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20 Years After 9/11: Rights-Based Policies for a New Era

On September 11th, 2001, nineteen members of Al Qaeda used hijacked airplanes to murder almost three thousand people. Twenty years later, we are still living in the post-9/11 world.

Shortly after the attacks, the U.S. government launched a war of unlimited geographic scope against an ill-defined and ever-evolving enemy. It has pervaded our political system, extending far beyond the realm of national security policy.

In the hands of short-sighted or opportunistic politicians, fighting “terror” is a catchall pretext to not only torture prisoners or shoot hellfire missiles at men of a certain profile but also to deny protection to refugees or crack down on activists protesting police violence.

The premise of these policies is that respect for human rights weakens national security. Two decades on, the verdict on this approach is in. It has destroyed hundreds of thousands of lives, consumed trillions of dollars, flouted national and international laws, shipped billions in weapons to repressive regimes, provided succor to despots, alienated allies, trashed this country’s reputation in many parts of the world fueled conflicts and massive human displacement, contributed to militarized and violent policing in the United States, diverted resources from other national priorities, and allowed Al Qaeda and its offshoots to flourish. All this before the trial of Khalid Sheik Mohammed, the alleged mastermind of 9-11, has even started.

Unless the goal of this effort was to expand the military footprint of the United States and restrict civil rights, it is an abject failure.

Since 2001, Human Rights First has been at the forefront of the pushback. Guided by our conviction that the best national security policies are those that respect human rights, we have not ceded an inch of “tough on terror” turf to those advocating manifestly disastrous policies.

After the sadistic abuse at Abu Ghraib came to light in 2005, we assembled a coalition of retired generals and admirals who changed the national debate on torture. “I never thought I’d live to see the day when a group of generals was working closely with a human rights group,” remarked then-Vice President Joe Biden.

While the partnership was unusual, it was also neutral. With their authority on national security, the generals and admirals provided counsel to political leaders. They were literally standing behind President Obama when he signed an executive order banning torture.

We then helped secure passage of the 2015 McCain-Feinstein amendment, the strongest anti-torture law in American history. When President Trump floated the idea of reinstating torture, senators of both parties cited the statute to shut him down.

Working alongside the military coalition and allied organizations, we have made progress on other fronts. Notably, we took on the moral and strategic failure of indefinite incarceration at the prison in Guantanamo Bay, and today the population at the prison has been reduced to thirty-nine from nearly eight hundred. Our work also helped lead the U.S. government to enact enhanced reporting requirements for civilian casualties and reforms to the legal and policy framework governing the use of military force.



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In addition, our many years as a leader on refugee protection has put us in a position to challenge nativist demagogues. During the Obama presidency, for instance, when member of Congress cited the threat of ISIS to try to block refugees, we mobilized a bipartisan group of foreign policy leaders for an advocacy campaign that pointed out that such a restrictive approach dovetailed with ISIS propaganda depicting the United States as hostile to Muslims. In President Obama's final year, we secured a dramatic increase in refugee resettlement.

Still, in many respects, the war on terrorism is alive and unwell. The United States continues to apply wartime rules to the use of lethal force, detentions, and prosecutions far beyond the traditional boundaries. Rules designed to set limits except for extraordinary circumstances have been bent; war has become a way of life. Even as President Biden withdrew troops from Afghanistan, he reembraced the concept of a “war on terrorism.”

Going forward, we will continue to push Congress and the administration to end “endless” war and place respect for human rights where it belongs: at the heart of U.S. foreign policy. To that end, the U.S. government should, for starters:

- Repeal the 2001 and 2002 AUMFs and, if necessary, replace the 2001 AUMF with a narrowly tailored authorization
- Close the prison at Guantanamo
- End the secret and unaccountable use of lethal force

Human Rights First will also intensify its focus on the war at home. The country’s militarized foreign policy—which has targeted Black, Brown, and Muslim communities around the world—has manifested in domestic policies, programs, and institutions. In particular, immigration enforcement and policing have grown more militarized and repressive, inflicting disproportionate harm on Black, Brown, and Muslim people in the United States. President Trump’s deployment of federal agents against Black Lives Matter (BLM) activists peacefully demonstrating against police brutality showed how the war can turn inward.

