]he next administration should prioritize the promulgation of new regulations that eliminate loopholes in the outdated AML regime and significantly curtail the ability of foreign nationals to buy real estate in the U.S. using anonymous shell companies.

Over the past two years, there has been growing bipartisan support in Congress for legislation that would end anonymous shell companies in the U.S. by requiring American companies to report their beneficial owners to the Treasury Department. Responding to a broad coalition of advocates in the business, human rights, national security, and anti-corruption communities, the House passed a beneficial ownership disclosure bill—the Corporate Transparency Act of 2019 (H.R.2513)—in October 2019.[23] In June 2020, after months of bipartisan negotiations, the Senate Banking Committee unveiled the Senate's own stand-alone beneficial ownership bill—the Anti-Money Laundering (AML) Act—and pushed for the bill's inclusion in the Senate's version of the must-pass FY2021 National Defense Authorization Act (NDAA).[24] Although the AML Act was not ultimately incorporated into the Senate's NDAA, the critical beneficial ownership requirements of H.R. 2513 were included in the House's version. [25] As of this blueprint's publication, it remains to be seen whether the House's beneficial ownership reforms survive the NDAA conference process. If the House amendments are included in the final bill, the NDAA's enactment into law would mark arguably the most significant anti-corruption development in the United States in decades.

While such legislative reforms are undoubtedly needed, the executive branch has ample authority to unilaterally strengthen the U.S. AML framework. Relying on this authority, the next administration should prioritize the promulgation of new regulations that eliminate loopholes in the outdated AML regime and significantly curtail the ability of foreign nationals to buy real estate in the U.S. using anonymous shell companies. Additionally, the next administration should move quickly to realign U.S. State Department resources to better ensure that anti-corruption efforts are a foreign policy priority. The three recommendations below address how an incoming administration could achieve these goals absent Congressional action.

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20 Judah, Sibley, *supra* note 16; Joshua Kirschenbaum, David Murray, *An Effective American Regime to Counter Illicit Finance*, The Alliance for Securing Democracy, The German Marshall Fund of the United States (Dec. 18, 2018) available at http://www.gmfus.org/publications/effective-american-regime-counter-illicit-finance.

21 Josh Kirschenbaum, *Closing Today's Illicit Finance Loopholes*, American Interest (Aug. 8, 2019) available at https://www.the-american-interest.com/2019/08/08/closing-todays-illicit-finance-loopholes/.

22 FACT Coalition, Letter to the Honorable Nancy Pelosi and the Honorable Kevin McCarthy regarding the Corporate Transparency Act / COUNTER Act (Jul. 20, 2020) available at https://thefactcoalition.org/wp-content/uploads/2020/07/FACT-Letter-Maloney-Amdt-1-NDAA-20200720-FINAL.pdf.

23 Corporate Transparency Act of 2019, H.R. 2513, 116th Cong. (2019) available at https://www.congress.gov/bill/116th-congress/house-bill/2513.

24 Rudolph, Morley, *supra* note 3, at p. 29.

25 Amy Mackinnon, *The U.S. is a Haven for Money Laundering. That Might be About to Change.*, Foreign Policy (Jul. 31, 2020) available at https://foreignpolicy.com/2020/07/31/us-money-laundering-shell-company-new-law/.

Recommendations

✓ Close regulatory loopholes in the U.S. anti-money laundering framework by expanding beneficial ownership reporting requirements

To prevent corrupt foreign nationals from laundering their ill-gotten gains in the United States, the next administration should use pre-existing statutory authorities to close loopholes in the current AML framework and expand the applicability of beneficial ownership reporting requirements.

The executive branch's authority to impose these requirements is derived from a series of statutes collectively known as the Bank Secrecy Act (BSA), which gives the Treasury Department the ability to require that "financial institutions" keep records and file reports that "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."[26]

To prevent corrupt foreign nationals from laundering their ill-gotten gains in the United States, the next administration should use pre-existing statutory authorities to close loopholes in the current AML framework and expand the applicability of beneficial ownership reporting requirements.

The Treasury Department's Financial Crimes Enforcement Network (FinCEN) establishes the various reporting and record-keeping requirements that comprise the current AML framework and, within certain parameters, identifies the economic actors to which they apply. Under current regulations, economic actors that are defined by FinCEN as "financial institutions" are required to know the identity of their individual customers and, in the event that their customer is a corporation, the identity of the corporation's beneficial owners.[27] This "beneficial ownership" information is then made available to U.S. law enforcement and plays a critical role in anti-money laundering investigations.

Currently, the statutory definition of "financial institution" is limited to only 24 types of businesses and institutions.[28] The definition does not include a variety of high-risk sectors for money laundering. For example, accountants, lawyers, real estate brokers, hedge funds, private equity funds,[29] and fine art dealers are not defined as "financial institutions" under the statute.[30] The statute does, however, grant the Secretary of the Treasury the authority to extend the regulatory definition to "any other business . . . whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters."[31] Relying on the authority granted to the Treasury Department in the BSA, the next administration should direct FinCEN to promulgate regulations that define these economic actors as "financial institutions." Specifically, the next administration should:

- **Expand the definition of "financial institutions," using the notice and comment rule-making process, to include all SEC-registered investment advisers, including investment advisors at hedge funds, private equity funds, and other private funds.** The rule would amend the BSA's definition of "financial institution" to include: "[a]ny person who is registered or required to register with the SEC under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(a))."[32]

26 31 U.S.C. § 5311, available at https://www.govinfo.gov/content/pkg/USCODE-2011-title31/pdf/USCODE-2011-title31-subtitleIV-chap53-subchapII-sec5311.pdf.

27 31 C.F.R. § 1010.230, available at https://www.govinfo.gov/content/pkg/FR-2016-05-11/pdf/2016-10567.pdf#page=1.

28 31 U.S.C. § 5312(a)(2) available at https://www.govinfo.gov/content/pkg/USCODE-2011-title31/pdf/USCODE-2011-title31-subtitleIV-chap53-subchapII-sec5312.pdf.

29 In July 2020, the FBI issued a bulletin in which it identified private equity funds as a favored tool for money launderers. Timothy Lloyd, *FBI Concerned over laundering risks in private equity, hedge funds–leaked document*, Reuters (Jul. 14, 2020) available at https://www.reuters.com/article/bc-finreg-fbi-laundering-private-equity/fbi-concerned-over-laundering-risks-in-private-equity-hedge-funds-leaked-document-idUSKCN24F1TP.

