

How Perpetual War Has Changed Us

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Reflections on the 20th
Anniversary of 9/11



Reiss Center on Law and Security

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Introduction

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Two decades have passed since the terrorist attacks of September 11, 2001. The United States has just ended the most enduring and concrete manifestation of the sprawling response to those attacks, completing its military withdrawal from Afghanistan. But after 20 years of ever-expanding conflict extending well beyond Afghanistan, a state of perpetual war has become a “new normal.”

Much of the American public cannot identify with whom the United States remains at war. Questions persist that go to the heart of how the United States conducts counterterrorism efforts in the post-9/11 era, and whether and how it will uphold the rule of law in so doing. Has the U.S. Congress authorized the armed conflicts the United States is fighting today, and what are the boundaries of these legal authorities? More fundamentally, is military force necessary to counter terrorism today, and if so, what should U.S. military engagement look like after the post-9/11 experiences in Iraq and Afghanistan? How should society deal with continuing radicalization to violent extremism, both domestically and abroad? And in designing policies to address current challenges, we cannot forget that the worst wounds created by the so-called “global war on terror” still fester: Why has there been no meaningful accountability for the most egregious abuses of the post-9/11 period, and what can be done now to address their legacies? How can we heal from the ways in which perpetual war has impacted American society at home and reshaped U.S. policy abroad? In concrete terms, what would a future without “forever war” look like?

In light of this critical inflection point, the Reiss Center on Law and Security and *Just Security* set out to provide an opportunity for leading thinkers and practitioners to reflect on many of these core issues. Amidst the multitude of remembrances and reflections that will surely mark

this solemn anniversary, we sought to focus on the legal and policy choices that, decades later, have created the new normal – one that was not inevitable, but which has profoundly reshaped the current state of security and rights. And we looked to the future of how forever war might end – and what will be left in its wake. The result was a weeklong symposium, published online in the days leading up to September 11, 2021.

We asked contributors to address issues such as the consequences of responding to terrorism in a war versus crime paradigm; how the war came home to the United States in terms of what a “forever war” footing meant for our domestic laws and institutions and for our social and political fabric; how the national security apparatus that was built after 9/11 affected different American communities, especially with respect to how surveillance and immigration policies affected communities of color; how civil society advocates responded to these challenges; and, finally, how perpetual war might come to an end, and what are the major unanswered questions for the future.

In this report, we have compiled that remarkable range of pieces: essays by scholars, civil society advocates, former senior government officials; authors with both personal stories and analytic expertise to provide at this historical juncture. It is our hope that these reflections can contribute to a fuller understanding of the past and the way ahead to the future in national security.

Five Principles to End the Forever War

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Two decades after 9/11, the United States remains locked in an accumulated set of intertangled counterterrorism conflicts across the Middle East and Africa: the Forever War. It's a struggle that President Joe Biden has pledged to end, and his early foreign policy decisions, most notably the U.S. withdrawal from Afghanistan, show that he is seriously committed to that objective. But in other locations across the Middle East and Africa, the United States is grappling with a seeming inertia toward endless military action. And the chaotic withdrawal from Afghanistan and domestic political backlash have raised questions among many foreign policy professionals as to whether we should actually draw down our military operations across the Middle East and Africa.

After 20 years of war with underwhelming results, ending the Forever War is a worthy goal. Yet ending the Forever War is a complex undertaking that will require disentangling the U.S. role in a set of overlapping conflicts and establishing a new set of legal and policy frameworks designed to constrain the use of force by the United States. It will demand that disengagement from key conflicts is done with care and competence to avoid producing greater instability. And it will require communicating the key efforts to end the conflict in an environment where Biden's political opponents are eager to use the downfall of Afghanistan, new terrorist threats, or other events that may arise as political cudgels. Having a clear set of guiding principles for ending the Forever War will help the administration to both build public support and motivate the professionals assigned to carry out this difficult process.

Ultimately, the Biden administration needs to define a new era, one in which militarized responses to irregular threats are a rarity, only conducted after exhausting all other options, and where terrorism is put in proper

context alongside other challenges. The goal should be to build a durable framework that greatly constrains the use of force, emphasizes civilian and partner responses, and makes the operations that do take place far smaller and more restrained than those that have predominated across the past two decades. Without clear standards for counterterrorism interventions and effective constraints on the use of force, the United States risks both stumbling into the fray when forbearance would be the wiser course and failing to intervene when action is actually appropriate. Ideally, Congress would be a partner in this goal, stepping up to fulfill its constitutional duty to decide when and where the nation must be at war. But the Biden administration has its own work to do, and despite the difficulty of the Afghanistan withdrawal, it can still diligently pursue a number of steps that could end America's longest conflict without compromising our security.

The Current State of Affairs: The persistence of terrorism and irregular warfare

When the Biden team took office, the critiques of the Forever War had become a familiar drumbeat: the United States has launched counterterrorism operations the world over, relying on an expansive interpretation of the 2001 and 2002 Authorizations for the Use of Military Force (AUMF), overstretched military forces, and unmanned drone aircraft to strike myriad terrorist threats that might emerge. In the process, trillions of dollars of taxpayer money and thousands of U.S. lives have been lost, millions of people abroad have been displaced and hundreds of thousands have died (directly or indirectly), and a vast swath from South Asia to the Sahel has been destabilized. Many conflicts of the Forever War are now waged with far less intensity than they once were, but U.S. forces continue to fight against al-Qaeda, ISIS, and their affiliates in at least a half dozen countries. While fewer U.S. forces and financial resources are dedicated to the fight than previously, there are clear and substantial opportunity costs. Simply put, the current form and degree of continued focus on terrorism diverts the attention of senior leaders from the nation's greatest threats, a dynamic of which our adversaries are all too aware.

The chaotic U.S. withdrawal from Afghanistan and the Taliban's rapid gains injected hesitation into the "end the Forever War" drumbeat and drew scorn from some of the conflict's biggest advocates, but in many ways, the recent events there have only reinforced why ending the Forever War should remain a top foreign policy priority. The Afghan government's rapid collapse suggested a fundamental futility in our years-long nation building efforts. The quick rout and surrender of Afghan security

forces – after the United States spent more than \$83 billion to train and equip them – suggested that even fully-resourced partnership capacity-building efforts may be for naught. And the ability of the Taliban to muster a competent 75,000-person fighting force after two decades of relentless bombing and ground operations suggests how military operations can fall far short of crippling an insurgency. Certainly there are lessons from the Afghanistan campaign that should be preserved for other conflicts, but the major U.S. efforts all failed miserably and in the process, raise profound doubts about our approach to counterterrorism.

What's more, while the Forever War is the compelling up-close problem, there is an even bigger challenge lurking: America's persistent, seemingly unavoidable tendency to get entangled in conflicts short of high-intensity war.

However much President Biden wants to focus on true existential foreign policy challenges, his docket will almost certainly be filled with a set of irregular conflicts and calls for military action. He must consider how the U.S. government will address concerns like transnational crime, state use of proxies, and calls for humanitarian interventions. Consider just some of the conflicts beyond the war on al-Qaeda and ISIS in which the Obama administration intervened: supporting the multinational campaign to overthrow Libyan president Muammar Qaddafi; deploying military advisors to support the hunt for Ugandan warlord Joseph Kony; sending Navy SEALs to confront pirates off the Horn of Africa; supporting the Saudi-led campaign against the Houthis in Yemen; and providing military support to counter-drug cartel operations in the Western Hemisphere. These are only the military operations President Obama approved. Top advisors also urged large-scale military intervention in Syria to stop Assad's use of chemical weapons against his population and other war crimes. Others urged him to take action to address mass atrocities and humanitarian crises in Sudan or to get more involved in UN peacekeeping missions. Military and intelligence officials urged him to do more militarily to counter Hezbollah and other Iran-linked groups.

President Trump was eager to claim anti-war credentials, but he too engaged in a number of military actions: twice launching cruise missiles against the Assad regime in response to its use of chemical weapons; ratcheting up the counter-ISIS campaign in Syria before ramping it down (before ramping aspects of it back up again); escalating operations in Somalia; deploying more special operations forces against terrorist groups; ordering an overt operation to kill Islamic Revolutionary Guard Corps-Quds Force commander Qassem Soleimani alongside an apparent covert operation to kill Iranian commander Abdul Reza Shahlai in Yemen; and a secret

cyberattack against Iranian intelligence defense systems. A review of any modern president's foreign policy record will be replete with instances of irregular warfare and military interventions short of war.

The Pathway Forward: New priorities, persistent questions, and institutional barriers

The good news is that the era of the Forever War as the central organizing principle of U.S. national security is already over. For U.S. foreign policy, COVID-19 and steady rising bipartisan concern over China and Russia in recent years have done what successive administrations were unable to – force the widespread recognition that, while terrorists continue to pose a threat that must be managed, the United States faces far greater challenges. Pandemic disease. Great power competition. Climate change. Cyber threats. Artificial intelligence and other new technologies. The militarization of space. The administration has already sent strong signals that these are its foreign policy priorities. For the first time in nearly a generation, every day is not September 12th.

But the Biden administration must now confront the uncomfortable reality that actually ending the Forever War raises as many questions as it answers. For one, what does it even mean – the end of long-term ground wars, particularly leaving Afghanistan, or more broadly stepping back from using military force as a default approach to confront terrorism? Should the United States leave some forces in Iraq? Should the United States continue to have some forces in Syria? Should it still be taking targeted strikes in Somalia? In Yemen? Should the U.S. military still conduct partnered operations with local forces, which can effectively share the burden but also pull the United States deeper into conflicts? Should the United States conduct strikes in defense of partner forces when U.S. personnel are not at risk?

Even if it de-emphasizes counterterrorism, the administration will still need to answer these and related questions. Further, the Biden team must grapple with these questions in the face of institutional forces – civil servants and the military officer corps – that are wary about the risks of ending longstanding operations or chafe at new limitations, and a media and punditry apparatus eager to sharp shoot every misstep and elevate every terrorist threat. And it must consider that its efforts to adjust its approach may face new congressional resistance if the president's party loses control of one or more chambers of Congress in the midterm elections.

Purposeful Reform: A set of principles for ending the Forever War

Irregular conflicts – whether related to terrorism or not – do not necessarily demand military responses. Savvy diplomacy, international cooperation, multilateral sanctions, law enforcement cooperation, tailored aid packages, and border security assistance are often more appropriate ways to achieve U.S. objectives, and these should be properly resourced and used as tools of first resort. Yet I don't believe that ending the Forever War should mean quickly terminating all counterterrorism operations, nor is that a likely outcome. Diplomacy and aid will at times fail or prove insufficient and Biden, or his successors, often operating under immense political pressure, will see use of force as necessary to disrupt an imminent terrorist attack or remove a top terrorist leader. But it's time to turn the page on the current approach and build a more sustainable strategy, one in which militarized responses are de-emphasized, terrorism is soberly considered alongside other threats, and effective oversight bounds our operations.

Five key principles, publicly articulated and contextualized around a larger strategy that moves beyond the Forever War, could guide the administration.

Principle 1 – Contract, don't expand. If we want to end the Forever War, the first principle should be to actually draw it down and resist temptation to grow what is already a sprawling campaign. This means holding a strong presumption against new counterterrorism missions, theaters, or groups. For example, the Biden team should look warily upon new pushes to deploy advisors to [Mozambique](#) and the [Democratic Republic of the Congo](#) absent overwhelming evidence that terrorists there threaten the United States in a direct, serious, and immediate way. It also means reducing the size and scope of existing missions in secondary theaters like the Sahel and Somalia and focusing on transitioning responsibility to our local partners as quickly as possible. U.S. military operations should be reserved for only the greatest threats to the United States and where alternative means of addressing the threat are unavailable. This is not a prescription for allowing a situation to get really bad before acting, as the United States did before ISIS seized Mosul in 2014. Rather, it means acting based on a fact-based evaluation of the threat, careful consideration of the risks of inaction, evaluation of alternatives to military action, and humility about what the U.S. military can accomplish. When considering irregular missions unrelated to terrorist threats against the United States, the presumption against using the military should be even higher.

The act of contracting needs to be comprehensive, and it requires taking a hard look at a global counterterrorism posture that is set up to defend against a threat but at times seems to actively seek one out. Does the United States need so many military task forces focused on counterterrorism? Does it need a persistent presence in Somalia or more than 500 troops and a drone base in the Sahel to combat groups that pose less of a threat to the United States than the core elements of ISIS and al-Qaeda? Does it need special operations forces active in more than 80 countries? The Pentagon is in the midst of a review asking some of these questions, and the new defense leadership should be ruthless in managing these force level and posture issues with the goal of drawing down our counterterrorism operations.

Posture reviews, whether conducted by the Pentagon or civilian agencies, should also carefully consider the U.S. government's risk calculus for counterterrorism deployments. On the one hand, the Trump administration relaxed the threshold for deploying U.S. counterterrorism forces, and several military personnel died in the process, including in circumstances where it was not clear that the military objective was worth the risk. At the same time, since at least the terrorist attack on Benghazi in 2012, the U.S. government has often tied its own hands by taking an overly cautious approach to deploying civilians. If the Biden administration prioritizes diplomacy and development in counterterrorism, it should consider how the U.S. military should be postured to support civilians in conflict zones and what additional resources the State Department and U.S. Agency for International Development might need to fulfill this vision.

Principle 2 – Emphasize, reform, and own partnerships. U.S. efforts to build partnership capacity are at a crossroads and in need of major re-evaluation. As the United States reduces its military presence abroad, it is essential that partners step up. Terrorism and other irregular threats are, by nature, the kind of challenges that require local knowledge and credibility. Local partners must be equally or even more committed to defeating them – or better yet, preventing their emergence – if combined efforts are to succeed. Burden sharing must be increased with European allies and regional partners as well.

At the same time, the U.S. record on counterterrorism partnerships is deeply disappointing. There have been successes, as with the coalition to defeat ISIS, which brought together more than 80 countries, both traditional allies and regional powers, and local forces all contributing what they could to roll back the threat. But in most places, partnership efforts have been under-resourced, over-militarized,

or unsustainable. The United States often provides its partners with high end gear that is greater than what they actually need, which is then only lightly used or they are unable to maintain. Capacity building efforts often focus on tactical commando forces and overlook the broader military or supporting institutions. Police training is carried out by Beltway contractors who hire current and former American cops of uneven quality. Few resources are typically dedicated to building the rule of law.

On the rare occasions when capacity building is well-resourced, as with Iraq before 2011 and Afghanistan, the United States has often built a replica of its own military, with heavy emphasis on airpower, extensive contractor support, and a reliance on U.S. advisors to support targeting and mission planning. All of this collapses absent strong and persistent U.S. presence.

Further, in the places where U.S. capacity building efforts have failed most miserably – Iraq, Afghanistan, Yemen – mistakes in capacity building were compounded by fundamental political problems within each partner country. Whether that’s corruption, state-sponsored abuses, or the failure to build an inclusive government, factors well beyond the military’s ability to shoot straight have often led to their defeat. In some cases, the United States ineptly managed these political dynamics or even fueled them instead of accepting how these political dynamics would undermine U.S. capacity building efforts and changing course accordingly. In other cases, the politics may have been beyond anything the United States could shape.