The country’s response to 9/11 has led to increased dangers for marginalized communities, and we are redoubling our efforts to fight racism, xenophobia, and anti-Muslim hatred. Our Innovation Lab is creating cutting-edge technological tools to help activists and advocates combat white nationalism and other forms of hatred.

Since the murder of George Floyd, we have also been a leader in the effort to demilitarize of the police. We will keep pushing Congress and the Biden Administration to curtail the Defense Department’s 1033 program by which it transfers military-grade weapons to civilian law enforcement agencies and will work to reform other federal programs that similarly allow police to get their hands on military-grade equipment.

We will also keep challenging the bogus claim that the government needs to block and expel refugees and other immigrants in the name of counterterrorism. President Trump’s so-called “Muslim ban,” which President Biden overturned on his first day in office, was perhaps the purest manifestation of this warped view.

But some of Trump’s other anti-refugee policies remain, and the “War on Terror” has infected the country’s immigration and asylum systems more broadly. The Department of Homeland Security (DHS) itself is a product of 9/11, and it has overseen a significant increase in detention and deportation. As we fight for reform, we will continue to make the case both to the public and politicians that the U.S.



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government can both protect Americans from terrorism and refugees from persecution; indeed, it must do both.

Finally, we will continue to push the U.S. government to fulfill its postwar obligations to the people of Afghanistan. Over the years, through our Veterans for Americans Ideals initiative, we have helped secure extensions and expansions of the Special Immigrant Visa (SIV) program for Afghans who worked for the U.S. government. But the program was never large enough, as became painfully clear in August as the U.S. military withdrew from that country. Working with allies in Congress and in other organizations, we will continue to bring to safety SIV recipients and other imperiled Afghans. We will also advocate for justice and accountability measures - ranging from fact-finding investigations to targeted sanctions - to hold responsible the perpetrators of past harms, and to mitigate future human rights abuses in Afghanistan.

The result of the U.S. war in Afghanistan, victory by the Taliban, is emblematic of the entire “War on Terror.” Outside of an elite few who have benefited financially or politically, the war has been good for no one. Citizens and soldiers from Kansas to Kirkuk to Kabul have suffered because of it. Yet the war perpetuates itself, creating with its failure a pretext for its own continued existence. It will not end until people who seek a better approach, one rooted in respect for human rights, bring it to an end.

We invite you to join us in this effort.



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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, in the summer of 2020, displays of heavily militarized law enforcement responses to racial justice protests spotlighted the relationship between systemic racism and America’s approach to policing.

The Trump administration exacerbated preexisting trends by controversially and unnecessarily using the U.S. military in a number of domestic contexts. This included 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, DC,

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%202016%202020_0.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>.



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Portland, Oregon, and elsewhere.⁵ Several of these policy choices 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 non-partisan military.⁷ As retired Admiral Michael Mullen—the 17th Chairman of the Joint 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

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 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

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, 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/>.

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.



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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 Biden administration and Congress 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 and Congress could take to do so, consistent with an effective, rights-based approach to policing.

Recommendations

End the Federalized and Militarized Response to Protests

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>.



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- **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 Wheeler¹⁸), and detained individuals without probable cause.¹⁹ The Biden 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. Congress should also pass legislation that prohibits the use of federal law enforcement agents or funds to counter or intimidate peaceful protests and assemblies. For situations

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>.



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where certain law enforcement activity may be appropriate, Congress should pass legislation codifying limits, using a 2020 proposal by federal lawmakers from Oregon as a guide.²⁰

- **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.²¹ This contemplated move prompted swift backlash from retired military and national security leaders, and eventually opposition from Secretary of Defense Mark Esper.²² 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. Congress should also engage in similar efforts to reform the Insurrection Act via legislation so that it cannot be abused by future administrations.²³

- ☒ **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.²⁴ These service members were deployed without the consent of D.C.'s 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

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 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>.

²² 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>.

²³ 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-preserved-authority-under-the-insurrection-act>.

²⁴ 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>.