30 Judah, Sibley, *supra* note 16.

31 31 U.S.C. § 5312(a)(2)(Z) available at https://www.govinfo.gov/content/pkg/USCODE-2011-title31/pdf/USCODE-2011-title31-subtitleIV-chap53-subchapII-sec5312.pdf.

32 Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers, 80 Fed. Reg. 52,680 (proposed Sep. 1, 2015) available at https://www.federalregister.gov/documents/2015/09/01/2015-21318/anti-money-laundering-program-and-suspicious-activity-report-filing-require-

- **Promulgate a rule that would extend the definition of "financial institutions" to include art dealers and antiquity dealers,** which, market research demonstrates, are especially susceptible to money laundering.[33]

- **Promulgate a rule that would require securities broker-dealers to conduct due diligence on their customers, as well as on their customers' customers.** Under current regulations, if a foreign brokerage executes a trade with a U.S. investment bank through an intermediary, the U.S. investment bank is only required to conduct due diligence on the intermediary, and has no obligation to vet the actual beneficiary of the trade.[34]

✓ Expand the applicability of "Geographic Targeting Orders" to prevent foreign individuals from laundering their illicit finances through the U.S. real estate market

A second front in the domestic battle against illicit finance is the U.S. real estate market. Since 2002, residential real estate transactions in the United States have been largely exempt from U.S. anti-money-laundering regulations.[35] Under the current AML framework, "persons involved in real estate closings and settlements" are not required to comply with the BSA's beneficial ownership and suspicious activity reporting requirements.[36] This so-called "real estate loophole" allows foreign individuals to launder their illicit finances in the U.S. by anonymously purchasing U.S. real estate using unattributable shell companies.[37] According to the *Financial Times*, prior to 2016, $32 billion in anonymous foreign money flowed into the U.S. real estate market in the form of all-cash transactions each year.[38]

Since 2016, FinCEN has used a specific regulatory tool, known as a Geographic Targeting Order ("GTO"), to partially close this "real estate loophole." GTOs are time-limited orders issued by FinCEN that impose recordkeeping and reporting requirements on specific economic actors or actions in certain geographic areas.[39] Businesses or persons engaged in an activity covered by a GTO are required to collect beneficial ownership information from customers participating in the covered transaction. If the customer is conducting the transaction on behalf of another person, or if the customer itself is a corporate entity, the GTO requires that the identity of the intended beneficiary of the

ments-for-registered.

33 *See* Financial Action Task Force, *Financing of the Terrorist Organisation Islamic State and Iraq of the Levant* (ISIL), p. 37 (Feb. 2015) available at http://www.fatf-gafi.org/media/fatf/documents/reports/Financing-of-the-terrorist-organisation-ISIL.pdf. According to the Basel Art Trade Guidelines, the art market's vulnerability is a result of "the volume of illegal or legally questionable transactions, which is noticeably higher in this sector than in other globally active markets." *See* Basel Institute on Governance, *Basel Art Trade Guidelines*, p. 7 (2018) available at https://www.baselgovernance.org/publications/working-paper-12-basel-art-trade-guidelines-intermediary-report-self-regulation. A July 2020 Congressional report traced $18 million in fine art purchases from U.S. dealers back to shell companies linked to sanctioned Russian kleptocrats Arkady and Boris Rotenberg. *See* Natasha Bertrand, *Congressional probe: Russian oligarchs using art to evade sanctions,* Politico (Jul. 29, 2020) available at https://www.politico.com/news/2020/07/29/probe-russian-oligarchs-evade-art-sanctions-386154.

34 Joshua Kirschenbaum, David Murray, The Alliance for Securing Democracy, The German Marshall Fund of the United States, *An Effective American Regime to Counter Illicit Finance*, p. 4 (Dec. 18, 2018) available at http://www.gmfus.org/publications/effective-american-regime-counter-illicit-finance.

35 The 2001 USA PATRIOT Act amended the BSA to require "persons involved in real estate closings and settlements" to comply with AML regulations. FinCEN, however, issued a temporary exemption for the real estate industry in 2002. Since 2002, FinCEN has extended AML requirements to residential real estate transactions that involve financing; however, non-financed transactions remain exempt from the BSA's reporting requirements. *See* U.S. Government Accountability Office, GAO-20-546, *Anti-Money Laundering: FinCEN Should Enhance Procedures for Implementing and Evaluating Geographic Targeting Orders*, p. 7-8 (Jul. 2020) available at https://www.gao.gov/assets/710/708115.pdf.

36 31 C.F.R. § 103.175, available at https://www.sec.gov/about/offices/ocie/aml2007/31cfr103.175.pdf.

37 Casey Michel, *Obama-era program to fight kleptocrats' favorite tool is working better than anyone guessed*, ThinkProgress (Jun. 19, 2018) available at https://thinkprogress.org/us-efforts-to-crack-down-on-shell-company-purchases-might-be-working-92e25df29511/.

38 Tom Burgis, *US prime property is magnet for illicit wealth, warns Treasury*, Financial Times (Feb. 23, 2017) available at https://www.ft.com/content/3b1b583e-f9ea-11e6-bd4e-68d53499ed71.

39 *See* 31 U.S.C. § 5326(a) available at https://www.govinfo.gov/content/pkg/USCODE-2011-title31/pdf/USCODE-2011-title31-subtitleIV-chap53-subchapII-sec5326.pdf; *see also* 31 C.F.R. § 1010.370, available at https://www.govinfo.gov/content/pkg/CFR-2011-title31-vol3/pdf/CFR-2011-title31-vol3-sec1010-370.pdf.

transaction be disclosed.[40] Per the BSA, a GTO can only be valid for 180 days.[41] However, the director of FinCEN has the authority to renew a particular GTO's 180-day window indefinitely.[42]

Through the reissuance and expansion of a single GTO over the past four years, FinCEN has required title insurance companies in certain geographic areas to report beneficial ownership information for luxury residential real estate purchases that are made in cash by a corporate entity.[43] Under this GTO, title insurance companies in the covered areas are required to report the names of all natural persons who, directly or indirectly, own 25 percent or more of the corporation purchasing the property.[44] If the purchasing corporation is owned by another corporation, the GTO requires the disclosure of the beneficial ownership information of all of the corporations involved.[45] This "real estate GTO" effectively prevents shell companies from being used to anonymously purchase luxury residential real estate in certain counties in the United States.