What’s needed is nothing short of a top-to-bottom review and reform of capacity-building efforts in security cooperation. The administration must be willing to use political capital – both within the executive branch and with Congress – so that it can shake up the massive, ossified, and broken security cooperation bureaucracy, and establish the governmental capabilities, resources, and programming agility to do capacity building well. The review should also rigorously evaluate the institutional circumstances that contributed to recent security assistance failures and use the lessons here to inform future security sector reform efforts and diplomatic strategies.

Further, the United States must manage its partnerships carefully, so that proxies and partners established to assume the lead on counterterrorism don’t end up sucking the United States deeper into conflict. It’s a difficult line to draw. Doing it right means getting a handle on the United States’ use of military surrogates and the authorities that enable those relationships, as well as evaluating the theaters, like Somalia and the Sahel, where advisory efforts evolved into extensive U.S. lethal military actions and more U.S. forces in harm’s way.

When the United States works through partners, it must treat their actions like U.S. actions. Too much of the counterterrorism campaign over the past two decades has involved moral compromises with dodgy partners to counter threats, without accountability. While this may have helped remove some terrorist leaders and slow the growth of some groups, it has also dramatically undermined U.S. credibility and fueled underlying grievances that enable terrorist recruitment. Consider Yemen, where Emirati counterterrorism partners stood up a series of prisons where unjust detention and torture have reportedly been commonplace. Washington simultaneously supported the Saudi-led campaign against the Houthis that has plunged the country into abject misery. In helping preserve this campaign and defending it, the United States compromised its own integrity and moral character in Yemen and other parts of the region. The answer is that the United States needs to demand more of its partners and take accountability when they go wrong.

Principle 3 – Play a strong defense and use force as a last resort. The United States has built robust defenses over the past two decades, investing hundreds of billions of dollars in law enforcement, intelligence, border security, infrastructure security, and international cooperation against terrorism. Yet, to observe the recent debate around the Afghanistan drawdown, some believe it’s inevitable (only a matter of time) before an Afghanistan-based al-Qaeda tries to strike the United States. Even if that is correct, we must begin to believe, and to understand, that it’s okay to play defense, to rely on our law enforcement professionals, intelligence community, international cooperation, or even armored airliner cockpit doors to prevent terrorist attacks. These capabilities have shown their ability to stop terrorism time and again since 9/11, and we should trust in the defenses and networks we have built to keep threats at bay.

Inevitably, there will be times when the United States must use force to stop threats to the country or to our people that cannot be disrupted in other ways. Yet the Biden administration must push back on what has too often been a rush toward militarism under the belief that if the United States doesn’t aggressively target every threat, its people will be endangered. The U.S. strike, earlier this year, on Iran-backed militias in Syria may be illustrative of the militaristic reflex. The United States is the most powerful nation in the world, with a broad range of foreign policy tools – diplomacy, intelligence cooperation, law enforcement, sanctions, aid – to incentivize or compel actions against terrorist groups and their sponsors. Could these resources have been better marshaled to prevent future attacks on U.S. forces in Iraq? And more broadly, can these tools be the first resort in addressing a range of threats? Absolutely.

The legal and policy threshold for using force is more complex when the threat is not to the United States, and the Biden administration will need to work through these scenarios as it reviews use of force policies. The administration may consider using force to stop mass atrocities, for example, though questions will inevitably abound as to what constitutes a mass atrocity or the complexities of engaging in a place like Syria where military force could hurt, not help, civilians caught in conflict. Similarly, the United States might take military action to halt a threat against an ally or partner, though consideration would need to be given as to whether that nation could take its own defensive action.

On those occasions when policymakers decide there is no alternative to the use of force, such operations must be conducted with the utmost care, discrimination, precision, and emphasis on preventing civilian casualties. In most situations, U.S. policy standards should be substantially higher than the baseline legal requirements under the law of armed conflict. The Obama administration put such a framework in place in the president's second term, with the [Presidential Policy Guidance](#) that governed drone strikes outside of hot warzones. That framework codified the need to exhaust all alternatives before using force, limited the scope of strikes, and mandated that strikes could be conducted only if there was "near certainty" that civilians would not be harmed. The Biden administration is [reportedly](#) nearing the completion of a review of its use of force policy. It should embrace the Obama framework's core principles of precision, discrimination, and restraint but go further in ensuring U.S. forces are meeting the guidance and that the guidance contributes to the overall goal of reduced use of force.

Principle 4 – Run a responsible, inclusive, and strategic decision-making process. After the calamitous decision-making of the Trump administration, in which major decisions were made with ad hoc teams of advisors and the National Security Council staff was gutted, a top priority for the new administration appears to be restoring a rigorous policy process. Yet this process should not just snap back to the Obama approach to counterterrorism. The administration needs a new process that begins with a realistic and updated assessment of the specific threat to the United States, risks to U.S. forces, the opportunity costs of using force compared to other national priorities, and the cost to foreign publics. Counterterrorism policy should be fully integrated with regional policy, and counterterrorism tools should be considered alongside humanitarian assistance, development, diplomacy, and other efforts aimed at conflict mitigation. Counterterrorism policy should consider the full range of approaches – such as terrorist financing, law enforcement, homeland

security, and countering violent extremism. Further, counterterrorism should take up less time on the docket of top policymakers – and with fewer overseas military operations, this is possible – so that senior leadership can focus more on the existential threats mentioned above.

Rigorous interagency policymaking should not come at the expense of empowering cabinet secretaries, however. In fact, while good interagency process will generally produce well-considered policy, it takes strong department leadership to actually implement. So while all relevant departments and agencies should shape counterterrorism policy, including guidance for the use of force, the Secretary of Defense and his senior civilian staff should be uniquely empowered – and expected – to implement the agreed-upon policy. This means providing effective oversight of military operations and ensuring that they meet the standards recommended by the cabinet and approved by the president.

Principle 5 – Ensure that operations are lawful and transparent. Finally, any military action that the United States takes, whether against terrorist groups or other irregular challenges, will only be as legitimate as the legal and political foundations on which it rests. This means that all operations should be grounded in a sound legal framework, a commitment to strong congressional oversight, and as much public transparency as possible, so that the nation can understand the fight being carried out in its name.

At a time when the public and Congress are increasingly wary of foreign wars, waging the fight through an expansive interpretation of executive authorities is neither sustainable nor wise. And following the Trump administration, where the executive branch trounced the legislative branch on a broad range of issues, it is now time to restore balance, particularly when it comes to the most fundamental of authorities, the power to wage war. The United States is now waging most of its counterterrorism operations under a 20-year-old force authorization, enacted quickly in response to the specific attacks of 9/11, at a time when the threat landscape, set of terrorist groups, and American psyche were far different than today.

It's time for an authorization that both imposes new limits and adjusts to the new strategic reality. At a minimum, this means Congress should follow through on the current bipartisan push to repeal the dead letter that is the 2002 Iraq war AUMF, and the administration work with Congress to create a new, far more limited version of the 2001 AUMF. These limits should include a time-bound sunset clause, so that Congress must periodically re-examine and re-authorize operations and possibly

dissuade the executive branch from the more expansive interpretations of the AUMF that can come without strong congressional oversight. It should include limitations on which enemy forces can be targeted, so that the administration cannot just declare a sprawling set of terrorist groups, associated forces, and successor forces as lawful targets for purposes of the AUMF. And it should provide some parameters — whether that’s a combination of reporting requirements, funding constraints, or restrictions on scale of efforts against enemy forces, or other measures — which work to ensure limited deployments don’t evolve into large-scale conflicts without explicit congressional authorization.

Congressional oversight should also be reinvigorated, with commitments from both the executive and legislative branches to ensure that Congress is concurrently briefed on operations and the basis for conducting them, has the opportunity to rein in operations that go beyond the bounds of congressional authorization, and can develop legislation allowing for greater public transparency. This role has never been more important, given that successive administrations have gutted the War Powers Resolution, stretched the AUMF to its breaking point, and at times treated congressional oversight as an afterthought. To see just how broken congressional oversight currently is, consider the 2019 strike on ISIS leader Abu Bakr al-Baghdadi, in which the White House notified some Republicans, but no Democrats, of the operation prior to it becoming public. Or the strike on Qassem Soleimani, where the Trump administration thumbed its nose at Congress by presenting a swirl of justifications for the action, none of them offered as the definitive explanation and each reportedly disconnected from the true decision-making calculus. Or even the strike this year against Iran-backed elements in Syria, where the administration presented a tenuous Constitution-based rationale for the action and briefed Congress at a staff level only immediately before the attack was conducted. This is not how it’s supposed to work.

As to the public, despite some admirable moves toward transparency over the past decade, much of the counterterrorism fight remains in the shadows. The American public deserves to understand the range of actions conducted in its name. Foreign publics in the countries where the United States conducts operations also need to understand the reason for the actions, the outcomes, and what the United States does to make condolence payments or reparations when things go wrong. Of course, there will always be some sensitive operational information that cannot be revealed publicly, but many of the justifications that have previously been offered to explain why the United States can’t be more transparent — that it couldn’t telegraph to terrorists its targeting standards, that transparency would compromise the special

operations forces and intelligence professionals central to our fight, that U.S. partners would never stand for it – have generally proven to be overstated. Within the U.S. federal bureaucracy, institutional interests in secrecy often tend to dominate – citing many of the reasons above – and a concerted push from senior leaders is required to meet broader commitments to transparency.

A more transparent approach to counterterrorism would begin by ensuring the military has the lead for lethal operations and can transparently discuss the results of specific operations, publicly explaining in a more convincing manner and with admissions where warranted why U.S. assessments of civilian casualties differ from those offered by human rights researchers, and providing comprehensive details on the legal and policy frameworks underpinning U.S. operations (as the Obama administration did in its waning days in office).

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Of course, principles are one thing. Actual decisions are quite another, as we have seen with the Afghanistan withdrawal. Similar quandaries will emerge in other regions. But in order to shore up support and encourage resilience at the outset, it is essential to articulate now a policy to end the Forever War, a set of principles for doing so, and a sustained public explanation for how adhering to these tenets will help the United States focus on bigger challenges. Absent such an intentional strategy, the administration may well find itself like its recent predecessors – sucked into endless war.

The Path Not Taken: Reimagining the Post-9/11 World

Rebecca Hamilton

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There was nothing necessary or inevitable about the U.S. government’s decision to respond to 9/11 through the lens of war. Instead, it could have treated the terrorist attacks as crimes and responded with criminal law. The many successful prosecutions of international terrorists in U.S. federal courts before and after 9/11 demonstrate the plausibility of such a counterfactual.

Had the United States used its criminal justice system to address the 9/11 attacks, such a response would have had its own challenges, and it is hard to say with certainty how the United States would have handled these. Still, exploring this counterfactual provides a useful lens into the policymaking considerations and potential consequences of an alternative approach.

The following fictional piece takes the prior prosecutions of international terrorists as a jumping off point for reimagining what the media coverage of this 20th anniversary might have looked like if the United States had treated 9/11 first and foremost as a crime, rather than responding with military action.

* * *

September 7, 2021

NEW YORK – The 16-year-old granddaughter of a New York City firefighter who was killed as the second World Trade Center tower collapsed on Sept. 11, 2001, stood at the front of a packed courtroom in the Southern District of New York earlier today. She was present at the sentencing hearing of a Saudi man, convicted on conspiracy charges related to the attacks that killed her grandfather. Though her voice wavered, the teenager looked at the convicted man directly as she presented her victim impact statement about the loss of a grandfather she had never met.

The court is just 15 minutes' walk from Ground Zero, where preparations are underway for the 20th anniversary commemorations of the attacks of Sept. 11, 2001. On Saturday, some of the same families who filled the courtroom this week will be gathering at the 9/11 Memorial Museum for the annual reading of the names of the nearly 3,000 people killed in the attacks.

For many Americans, the clear, blue sky morning of Sept. 11, 2001, feels like yesterday. In events that were previously unimaginable, 19 hijackers used four commercial airliners to launch the single deadliest terrorist attack on U.S. soil. In the years since, victim impact statements, like the one read in court this morning, have ensured that the legacy of harm inflicted on that day has remained central to decision-making over the fate of the surviving perpetrators. The influence of the voices of these 9/11 families is reflected in the number of al-Qaeda affiliates now serving life sentences in ADX Florence, the Bureau of Prisons SuperMax facility in Colorado, and in the death sentences handed down to the men who helped plan the attacks.

This anniversary, though, is also an opportunity to reflect on what the nation's response to the terrorist attacks has been over the last 20 years, beyond the individual outcomes in each trial. Despite overwhelming pressure to respond with force, the United States focused its energy on the courtroom. It demonstrated to the world that its criminal justice system is capable of prosecuting grave crimes in a manner that is fair, efficient, and effective. All of those complicit in the 9/11 attacks who have been prosecuted in federal courts have received trials that domestic and international experts have recognized as fair and consistent with respect for the rule of law.

Moreover, relying on broad conspiracy charges and material support statutes, interrogations by FBI specialists have unearthed detailed information on the ways in which al-Qaeda operates. This information, in addition to supporting the work of federal prosecutors, has helped foil future attacks planned by the terrorist organization.

Yet the way in which the United States has secured custody of some of these defendants has raised concerns among human rights groups. 9/11 co-conspirators located in allied nations were readily identified and brought into U.S. custody through existing extradition agreements. A number of suspects in other locations, however, have been subject to rendition, in some cases with the alleged involvement of U.S. Special Operations forces.

Human rights groups argue that these renditions have been unlawful, and defense counsel have sought to convince judges that this illegality prevents U.S. courts from exercising jurisdiction over the defendants. Federal prosecutors have responded in each case that they

satisfied criminal procedural rules in that there was no “unnecessary delay” before the defendant’s presentation before the court. To date, courts have accepted the government’s argument, allowing the cases to proceed.

Although information gained from the criminal defendants has been credited with preventing further terrorist attacks by al-Qaeda, the possibility of a future attack has continued to loom in the minds of U.S. intelligence officials.

“Al-Qaeda is no longer the major threat I think about when I wake up each morning,” said a senior intelligence officer, on condition of anonymity. “But they haven’t gone away either. Their hideouts in the hills of Afghanistan feel distant for now – I just hope that lasts.”

His comments reflect a broader debate that has surfaced on numerous occasions since 9/11 about whether the United States should have sought to “wipe out” al-Qaeda by force and attacked the governments that provided them safe haven. In the years immediately following the attacks, several members of Congress pushed for an invasion of Afghanistan to overthrow the Taliban. Others have since argued for military action that would not require American troops on the ground.

“The U.S. should develop a lethal drone program to target the 9/11 co-conspirators that we have failed to bring into custody,” a leading Senate Republican said earlier this week. “We could destroy the core of al-Qaeda without putting our service members in harm’s way.”

The suggestion of a drone program is not a new one. But in the absence of any further attacks, there has been little appetite for taxpayer dollars to go toward such a program. Recent polling shows most Americans prefer the government to prioritize immediate domestic needs in healthcare, employment, and education, after 18 months of living through a global pandemic.

This 20th anniversary is perhaps also a moment to reflect on the path not taken by the U.S. government in the wake of attacks that roiled the nation, and the world. History is replete with examples of nation states responding to violence with more violence. Had the United States put itself onto a war footing in the aftermath of 9/11, the nation we know today could well look very different. Those public officials who have supported the criminal law approach taken by the U.S. government say lives have been saved and American communities strengthened. Their 20th anniversary reflections, compiled by an independent think tank in Washington, D.C. earlier this week, are filled with questions meant to reaffirm the path taken:

“How many service members might we have lost if the United States had responded with the power of its military, instead of the power of its prosecutors?”