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congressional authorized exceptions for extraordinary circumstances.²⁵ 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,”²⁶ Attorney General Barr cited a training provision in Section 502(f) of Title 32 of the U.S. code²⁷ as the basis for deploying out-of-state National Guard troops to police the District.²⁸ 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.²⁹ Congress should pass legislation to ensure Section 502(f) is never abused in this manner again. The provision introduced by Congresswoman Mikie Sherrill in the FY2022 National Defense Authorization Act (NDAA) would serve this purpose.³⁰

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.³¹ Yet the Biden administration has within its existing authority tools to accomplish significant steps toward reform. Accordingly, the administration should:

- **Building from the findings of the Task Force on 21st Century Policing,³² 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 background and

²⁵ 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=IwAR2xuJHDl53Ht-5olyU4aTTtoHPm24NJitiffi5ViUh5cd-gbJNrU99R408.

²⁶ Lakes, Cooper, *supra* note 24.

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

²⁸ 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>.

²⁹ 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>.

³⁰ Senator Tom Udall, Representative Jim McGovern, *supra* note 28.

³¹ 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>.

³² 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.



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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.³³ By contrast, there are proven, effective law enforcement training programs that emphasize de-escalation,³⁴ 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 towards 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.³⁵

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 Biden administration should:

- **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% of troops who responded personally saw "evidence" of white supremacy and racist ideologies in the military.³⁶ 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 the DoD failed to explicitly ban white supremacist symbols. Instead, it provides an exhaustive list of all the flags which shall be permitted in public spaces

³³ 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/>.

³⁴ 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/>.

³⁵ 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>.

³⁶ 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/>.



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in military installations and Department of Defense workplaces and common access areas.³⁷ 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 Biden administration and Congress 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 virtually no cost.³⁸ 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.³⁹ Immigration and Customs Enforcement (ICE) and CBP—both of which were involved in recent protest responses—are also substantial beneficiaries of this program.⁴⁰

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.⁴¹ 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.⁴² The working group’s recommendations resulted in the halt of transfers of certain military equipment, including rifles, grenade

³⁷ 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/-1/200717-FLAG-MEMO-DTD-200716-FINAL.PDF>.

³⁸ 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/>.

³⁹ Brooks, *supra* note 33; 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/>.

⁴⁰ Open Letter to House Armed Services Committee Members In Support of Ending the 1033 Program (Jun. 30, 2020) available at <https://s3.amazonaws.com/demandprogress/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>.

⁴¹ 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>.

⁴² 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>.



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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.⁴³ The working group's recommendations also resulted in police departments being required to provide justifications for acquiring certain weapons and equipment.⁴⁴ On August 28, 2017, the Trump administration rescinded the Obama executive order and made both tracked armored vehicles and bayonets available for transfer.⁴⁵

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.⁴⁶ Because the 1122 program is not a transfer or grant program, the federal government is not currently required to monitor it.⁴⁷

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.⁴⁸ 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.⁴⁹ Since 2003, states and metro areas have received \$24.3 billion from these programs, often with minimal oversight.⁵⁰ As a result, these programs have funneled military-grade equipment, including armored vehicles, drones, tear gas, rubber bullets, and sophisticated surveillance

⁴³ 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>.

⁴⁴ *Id.* at p. 4.

⁴⁵ 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/>.

⁴⁶ U.S. General Services Administration, *1122 Program Equipment and Supplies Catalog* (Feb. 2014) available at https://www.gsa.gov/cdnstatic/1122_CatalogFeb2014Finalv2.pdf

⁴⁷ 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

⁴⁸ *Homeland Security Grant Program*, *supra* note 4.

⁴⁹ Ackerman, *supra* note 4.

⁵⁰ McCartney et al., *supra* note 4.



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equipment, to police forces across the country.⁵¹ The Biden administration and Congress should curtail this flow of military equipment to local law enforcement by taking the following steps:

- **Freeze the 1033 and 1122 programs.** The Biden 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.
- **Codify legal restrictions on the 1033 and 1122 programs via congressional action.** There is clear bipartisan support for curtailing the flow of military equipment to law enforcement. In considering possible legislative action, Congress should look to Representative Hank Johnson's previously proposed legislation—The Stop Militarizing Law Enforcement Act—restricting the 1033 program as a model for the types of transfer restrictions and oversight measures it should work with Congress to enact.⁵² This legislation has already passed in the House of Representatives with bipartisan support as part of the George Floyd Justice in Policing Act.⁵³
- **Reform the Homeland Security Grant and Urban Area Security Initiative programs.** The 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. In addition, Congress should codify these provisions into law.