FinCEN's first real estate GTO, issued in January 2016, applied only to covered transactions in New York City and Miami.[46] Despite its limited reach, the order had a significant impact on the luxury real estate market in both metropolitan areas. According to a report published by the Federal Reserve Bank of New York, in the first two years of the GTO's existence, all-cash real estate purchases by anonymous shell companies in covered counties fell by 70 percent, amounting to roughly $45 billion.[47] As a result of this success, in 2018, FinCEN expanded the order's reach to cover 12 metropolitan areas: Boston, Chicago, Dallas-Fort Worth, Honolulu, Las Vegas, Los Angeles, Miami, New York City, San Antonio, San Diego, San Francisco, and Seattle.[48] Since 2018, the scope of the GTO has remained static. The most recent GTO, issued on May 8, 2020, covers only residential real estate transactions in the same 17 counties and five boroughs identified in the 2018 order.[49]

In order to better prevent foreign individuals from laundering the proceeds of their corruption in U.S. markets, the next administration should expand FinCEN's real estate GTO and take regulatory action to make the order's requirements permanent.

Kleptocrats have taken full advantage of the real estate GTO's geographic limitations. In August 2020, the Department of Justice brought a civil forfeiture action against well-known Ukrainian kleptocrat Ihor Kolomoisky, alleging, in part, that Kolomoisky and his business partner used stolen funds to purchase commercial real estate throughout the United States.[50] According to federal prosecutors, Kolomoisky used offshore shell companies to launder hundreds of millions of dollars through residential and commercial real estate in Cleveland, Ohio, a city not covered by the current GTO.[51] The U.S. Attorney's Office in Cleveland has

40 *See, e.g.,* U.S. Department of the Treasury, Financial Crimes Enforcement Network, *Geographic Targeting Order* (Oct. 20, 2015) available at https://www.fincen.gov/sites/default/files/shared/Renewal_Miami_TBML_GTO_Order.pdf.

41 31 U.S.C. § 5326(d) available at https://www.govinfo.gov/content/pkg/USCODE-2011-title31/pdf/USCODE-2011-title31-subtitleIV-chap53-subchapII-sec5326.pdf.

42 American Land Title Association, *Real Estate Geographic Targeting Orders Fact Sheet*, p. 2 (2016) available at https://www.alta.org/media/pdf/fincen/160812-real-estate-geographic-targeting-orders-faq.PDF.

43 *Id.*

44 *Id.* at p. 1.

45 *Id.* at p. 3.

46 U.S. Department of the Treasury, Financial Crimes Enforcement Network, *Press Release: FinCEN Targets Shell Companies Purchasing Luxury Properties in Seven Major Metropolitan Areas* (Aug. 22, 2017) available at https://www.fincen.gov/news/news-releases/fincen-targets-shell-companies-purchasing-luxury-properties-seven-major.

47 Sean Hundtofte, Rantala Ville, *Anonymous Capital Flows and U.S. Housing Markets,* University of Miami Business School Research Paper No. 18-3 (May 28, 2018) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186634.

48 U.S. Department of the Treasury, Financial Crimes Enforcement Network, *FinCEN Reissues Real Estate Geographic Targeting Orders and Expands Coverage to 12 Metropolitan Areas* (Nov. 15, 2018) available at https://www.fincen.gov/news/news-releases/fincen-reissues-real-estate-geographic-targeting-orders-and-expands-coverage-12.

49 GAO-20-546, *supra* note 35; *see* U.S. Department of the Treasury, Financial Crimes Enforcement Network, *FinCEN Reissues Real Estate Geographic Targeting Orders for 12 Metropolitan Areas* (May 8, 2020) available at https://www.fincen.gov/news/news-releases/fincen-reissues-real-estate-geographic-targeting-orders-12-metropolitan-areas-1.

50 Matt Zapotosky, Rosalind Helderman, *Ukrainian who made appearance in Trump impeachment saga accused by U.S. of stealing, laundering billions,* Washington Post (Aug. 2, 2020) available at https://www.washingtonpost.com/national-security/justice-department-accuses-ukrainian-oligarch-of-stealing-billions-from-bank-he-once-owned-and-laundering-it-in-the-us/2020/08/06/b88924b8-d7f4-11ea-aff6-220dd3a14741_story.html.

51 *Id.*

reportedly opened a criminal investigation into Kolomoisky for money laundering.[52]

In order to better prevent foreign individuals from laundering the proceeds of their corruption in U.S. markets, the next administration should expand FinCEN's real estate GTO and take regulatory action to make the order's requirements permanent. Nothing in the relevant statute prevents FinCEN's GTOs from applying to both commercial and residential real estate transactions, and there is no limitation on the geographic scope of the order. Furthermore, as illicit finance experts Joshua Kirschenbaum and David Murray have outlined, the reporting requirements of the real estate GTO can be made permanent through the promulgation of a new regulation that defines title insurance as a "covered product" under the BSA.[53] To take full advantage of these authorities contained in the BSA, and to improve the U.S. AML regime, the next administration should adopt the following recommendations:

- **At the next renewal of the real estate GTO, extend the order to cover both residential and commercial real estate transactions.** Acting through FinCEN, the next administration should immediately issue an amended GTO that extends the order's beneficial ownership reporting requirement to cover both residential and commercial real estate transactions.
- **In the amended GTO, extend the order to cover all major- to medium-sized metropolitan regions in the country,** including, but not limited to, the following cities and surrounding counties of: Washington, DC; Philadelphia, PA; Phoenix, AZ; Houston, TX; Austin, TX; San Jose, CA; Jacksonville, FL; Columbus, OH; Cleveland, OH; Charlotte, NC; and Indianapolis, IN.
- **Through the notice and comment rule-making process, define "title insurance" as a "covered product" under the BSA, and require beneficial ownership reporting.** Currently, only insurance policies that have a transferable cash value are defined as "covered products" under the BSA and are subject to AML requirements.[54] To permanently require that title insurers provide beneficial ownership information to federal authorities, the next administration should expand the regulatory definition of "covered product" to include "title insurance" and obligate insurance companies to report the identity of the beneficial owners of corporate entities that purchase such insurance.[55]

52 Michael Sallah, Tanya Kozyrevya, Christopher Miller, *This Billionaire Oligarch is Being Investigated By A US Federal Grand Jury for Alleged Money Laundering*, BuzzFeed (May 19, 2020) available at https://www.buzzfeednews.com/article/mikesallah/ukraine-billionaire-oligarch-money-laundering-investigation.