“How many trillions might have been devoted to defense spending at a time when a global economic recession and, now, a global pandemic, have posed existential threats to the health and well-being of ordinary Americans?”

“How would communities across the country have fared if instead of treating the 9/11 co-conspirators as criminals, we had instead defined them by their professed religious beliefs?”

As commemorations begin this weekend, the words from the victim impact statement, read with such poise in the courtroom this morning, are worth reflecting on:

“I had no control over the actions you took that led to my grandfather being taken from me, before I was even born. But I stand before you to tell you that you did not win. You will sit in a jail cell. And while you are there, I want you to know that alongside my family, my community, and my generation, I am working to build a world that is safe for everyone.”

* * *

Counterfactual narratives are notoriously subject to challenge. Had the U.S. government responded to 9/11 as a crime, one can imagine plenty of variations to the 20-year viewpoint offered above.

We can say with certainty that absent the war lens that followed 9/11, the estimated 7,000 U.S. service members and 8,000 contractors who have lost their lives in Iraq and Afghanistan – and the overwhelming, if contested, number of civilians – would not have been killed in those locations. We cannot say that, freed from the strain on military resources that those wars created, the United States would not have deployed these same people to Syria or elsewhere with consequences – perhaps better, perhaps worse – that are unknowable.

We can be sure that the estimated \$5.4 trillion in current dollars spent on appropriations connected to the War on Terror would have gone elsewhere. And likewise for the estimated \$7 billion spent on Guantanamo Bay. We cannot be certain that those dollars would have gone instead to say healthcare, education, or reducing our fiscal deficit. But it seems plausible to suggest that had the notion of what constitutes a “threat” to the American way of life been different, financial and human capital from the public and private sectors may have been reoriented accordingly.

We can posit, as President Barack Obama did, that absent the invasion of Iraq, there would have been no ISIS. And a careful counterfactual analysis undertaken by Hal Brands and Peter Feaver provides some confidence for this hypothesis. Yet that does not preclude the possibility that a different terrorist organization would have emerged, or that al-Qaeda would have continued to pose a significant threat.

What we can confidently assert is that the structure of the laws and institutions created to support and legitimize the war footing that the United States has placed itself on since 9/11 would be markedly different if we had responded to 9/11 as a crime. There would also have been a different narrative about what it means to be (or to be perceived as) Muslim and/or Arab in America, and how we understand America's role in the world. After 20 years, the United States is long overdue for such reflections, which will be critical for policymakers at future forks in the road.

In the “War on Terror,” What Did Rights Organizations Get Wrong?

Jameel Jaffer

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With the 20th anniversary of the September 2001 attacks approaching, and images of the United States’ withdrawal from Afghanistan dominating the news, many Americans are reflecting on these past two decades – on the 9/11 attacks themselves and their thousands of victims; on the ways in which our government responded to the attacks, and on the many lives affected or cut short by those responses; and on the disfiguration of our communities, society, and world by years of terrorism, counterterrorism, and war. In conversations over the next days and weeks, U.S. human rights organizations will draw attention to the human and democratic costs of some of the U.S. government’s post-9/11 policies. They’ll ask once again whether these policies serve (or served) our interests, and whether these policies are (or were) consistent with our law and values. This is exactly what human rights organizations should do, of course.

But this moment also provides an opportunity to look inward – a chance for human rights organizations to reassess the decisions they made, and the work they did, over the past two decades. This kind of institutional introspection might be difficult for a number of reasons. But asking – individually, organizationally, and as a human rights community – what we might have done differently, and what we got wrong, might help us understand how we need to change, and how we can be more effective in the future. This kind of critical self-reflection makes sense even if one believes, as I do, that American human rights organizations were extraordinarily fortunate to have the leaders they did, and that these organizations did a lot of work over the past two decades that was principled, tactically savvy, and effective.

* * *

I’ve been doing some of this kind of reflection myself. One of the human rights issues I spent a lot of time working on when I was at the ACLU had to do with interrogation policy. We filed lawsuits that compelled the government to release hundreds of documents relating to the maltreatment of men held in U.S. custody, and later we represented some of those men in lawsuits against the officials who had authorized their abuse and torture. Like our counterparts at other human rights organizations, we were also active participants in public debate about this issue. I’ve been thinking about one of the arguments we adopted as a frame for our efforts – an argument I’ve always associated with Senator John McCain.

Senator McCain was a particularly committed opponent of the Bush administration’s torture policies because of his experience as a prisoner of war in Vietnam. In the Senate and the press, he argued again and again that torturing prisoners was simply beneath the United States – that it was fundamentally inconsistent with American values. “Bob, could I just say – it’s not about them; it’s about us,” McCain said to Bob Schieffer on Face the Nation in 2014, after the Senate Intelligence Committee released the executive summary of its report on the CIA’s torture program. “It’s about us, what we were, what we are and what we – and what we should be.”

We adopted this frame at the ACLU, too. It seemed to resonate with people across the political spectrum. It had the effect of taking the focus off the prisoners who had been tortured, all of whom were dark-skinned foreigners with strange names and adherents of a religion unfamiliar to most Americans, and some of whom had been accused of terrible crimes, and it put the focus instead on American traditions and values – or on purported American traditions and values, some might say. It wasn’t a human rights argument, strictly speaking. At bottom it was an argument that one didn’t need to view the prisoners as entitled to human rights, or even as fully human, in order to conclude that the United States shouldn’t torture them.

I think human rights organizations were right to adopt this argument, especially because other arguments rarely seemed to convince anyone who wasn’t convinced already. Now I wonder, though, whether the emphasis we gave to this argument had costs we didn’t recognize at the time.

The debate about torture unfolded differently in the United States than it did in some other democracies. In other democratic countries, the debate centered around the experiences of specific people. In Canada, for example, a government commission led by a former Justice of the Supreme Court investigated the case of Maher Arar, a Canadian citizen whom the United States “rendered” to Syria, where he was tortured

for a year and imprisoned in a cell he likened to a grave. At the conclusion of the commission's inquiry, Arar received an apology from the Canadian prime minister as well as substantial compensation. Arar's story became common knowledge in Canada, as did the story of Omar Khadr, a Canadian citizen who was 15 years old when he was detained by the United States in Afghanistan and then imprisoned and tortured at Guantanamo. The Supreme Court of Canada held that Canadian interrogators violated Khadr's rights when they interrogated him in American custody.

In other democracies, too, men who suffered torture at the hands of American interrogators – or at the hands of their proxies – became something like household names. The “Tipton Three,” three British citizens who were held at Guantanamo, became a cause célèbre in the United Kingdom. The story of Binyam Mohamed, whom the United States rendered to Morocco for torture and then imprisoned without charge at Guantanamo for five years, also became well known in the United Kingdom, in part because the High Court of Justice considered an aspect of his case. Ahmed Agiza and Muhammad al-Zery, Egyptian nationals whom the United States rendered to Egypt, became a focus of public and press attention in Sweden, where the two had sought asylum before falling into the hands of the CIA. Khaled el-Masri, a German national whom the United States imprisoned and tortured in Afghanistan after mistaking him for someone else, received similar attention in Germany, in part because the European Court of Human Rights took up his case.

The debate in the United States, by contrast, seemed to be about everything except the experiences of specific victims. It was about statutory terms, constitutional provisions, farfetched hypotheticals, and competing accounts of our national character. The stories of specific people did sometimes seep in at the margins, but I doubt there are very many Americans, even today, who could name a person who was imprisoned in a CIA black site, or tortured at Guantanamo, or rendered by the United States to Syria or Morocco or Egypt – let alone tell his story.

It would be overstating things, I know, to attribute this entirely, or even principally, to human rights organizations' adoption of McCain's argument. The influence of human rights organizations is limited. Also, not every human rights organization gave a lot of emphasis to McCain's argument, and even the organizations that adopted it wholeheartedly made other arguments as well. Even as we employed McCain's argument, we tried very hard to tell the prisoners' stories in court, in Congress, in the press.

If Americans are unfamiliar with the stories of men who were tortured, it’s probably less because human rights organizations didn’t *tell* these stories than because the government took great efforts to *suppress* them – denying visas to former prisoners who wanted to meet with audiences in the United States, censoring transcripts of judicial proceedings, and declaring the prisoners’ memories of their torture to be classified, for example. Another contributing factor—perhaps the decisive one—was that courts and other accountability institutions in other democracies played their appointed roles, whereas their counterparts in the United States too often served as helpmeets to the “war on terror.”

Still, I can’t help but wonder whether human rights organizations’ insistence that the torture debate was “not about *them*,” – that is, not about the men whose human rights had been violated – might also have contributed to the distinctive way the torture debate unfolded in the United States. Every time we foregrounded McCain’s argument, after all, we substituted a debate about abstractions for a debate about prisoners’ specific experiences. Would we have felt comfortable doing this in any other context, if we were addressing any other human rights violation? Again, I don’t actually think it was a mistake for us to adopt the argument, in the circumstances. But is it possible that our decision to adopt it did something more than just bracket prisoners’ human rights – that it might have, even if only in a small way, contributed to their dehumanization as well?

* * *

The question of how some human rights organizations talked about torture is just one of many questions that could be asked about the decisions that human rights organizations made in the months and years after 9/11. Over the past two decades, these organizations made countless decisions about which issues to focus on, which cases to take on, how to allocate resources, whom to collaborate with, which arguments to deploy, whether and how to engage with government officials, and how to frame complex issues for the public. Some of those decisions involved questions of tactics – like the question of how to talk about torture – but others involved much larger questions of strategy, values, or purpose.

In his new book, [Reign of Terror](#), Spencer Ackerman writes about the war on terror’s “grotesque subtext” – the perception that nonwhites, and Muslims in particular, are “marauders from hostile foreign civilizations.” One question that might be asked of human rights advocates is whether we adequately addressed, or even fully appreciated, this subtext. I suppose another question that might be asked is what

it would have meant to appreciate or address it. Perhaps we would have spent less energy debating the finer points of the Foreign Intelligence Surveillance Act and Common Article 3, and more energy talking about the prejudices that connected the government's national security policies to one another? Or perhaps we should have relied more heavily on political and moral arguments, and less heavily on legal ones?

Others have questioned the role that human rights organizations may have played in "sanitizing" the war on terror. In the *New York Review of Books*, Samuel Moyn writes that human rights organizations made the war on terror marginally less brutal, but that making it less brutal also helped legitimate it. Jack Goldsmith has said essentially the same thing, albeit with satisfaction rather than dismay. Chase Madar made a related argument when he reviewed my book about the drone program, criticizing human rights organizations for failing to recognize that "the real function of the laws of armed conflict is not to restrain lethal force but to optimize its application." Were we wrong to focus on wartime abuses rather than on war itself? Were there ways in which our efforts to protect human rights served to entrench the war on terror, and even make it more possible for the U.S. government to extend it?

To acknowledge these (and other) critiques is not necessarily to agree with them. But it would be worthwhile for us to engage with them, and for us to ask, more broadly, whether, over the past 20 years, human rights advocates did what they came to do. For human rights organizations, effectiveness has many dimensions, including bearing witness, giving voice to victims, exposing abuses, preventing abuses, countering official narratives, creating a historical record, building coalitions, changing the law, and influencing government policy. Still, we wanted to be effective. Were we as effective as we could have been?

The Costs of 9/11's Suspicionless Surveillance: Suppressing Communities of Color and Political Dissent

Faiza Patel

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Domestic intelligence programs have grown inexorably since 9/11, born out of fear of terrorism and sustained by laws and policies that allow government agencies to amass more data about more Americans in an effort to ferret out the few who might do harm. Often these programs target Muslim communities in the United States, treating them as inherently suspect because of their faith. The same domestic intelligence programs and authorities have provided ready tools for suppressing political dissent and racial justice movements, which are viewed as threatening the existing sociopolitical order.

As we mark two decades since these changes became part of the legal landscape, it is time to rethink whether the nation is well served by a domestic intelligence system that can so easily be diverted from legitimate purposes. While the current structure may seem firmly entrenched after 20 years, it is not immune to reform. In fact, the existing system is itself a departure from the framework created in the 1970s to correct serious abuses. It can and must be reformed.

America's Dark Domestic Surveillance History

The evolution of two federal agencies – the Federal Bureau of Investigation (FBI) and the National Security Agency (NSA) – shows how expansive domestic surveillance has become the norm. In the 1970s, the Church Committee's investigation documented how these agencies (and others) had abused the trust of the American people to spy on ordinary Americans, such as those protesting against the Vietnam War and the leaders of the civil rights movement.

These findings reshaped the work of the FBI. While the committee's recommendation to establish a statutory framework for the Bureau was preempted by the issuance of internal guidelines by then-Attorney General Edward Levi, the rules he issued incorporated many of the Church Committee's recommendations. Most importantly, they required that "domestic security investigations be tied closely with the detection of crime" and incorporated "safeguards against investigations of activities that are merely troublesome or unpopular."

As for the NSA, in response to the Church Committee's investigation, Congress subjected the NSA's domestic surveillance programs to case-by-case judicial review by creating the Foreign Intelligence Surveillance Court (FISC). For the government to conduct surveillance on Americans, it had to convince the FISC that its primary purpose was to collect foreign intelligence and that it had probable cause to believe that the target of surveillance was an agent of a foreign power and had some link to criminal activity.

While by no means without flaws and blind spots, these reforms recognized the risks of domestic spying, placing firm constraints based on criminal suspicion which served to protect Americans' ability to speak and organize freely.

The Post-9/11 Domestic Surveillance System

Since 9/11, however, these strictures and the practices they generated have been rolled back and the abuses they were meant to prevent proliferated, teaching us once again why we need stricter limits on domestic intelligence.

I have previously written about how after 9/11, the Justice Department progressively loosened the FBI's guidelines for investigations to allow agents to open investigations absent suspicion of criminal activity and with minimal supervisory controls. This allowed for racial, ethnic, and religious profiling, including of Muslims, Chinese Americans, and racial justice protesters. To this day, the FBI continues to treat Muslims as suspicious and warranting surveillance even where there is no indication of criminal or terrorist activity – a trend spanning both Republican and Democratic administrations. It has tried to "map" Muslim communities and keep tabs on Muslims' lawful speech and religious observance by infiltrating mosques. The threat of immigration consequences is dangled to recruit Muslims to spy on their friends and neighbors. American Muslims traveling home from overseas trips are subjected to intrusive questioning about their faith, the mosques they attend,

and even their views on particular religious scholars. These practices are not an aberration. While the Justice Department has issued guidelines that purport to ban profiling on the basis of race, religion and ethnicity, it still allows for consideration of those characteristics in certain national security and border investigations.

In the aftermath of 9/11, the NSA has followed a similarly problematic path. It has spied on Americans without actual suspicion. Using an extraordinarily broad interpretation of Section 215 of the Patriot Act blessed by the FISC, the agency accumulated the phone records of millions of Americans. Once the extent of the program became public knowledge, Congress acted to limit its reach in 2015. But Congress has continued to allow the NSA to maintain President George W. Bush's warrantless wiretapping program. Section 702 of the FISA Amendments Act, which passed in 2008, allows the NSA to collect hundreds of millions of electronic communications each year. While the surveillance must be targeted at foreigners overseas, massive amounts of Americans' emails, phone calls, and text messages are scooped up in the process. The FISC has no role in reviewing whether this collection is justified; it is relegated to reviewing the NSA's rules for the program. Indeed, collecting foreign intelligence doesn't even need to be the "primary" purpose of collection; the government only needs to certify that acquisition of foreign intelligence is a significant purpose of the overall program. Despite the broad leeway afforded by the law, the government has consistently failed to follow rules meant to minimize its collection of purely domestic communications and remedy Fourth Amendment violations as directed by the FISC.