End the Military's Role in Immigration Enforcement

In 2018, the Trump 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.⁵⁴ The U.S. military’s presence at the border remains to this day.⁵⁵ Beyond politicization of the military, this action amounts to a direct militarization of immigration enforcement. It has unnecessarily kept military service members away

⁵¹ Barrett, *supra* note 39.

⁵² 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.

⁵³ George Floyd Justice in Policing Act, *supra* note 31.

⁵⁴ Shear, Gibbons-Neff, *supra* note 3.

⁵⁵ 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.com/2020/6/25/21303370/us-mexico-border-military-2020-immigration-coronavirus>.



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from their families and diverted funding and personnel from overseas missions, jeopardizing morale.⁵⁶ The Biden 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 Biden administration should pledge not to deploy active-duty military personnel for immigration enforcement purposes. The 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.⁵⁷ 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.⁵⁸ 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,⁵⁹ covering two-thirds of the American population.⁶⁰ The 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.
- **Stop the diversion of DoD funds to the southern border or for any other immigration enforcement purpose.** The Trump administration diverted to border wall construction over

⁵⁶ 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>.

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

⁵⁸ 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.*

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

⁶⁰ American Civil Liberties Union (ACLU), ACLU Factsheet, *Customs and Border Protection’s 100-Mile Rule* (2015) available at <https://www.aclu.org/other/aclu-factsheet-customs-and-border-protections-100-mile-zone?redirect=immigrants-rights/aclu-factsheet-customs-and-border-protections-100-mile-zone>.



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\$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.⁶¹ The diversion of DoD funds has drawn bipartisan Congressional criticism⁶² and should end. DHS has by far the largest budget of any federal law enforcement agency⁶³ 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 Biden 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. § 374,⁶⁴ which authorizes the Department of Defense to maintain and operate equipment to assist with immigration law enforcement, and 10 U.S.C. § 372,⁶⁵ 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 Trump administration issued a legal memo of questionable legality authorizing the military to use force against migrants at the border.⁶⁶ The Biden 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 repeatedly considered using DoD facilities to detain immigrants and unaccompanied children.⁶⁷ This idea is not new—the Obama administration briefly held roughly 7,700 unaccompanied children in military bases in 2014.⁶⁸ The military is not trained to, and should

⁶¹ Brakton 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>.

⁶² Cochrane, *supra* note 61.

⁶³ 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/>.

⁶⁴ 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>.

⁶⁵ 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>.

⁶⁶ 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/>.

⁶⁷ 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/>.

⁶⁸ 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.



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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.”



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Ending Endless War

Introduction

For 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,⁶⁹ and President Biden has repeatedly promised to end America's so-called "endless wars,"⁷⁰ beginning with drawing down forces in places like Afghanistan and Iraq.⁷¹ 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.⁷²

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.

⁶⁹ 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/>.

⁷⁰ 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/>.

⁷¹ 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>.

⁷² 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>.



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With a growing recognition of other pressing global challenges—from the devastation of climate change to great power competition—the Biden 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.⁷³

Recommendations

Repeal the 2001 and 2002 Use of Force Authorizations and, if Necessary, Replace the 2001 Authorization

The first step to ending endless wars is for Congress to repeal the 2001 and 2002 Authorizations for Use of Military Force (AUMF), and if necessary, replace the 2001 AUMF with a more narrowly tailored authorization. Successive administrations have relied on these legal authorities in 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.”⁷⁴ Nearly 20 years later, this AUMF has been used as the primary legal basis⁷⁵ for military operations against a number of different groups in at least 19 different countries around the world,⁷⁶ including against “associated forces” and “successor entities” of those responsible for the 9/11 attacks. Prior administrations have also claimed that the

⁷³ 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/>.

⁷⁴ 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>.

⁷⁵ 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/>.

⁷⁶ 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>.