53 Kirschenbaum, Murray, *supra* note 34, at n. 30.

54 *Id.*

55 *Id.*

Photo by Moritz Wickendorf

✓ Direct the Secretary of State to establish a new senior anti-corruption coordinator position within each of the State Department's six regional bureaus

Foreign systems of corruption directly challenge America's foreign policy goals of promoting human rights, democratic governance, and the rule of law. International corruption is increasingly viewed as the weapon of choice for many regimes that seek to destabilize the geopolitical order that the U.S. helped build. Vladimir Putin's government in Russia, for example, has weaponized corruption in various European countries as a means to weaken NATO and the European Union.[56] Chinese government-linked businesses are frequently accused of engaging in corrupt practices under the auspices of China's Belt and Road Initiative. [57]

To improve the State Department's current anti-corruption efforts and lessen the impact that foreign corruption has on other U.S. foreign policy priorities, the next administration should take steps to reform how the State Department approaches its anti-corruption efforts. As explained in a recent report from the Carnegie Endowment for International Peace, the State Department's senior-level focus on fighting corruption is spotty.[58] State's anti-corruption policies and programs are designed and executed by four functional bureaus—the Bureau of International Narcotics and Law Enforcement Affairs (INL); the Bureau of Economic and Business Affairs (EB); the Bureau of Democracy, Human Rights, and Labor (DRL); and the Bureau of

56 *See* Dániel Hegedüs, German Council on Foreign Relations (DGAP), *The Kremlin's Influence in Hungary: An examination of Budapest's ties to Moscow*, p. 4 (Apr. 27, 2016) available at https://dgap.org/en/think-tank/publications/dgapanalyse-compact/kremlins-influence-hungary.

57 *See, e.g.,* Jonathan A. Hillman, Center for Strategic and International Studies (CSIS), *Corruption Flows Along China's Belt and Road* (Jan. 18, 2019) available at https://www.csis.org/analysis/corruption-flows-along-chinas-belt-and-road; *see also* Will Doig, *The Belt and Road Initiative Is a Corruption Bonanza*, Foreign Policy (Jan. 15, 2019) available at https://foreignpolicy.com/2019/01/15/the-belt-and-road-initiative-is-a-corruption-bonanza/.

58 Abigail Bellows, Carnegie Endowment for International Peace, *Ten Ways Washington Can Confront Global Corruption* (Jul. 25, 2018) available at https://carnegieendowment.org/2018/07/25/ten-ways-washington-can-confront-global-corruption-pub-76919.

Photo by Ted Eytan

Energy Resources (ENR)—in coordination with the Department's six regional bureaus.[59] Despite a growing recognition of corruption's strategic impact, however, at present, the department lacks a senior coordinator focused on harmonizing efforts to address corruption, as well as senior leads within regional bureaus explicitly tasked with the same mission in their areas of responsibility.

To address this shortfall, the next administration should direct the Secretary of State to establish a new senior anti-corruption coordinator position within each of the six regional bureaus that fall under of the office of the Under Secretary of State for Political Affairs. Each senior anti-corruption coordinator should work with the various missions within their area of responsibility, as well as relevant functional bureaus and interagency partners, to establish and implement country-specific anti-corruption plans.

This proposal builds on a successful pilot program initiated by the Bureau of Europe and Eurasian Affairs (EUR) in 2014, which temporarily established a senior anti-corruption coordinator position.[60] During his time in the position, the senior officer tasked with this mission worked with EUR's posts to create anti-corruption action plans tailored to the specific political realities and corruption challenges faced by each post.[61] The existence of the position allowed EUR to elevate the importance of anti-corruption efforts internally, improving the department's anti-corruption work in the region.

By establishing similar positions throughout all six regional bureaus, the incoming administration will improve the efficacy of the State Department's current anti-corruption work, while signaling to the international community that anti-corruption efforts are a U.S. foreign policy priority.

59 These include the bureaus responsible for African Affairs (AF); European and Eurasian Affairs (EUR); East Asian and Pacific Affairs (EAP); Near Eastern Affairs (NEA); South and Central Asian Affairs (SCA); and Western Hemisphere Affairs (WHA).

60 George Kent, *Countering Corruption Regionally: The "EUR" Initiative*, Foreign Service Journal (Jun. 2016) available at https://www.afsa.org/countering-corruption-regionally-eur-initiative.

61 *Id.*

10

Rejoining the U.N. Human Rights Council while Advancing Real Reform

Photo by UN Photo/ Jean-Marc Ferré

Introduction

Defending human rights is not a unilateral endeavor. No country, no matter how powerful and influential, can match the credibility of the international community acting through its shared institutions. And despite its imperfections and the challenges posed by many of its member states, no institution possesses the relevance or global reach of the United Nations—a fact well understood by the generation of U.S. policymakers who presided over the U.N.'s creation and the drafting of the Universal Declaration of Human Rights (UDHR).[1]

[T]he decision to unilaterally withdraw from the Council was shortsighted, counterproductive to U.S. interests, and predicated on erroneous assumptions about the Council and the utility of U.S. membership.

Recognizing the U.N.'s essential role in promoting and defending human rights does not, however, mean turning a blind eye to its shortcomings. As a political body, the U.N.'s organs reflect the consensus—or lack thereof—of their member states. As a result, governments that systematically violate the rights of their own citizens routinely wield significant influence over U.N. activities. The tension between the U.N.'s institutional commitment to human rights, as expressed through its charter and human rights treaties organized under U.N. auspices, and the practices of its members is a perennial obstacle to the body's ability to act credibly and effectively on human rights issues. This is especially the case for the only U.N. political body exclusively devoted to advancing human rights: the U.N. Human Rights Council ("Council" or "HRC").