Information about Americans warrantlessly collected by the NSA under Section 702 can be accessed by the FBI for use in purely domestic criminal investigations. After years of advocacy by civil society, Congress imposed some modest requirements on these backdoor searches. The Bureau must follow "querying procedures" approved by the FISC; obtain an individualized order from the FISC for reviewing communications in cases that don't relate to national security; and keep track of each U.S. person query it conducts. The FBI, however, has not complied with even these minimal requirements, preferring to freely avail itself of the fruits of warrantless surveillance.

While little is publicly known about who is targeted by these programs, the NSA too has often trained its sights on Muslims. Documents revealed by NSA whistleblower Edward Snowden show that the FISC authorized surveillance of five Muslim men all of whom had led highly public, outwardly exemplary lives. They included Faisal Gill, a military lawyer who served as a high-level official in the White House and the

Department of Homeland Security under President Bush; Asim Ghaffoor, another attorney and former Congressional staffer who represented Muslim clients; Agha Saeed, a Muslim activist and organizer; Nihad Awad, the co-founder and leader of the Council of American Islamic Relations, the country's largest Muslim civil rights organization; and Hooshang Amirahmadi, a professor who advocated against sanctions on Iran. While it is possible that the government happened to have information suggesting these men were involved in criminal activities, a more likely explanation is the overall suspicion of Muslims that is the hallmark of the post-9/11 era.

The expansive post-9/11 notion of “homeland security” – manifested most concretely in the creation of the Department of Homeland Security (DHS) – underpins suspicionless surveillance. DHS itself, “as part of its regular operations, conducts invasive physical searches of millions of Americans and their belongings each week without any predicate.” These programs, according to the former general counsel of the agency, raise such serious privacy and due process concerns that those raised by homeland security information collection by the NSA “pale by comparison.”

The fusion center network supported by DHS is yet another fount of domestic intelligence. Police departments' reports of supposedly “suspicious activity” are shared with a range of federal, state, local, and tribal law enforcement officials through these centers. According to a two-year-long, bipartisan Senate investigation published in 2012, fusion centers have yielded few counterterrorism benefits, instead producing shoddy reports consisting of “predominantly useless information.” Often, the reports singled out Muslims engaged in normal activities for suspicion: a DHS officer flagged as suspicious a seminar on marriage held at a mosque, while a north Texas fusion center advised keeping an eye out for Muslim civil liberties groups and sympathetic individuals and organizations.

Political movements, too, especially those powered by people of color, are often viewed as threats, and the domestic intelligence infrastructure created in the last decades has been turned against them. The FBI, DHS, and local police have spied on the Black Lives Matter movement, immigration activists, and environmental campaigners. As I have previously explained:

In a move reminiscent of the J. Edgar Hoover era, the Bureau has racial justice protesters in its crosshairs. As early as 2015, the Department of Homeland Security monitored the social media posts of Black Lives Matter activists. Just nine days before the deadly 2017 white supremacist rally in Charlottesville, the FBI issued a report conjuring up a “Black Identity Extremist movement” out of a handful of unrelated acts of violence and warned law enforcement agencies across the country of the threat posed by Black activists protesting police violence.

As for immigration activists, DHS officers in New York kept track of protests against then-President Donald Trump’s anti-immigrant agenda through Facebook. They worked with other federal agencies and the Mexican government to create a surveillance target list of activists and lawyers suspected of supporting a migrant caravan heading north from Central America. A private security company provided local and federal law enforcement agencies with “daily intelligence updates” on the Standing Rock Sioux’s protests against the Dakota Access Pipeline. And most recently, last year, Trump and then-Attorney General Barr repeatedly tried to brand the nationwide racial justice protests triggered by the killing of George Floyd at the hands of Minneapolis police as the handiwork of “Antifa” domestic terrorists.

Anniversaries provide a time to reflect and reset. The rules were changed after 9/11. In light of the record of the last decades, we can no longer hide from how turning to a domestic intelligence collection system untethered from criminal suspicion has facilitated the targeting of communities of color and political dissent. The system must change again to curb the domestic surveillance infrastructure.

The Forever War on the Homefront

Heather Aliano

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Our military has been at war for 20 years. My husband has served for all 20 of them. We began our military family journey with optimism, pride, and a fighting spirit, but none of us truly knew what it would be like to serve in a wartime military. It's only after enduring the worst of a never-ending war, the constant demand to push harder, and the stigma attached to not always being in fighting form that our enthusiasm has been weakened. The last 20 years of war have taken our country's most patriotic public servants and ground them down into dust.

While there is much talk today about the tragic end of the war in Afghanistan and turning the page, the demand on our troops is far from over. There is no clear end in sight, and with threats that persist around the world, there will be hard decisions to be made at all levels of leadership. Military families have lived with the direct impact of “forever wars” for 20 years and will continue to do so for a lifetime. War is not something you can take off and hang up like an old hat. It takes up residence within you.

War Has Become a Constant Companion in Our Home

Three years ago, my husband, an active-duty airman, returned home from a six-month deployment. I stood at the airport, six children in tow, dressed to the nines with colorful signs in hand despite the midnight arrival time. The flight was delayed, and we were the only people in the terminal for a long time. Shortly before the plane landed, two other airmen arrived to stand with us (and take those cheerful homecoming photos everyone loves to see). That was his welcome committee—an anxious wife, six overtired children, and two airmen he barely knew.

I had known this deployment felt different – his calls home were stilted, and he often sounded tired. I didn't realize that this chapter of the war was not over for him when he stepped off the plane. It came home, too, and the tug-o-war battle between wartime trauma and the challenge of resuming a "normal" life was brewing within him.

A week or two after homecoming, we met up with some of the civilian friends I had made while he was gone for a celebratory lunch. As politicians, they had their thoughts and philosophies around war, the defense budget, and the use of violence rather than diplomacy. They asked the standard questions and made the standard assumptions.

Have you killed anyone? You knew what you were signing up for. Why would you do it?

At that moment, he just shrugged his shoulders and said, "Well, that's the job." When we got back into the car, settling into the new silence that accompanied his new personality, he turned to me and shared that his performance review from the deployment credited him for more than 3,200 kills.

I don't remember how I reacted at the moment. I am sure I tried to keep an air of cool indifference. In my mind, I was reeling. 3,200 – that's more people than houses in my neighborhood. 3,200 is more people than were killed on September 11th. 3,200 works out to be more than 500 kills a month. Three thousand two hundred people dead wasn't, and still isn't, fathomable to me.

The answers to the questions are also standard. "That's the job. We did not know what we signed up for. Sometimes I don't understand why we do it."

"We Didn't Know What We Signed Up For"

My husband enlisted in the military in September 2001, before the World Trade Center attack. Secure Families Initiative succinctly explains how everything changed for us that week: three days after the 9/11 attacks, Congress voted nearly unanimously to give President George W. Bush far-reaching powers to wage war against the perpetrators of those attacks. Because Congress didn't yet know who the perpetrators were, the language was left intentionally vague. No geographic boundaries or sunset provisions were included. This resolution, the 2001 Authorization for Use of Military Force (AUMF), a subsequent war authorization

to invade Iraq, and expansive interpretations of each, opened the doors to ongoing military action in countries around the globe against numerous enemies not named in the original authorizations, without further Congressional approval, or the knowledge and support from the American people. In the last 20 years, they have been used to justify force in at least 41 operations in 19 countries across the Middle East and Africa.

In the aftermath of 9/11, my husband was asked again and again, “*Are you still going to go?*” But of course he was still going to go. He made a commitment, was itching to get out of the small town he lived in his entire life, and didn’t really feel like he had much of an option otherwise. Early on, the job was fun. He had friends and loved the camaraderie among service members. He volunteered for extra duty, collecting a shelf full of metal eagles as awards and bolstering his performance reviews. He was promoted quickly, finished his degree, and was commissioned as an officer. All the while, he participated in the war, leaving our family more than 22 times – over 850 days – to serve in 15 countries across six continents.

A Highlight Reel of Death

After his last deployment, the one with 3,200 kills, he was not the same young, idealistic airman that left. Everything after that deployment became filtered through a lens of trauma. War just never left him. He developed intense anxiety, leading to heart palpitations and many trips to the emergency room when he thought perhaps he was having a heart attack or maybe a stroke. His anxiety led his hands to itch and itch and scratch until his legs were covered in bloody scabs. His intense emotions led to the end of our adoption journey, when the anxiety caused us to tell our social workers that they needed to find another adoptive family for our sweet babies. He’d tell stories of the deaths he watched, the times where he saw people commit terrible acts before they were “eliminated,” and he’d reach for a drink to numb those emotions. I’ve spent more nights than I can count worried that the reactivity, the paranoia, feeling of inadequacy, and uncertainty are becoming too much for him to handle. I fear that war will still take him in the end, even though he got off that plane safe and physically whole.

When he finally went to ask for help, he told the counselor that he didn’t understand how he could possibly have PTSD if he wasn’t the one on the ground who actually committed these acts. He was safe the whole time, sitting in a dark room, surrounded by what equates to the Sports Center of war. He got to see all of the highlights. There

wasn't time between kills to breathe fresh air, or walk out the tension. He didn't pull the trigger 3,200 times, but he watched each target, following them, witnessing their crimes, and making it possible for the mission to succeed.

He participated in war, and troops all over our country are participating in war every day, without ever leaving home. Maybe American civilians don't know we continue to be at war – at least before the withdrawal from Afghanistan this summer, and even then not beyond that battlefield – because war itself has changed. Technological advances allow our military to fly drones rather than engage on foot, monitor war activities in safe rooms, mount cyber attacks rather than ground attacks, and make decisions on action more quickly than ever before as information is fed back to leadership without a time delay. All of these things are supposed to make war “better”, with some even claiming they will reduce PTSD and harm to our troops. However, a new report from Brown University's Cost of War Project puts a magnifying glass on this issue. “An estimated 7,057 service members have died during military operations since 9/11, while suicides among active duty personnel and veterans of those conflicts have reached 30,177 – that's more than four times as many.” Significantly, the researchers found this trend was true regardless of whether troops had seen or engaged with combat on the ground.

Many pundits and political leaders are framing the withdrawal from Afghanistan as a messy “end” to a forever war. Those people – many of whom have never put on a uniform or witnessed the aftermath of war in their own home – are more optimistic than I am. I do not see an “end” to the forever war, abroad or at home. Not only because the latest news of Taliban control of most of Afghanistan will almost certainly exacerbate feelings of despair by those who sacrificed so much in that country, but even beyond Afghanistan, many service members don't expect the demand for their time, energy, and sacrifice to “sundown” along with that mission. As Afghanistan ends, other endless conflicts rage on in other parts of the world.

Ending the War at Home

We have an opportunity to continue this conversation and make meaningful change, but we will only be able to do that if we can overcome the divisiveness that permeates our national security and diplomacy efforts to work with people who think, vote, and believe differently than us. As I learned from the One America Movement, our toxicity makes it impossible to make progress on the issues that

matter. We cannot wait any longer for our public servants to come together and make meaningful changes to how we engage in war and care for our families on the homefront, or to address the visible and invisible wounds they will carry with them for the rest of their lives.

What do I hope we take away from the ongoing tragedies we're witnessing in Afghanistan? To never again paint revenge with a broad brush, neglect the physical and mental health of our service members and their families, and send our service members into harm's way toward futile ends again and again until they break. My family is proud of our service, and if given the chance to do it all over, I am sure my husband would sign his name on the dotted line even knowing what was in store for him. But future generations deserve better. We have to realize war is fought not just overseas, but is ever present for our military families on the homefront.

The Legacy of 9/11: Counterintelligence and Counterterrorism Spotlights and Blind Spots

Asha Rangappa

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One of the recurring patterns of the U.S. intelligence community's response to emerging threats is that it is often reactionary. Being caught unaware of the urgency of a new danger results in a pendulum swing: creating new priorities, policies, and procedures to correct those gaps. This is to be expected. After all, intelligence agencies – while designed to respond rapidly to discrete events – are, policy-wise, bureaucracies that are like large, slow-moving ships. Turning them around can take some time and effort, but once they face a new direction, they can barrel full speed ahead. Our multi-decade response to 9/11 is a classic example of both the resilience of the intelligence community even after a massive failure, but also how this reactionary approach set us up to repeat the cycle of missing other emerging threats over the horizon – particularly with Russia and domestic terrorism.

In its [report](#), the 9/11 Commission concluded that the successful arrest and prosecution of the perpetrators of the first bombing of the World Trade Center in 1993 “had the side effect of obscuring the need to examine the character and extent of the new threat facing the United States.” In particular, the FBI's focus on its reactive, law enforcement function – which resulted in tangible and visible credit to the agency and specific field offices – took precedence over forward-looking counterintelligence and counterterrorism efforts, which had fewer immediate returns. For the CIA, the end of the Cold War led to significant budget cuts after 1992 – the report [notes](#) that in 1995, for example, the agency hired

only 25 new officers. Without the unifying focus of the Cold War, the CIA's mission seemed unclear and adrift; the Commission observed that the CIA found it difficult to adapt to a world without a clear adversary, and that its Cold War resources were either unable to be prudently reallocated or were diluted among too many different priorities.

John Sipher, a 25-year veteran CIA officer who served in Moscow, notes that the disconnect was also rooted in administration priorities. "Among the national security agencies, the CIA is immediately responsive to the needs and interests of the White House," Sipher emphasizes. "The lack of interest in foreign policy for much of the Clinton Administration left the Agency to make do as best it could. It tried to anticipate policymaker interest by reading tea leaves – not the best way to provide tailored intelligence."

The events of 9/11 changed all of this. The FBI, for its part, bore the brunt of the 9/11 Commission's criticisms but, thanks to the leadership of then-Director Robert S. Mueller III, avoided having its intelligence function severed from its law enforcement one. Along with legislative changes like the USA PATRIOT Act which made it easier to engage in foreign intelligence surveillance, increased funding for hiring new agents, and awarding "stats" for field offices pursuing terrorism related cases, the Bureau made immediate, if incremental, progress toward a comprehensive and consistent counterterrorism effort across its 56 field offices. (One particularly emblematic expression of this shift was in the ongoing case simulation at Quantico, which at the time was a bank robbery investigation – my new agent class was one of the first to work on a terrorism angle incorporated into the scenario.) Similarly, the CIA had clearer intelligence collection priorities following 9/11, and increased its intelligence sharing through coordination by the newly-created Director of National Intelligence.

To be sure, the intense focus on preventing another terror attack on American soil was effective in thwarting many plots in motion. From the 2002 arrest of Jose Padilla, who planned to build and detonate a dirty bomb, to the disruption in 2009 of an al-Qaeda plot to bomb the New York City subway, there is no doubt that the intelligence community learned many of the tragic lessons outlined in the 9/11 Commission Report and acted to ensure they never happened again. But this pendulum swing, while necessary, also went too far in several respects, legally and morally, including the warrantless surveillance of Americans (over the early objections of the Justice Department) under STELLAR WIND and the use of enhanced interrogation techniques (including torture) on prisoners at Guantanamo and Abu Ghraib.