2001 AUMF and the 2002 AUMF⁷⁷ (which authorized force against the Saddam Hussein regime in Iraq) provide authorization for using force against the Islamic State in Iraq and Syria (ISIS).⁷⁸ The Trump administration even went 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 2020.⁷⁹

In addition, President Biden 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.

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, wartime 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.⁸⁰ 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.⁸¹ These practices violate fundamental human rights protections against extrajudicial killing, detention without charge or trial, and fair trial guarantees.⁸²

To move away from endless war and towards a sustainable approach to security, lethal force should be used only as a last resort and in compliance with peacetime use of force standards.⁸³ Guantanamo should be closed, and

⁷⁷ 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>.

⁷⁸ 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.

⁷⁹ 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.

⁸⁰ 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/>.

⁸¹ 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/>.

⁸² *Id.*

⁸³ *Id.*

the use of indefinite detention and military commissions should be discarded in favor of utilizing the far more effective civilian courts.⁸⁴

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 nongovernmental 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 Biden 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.

⁸⁴ 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/>.

Include Essential Safeguards in Any Future AUMFs

Should Congress decide to pass a new AUMF, it should ensure that the authorization contains essential safeguards to prevent future abuse. Several safeguards have garnered bipartisan support⁸⁵ 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.⁸⁶

⁸⁵ 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-77759fc1eacc_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>.

⁸⁶ 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/>.

- **Setting an Expiration Date.** Sunset clauses, which have been included in nearly one-third of prior AUMFs⁸⁷ and several post-9/11 national security statutes,⁸⁸ 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.

Reform the War Powers Act

Congress should pursue several structural reforms 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. Many of these reforms were introduced as part of the bipartisan National Security 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 US 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

⁸⁷ 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/.

⁸⁸ Julian Hattem, *Obama signs NSA bill, renewing Patriot Act powers*, The Hill (Jun. 2, 2015) available at <http://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>.

- **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

Introduction

As the detention and trial facilities at Guantanamo Bay approach their 20th year of operations, the United States continues to detain 39 individuals, including ten men whose transfer has already been approved by the Department of Defense.⁸⁹ 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.⁹⁰ Moreover, the human rights abuses at Guantanamo have tarnished the United States' reputation as a global leader on human rights⁹¹ at a time when such leadership is being questioned more than ever. The most expensive prison in the world,⁹² the crumbling detention facility and ineffectual commissions have also cost American taxpayers more than \$7 billion dollars since opening in 2002.⁹³

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.⁹⁴ 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."⁹⁵ 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."⁹⁶ President Trump 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.⁹⁷

⁸⁹ Carol Rosenberg, *The Guantanamo Docket* (last updated July 19, 2021) available at <https://www.nytimes.com/2019/09/16/us/politics/quantanamo-bay-cost-prison.html>.

⁹⁰ 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-quantanamo-abu-ghraib/>.

⁹¹ Nick Gass, *Colin Powell: Gitmo was always closing*, Politico (Feb. 24, 2016) available at <http://www.politico.com/story/2016/02/colin-powell-quantanamo-bay-219739>.

⁹² Rosenberg, *supra* note Error! Bookmark not defined..

⁹³ *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-quantanamo.html>.

⁹⁴ 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-quantanamo>; 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-Quantanamo.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/GeneralsAdmiralslettertoHASCASC.pdf>.

⁹⁵ George W. Bush, *Decision Points*, p. 179-180 (2010).

⁹⁶ 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>.

⁹⁷ Baker, *supra* note 93.

President Biden expressed⁹⁸ his support for closing Guantanamo on the campaign trail and has begun reviving an effort to reduce the population of prisoners at Guantanamo by sending detainees to other countries. His administration transferred its first detainee in July 2021.⁹⁹

The Biden 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—twelve years ago. follows is a blueprint for how the Biden administration can take immediate action to close Guantanamo and end the military commissions.

End Indefinite Detention at Guantanamo

The Biden 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 thirty 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, he 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. Ten of the detainees at Guantanamo have already been approved for transfer by the Justice Department, Defense Department, State Department, Department of Homeland Security, Office

⁹⁸ Carol Rosenberg, *Biden Still Wants to Close Guantanamo Prison*, New York Times (June 27, 2020) available at <https://www.nytimes.com/2020/06/27/us/politics/biden-guantanamo-prison.html>.