The Trump administration announced its decision to withdrawal from the Council in 2018.[2] Citing the membership of well-known human rights-abusing regimes and the Council's disproportionate focus on Israel, the administration argued that it could better pursue U.S. foreign policy from outside the body.[3]

In articulating its public justification, the administration touched on legitimate concerns regarding the Council's efficacy and perceived legitimacy. However, the decision to unilaterally withdraw from the Council was shortsighted, counterproductive to U.S. interests, and predicated on erroneous assumptions about the Council and the utility of U.S. membership. It will be up to the next administration to reverse this error in judgment and quickly return the United States to the Council.

The protection and promotion of the international human rights framework is undeniably in the U.S. national interest. Overwhelming data demonstrates that governments that respect the fundamental rights of their citizens are more reliable allies, stronger trading partners, and better stewards of regional peace and long-term international stability.[4] In order to guarantee that the United States plays an integral role in the multilateral effort to improve compliance with the human rights framework, the next administration should rejoin the Council and work from within to secure necessary reforms. It is only through active participation in the international human rights movement that the U.S. can help propel the movement forward and achieve its foreign policy goals.

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1 For the United States' role in the enshrining of human rights principles in the United Nations Charter and the creation of the Universal Declaration of Human Rights, *see* Tony Evans, *U.S. Hegemony and the Project of Universal Human Right*s, pp. 48-70 (1996).

2 Gardiner Harris, *Trump Administration Withdraws U.S. From U.N. Human Rights Council,* New York Times (Jun. 19, 2018) available at https://www.nytimes.com/2018/06/19/us/politics/trump-israel-palestinians-human-rights.html.

3 Mike Pompeo, U.S. Secretary of State, Nikki Haley, U.S. Permanent Representative to the United Nations, Remarks to the Press on the U.N. Human Rights Council (Jun. 19, 2018) available at https://www.state.gov/remarks-on-the-un-human-rights-council/.

4 Democracy & Human Rights Working Group, McCain Institute for International Leadership, *Advancing Freedom Promotes U.S. Interests,* at p. 2 (Sep. 2016) available at https://www.mccaininstitute.org/advancing-freedom-promotes-us-interests/; *see also* Michael Fuchs, Center for American Progress, *How to Support Democracy and Human Rights in Asia* (Sep. 16, 2019) available at https://www.americanprogress.org/issues/security/reports/2019/09/16/474577/support-democracy-human-rights-asia/; *see also* Executive Order Executive Order 13,818, Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption, 82 Fed. Reg. 60839 (2017) available at https://www.humanrightsfirst.org/sites/default/files/eo-13818-glomag.pdf (finding that "[h]uman rights abuse and corruption undermine the values that form an essential foundation of stable, secure, and functioning societies; have devastating impacts on individuals; weaken democratic institutions; degrade the rule of law; perpetuate violent conflicts; facilitate the activities of dangerous persons; and undermine economic markets.").

Why U.S. Leadership Matters at the Council

To understand the need for U.S. leadership on the Council, it's important to first recognize the unique and complex role that the HRC plays in the global human rights movement. The U.N. General Assembly established the Human Rights Council in 2006 with the mandate to "promot[e] universal respect for the protection of all human rights and fundamental freedoms for all," and to "address situations of violations of human rights."[5] The body is composed of 47 members, and its seats are allocated by geographic region. The Council engages in numerous lines of work aimed at the realization of its mandate, including a rolling review of the human rights records of every General Assembly member, known as the Universal Periodic Review (UPR), the commissioning of independent investigations into human rights situations, and the debate and passage of thematic and country-specific resolutions on human rights issues. The Council also provides an important forum for civil society, and is widely regarded as the body "most open and accessible in the U.N. structure" to non-governmental organizations.[6]

Since its creation, the Council has faced criticism concerning its credibility and efficacy. One recurring source of criticism is the Council's composition. Since its creation, the body has consistently included governments with well-documented histories of human rights abuse, including Eritrea, Venezuela, the Philippines, Burundi, Egypt, Cuba, China, Russia, and Saudi Arabia.[7] Another perennial source of criticism is the Council's history of ignoring or failing to appropriately grapple with serious human rights situations, while placing disproportionate focus on others. The Council has yet to authorize an inquiry or report relating to well-documented cases of human rights abuses in Egypt and Bahrain, for example. By contrast, the situation in the Israeli-occupied territories of Gaza and the West Bank is the only permanent item on the Council's agenda—meaning that the matter must be discussed at every Council session.[8] Between 2006 and 2016, Israel was the subject of more condemnatory resolutions than any other country.[9] While focus on violations of human rights relating to the Israel-Palestine conflict is appropriate to the Council's mandate, such concerted, inordinate attention is not.

5 G. A. Res. 60/251, at ¶ 1 (Apr. 3, 2006) available at https://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf.

6 *Assessing the United Nations Human Rights Council: Testimony prepared for the Subcomm. on Multilateral International Development, Multilateral Institutions, and International Economic, Energy & Environmental Policy of the S. Comm. On Foreign Relations*, 115th Cong., p. 3 (May 25, 2017) available at https://www.foreign.senate.gov/imo/media/doc/052517_Piccone_Testimony.pdf.

7 U.N. General Assembly, *Election and Appointments*, available at https://www.un.org/en/ga/74/meetings/elections/hrc.shtml.

8 Patrick Wintour, *UK will change tack on UN motions criticizing Israel, says Jeremy Hunt*, Guardian (Mar. 21, 2019) available at https://www.theguardian.com/world/2019/mar/21/uk-will-change-tack-on-un-motions-criticising-israel-says-jeremy-hunt.

9 Jacob Blaustein Institute for the Advancement of Human Rights, *Game-Changer: the U.S. at the UN Human Rights Council*, p. 3 (May 2017) available at https://www.jbi-humanrights.org/files/jbi-briefing-paper---game-changer---us-on-unhrc-1.pdf.

Photo by Henry Mühlpfordt

These various criticisms, as well as the Council's supposed infringement on U.S. sovereignty, formed the basis of the Trump administration's rationale for withdrawing from the Council. In a June 2018 speech justifying the administration's decision, then-U.S. Permanent Representative to the U.N., Nikki Haley, called the Council a "protector of human rights abusers and a cesspool of bias" that "makes a mockery of human rights."[10] Since the U.S. withdrawal, the Trump administration has doubled down on its criticism of the Council. In response to the body's decision to order a report on "systemic racism" against people of African descent—a vote that was taken shortly after George Floyd's murder—Secretary of State Mike Pompeo referred to the Council as "a haven for dictators and democracies that indulge them" and suggested that the resolution "reaffirmed the wisdom of [the administration's] decision to withdraw in 2018."[11]

Taken at face value, the Trump administration's decision to withdraw was based on two conclusions, neither of which withstand scrutiny. The first of these is that, in aggregate, the Council does more to harm the cause of human rights than to advance them. The second conclusion is that U.S. participation in Council activities legitimizes a deeply flawed institution, a concern that overrides any potential benefit from U.S. engagement.