These excesses were ultimately exposed and generally corrected, but the longer term consequence of the constant government and media focus on preventing another 9/11 is that it blinded us to two of the major threats which currently pose an existential threat to democracy.

The first is Russia. The end of the Cold War, and the belief that we had “won,” obscured the growing threat posed by Moscow and even made it easier for the Kremlin to operate inside the United States. Even after the arrest of 10 Russian “illegals” in 2010 – spies operating without diplomatic cover – the threat from Russia was treated as a punchline, rather than a serious threat. Case in point: After Mitt Romney identified Russia, not al-Qaeda, as the biggest geopolitical foe to the United States, then-President Barack Obama launched a zinger at the 2012 presidential debate: “The 1980s are now calling to ask for their foreign policy back.”

More importantly, this posture shaped the public’s perception of what constituted a foreign “threat” to the homeland. To wit: If it wasn’t connected to the Middle East, and involving explosions and dead bodies, it wasn’t really dangerous. This outlook came to haunt the United States in 2016, when evidence of Russia’s disinformation operation in the presidential election came to light. It became apparent that, at least for some people, Russia’s interference only mattered if it ended up affecting the final vote. The lack of evidence that it did so (something that would be difficult to prove, since Russia’s effort was ultimately a psychological operation) resulted in ambivalence and partisanship over the level of response required. Consider, by contrast, how even unsuccessful terrorist attempts which resulted in no casualties, like Richard Reid’s failed “shoe bomb,” led to onerous security measures in airports – ones that are still in place, over a decade later. What’s more, in the years that followed the Russian military intelligence’s 2016 attack on the United States, Americans identifying with President Donald Trump’s party increasingly warmed toward Putin and believed Russia was less of a critical threat. The basis for that outcome was laid before Trump stepped into office in part because the U.S. government had not oriented itself or the American public toward understanding the true nature of the danger posed by Russia.

This myopic focus on Islamic terrorism also eclipsed the growing threat of white nationalist terrorism and militia movements in the United States. If there was a missed through-line from the 1993 World Trade Center bombing to 9/11, there was another one between Oklahoma City and January 6. As Professor Kathleen Belew, a leading expert on white nationalism, has written, the declaration of war by the far

right on the U.S. government reached its pinnacle in 1995 with the bombing of the Alfred P. Murrah federal building, and presaged the goals of the movement today. For a brief moment, at least, the “face” of terrorism was represented by Timothy McVeigh, who at that point was the perpetrator of the worst mass casualty event on American soil since Pearl Harbor. But as Belew also carefully documents, it was not understood how McVeigh connected up with the white power movement at the time.

After 9/11, the popular imagination was transfixed by Osama bin Laden and his transnational network, as government resources shifted decisively toward foreign terrorism. We should question whether the intelligence failure preceding January 6 was caused, at least in part, by the fact that the people in attendance didn’t “look” like terrorists or what one counterterrorism expert referred to as the “invisible obvious” in which decision-makers and analysts failed to see the threat from people who looked like them. (This last point also mirrors another post 9/11 issue: The intelligence gaps created by a lack of diversity in our intelligence community.)

Fortunately, we have slowly come to terms with these new threats from Moscow and from within. In the previous Congress, the Senate Select Committee on Intelligence investigated and prepared a five-volume bipartisan report on Russian active measures and 2016 election interference, and the Office of the Director of National Intelligence provided a comprehensive intelligence assessment on foreign interference in the 2020 election to the President and Congress on January 7, 2020 and to the public on March 15, 2020. On the domestic terrorism front, last June the National Security Council issued its National Strategy for Countering Domestic Terrorism, which includes many of the measures taken in the post-9/11 context, including enhancing information sharing among agencies and increasing resources to investigate, prosecute, and track domestic terrorism. Also like after 9/11, Congress has now undertaken its own investigation through its bipartisan select committee looking into the events leading up to January 6, and the Justice Department is at least vigorously pursuing the foot soldiers.

Twenty years after 9/11, we can be sure that U.S. policies, priorities, and resources will rise to meet the new challenges we face on foreign and domestic fronts. But, it is worth noting that we are once again responding from a reactionary posture to two of those major threats, suggesting that there are still lessons to be learned from the way the United States bounced back 20 years ago. For one, we need to ensure that the pendulum swing does not overcorrect, as it did with countering Islamic terrorism, to justify illegitimate and unlawful means to an end. We must also remember that as large as these current threats loom now, they won’t last forever and may even evolve or be eclipsed by others. Hopefully the next time around, we won’t miss the warnings.

How to Responsibly End Three Key Rights-Abusing Post-9/11 Policies

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As we approach the 20th commemoration of the Sept. 11, 2001 attacks and a collective assessment of what followed, the humanitarian situation in Afghanistan and the massive scale of civilian suffering there dominates the airwaves. If you've followed the history of America's longest war and its impact on Afghan civilians, [Shaharзад Akbar's words](#) resonate forcefully when she says that international forces leave behind "an uncertain future for my country," and, critically, "a legacy of impunity that threatens to undermine hopes for peace and justice in Afghanistan for years to come." She rightly asks the United States and its allies to hold themselves to account because "[i]n the many long years of 'forever war' for Afghans, the rights of civilian victims of the conflict have never been a priority."

Failure to apply that lesson – meaningful acknowledgement of human rights harms caused by war-based policies, and the need for accountability not impunity – is an all-too-familiar hallmark of the last 20 years. Ms. Akbar's lesson also needs to be applied to other post-9/11 U.S. actions that in recent years may have seemed less visible to many Americans, even as they have destroyed the lives, privacy, and security of primarily Brown, Black, and Muslim communities at home and around the world. Otherwise, those ongoing actions and their impacts, too, will even further undermine human security.

To that end, one year ago, two of us [wrote](#) of the 20th anniversary of 9/11:

A president addressing the nation on such a solemn occasion should be able to tell the American people not only that there has been a modicum of justice for the attacks, but also that American leaders have dismantled and corrected the architecture that has, for most of the past two decades, made true justice impossible – and caused so much harm to so many people at home and abroad.

We and colleagues in the U.S. human rights community set out plans and benchmarks for durably and responsibly ending three of the post-9/11 era's most enduring abuses, by ending indefinite military detention and unfair trials at the Guantanamo military prison; reckoning with state-sanctioned U.S. torture; and ending our government's program of secretive, unlawful, and unaccountable killings that take place even outside of recognized armed conflicts.

We are still not where we need to be, though the Biden administration has set high expectations.

Matching Actions to Aspirations

In his first foreign policy address at the State Department, President Joe Biden described as the country's "grounding wire" the values of "upholding universal rights, respecting the rule of law, and treating every person with dignity." He spoke of a "commitment to truth, transparency, and accountability," and stressed the importance of racial equity and justice. The following week the administration announced its intention to close Guantanamo. In March, the *New York Times* reported the administration had secretly imposed temporary limits on lethal strikes outside recognized war zones while it reviewed their legal and policy framework. In June, the president strongly reaffirmed "the United States' unequivocal ban on torture and opposition to all forms of inhumane treatment," declaring that the United States "must never again resort to its use."

But much remains to be done to narrow the gulf between aspirations and reality. That work is urgent. Another year – or 10 or 20 years – from now, we should not be looking back at the U.S. withdrawal from Afghanistan as marking a new phase of the same sorts of abuses, facilitated by the same legal and policy architecture that fueled them for the previous 20 years.

Responsibly Ending Indefinite Detention and Unfair Trials at Guantanamo

Twenty years of abuse and injustice are at the heart of the still-open prison at Guantanamo. Last year, we wrote that "[p]ursuing justice for the September 11, 2001 attacks became immediately complicated when the government subjected the accused to torture and detained them on an island that was meant to be outside the law." Today, 39 of the 40 men held captive at Guantanamo when Biden took office

remain, and his administration still can't bring itself to agree that fundamental due process rights apply to the Muslim prisoners there. That failure was sadly of a piece with two decades of wrong-headed executive branch lawyering, which has focused on defending expansive executive power claims – for example to indefinitely detain, or surveil, or use lethal force – and rejecting legal claims seeking the application of even basic rights safeguards. In 2021, it's a self-defeating strategic policy choice to treat the Due Process Clause as optional at Guantanamo, when acceptance of it would help the executive branch resolve years of military detention without charge or trial. On Sept. 30, the administration can correct its position and do the right thing in court.

The Biden administration also needs to recognize that there never has been, and never will be, a way to unwind Guantanamo closure from the ongoing impact of torture. The military commissions demonstrate why: the Bush administration's turn to "the dark side," combined with his and successive executive branch efforts to cloak those abuses in secrecy and still-unfair rules, ensured the novel war court system's failure. Most recently, in a desperate attempt to rescue commission trials, prosecutors attempted to lawyer around U.S. antitorture obligations by resorting to the use of torture-derived evidence. Although the administration has taken a couple of steps toward a course-correction, again, in 2021, merely taking steps to abide by the torture prohibition falls disgracefully short. The fixes are not hard.

Relatedly, Biden should also fully declassify the CIA torture program, finally allowing sunshine to disinfect a rot that continues to spread. His Defense Secretary, Lloyd Austin, and Attorney General, Merrick Garland, must align their departments with the president's policies and pledges, including adopting a blanket prohibition on using torture evidence – anytime, anywhere. It's the least the administration can do after two decades of executive branch efforts to prevent judicial accountability for torture – which the courts shamefully and virtually always upheld. And the administration should take full advantage of the opportunity it was given, when the Trump administration handed over for completion an internal review of U.S. interrogation practices, to ratchet up safeguards against a return to torture.

The United States has fallen far in its post-9/11 policies and failure to ensure accountability for their abuses, but with swift and decisive action a measure of justice and accountability is salvageable. Biden should now make unmistakably clear that he expects all relevant administration officials to work diligently and without delay to end indefinite military detention at Guantanamo, prioritizing transfer of men who have been cleared – some for years.

To resolve the myriad failures of the military commissions system, prosecutors should take the death penalty off the table, consistent with Biden's campaign pledge to work to end the death penalty and Attorney General Garland's initial step of suspending federal executions. They should start talking seriously to detainee defense counsel about possible plea deals. And the Justice and Defense Departments should engage deeply with 9/11 family members to help ensure that the accountability process produces at least some measure of the transparency they have long sought.

Closing Guantanamo responsibly is not only necessary, it's also possible.

Responsibly Ending Secretive and Unaccountable Lethal Strikes

Abuses and impunity also characterize the ongoing program of lethal strikes outside of the war zones of the last 20 years, like Afghanistan, Iraq, and Syria. The program, which began when President Bush authorized a 2002 strike in Yemen, has since killed and injured at least many hundreds of civilians in multiple countries, displaced entire communities, caused lasting psychological harms – and led to or perpetuated conflicts. Drone and air strikes in Yemen and Somalia have killed and injured elderly women and young children, while destroying livelihoods. Civilians harmed by CIA or military strikes in each impacted country have repeatedly asked for acknowledgement and justice, but received virtually none, even in the rare cases where the United States admits to causing the civilian deaths and injuries.

When Biden took interim measures to roll back Obama- and Trump-era policies, he raised hopes that this extrajudicial killing program could finally end. But with the review ongoing and no results announced, the U.S. resumed drone strikes in Somalia under a novel – and virtually limitless – theory of “collective self-defense” of allies.

It's not entirely clear how the situation in Afghanistan will impact the Biden administration's longer-term policy-making as opposed to its immediate responses to crisis events. Biden has repeatedly emphasized “over the horizon” capability to launch future strikes and stressed that the United States is conducting “effective counterterrorism missions against terrorist groups in multiple countries where we don't have permanent military presence” – which may be a response to political pressures and criticisms, but it is no answer to the human rights, legal, and strategic costs of the lethal strikes program in those countries.

For that reason, it was especially problematic to see a *New York Times* report that the Biden administration was poised to announce a continuation of the lethal strikes program, possibly around the 9/11 anniversary. According to the *Times*, the fall of President Ashraf Ghani's government has rendered the administration's plan for strikes in Afghanistan obsolete, and the administration is considering what to do there, before putting the overall lethal strikes policy in place. The Biden policy would apparently combine elements of the Obama and Trump era approaches – which seem to boil down to different approval levels for strikes in different countries – in essence, tinkering with the bureaucracy of death, rather than ending extrajudicial killing.

If the Biden administration is tempted to continue this program, it would do well to reflect, again and deeply, on recent history. Biden's predecessors justified their program of secretive and unaccountable killings with a patchwork of made-up and shifting legal and policy rationales that sought to maintain executive branch flexibility but which Congress has not authorized and which violate international human rights law safeguards and protections against unlawful use of extraterritorial force. In response to criticism and controversy, the Obama administration developed its Presidential Policy Guidance in 2013, imposing some constraints on use of force outside what it termed "areas of active hostilities." In doing so, it entrenched the lethal strikes program. The Trump administration then showed how easily executive branch norms and constraints could be cast aside, as President Trump authorized dramatically increased lethal operations with changes to the Obama rules that did away with key attempts at safeguards, and even took the country to the brink of war with Iran.

The lessons of American history – both of the last two decades and longer – are starkly apparent for anyone willing to look at them objectively. They include that our system of checks and balances when it comes to war powers is broken and must be recalibrated because it's still far too easy for the United States to get into and continue conflicts – with all of their human rights, liberties, and rule of law costs – than it is to responsibly get out of them. Another lesson our country must grapple with is one Ms. Akbar and so many human rights leaders at home and around the world call out: we have largely failed to provide meaningful accountability – whether through the courts, or Congressional oversight – for the myriad abuses committed in the name of our national security and rhetorical or actual wars. And the ongoing harsh and tragic reality is that the victims and survivors of our militarized foreign policy are largely Brown, Black, and Muslim communities, exacerbating structural racism and divides.

Applying those lessons, in June, more than 100 groups representing diverse perspectives – human rights, racial, social, and environmental justice, as well as veterans’, humanitarian, and faith-based groups – called on the Biden administration to end the program of lethal strikes outside of “recognized battlefields” for good. The 9/11 commemoration is “an opportunity to abandon this war-based approach and chart a new path forward that promotes and respects our collective human security,” their letter said. That new path means, as a first priority, disavowing and ending the policy of killing terrorism suspects outside of recognized armed conflicts. The administration should also specifically end the CIA’s covert use of lethal strikes, including in armed conflict situations, given the long record of an utter lack of any meaningful oversight or accountability. It should disclose still-secret legal analysis and policy standards for use of lethal force outside of armed conflict, and affirm that it will comply with international human rights law and the law of armed conflict, as well as constitutional limits on the use of war powers.

Reversing 20 years of war-based and rights-violating policies may not be easy, but it has to be done if the Biden administration is to follow through on its promises. There’s more public support – and far less opposition – to end these policies and abuses than debates among Washington policy makers often make it seem. Perhaps that’s because even in our polarized times, a significant majority of Americans are tired of perpetual conflicts and abuses, and hope that policy makers understand that our collective human security depends on new, rights-promoting ways forward.

Immigration Policy Before and After 9/11: From the INS to DHS – Where Did We Go Wrong?