⁹⁹ Carol Rosenberg, Biden is reviving an effort to move detainees out of Guantanamo Bay, New York Times (July 19, 2021), available at <https://www.nytimes.com/live/2021/07/19/us/politics-news#biden-is-reviving-an-effort-to-move-detainees-out-of-guantanamo-bay>.

of the Director of National Intelligence, and the Joint Chiefs of Staff.¹⁰⁰ 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 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.¹⁰¹
- 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.**¹⁰² 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.¹⁰³ 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.¹⁰⁴ 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;

¹⁰⁰ Carol Rosenberg, *The Guantanamo Docket*, New York Times (last updated July 19, 2021) available at <https://www.nytimes.com/2019/09/16/us/politics/guantanamo-bay-cost-prison.html>.

¹⁰¹ 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>.

¹⁰² 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/>.

¹⁰³ Periodic Review Secretariat, *Subsequent Full Review*, available at <https://www.prs.mil/Review-Information/Subsequent-Full-Review/>.

¹⁰⁴ *The Guantanamo Docket*, *supra* note 100.

- 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.

■ **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.¹⁰⁵ Following this decision, a judge recognized that Idris' physical and mental illnesses rendered him incapable of participating in terrorist or insurgent activities, and ordered him released.¹⁰⁶ 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.

¹⁰⁵ 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.com/2013/10/03/3667663/us-wont-fight-release-of-ill-prisoner.html>.

¹⁰⁶ 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>.

- **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.¹⁰⁷ 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 with were not war crimes at the time the conduct at issue occurred.¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰

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.¹¹¹

By contrast to the commissions’ tragic circus, U.S. federal courts have effectively prosecuted more than 900 terrorism suspects since 9/11, owing to clear rules and decades of precedent.¹¹² 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.¹¹³ 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.¹¹⁴

¹⁰⁷ 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>.

¹⁰⁸ *Id.*

¹⁰⁹ 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>.

¹¹⁰ 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>.

¹¹¹ 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/>.

¹¹² Trevor Aaronson, Margot Williams, *Trial and Error*, Intercept (last updated Jul. 15, 2020) available at <https://trial-and-terror.theintercept.com/>.

¹¹³ Human Rights First, *Identified Foreign Captures*, available at <http://www.humanrightsfirst.org/sites/default/files/Identified-Foreign-Captures.pdf>.

¹¹⁴ 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*

Given these stark facts, the 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.

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

Introduction

Minimizing and addressing civilian harm is critical on humanitarian grounds and as the basis for the success and legitimacy of American military operations.¹¹⁵ 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.”¹¹⁶ Civilian harm from U.S. strikes can fuel support for the opposition,¹¹⁷ impede assistance from allies and partners, tarnish the reputation of the United States as a leader on human rights,¹¹⁸ and set a dangerous precedent for other nations to follow.¹¹⁹ 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.”¹²⁰

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.¹²¹ 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).¹²² 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

¹¹⁵ 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>.

¹¹⁶ 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.

¹¹⁷ 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/>.

¹¹⁸ 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>.

¹¹⁹ 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/>.

¹²⁰ 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.

¹²¹ 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>.

¹²² 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/>.

responding to civilian harm across the Combatant Commands.¹²³ 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.¹²⁴ The Biden administration should make completion of this uniform policy a top priority and ensure that the policy meets the following requirements.

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

¹²³ 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>.

¹²⁴ 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/>.

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;
- **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.¹²⁵

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.
- **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

¹²⁵ 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>.

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 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 that design, implement, and monitor U.S. military partnerships.¹²⁶ 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

¹²⁶ 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>.

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. 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.
- **Be transparency 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.¹²⁷ 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.

¹²⁷ 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>.

- **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.

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.¹²⁸ 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.

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.¹²⁹ 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:

¹²⁸ 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>.

¹²⁹ 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-2020-03-NGO-recommendations-on-Ex-Gratia-Amends-for-DoD-Policy-March-2019.pdf>.

- **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.