Contrary to the Trump administration's assertions, the Council plays an important role in multilateral efforts to protect human rights and, since 2006, has made significant improvements in identifying and addressing serious human rights situations in a timely manner. In recent years, the Council has requested investigations or reports on grave violations in over two dozen countries, including North Korea, Cambodia, Myanmar, the Philippines, Sri Lanka, Burundi, Central African Republic, South Sudan, Sudan, Iran, Yemen, Libya, and Venezuela.[12] In the case of North Korea, the findings of a Commission of Inquiry appointed by the Council were sufficiently powerful to persuade the Security Council to convene a series of annual sessions on the topic.[13]

The Council has likewise passed resolutions advancing rights in key thematic areas, such as resolution 32/2 of June 2016, which established an international expert on violence and discrimination based on sexual orientation and gender identity.[14] "Special procedures"—independent human rights experts serving under Council mandate—have likewise undertaken vital human rights-related investigations, such as the 2019 report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, who found the Saudi Arabian government responsible for the October 2018 murder of Saudi Arabian journalist and dissident Jamal Khashoggi.[15] Other special rapporteurs on freedom of association and peaceful assembly, freedom of expression, and freedom of religion or belief have helped to advance international thinking and norm-setting on key thematic issues.

[W]hile it is true that some countries seek membership in the Council to shield themselves and others from scrutiny, the ability of these states to prevent the Council from documenting and condemning violations is often limited.

Furthermore, while it is true that some countries seek membership in the Council to shield themselves and others from scrutiny, the ability of these states to prevent the Council from documenting and condemning

10 Pompeo, *supra* note 3.

11 Michael Pompeo, U.S. Secretary of State, *Press Statement: On the Hypocrisy of UN Human Rights Council* (Jun. 20, 2020) available at https://www.state.gov/on-the-hypocrisy-of-un-human-rights-council/.

12 U.N. Human Rights Council, *List of HRC-mandated Commissions of Inquiries / Fact-Finding Missions & Other Bodies* (last updated Oct. 2019) available at https://www.ohchr.org/EN/HRBodies/HRC/Pages/ListHRCMandat.aspx; Mark P. Lagon, Ryan Kaminski, International Institutions and Global Governance Program, Council on Foreign Relations, *Bolstering the UN Human Rights Council's Effectiveness*, p. 5 (Jan. 2017) available at https://www.cfr.org/sites/default/files/pdf/2016/12/Discussion_Paper_Lagon_Kaminski_UNHRC_OR.pdf.

13 *US scraps UN meeting on North Korea human rights,* Channel News Asia (Dec. 8, 2018) available at https://www.channelnewsasia.com/news/asia/us-scraps-un-meeting-on-north-korea-human-rights-11012546.

14 Human Rights Council Res. 32/2, U.N. Doc. A/HRC/RES/32/2, (Jul. 15, 2016) available at https://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/32/2.

15 Dr. Agnes Callemard (Special Rapporteur on extrajudicial, summary or arbitrary executions), *Investigation of, accountability for and prevention of intentional State killings of human rights defenders, journalists and prominent dissidents,* U.N. Doc. A/HRC/41/36 (Oct. 4, 2019) available at https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session41/Documents/A_HRC_41_36.docx.

violations is often limited. Burundi's presence on the Council, for example, did not impede the body from establishing an independent commission of inquiry into abuses in the country.[16] Likewise, the Philippines' election to the Council in 2018 did not thwart the passage of a resolution addressing drug war killings in the country and directing a comprehensive report on the matter, despite an aggressive campaign from Manila (with the strong support of Beijing) to quash the initiative.[17] Finally, Venezuela's presence on the Council since 2017 did not prevent the Council from requesting that the High Commissioner prepare a hard-hitting report on violations committed by the Maduro government.[18]

Further undermining the Trump administration's decision to withdraw, considerable evidence demonstrates that U.S. presence on the Council resulted in an increase in scrutiny of serious human rights situations and improved the overall quality of the Council's adopted resolutions.[19] During its period of engagement, American diplomatic leadership contributed to an increase in the number of independent human rights experts reporting to the Council on topics of interest to human rights advocates, as well as the establishment of numerous fact-finding and monitoring missions. The United States also helped end the passage of resolutions condoning punishments for blasphemy and circumscribing freedom of expression,[20] and helped secure resolutions calling for the protection of human rights defenders.[21] Finally, U.S. engagement helped keep serial human rights violators Iran, Syria, and Russia—which reliably held a seat on the Council and its predecessor body for decades—off the body in 2010, 2011, and 2016, respectively.[22]

[C]onsiderable evidence demonstrates that U.S. presence on the Council resulted in an increase in scrutiny of serious human rights situations and improved the overall quality of the Council's adopted resolutions.

The absence of American leadership has also made it easier for some of the world's worst human rights offenders to obtain a seat on the Council. Before the United States' withdrawal in 2018, none of the world's nine worst human rights offenders, as ranked by the NGO Freedom House, had ever served on the body.[23] In the elections that have occurred since, four such governments—Eritrea, Somalia, Sudan, and Libya—have been elected, along with a number of others that routinely engage in significant abuses, such as Venezuela, the Philippines, and Cameroon.

In line with this data, an American return to the Council is likely to help mitigate the body's disproportionate focus on Israel. By compelling the Council to focus on a broad range of human rights concerns, U.S. membership on the Council necessarily reduces the body's focus on Israel. According to the American Jewish Committee's Jacob Blaustein Institute for the Advancement of Human Rights, "[t]he number of Israel-specific resolutions adopted by the Council declined during the period of US membership, both

16 U.N. Human Rights Council, *Commission of Inquiry on Burundi*, available at https://www.ohchr.org/en/hrbodies/hrc/coiburundi/pages/coiburundi.aspx.