Camille J. Mackler

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Immigration policy, like so many other facets of American life, has been indelibly altered since the 9/11 terror attacks, forever linking how the United States approaches migration to homeland security. The chain of events set into motion that day led to a fundamental shift in the immigration narrative – re-framing it as both a risk to and a tool of U.S. national security efforts. Using the legislative momentum provoked by the attacks, and the newly created Department of Homeland Security as a way to achieve long-standing immigration reform goals, policymakers have made choices over the last 20 years that have forever transformed the national dialogue on how the United States welcomes – or not – those who choose to come to its shores. But by ignoring lessons of the past 80 years of immigration processes, the United States is right where it started – with an overburdened, unwieldy immigration system that runs counter to its economic needs, cultural growth and, ultimately, its national values.

The Pre-9/11 World of Immigration Policy

For decades, the Immigration and Naturalization Service (INS) – the precursor to the Department of Homeland Security (DHS) – was the black sheep of the executive branch. A small agency tasked with administering and enforcing the nation’s immigration laws, it had been jostled around – from the Department of Labor to, eventually, the Department of Justice – with no clear idea of where it best fit. Chronically underfunded and under-resourced, INS was, much like the topic of immigration itself, perplexing to numerous sessions of Congress and White House administrations, none of which knew exactly where it belonged or what to do with it.

In the 1990s, the contours of the immigration debate began sharpening. In line with the decade's "War on Drugs" and "tough on crime" policies, immigration became increasingly punitive and criminalized. The broad mandate of INS – which served as both adjudicator and enforcer of immigration laws – got in the way of the increasing fixation on criminal enforcement.

The Post-9/11 World of Immigration Policy

After the terror attacks of Sept. 11, 2001 – perpetrated by non-citizens who used the immigration system for their terrible purposes – U.S. government structures underwent a seismic change, ultimately leading to the creation of a brand new agency: DHS. This massive overhaul of the executive branch provided the Bush administration with another solution to fix the chronic lack of funding and support that had plagued INS for far too long – problems that were blamed in large part for the 9/11 attacks. By restructuring government agencies, the Bush administration was also able to refocus U.S. immigration policy. The Department of Justice retained the immigration court system. All other immigration functions were brought into the newly created DHS, including not only the role INS had played, but also the Customs component, which was relocated from the Treasury Department.

The creation of DHS irrevocably set the country on a path that made immigration enforcement a matter of national security and justified treating migrants as dangers to the homeland. Although the blurring of lines between immigration and criminal law had begun years before DHS opened its doors – when President Bill Clinton signed the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) – the establishment of DHS after 9/11 escalated this adversarial approach to immigration. IIRIRA transformed the immigration system into the punitive, quasi-criminal system it is today. But it was the post-9/11 creation of DHS that opened the door to the dark policies of the recent past – mass detention of asylum seekers, deportations that tear communities apart, and large investments in private detention complexes.

I have been an immigration attorney and advocate for over fifteen years. But in 2003, I was just starting that journey. I began law school the same year DHS opened its doors, and got my first job in immigration law less than a year later. As I learned and grew as an immigration lawyer, I saw the slow erosion of the previous approaches to immigration adjudication in favor of more punitive philosophies. Government prosecutors, now employees of DHS, slowly stopped offering immigration benefits

to those who clearly qualified, in favor of attempting to deport as many individuals as possible. Interpretation of immigration law, which had always favored the government, now included new obstacles to obtaining legal status. Bureaucratic processes became more convoluted and opaque.

At the same time, DHS grew in influence and size. It now includes 24 sub-agencies, such as U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), the Transportation Safety Administration (TSA), the Federal Emergency Management Agency (FEMA), and the Coast Guard. More importantly, its law enforcement budget has at times dwarfed the budgets of all other federal law enforcement agencies combined.

What Went Wrong: Insights from Former Government Employees

Over the last three years, as the Trump Administration pushed the immigration enforcement purview of the DHS to previously unseen levels, I've interviewed immigration advocates and current DHS employees – all of whom had started their careers in the legacy agencies including Customs and INS – to get their perspectives on where the United States went wrong in attempting to reform INS and creating DHS. Many of them still work in, or have returned to, government service and shared their observations on condition of anonymity. As a result, I have aggregated and summarized their points for this article.

Overall, the former agency employees of the precursors to DHS all agreed on a few key points: the system, as it is currently set up, is not functional and must be streamlined.

Everyone generally agreed that INS was an underfunded and under-resourced agency that was never fully empowered to fulfill its mission. In their view, that mission itself seemed fundamentally conflicted, with the agency being in charge of simultaneously granting immigration status, prosecuting violators of immigration law, and effectuating deportation orders. The leadership of the field offices could be filled by individuals performing any of those disparate and at times conflicting functions. This meant that various local offices may have different policies depending on whether they were led by someone who rose through adjudications and had spent their career granting immigration status, or someone coming from enforcement who had spent their career seeking out those who had violated the laws.

According to these former government employees, Deportation Officers at INS, or DOs for short, were jokingly referred to as “Desk Officers” because their division’s work was largely administrative paperwork, a stark contrast to the militant law enforcement culture that permeates that division’s successor – Immigration and Customs Enforcement (ICE). Those sub-agencies with the more overt law-enforcement mandates complained that the culture was set by the Border Patrol, with everything from priorities to weapons being determined by agents whose jobs were, and still is, to patrol land borders. Border Patrol, more than any other agency with purview over immigration issues, has had a long and problematic history that is tied more closely to some of the worst aspects of law enforcement. The agency purchases military-grade (and sometimes military-used) equipment that seems excessive at best, including M-4 guns with silencers, night vision goggles, and armored vehicles. Its agents also have a well-established track record of abuse and neglect of those in their custody. Yet its leadership is reported to have a large influence in decision-making spaces, within both legacy INS and, more recently, DHS.

The former government employees also observed that in the effort to reform these deficiencies in the wake of the 9/11 terror attacks, immigration policy became overtaken by a law enforcement and exclusionary mentality. While the creation of DHS ultimately addressed the breakdowns in communication between various parts of government that contributed to the intelligence failures that led to the attacks, it also generated other challenges. Congress fueled the growth of immigration enforcement mechanisms by allowing enforcement and detention budgets to balloon in size, which contributed to DHS’s dysfunction. The various congressional committees that previously had jurisdiction over the different predecessor agencies would not give up their control, resulting in fractured oversight of DHS, which continues to this day. This promotes distrust and rivalry among the various sub-agencies of DHS. At the same time, the work of sub-agencies that had up until that point been mainly administrative became ultra-politicized in the wake of the intensified focus on counterterrorism and under the glare of the growing 24-hour news cycle.

No DHS sub-agency exemplifies this dramatic shift more than CBP, which blended legacy Customs, an agency with no immigration function housed within the Treasury Department; Inspections, a sub-agency of INS which had been tasked with confirming that individuals entering the United States had the appropriate paperwork; and Border Patrol, which had operated, and still operates, in a quasi-military manner patrolling land borders. CBP’s mission today is ostensibly to

protect the homeland from threats from abroad, but it has had an outsized focus on individual travelers, at the expense of efforts to intercept narcotics, criminal organizations, and terrorist groups as a whole. Both the impetus and the result of this singular focus on individuals are a political narrative that portrays immigrants as an inherent danger to the United States. This narrative permeates both news coverage and, increasingly, internal agency culture. More and more DHS employees, including CBP agents and ICE prosecutors, are viewing their role as keeping immigrants out, instead of offering an impartial assessment of whether the law permits them to stay.

While CBP exemplifies the politicization and ultimate subversion of its core mission for immigration policy purposes, other sub-agencies of DHS have been subject to the same whims. Under the previous administration, a focus on Latin American gangs, notoriously MS-13, transformed ICE into a criminal law enforcement agency and helped further anti-immigrant rhetoric by closely aligning border policy with the fearsome gang. Ultimately, all of the other immigration-related sub-agencies in DHS suffer from the same fundamental flaw – they operate with missions that are too broad, too ill-defined and too vulnerable to political whims.

The Path Forward

As the United States marks the 20th anniversary of the terror attacks, and rapidly moves toward the 20th anniversary of the Department of Homeland Security, the time seems right for an evaluation and course correction. The United States must learn from the mistakes made in creating DHS by restructuring it and its accountability mechanisms as follows:

- First and foremost, Congress should streamline oversight of the various sub-agencies within DHS and bring DHS under the jurisdiction of one congressional committee.
- Second, as Congress exercises its authority over DHS, it should divide various functions of DHS to better separate immigration and national security. Border Patrol and ICE should perform their administrative law enforcement functions separately from CBP's and Homeland Security Investigations' broader criminal law enforcement activities. For example, investigations of individuals traveling to the United States from abroad who are potentially part of larger criminal networks should be kept separate from the daily processing of travelers to the United States.

- Finally, the Biden administration should work with Congress to clearly define the missions of each sub-agency within DHS to avoid making them vulnerable to political whims. For example, national security efforts should include immigration law and procedures as tools, but not make their enforcement the end goal. Migrants arriving at the border in search of help should be met by USCIS officers to adjudicate their asylum claims and agencies better trained in working with vulnerable populations, such as the Office for Refugee Resettlement (ORR) and FEMA.

Over the past 20 years, we have seen the harmful trajectory U.S. immigration policy has taken as DHS has blurred the lines between immigration enforcement and national security. But a close examination of previous policies shows that the reforms that were already long overdue on Sept. 11, 2001, have yet to happen. It's not too late to set DHS on the right path to ensure that it embodies the nation's values and protects the country.

Human Rights Advocacy and the Institutionalization of U.S. “Counterterrorism” Policies Since 9/11

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Anniversaries are complex moments. Pausing to reflect on the events of 9/11 compels us to recall the lives lost, the harms experienced, and the long personal and communal shadows that these losses left on the United States and the [93 other countries](#) who count their nationals among the dead. We are equally required on this 20th anniversary to account for the responses to the horror of that day. The legal, political, military, and economic reactions to the attacks on the Twin Towers and the Pentagon have spanned the globe and they continue to the present. This reflection pauses to contemplate the human rights response to 9/11 and the legacy of counterterrorism free from human rights constraint.

September 11 spawned a new era of perpetual warfare, and the efforts of ugly disengagement from that war footing continue today in Afghanistan and beyond. The immediate aftermath of the attacks was defined by a collective moment of global condemnation and solidarity. The day after the attack with the pall of smoke and ash setting over New York, the U.N. Security Council gathered and [declared](#) international terrorism a threat to peace and security. Before the end of September 2001, a sweeping and powerful Chapter VII [resolution 1373](#) was [adopted](#) by the Council. This legislative resolution created precise and defined obligations for member States of the United Nations to thwart and prevent terrorism, void terrorism financing, protect borders, and hold terrorists accountable for the acts they had

perpetrated. It also established a new powerful architecture of counterterrorism within the United Nations, with the creation of the Counter-Terrorism Committee and its implementing body the Counter-Terrorism Executive Directorate.

In the absence of an agreed definition of terrorism underpinning all of this expansion, these institutional and normative tectonic shifts had more than a hint of *dolos* to them: terrorism was everywhere and nowhere, it was to be defined by States, and could be everything and nothing. Part of the story for the next 20 years is the consolidation and expansion of this architecture and these norms with the seepage of counterterrorism to sustain securitization, facilitate authoritarianism, weaken the rule of law, and undermine democracies in truly every corner of the globe.

As these new organizing structures of global, regional, and national counterterrorism were becoming embedded, the U.S. response to the events of 9/11 was marked by a tsunami of violent and systematic human rights abuses. To the international community, President George W. Bush declared, “Either you are with us or you are with the terrorists.” As the nomenclature of a “global war on terror” was adopted and mainstreamed, torture memos were produced, torture was widely and egregiously practiced, individuals were rendered across borders, a detention camp was established in Guantanamo Bay, Cuba, military commissions were established, surveillance expanded and ethnic and religious profiling was magnified, and the assault on civil liberties and human rights righteously led by the United States appeared to be comprehensive and unstoppable.

With the value of hindsight, two patterns appear obvious to me now. The first is the extraordinary fortitude of some human rights advocates in the United States who continued – despite the costs of confrontation at that moment, when “rallying around the flag” was the demanded response – to try to vindicate the fundamental rights to life, to freedom from torture, and to a fair trial, and to rally against abductions and legal black holes. In parallel, one can see how long it took for that civil liberties response to mobilize more broadly, and how difficult it was to gain traction and cross from contestation to successful challenge. That time gap was the product of the uncommon cost of the terrorist attacks on the fabric of civic and legal life, a readjustment factor that is well-known to those of us who have lived in societies experiencing sustained violence for a long time. As many commentators have observed, the shift from a Bush to Obama administration had less fundamental effect than some had expected on the nature and form of waging of a “war on terror” even if that particular nomenclature was abandoned.

It is also clear now, as we look back 20 years later, that in many ways domestic legal and political success in challenging the fundamentals of the “war on terror” was limited. Some measures of those limitations include the continued operation of the legal black hole that is the detention facility at Guantanamo Bay, Cuba where 39 men remain detained, the vast majority of whom have never been charged with any crime; the failure to rescind the USA Patriot Act; the ongoing, largely untrammelled surveillance of ordinary citizens and the collection of vast amounts of metadata justified by security rationales that are rooted in the post-9/11 datafication of counterterrorism practice; the de facto amnesties (and in some cases promotions) provided to those who had committed, ordered, and enabled systematic torture; the regularization of drone strikes across multiple conflict sites institutionalizing what many human rights experts consider extrajudicial execution under the fiction of a rational executive. All of these practices reveal only a fraction of the human and human rights costs of normalized U.S. counterterrorism policy post 9/11.

I also observe that as time moved further away from the cataclysmic moments of 9/11, the interest of the general American public and civil society more broadly in calling out and naming costs and insidious harms that followed from the “war on terror” waned. One might have expected the opposite – that the public would be less tolerant of rights infringements and of emergency powers after the shock and trauma of 9/11 receded in time. Doing human rights work in the context of counterterrorism is never easy. Those who defend rights, including the rights of those who transgress societal norms through the most deplorable violence, are often seen as “fellow-travelers” of terrorism rather than defenders of essential values in democratic societies. There were few human rights wins post 9/11, and many civil liberties organizations struggled to maintain funding and support to continue engagement on defending human rights in counterterrorism contexts. There is also a plain truth that many organizations grew tired of this work – the uphill battle to undo the normalization of securitization is not sexy, and it has few allies, particularly when security sector and political stakeholders of various stripes are aligned on the value of counterterrorism. And the road ahead may become even more uphill: There is a very uncomfortable reality that as the United States now turns away in its foreign policy focus from counterterrorism to great power competition, there is less and less hope that the structural problems of normalized counterterrorism will be undone, and will rather become part of the arsenal of “doing law and order” at home.

Meanwhile, the rest of the world was taking note, learning the lesson that the language of counterterrorism was enabling, legitimizing, and accepted. In this way, the architecture created and supported by the United States starting in 2001 paved the way for an unfolding global expansion of counterterrorism. The result of that growth has been the stifling of human rights, the choking of civil society, and the weakening of the rule of law on every continent. It is not by accident that counterterrorism regulation has expanded and deepened across the globe in the past 20 years, with tranches of national legalization efforts which are broad, imprecise, and highly opaque on what precisely constitutes terrorism. In this vein, defending women's rights has been defined as terrorism, arguing for the protection of the environment is terrorism, pro-democracy movements are terrorists, humanitarian protection supports terrorists, and civil society actors are engaged in terrorism when they call their governments to account.

Twenty years of an enabling and permissive environment on terrorism regulation has created a permissive and enabling ecosystem in which the invocation of the word “terrorism” has been sufficient to justify government overreach and retaliation in most regions of the globe. In this highly challenging global environment – a distinct legacy of the export of the “war on terror” – civil society advocates continue to do their work in the most difficult of circumstances, naming the misuse and abuse of counterterrorism. Many of them are imprisoned, threatened, harassed, and even killed for calling out such abuses.

Still, it states the obvious that 20 years on from 9/11, there are real terrorist threats to be addressed – but the terminology of terrorism itself has become cheapened by systemic abuse and misuse. And so, where do we go now?

The answer lies in a genuine reckoning on the use and abuse of counterterrorism measures and institutions. It would require at the national level, starting in the United States, a commitment to “dealing with the past,” setting aside the convenient pact of forgetting about the systematic human rights abuses that followed the tragedy of 9/11, holding perpetrators accountable in meaningful ways, and sending a much needed global signal that counterterrorism measures are not a convenient cover for war crimes, crimes against humanity, and systematic violations of human rights. It would require the United States to take a cold hard look at the legacy it has bequeathed to the world in the form of enabling counterterrorism measures that neither counteract terrorism nor protect society. Globally, a good place to start would be reform of the work of the United Nations Counter-Terrorism Committee

and the Counter-Terrorism Executive Directorate to ensure that States cannot use counterterrorism as a chimera to systematically violate human rights and undo the rule of law. Another essential step is for States to commit to adequate funding and independent oversight of the U.N.’s counterterrorism architecture to ensure that counterterrorism is effective, human rights compliant, and not impinging or undermining the core work of the organization. In parallel, this would send a strong signal to member States that independent and human rights-based oversight of counterterrorism is essential to prevent the scale of misuse that we have seen normalized and accepted over the past two decades. More than anything else, 20 years on from 9/11 we need less counterterrorism and severely pruned back institutions, practices, and norms. Post 9/11 counterterrorism has, in many respects, not been delivering security, and has certainly not protected the rights and dignity of those who need it most in countries where violence and harm require complex, difficult, and long-term solutions. Undoing this legacy of 9/11 is not easy, and it would be easy to pretend it is unnecessary. But some exports should be recalled, and the human rights-free export of counterterrorism is not a 9/11 legacy the United States should want to preserve.

There Is a Way to Close Guantanamo

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Note: The views expressed by the author do not reflect the views of the Department of Defense, the United States Government, or any agency or instrumentality thereof.

As the Biden administration labors to shape a post-endless war American existence and to reassert U.S. leadership on issues like human rights and respect for the rule of law, it must also end the vestigial policies of the past two decades of war that undermine that mission. Indefinite law of war detention at Guantanamo Bay is one of those policies. Just as President Joe Biden said that he would not pass on the war in Afghanistan to a fifth U.S. president, neither can he pass on the detention facility at Guantanamo. Setting aside pressing legal questions – like whether the government retains authority to detain individuals captured in the course of the war in Afghanistan now that the war is ending, or whether the Due Process Clause applies at Guantanamo – that may force the Biden team to scramble to release individuals from Guantanamo, either in response to a court order or to avoid one, there is real urgency to closing the detention facility where today 39 men remain. There is also a way ahead.

Since day one of the Obama administration there have been numerous plans and roadmaps for Guantanamo closure, each of them frustrated to some degree by changing domestic and international political realities and missed opportunities. Thirteen years later, it's time for a serious rethink. The steps outlined below are achievable, with real leadership from the White House and sustained interagency attention. They reckon with current realities and take into account what has and has not worked in past administrations. I served at the State Department for eight years and worked in the office of each of the three Special Envoys for Guantanamo Closure, where I negotiated detainee transfers and ultimately served as Chief of Staff to the last envoy. I also worked on Guantanamo policy as Director for Human Rights and National Security Issues on the staff of the National Security Council, and am now on the legal team representing Majid Khan, the sole cooperating high-value detainee in the military commissions at Guantanamo.

Over the past decade-plus, substantial progress has been made in the effort to close Guantanamo, but there remains hard work to be done to achieve that goal. The steps outlined here provide the Biden administration with a framework that, if pursued with seriousness of purpose, would end the policy of law of war detention, close Guantanamo, and with it end one of the grimmest chapters of the endless war era.

Part I: Transfer All Detainees Not Subject to Criminal Charge

Of the 39 men currently detained at Guantanamo, 27 have not and never will face any criminal charges either in U.S. federal courts (in part due to a legislative prohibition on transferring detainees to the U.S. mainland for any purpose, including for prosecution or to receive medical treatment) or the military commission system established specifically to prosecute Guantanamo detainees. Each of these 27 men must be transferred to their home country (repatriation) or third countries (resettlement) without delay.

Periodic reviews are a helpful, but are not a prerequisite process for all transfers: This group includes the 17 men who have yet to be “approved for transfer” by the Periodic Review Board (PRB), an interagency body that conducts a discretionary administrative process akin to a parole board and determines whether a detainee’s continued law of war detention is necessary to protect against a “significant threat to the security of the United States.” The PRB has proven useful as a forum to evaluate and contextualize relevant information in the U.S. government’s possession related to a detainee’s history, time in detention, and plans for the future, and it has helped to facilitate detainee transfers. But the PRB is not the exclusive means by which the administration could or even should exercise its discretion to decide whether it is time to transfer these detainees.

Time is of the essence and the Biden administration can and should arrange detainee transfers even for individuals currently awaiting a PRB hearing while negotiating individualized security and humane treatment assurances as it would for any detainee transfer from U.S. custody. Forgoing potential transfer opportunities because of delays inherent to a bureaucratic process, even a thoughtful and helpful one, is a good way to miss another opportunity to close Guantanamo.

The detainees whom the PRB has not yet approved for transfer have been pinned with the moniker “too dangerous to release” and thus sustained in a category of men held indefinitely and without charge at Guantanamo. It is true that some of these men have concerning histories, skill sets, and past affiliations that in previous years may have posed a threat that U.S. officials believed could not be appropriately mitigated after transfer. But it is also true that nearly twenty years after their capture circumstances have changed; the men have aged (the oldest detainee is 73 years old and has suffered multiple heart attacks), and the battlefields upon which some of them were captured and the groups to which they are alleged to belong no longer exist. Some of these men were tortured while in U.S. custody and suffer from serious medical and psychological conditions that not only cannot be sufficiently addressed at Guantanamo, but militate in favor of transfer out of U.S. custody. In essence, what has kept these men at Guantanamo are allegations based on a two-decade old immutable set of facts, which should not serve as the sole basis for a contemporary decision to continue to hold them indefinitely in law of war detention.

It simply does not make sense, and is not in the U.S. national security interest, to maintain a policy of indefinite law of war detention for these few men. Indeed, Section 5(b) of Executive order 13567, which established the PRB, foresaw this very situation and requires that *at least* once every four years the Principal officers of relevant departments and agencies review “whether a continued law of war detention policy remains consistent with the interests of the United States, including national security interests.” If such a review has not yet happened under the Biden administration – I am not aware of any such review *ever* happening – now would be a good time to conduct one.

A renewed diplomatic strategy: Some of these 27 detainees can be repatriated and others, due to circumstances outside of their control, will need to be resettled in third countries. Transferring these individuals will require direct and sustained engagement by President Biden who, as Vice President, used every opportunity to lend his personal support to advancing the closure effort, including by directly making asks of foreign leaders to accept former detainees into their countries. Simply put, he helped create transfer opportunities and close out negotiations on transfer arrangements. With the help of his cabinet, in particular that of Secretary of State Antony Blinken and Secretary of Defense Lloyd Austin, he can and must engage with the same vigor now that he is president.

Detainee transfers from Guantanamo will require a diplomatic strategy to secure transfer agreements, a strategy that itself must fit into a broader, increasingly complex diplomatic calculus, including, for example, the recalibration of the U.S.-Saudi relationship. Saudi authorities have a demonstrated ability to reintegrate former Guantanamo detainees and their rehabilitative infrastructure has proven apt to accommodate the transfer of a large number of detainees, including Yemeni nationals who cannot return to Yemen given the security situation there. Saudi authorities also have a demonstrated track record of successfully implementing appropriate security measures to mitigate any risk potentially posed by those detainees who may not yet have been approved for transfer by the PRB and may represent heightened security-related concerns to U.S. officials. One-off transfers, like that of Abdul Latif Nasser to Morocco this past July (thus far the Biden administration's only detainee transfer, which was overdue but laudable as a step in the right direction) are necessary in the context of some repatriations but cannot be the strategy for all detainees in need of transfer. The landscape of potential resettlement destinations is quite different now than it was a decade ago, or even in the latter part of the Obama administration, but it is navigable.

Some two dozen countries lent their assistance and resettled scores of detainees after rightly demanding the United States end detention operations at Guantanamo. But many previous resettlement locations now present a more complicated set of circumstances. Take for example Europe. The historic migration crises that brought to European countries large numbers of refugees from the Middle East and North Africa dramatically amplified the same anti-immigrant voices that opposed those nations offering humanitarian resettlement to former Guantanamo detainees during the Obama years. And today many of these countries are confronting the prospect and politics of providing refuge to those fleeing Afghanistan.

In short, the domestic politics in these countries just are not the same now. That is not to suggest that it was ever an easy decision by these governments. But they made the choice to resettle former detainees as a humanitarian gesture and in solidarity with the Obama administration as it worked to close Guantanamo, even when the United States itself was unwilling to resettle detainees. None of this is to say it is no longer worth knocking on the doors of those who have already taken in former detainees. The United States doesn't have that luxury. There may be compelling reasons that make a detainee a strong resettlement candidate for a particular country, like familial connections. It will be a challenging task for U.S. officials, but not impossible.

Part II: Resolution for Detainees Subject to Military Commission Prosecution

As to the other category of detainees, the 12 individuals who are at various stages of criminal process in the military commissions, there too is a path forward that the Biden administration should pursue in short order: negotiated resolutions to the pending cases.

Recognize the centrality of the torture legacy: It is open and obvious to any casual observer of the military commission system that much of the reason why trials have been illusive revolves around the issue of torture and mistreatment of detainees in U.S. custody. Torture is the U.S. government's original sin with regard to the detention of terrorism suspects now at Guantanamo, and it pervades each of the pending military commission cases. In the words of my former boss, the first Special Envoy for Guantanamo Closure Ambassador Dan Fried, "torture is non-biodegradable." While the taint of torture will never disappear, negotiated resolutions present an opportunity to sidestep the most significant issues that have vexed the military commissions while also providing for some measure of accountability.

The case of my client, Majid Khan, a longtime cooperator with U.S. authorities who pleaded guilty to a range of charges in 2012, is instructive. (As noted above, I am a member of Mr. Khan's legal team). While Khan's original plea agreement allowed him to present evidence of his torture and call witnesses at sentencing, when it came time for an in-court examination of his mistreatment – which a military judge ruled could be worthy of an award of sentencing credit as a remedy – the government balked and renegotiated the plea agreement to avoid that public examination of his torture. Khan's case demonstrates that in any military commission case the government will ultimately be faced with a Hobson's choice with respect to some accountability for torture. It will either have to confront head on the issue of torture, the occurrence of which isn't seriously in dispute, or assert the national security privilege. (When classified information, or "state secrets," is material to a case, the government has the choice to either allow or prevent disclosure of the information in question by asserting the "national security privilege." However, if the government opts to prevent disclosure, there are a range of consequences for that decision up to and including the dismissal of charges). With either choice the law compels that a remedy be provided. In the case of the five 9/11 co-conspirators where the death penalty is sought, their treatment will be relevant to their sentences and that means, simply, capital punishment will not occur. The only real question is whether to spend

additional millions of dollars and wait an unknown number of years longer to get to that point. The answer is clear and should be to the Biden administration: it is a hard no. Negotiated resolutions are the way to exit what has otherwise proven to be a road to nowhere.

Negotiated resolutions to pending cases: Much as President Biden leveled with the American people about the dim prospects of sustained military engagement in Afghanistan and the need as a strategic matter to end the endless wars, he should similarly acknowledge the reality that merits trials in the military commissions are exceedingly unlikely. Moreover, even if convictions are secured years from now, there will be appeals that deprive victims' families and our larger society of closure and accountability, likely guaranteeing that the 30th anniversary of the 9/11 attacks will arrive and there will still be no finality to the case. There is a better way.

The president, as commander in chief and the ultimate authority in the military justice system, should instruct the Secretary of Defense to begin discussion with his designee, the convening authority for military commissions, about the possibility of negotiated resolutions to the pending cases. (In the military justice system an accused enters into a plea agreement with the convening authority and not prosecutors). While some may wrongly assert that the president providing this instruction would constitute "undue command influence," such an action would in fact not be improper. As a practical matter, military courts have found undue command influence when action has been taken to the *detriment* of the accused, and when a specific outcome or punishment has been directed. Any guilty plea in the capital cases would require taking death off of the table, and thus be to the benefit of the accused given the potential punishment they are currently facing. The president would not be directing specific action in a specific case, rather providing policy guidance with respect to the military commissions writ large. This guidance would be no different than, for example, if President Biden, who is opposed to the death penalty, set a policy that capital punishment would not be sought for crimes committed under the jurisdiction of the military justice system. Most important, as the president would articulate, negotiated resolutions are in the interest of all parties, taking into account the need for finality and closure after the passage of two decades since the offenses for which the defendants stand accused.

Assuming plea agreements are reached, which I am confident they can be, the question arises as to where the detainees-turned-prisoners should serve their sentences?

Where should sentences be served? To address this question, let me briefly return to the 27 detainees not facing prosecution as the answer will in part result from their transfer out of U.S. custody. Transferring these men from Guantanamo fundamentally alters the discussion about the wisdom and resources spent to continue detention operations at Guantanamo for the small number of men then remaining (12). Some have argued that simply moving detainees out of Guantanamo to the U.S. mainland or to another U.S. military facility elsewhere in the world achieves closure. It does not – moving Guantanamo is not closing Guantanamo. As a substantive matter, in the case of relocating detainees elsewhere outside of the United States, to another military base for example, such a course of action would simply *export* the same problematic policy of indefinite law of war detention to another location. Bringing uncharged individuals to the U.S. mainland, which arguably would require a change in the law, would in effect *import* to the United States the same problematic policy of indefinite law of war detention and raise even more grave Constitutional concerns than already attend detention at Guantanamo. Simply put, it is the policy of indefinite law of war detention that must end, and with regard to the men that will not face prosecution, the only answer is to transfer them to third countries.

Returning to those that plead guilty and are convicted in the military commissions, as imperfect a system as it is, what to do is a little more complicated. The U.S. government must make some hard choices. It can retain these individuals in U.S. custody to serve their sentences, or it can transfer them to serve sentences in foreign custody. The latter solution makes a lot of sense for the non-capital cases. For example, the defendants in the most recently initiated prosecutions related to a series of terrorist attacks in Southeast Asia in the early 2000's, two Malaysian nationals and an Indonesian who have been held for 18 years prior to their arraignment just last month, could serve their eventual sentences in either of those two countries. The five co-conspirators in the 9/11 case present a more complex scenario and for a range of reasons the U.S. government would likely want to retain custody of these individuals as they serve what would likely be life sentences.