17 Human Rights Council Res. 41/2, U.N. Doc A/HRC/RES/41/2 (Jul. 17, 2019) available at https://undocs.org/A/HRC/RES/41/2; *Philippines drugs war: UN votes to investigate killings*, BBC (Jul. 11, 2019) available at https://www.bbc.com/news/world-asia-48955153.

18 U.N. Office of the High Commissioner for Human Rights, *UN Human Rights report on Venezuela urges immediate measures to halt and remedy grave rights violations* (Jul. 4, 2019) available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24788&LangID=E.

19 *Game-Changer, supra* note 9, at p. 3.

20 Human Rights First, *U.N. General Assembly Abandons Dangerous "Defamation of Religion" Concept* (Dec. 19, 2011) available at https://www.humanrightsfirst.org/press-release/un-general-assembly-abandons-dangerous-%E2%80%9Cdefamation-religion%E2%80%9D-concept.

21 Human Rights Council Res. 25/18, U.N. A/HRC/RES/25/18 (Apr. 11, 2014) available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/134/52/PDF/G1413452.pdf?OpenElement.

22 *See* Mark Leon Goldberg, *The Relationship Between Iran and the Human Rights Council is Extremely Contentious*, UN Dispatch (Feb. 28, 2018) available at https://www.undispatch.com/relationship-iran-human-rights-council-extremely-contentious/; *see also Syria 'drops bid' to join UN human rights body*, France 24 (Nov. 5, 2011) available at https://www.france24.com/en/20110511-syria-drops-bid-candidate-seat-un-united-nations-human-rights-council-araud; *see also* Julian Borger, *Russia denied membership of UN human rights council*, The Guardian (Oct. 28, 2016) available at https://www.theguardian.com/world/2016/oct/28/russia-denied-membership-of-un-human-rights-council.

23 Jacob Blaustein Institute for the Advancement of Human Rights, *The Impact of US Engagement on the UN Human Rights Council's Country-Specific Scrutiny* (Mar. 31, 2017) available at https://www.jbi-humanrights.org/jacob-blaustein-institute/2017/03/the-impact-of-us-engagement-on-the-un-human-rights-councils-country-specific-scrutiny-.html; *Game-Changer, supra* note 9.

in absolute terms and as a percentage of all country-specific resolutions."[24] In fact, during the March 2018 session, the State Department itself reported that the Council saw "the largest shift in votes toward more abstentions and no votes on Israel related resolutions since the creation of the [Council]."[25]

Finally, U.S. absence from the Council and the U.N. system more broadly has made it easier for repressive governments to reshape global engagement and discourse on human rights. China, in particular, has engaged in a systemic effort to weaken U.N. human rights mechanisms, suppress discussion of specific human rights violations in the Council, and silence human rights victims and activists.[26] China has also sought to shift the international human rights agenda away from the protection of individual rights toward subjects such as economic development and state sovereignty.[27] As the Chinese government has clearly recognized, American disengagement simply cedes fertile diplomatic ground to authoritarian regimes.

China's increased influence over the Council was on full display during the body's debate over the recently passed Hong Kong National Security Law. In response to China's enactment of the draconian law that eviscerated civil and political rights in Hong Kong, the Council issued two competing statements.[28] Relying on like-minded authoritarian states and smaller states over which China has significant economic influence, the Chinese delegation apparently convinced 53 states to vote in favor of a Cuba-led statement endorsing the Security Law.[29] In contrast, only 27 Council members voted in favor of the United Kingdom-led statement condemning China's actions.[30] Of the 53 states that expressed their support for the law, 50 are identified by Freedom House as "not free" or "partially free."[31] The three "free" countries that backed Cuba's statement were Antigua and Barbuda, Dominica, and Suriname, all of which have accepted assistance from China's Belt and Road infrastructure program.[32]

24 *Game-Changer, supra* note 9, at p. 4.

25 U.S. Department of State, Fact Sheet: Key Outcomes of U.S. Priorities at the U.N. Human Rights Council's 37th Session (Mar. 23, 2018) available at https://translations.state.gov/2018/03/23/key-outcomes-of-u-s-priorities-at-the-un-human-rights-councils-37th-session/; *Game-Changer, supra* note 9, at p. 4.

26 Kristine Lee, Alexander Sullivan, Center for a New American Security, *People's Republic of the United Nations: China Emerging Revisionism in International Organizations* (May 2014) available at https://www.cnas.org/publications/reports/peoples-republic-of-the-united-nations.

27 Permanent Mission of the People's Republic of China to the United Nations, *Human Rights Council Adopts China-Proposed Resolution* (Jun. 28, 2017) available at http://www.china-un.ch/eng/dbtyw/rqrd_1/speech/t1473894.htm.

28 Dave Lawler, *The 53 Countries Supporting China's Crackdown on Hong Kong*, Axios (Jul. 3, 2020) available at https://www.axios.com/countries-supporting-china-hong-kong-law-0ec9bc6c-3aeb-4af0-8031-aa0f01a46a7c.html.

29 *Id.*

30 *Id.*

31 *Id*

32 *Id.*

Recommendations

✓ Rejoin the Human Rights Council and prioritize securing reforms

U.S. interests in defending and promoting human rights will not be advanced by a continued absence from the HRC. For all of its flaws, the Council remains a powerful tool for exposing and mobilizing international action on human rights violations. The presence of bad-faith actors who wish to undermine the body's work is not a compelling basis for U.S. absence. Rather, this very presence justifies robust reengagement, and demands American leadership aimed at amplifying the voices of those who want to see the Council succeed, while limiting the influence of those who do not.

In an ideal world, an American return to the Council could be paired with structural reforms to the body's operating procedures that would discourage governments with poor human rights records from seeking and maintaining membership in the body. However, many such beneficial reforms would require amending General Assembly resolution 60/251, which established the body.[33] Given the General Assembly's make-up, however, such an effort to "re-open" the Council's mandate remains more likely to result in changes that weaken the body than that strengthen it.

Given practical limitations on how it can fundamentally reform the Council's operations, U.S. reengagement with the body should be based not upon unworkable demands, but on diplomatic leadership.

This reality does not mean that the United States should accept business as usual. Misplaced policy prescriptions aside, members of the Trump administration were correct in stating that the presence of human rights violators undermines the body's efficacy. Similarly, while Israeli policies in the Palestinian territories are worthy of international attention, no government operating in good faith should claim that these policies justify garnering substantially more of the Council's time and resources than, for example, North Korea's totalitarianism, Myanmar's genocidal persecution of its Rohingya population, or Chinese abuses in the Xinjiang Uyghur Autonomous Region.

Given practical limitations on how it can fundamentally reform the Council's operations, U.S. reengagement with the body should be based not upon unworkable demands, but on diplomatic leadership. A future Secretary of State should, therefore, couple a public announcement of U.S. reengagement with the Council with a concerted diplomatic effort to assemble a likeminded coalition dedicated to unilaterally improving the body's function. Countries engaged in the effort would likewise announce, via a public pledge, coordinated steps they would undertake to strengthen the Council.

This pledge should, at a minimum, contain the following elements:

- **Voluntarily submission to public vetting.** At present, there is no requirement that countries seeking Council membership undergo any additional scrutiny as a condition of their candidacy. The United States and likeminded nations should accordingly request that the President of General Assembly or the Council host a special session in advance of annual Council elections during which candidates for the Council can present their qualifications for membership, and concerned countries and civil society can provide third-party assessments. Although NGOs have organized forums outside official U.N. settings in the past,[34] such private events have been easy for candidates to ignore. This would not be true of candidate reviews that occur in the context of official U.N. proceedings. Participation would be voluntary, but the absence of a candidate would not preclude other participants from commenting on that candidate's human rights record. The United States should, of course, pledge to participate in such a public vetting when it seeks to rejoin the Council.

33 G. A. Res. 60/251, *supra* note 5.

34 Peter Splinter, Open Global Rights, *Elections without choice: "clean slates" in the Human Rights Council* (Oct. 12, 2017) available at https://www.openglobalrights.org/election-without-choice-clean%20slates-in-the-human-rights-council/.

- **Promotion of strong candidates and competitive elections.** The poor human rights records of candidates running for Council membership, in conjunction with frequent "clean-slate" elections, allows for some of the world's worst human rights abusers to serve on the body. The United State should set an example by identifying states with strong human rights records that have never served on the Council and providing them with the diplomatic support and technical resources to stand successfully for a Council seat. It should synchronize this announcement with public statements from a cross-regional group of rights-respecting governments, who will likewise publicly pledge to champion strong candidates and competitive elections within their own regional blocs.

- **Commitments to funding the Office of the High Commissioner.** The Office of the High Commissioner for Human Rights (OHCHR) serves as a secretariat and technical support body to the Council, in addition to carrying out some independent functions. OHCHR is not under the Council's direct control—High Commissioners have made statements and issued reports criticizing Council members on numerous occasions[35]—but the office plays a crucial role in ensuring that the Council can discharge its mandate. Since 2018, the Trump administration has elected not to fund OHCHR.[36] Withholding these funds undermines one of the strongest voices for human rights in the U.N. system and should be reversed at the first opportunity.

- **Opposition to any member subject to a Council mandate.** Countries that have been identified by the Council as meriting an independent inquiry into human rights violations should not have a seat at the Council table. At a minimum, their participation poses an unacceptable conflict of interest. It also signals that they are unlikely to take seriously abuses occurring in other countries. The United States and likeminded governments should accordingly pledge to vote against the candidacy of any country that is the focus of a special procedure of the Council.

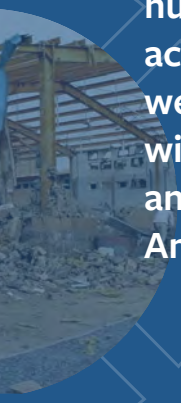
- **Voting to suspend any member with documented pattern of violations.** Resolution 60/251's requirement that two-thirds of General Assembly members vote in support to remove a Council member has made suspension of Council members a dead letter in all but the most extreme circumstances. Nevertheless, there is still value in forcing votes on suspension where Council-mandated inquiries have produced credible evidence of systematic and grave human rights violations. In such cases, the publicity generated by the suspension campaign itself may prove as embarrassing to the offending member as actual suspension. In addition, such efforts may discourage members against whom suspension is sought from seeking reelection to the Council, and dissuade human rights violating governments from running for a Council seat in the first place. The United States and likeminded governments should, therefore, pledge to organize suspension votes within the General Assembly whenever a sitting Council member is credibly shown to have committed systematic and grave human rights violations.

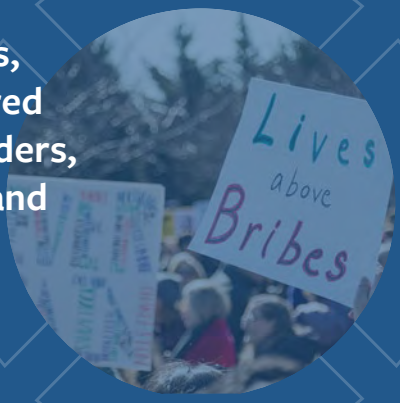
- **Bundling all country-specific resolutions under one agenda item.** The existence of a separate item on the Council's agenda for matters relating to Israel and Palestine is inefficient and has little substantive justification. The United States should accordingly lobby other Council members to ensure that condemnatory resolutions concerning Israel and the occupied Palestinian territories be passed under the same agenda item as those for all other countries. Although such a change may seem a formality, it would likely mean less time and fewer Council resources spent on Israel relative to other human rights situations. It would also serve as a symbolic acknowledgment that the actions of the government of Israel should not be presumptively viewed as more deserving of Council's resources than those of other governments.

35 Nick Cumming-Bruce, *U.N. Rights Chief, Denouncing 'Gross Inequalities,' Jabs at China and Israel*, New York Times (Mar. 6, 2019) available at https://www.nytimes.com/2019/03/06/world/europe/un-rights-bachelet.html; Zeid Ra'ad Al Hussein, U.N. High Commissioner for Human Rights, Opening Statement at the 30th session of the Human Rights Council (Sep. 14, 2015) available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16414.

36 Congressional Research Service, IF11457, *In Focus: United Nations Issues: U.N. Office of the High Commissioner for Human Rights* (Mar. 13, 2020) available at https://fas.org/sgp/crs/row/IF11457.pdf.

Human Rights First challenges the United States to live up to its ideals. When the U.S. government falters in its commitment to promote and protect human rights, we step in to demand reform, accountability, and justice. For over 40 years, we've built bipartisan coalitions and partnered with frontline activists, lawyers, military leaders, and technologists to tackle issues that demand American leadership.





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