So, where do they go – do they remain at Guantanamo? No. While there is currently a statutory ban on entry into the United States by anyone ever held at Guantanamo, there is a real question whether that prohibition unconstitutionally infringes on the powers of the president. Some argue that the president, pursuant to his authorities as commander in chief, could simply order these individuals brought to serve their sentences at an appropriate facility on the mainland. Were such a decision to be made and if challenged by Congress, it may well be a political question that the courts would not entertain. There is also a question as to what the remedy for such an executive action would be. That said, the politics cut in favor of not having the

fight that would result from such a decision. Moreover, President Biden, having spent years in the Senate, may interpret Congress' powers (in relation to immigration, for example) as broad enough to deprive the commander in chief of this authority, at least when Congress has already spoken. So, the administration would be left to work with Congress to change the law, something that it has already said it plans to do, *but only with respect to those serving sentences.*

It's also worth considering what plea agreements are likely to entail. Taking the capital cases first, given the torture the defendants endured while in U.S. custody, dropping the death penalty in favor of life sentences would be both a moral and legal necessity. It would also be a vindication of U.S. commitment to the rule of law by providing a modest degree of accountability for the abuse. (Ironically, life sentences are effectively what proceeding with prosecutions in the military commissions would amount to given the intractable delays in going to trial and the certain appeals process to follow.) Once convicted, the men would serve their sentences in an appropriate facility on the mainland with similar stringent security controls and living conditions under which they have been held for the past fifteen years. As for the non-capital cases, defendants would plead guilty in exchange for a term of years, preferably to be served abroad in foreign custody (with appropriate humane treatment and security measures in place).

While as a factual matter it seems plain that amending the law to allow convicted detainees to serve sentences at an appropriate facility within the United States is a solution in the interests of justice for the American people, moving any men to the mainland, even to serve sentences, would be rife with the same political hyperbole and scare tactics that scuttled the initial attempt to try the 9/11 co-conspirators in federal court in the Southern District of New York in 2011. But unlike a decade ago, the facts surrounding Guantanamo would be different. At that point, Guantanamo could hold as few as five men, and the arguments for why the U.S. government should not spend what surely would be an astronomical sum to imprison just five men at Guantanamo, would be stronger and may materially change the discourse. It is worth the try.

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Justice is frequently imperfect and true accountability can be illusive. But the lack of both in the context of Guantanamo exacerbates the still raw pain associated with the 9/11 attacks and also highlights a failure to reckon with the worst excesses of the post-9/11 period which, unfortunately, Guantanamo continues to epitomize. There is a better way, and it is still achievable if we try.

Adopting a Whole-of-Society Approach to Terrorism and Counterterrorism

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On the 20th anniversary of 9/11, there is a genuine responsibility to assess anew the terrorism and extremism environment within which we in the United States currently find ourselves. Beyond that, we need also to consider with an open mind whether the strategy and policy approaches we have been relying on in the past two decades are well-suited to the evolving challenges we face.

As we approach that 20-year anniversary, my answer to the latter question is a clear “no.” Particularly with the growing threat to public safety and security posed by domestic violent extremism, it is essential that we move beyond the post-9/11 counterterrorism strategy paradigm that placed government at the center of most counterterrorism work. Viewed from the perspective of a private citizen and former senior government official responsible for counterterrorism matters, there is a clear imperative to mature and evolve our counterterrorism strategies from a focus on integrating a “whole-of-government” effort to a much wider, more expansive and inclusive “whole-of-society” approach to addressing our terrorism and violent extremism challenges.

That wider circle must not only include state and local governments, but also the private sector (to include technology companies), civil society in the form of both individual voices and non-governmental organizations (NGOs), and academia. A whole-of-society approach promises to be in many ways more messy, more complicated, and more frustrating in terms of delivering outcomes. All that said, adopting this broader perspective offers the best chance of managing or mitigating the diverse, constantly changing threat we face from terrorism, particularly inside the United States.

Evolution of the Threat

In recent years, the most efficient way to track the federal government's evolving view of the terrorist threat to Americans has been to review the Annual Threat Assessment of the United States Intelligence Community. Publication of that document, and the ensuing public testimony before U.S. congressional committees by senior intelligence officials, represents the best chance for our Intelligence Community (IC) to speak publicly about its assessment of the full range of threats to U.S. national security. As in prior years, this year's assessment catalogues and updates the threat picture tied to Sunni terrorist groups like ISIS, al-Qaeda, and their various affiliates and networks around the world. Two decades after 9/11, that is largely familiar stuff, and that aspect of the threat promises to be persistent over time given security challenges in key conflict zones around the world.

Where this year's assessment breaks new ground for the IC is with its focused treatment of what the Community calls Domestic Violent Extremists (DVEs). The IC this year assesses that DVEs "motivated by a range of ideologies not connected to or inspired by jihadi terrorist organizations like al-Qaeda and ISIS pose an elevated threat to the United States." The assessment further notes that this "diverse set of extremists reflects an increasingly complex threat landscape, including racially or ethnically motivated threats and antigovernment or antiauthority threats."

Beyond the abbreviated treatment of the domestic extremism threat in its annual comprehensive assessment, the Office of the Director of National Intelligence (ODNI) went on to publish a more focused threat assessment of the DVE problem in March of this year. The IC's effort to elevate analysis and discussion of the threat posed by DVEs is important because it puts the federal government on record and helps signal heightened priority focus across the CT and homeland security enterprise, which ultimately will help drive resource allocation.

But this year's assessment hardly comes as any surprise given the increased prevalence of domestic terrorist attacks or events we've seen in recent years. Indeed, if most Americans were asked if they felt more at risk from a homeland terrorist attack linked to a domestic group/actor or to an overseas group/actor, I suspect the large majority would cite the DVE threat as feeling more imminent and more acutely dangerous to the average person living in the United States. And statistically, it is, indeed, the greater threat. As the *Washington Post* has noted, nearly every state has catalogued at least one domestic extremist incident or plot in recent years, suggesting that there the reach and potential impact of the DVE problem has eclipsed other forms of terrorism here inside the United States.

The net result of this evolving threat landscape is that domestic terror concerns now sit alongside homeland threats linked to overseas terrorist groups or ideologies, on roughly equal footing in terms of the level of urgency, political salience, and policy prioritization. Perhaps the best evidence that this transformation of the threat picture had taken place was the early effort by the incoming Biden administration to prioritize the development of fresh approaches to address domestic extremism and terrorism. This was almost certainly intended to be an early priority for President Biden's team even before the events of Jan. 6 at the U.S. Capitol, but the attack on the Capitol certainly added impetus to the effort.

The announcement on Jan. 22, 2021 of a domestic terrorism policy review led by the National Security Council (NSC) staff and the fast-track development of a National Strategy for Countering Domestic Terrorism signaled early urgency and immediate focus at the highest levels of the Biden team. These moves also suggested that the new administration did not feel adequately postured to address this particular threat landscape in terms of the strategy, programs, and resource framework that it inherited from the Trump administration.

What Does the Changing Threat Landscape Mean for CT Strategy?

This evolution in the threat landscape should cause us to reexamine with a critical eye the set of tools, strategies, and structures that we are using to respond. For the entire post-9/11 period, senior officials under the Bush, Obama, and Biden administrations have touted their development of “whole-of-government” approaches to addressing the CT challenges we faced, mostly from abroad. In so doing, we aimed to reassure the American people that the federal government was taking an expansive, creative approach to keeping them safe. We were not simply relying on one set of tools tied to our law enforcement community or another set of tools operated by either our military or our intelligence community. That whole-of-government mindset was also driven by the painful self-examination and lessons learned exercise that followed the 9/11 attacks. The 9/11 Commission recommendations certainly pointed to a need for a more coherent and coordinated federal response to terrorism, but even without that roadmap, counterterrorism professionals knew instinctively that new ways of doing business across government were required to respond to the al-Qaeda threat.

A whole-of-government approach meant that whenever we confronted a particular terrorism problem, the White House and NSC staff would organize an effort to bring all tools and instruments of national power into an integrated effort to address that problem. These diverse tools, to be orchestrated and sequenced, included the use of military power when absolutely necessary, but also diplomatic influence, intelligence operations and collection and analysis, law enforcement operations, capacity building, financial tools, international development and foreign assistance programs, and our strategic communications capacity.

Embedded within the whole-of-government approach to terrorism was a presumption that the federal government was not only the primary actor when it comes to terrorism and counterterrorism work but in most cases the *only* actor of consequence in terms of being able to deliver positive outcomes and mitigate threats to Americans. We of course were also heavily reliant on the capacity of state and local governments and partners responsible for their share of the homeland security enterprise. But for the most part, development and execution of counterterrorism strategy was a Washington-centric project for both Republican and Democratic administrations since 9/11. Today's evolving threat landscape, and in particular the emergence of a dramatically heightened threat from domestic violent extremists, renders that whole-of-government approach to counterterrorism wholly insufficient.

Toward a Whole-of-Society Approach to Countering Terrorism and Violent Extremism

While we should not absolve government of its obligation to lead and organize societal response to the problem of terrorism and violent extremism, the set of actors and sectors with at least some degree of responsibility for contributing to solutions extends well beyond government. We stand a much better chance of achieving results with our CT strategies if those strategies reflect input and active participation from that diverse set of stakeholders beyond government and seek to harness the knowledge, expertise, and comparative advantage that exist outside the classified circle of CT experts centered in Washington. This wider set of contributors, or stakeholders, includes:

The private sector, including technology companies. In the past, content associated with known Salafi-Jihadi terrorist groups like al-Qaeda and ISIS was widely available on larger, more mainstream social media platforms. It is also true that many of those platforms have invested significant effort and resources in building content moderation capabilities to remove that content when it violates

their terms of service frameworks. Today, terrorists and violent extremists continue to take advantage of the online environment to further their agenda, but the problem has expanded to include exploitation of many different online service providers and different components of the technology stack by a broader range of actors and organizations across the ideological spectrum. That evolving reality imposes on the private sector special responsibility to be more creative and agile in the effort to develop effective tools, policies, and approaches to addressing terrorist or violent extremist content or activity on their platforms and services. Clearly, more needs to be done by industry to limit the ability of terrorists to exploit the online environment.

At the same time, the many questions private companies face in this context are not easy and many potential solutions come with unintended consequences. Countering terrorism and violent extremism are important societal objectives, but those objectives cannot be pursued at the expense of other equally important principles and priorities, to include respect for fundamental human rights such as freedom of expression. When companies look to governments for guidance in the form of law or policy with respect to many of these complicated questions, what they often see is an incomplete and sometimes conflicting patchwork of measures and legal frameworks.

When we take stock of the last several years of back-and-forth between the U.S. government and the technology sector on this set of problems, it's possible for two things to be simultaneously true. Several of the largest and most prominent tech companies have shown a willingness to tackle these problems more aggressively, to devote significant resources to that work, and to deepen their conversation with government about those efforts. At the same time, clearly, much more work needs to be done by those leading companies and by governments to eliminate terrorist activity on the internet as the problem of online terrorism and extremism continues to evolve.

Put simply, government and the private sector, certainly for the foreseeable future, will each have a critical role to play in addressing the societal challenge of terrorism and violent extremism. Governments look to companies to be more effective and forward leaning in promptly enforcing their terms of service. Companies increasingly look to governments for greater clarity on the policy and legal landscape, reducing the need for companies to go it alone in making decisions about designation frameworks or banned content. Creating open channels for that dialogue is essential. The organization of which I am the Executive Director, the Global Internet Forum to Counter Terrorism, or GIFCT, serves as one of those vehicles for collaboration and dialogue between and among the various actors.

Civil society, to include the full array of relevant NGOs and independent voices.

The ways in which civil society voices and organizations can contribute to CT strategies, particularly in the context of DVEs, is worthy of a much longer discussion than this essay allows. Suffice to say that much of the most important and effective work being done to prevent the spread of hatred, violent extremism, and targeted violence takes place at the local or community level. It is encouraging that the Biden administration has moved quickly to capitalize on that source of strength by both emphasizing this work as part of its new national strategy, while also planning to expand the pool of federal funds available to support it.

Civil society voices also play a critical role in engaging with government and the technology sector on terrorism questions, particularly with respect to content moderation, to ensure that the work undertaken in pursuit of CT objectives has the impact of advancing fundamental human rights, especially freedom of expression. Inclusion of civil society voices in the effort to develop effective CT strategies increases significantly the chances that those strategies will be reflective of society as a whole and broadly consistent with our set of collective values.

Academics and other subject matter experts. One of my most embarrassing personal blind spots during my period of government service working on terrorism issues centered on my failure to appreciate just how much knowledge and expertise existed outside of government on the problem that I was focused on inside government. Those of us “inside” tended to believe, or at least to act like, we had access to the best information and that our strategic insights were therefore informed by that knowledge advantage. Sitting outside government as I now do, that mindset seems myopic at best and absurdly self-defeating at worst. The deep reservoir of expertise and information on all forms of terrorism and violent extremism that exists outside of government remains untapped in my view. That is partly a result of the focus and investment of resources in the academic world that has taken place over the last twenty years. It is also a reflection of the fact that so much terrorism information and activity resides or is accessible in the open source environment, where a government analyst is no more privileged with access than any other smart terrorism expert.

The glimmer of good news is that the Biden administration’s new Domestic Terrorism strategy plainly acknowledges that government does not have a monopoly on wisdom or information with respect to this problem. The strategy calls upon DHS to “create a structured mechanism for receiving and sharing within government credible non-governmental analysis.” That’s an important admission that successful government strategies will hinge on input, analysis, and information from outside government, where relevant expertise is available.

Other governments. Collaboration between the federal government with both state and local governments here in the United States and with partner governments abroad has long been a feature of U.S. CT strategies. That collaboration needs to deepen even further as CT resources are redirected to address other high priority national security challenges. Terrorists, even domestic terrorists, will continue to show a complete disregard for international borders. Terrorist and extremist narratives circulate freely across the world, as does relevant expertise, advice, and encouragement. That content is also translated and localized for particular audiences all over the world. Any successful approach to our CT problems will contain an important degree of both burden sharing and tangible cooperation with governments at every level.

Having argued that successful CT strategies must be more inclusive and reflective of the genuinely multi-stakeholder nature of the problem, I would not make the case that involving the full array of stakeholders is easy or always comfortable. More voices representing more constituencies can often bring more discord, disparate and competing priorities, and multiple paths to solutions that are often at odds with each other. A whole-of-society approach to our CT problems is certain to be messy, complicated, and at times very unrewarding. It may not be possible to devise policies or strategies that are acceptable to all of the various participants. The effort to arrive at a common set of solutions to a complex problem like terrorism, especially given the diverse nature of the stakeholder community, may seem literally impossible. And yet, working outside that multi-stakeholder framework ultimately limits the efficacy and impact of CT strategies before they are even conceived or developed.

Innovation of Institutions

If it is true that whole-of-society, multi-stakeholder engagement is essential to the effort to develop and implement sound CT strategy and policy, then where and how should that engagement take place? What institutions and fora can we potentially look to for inspiration and example as we try to create and mature this sort of innovative framework for policy development? Unfortunately, there is not a great deal of history on which to draw in this space and I would argue that this work is still very much in an early proof-of-concept phase. That said, there are in fact nascent efforts to create just these sorts of engagement frameworks.

One of those, the [Christchurch Call](#), emerged out of the horrific attack on members of the New Zealand Muslim community in March 2019. Organized and driven by New Zealand Prime Minister Jacinda Ardern and French President Emmanuel Macron, the Christchurch Call has brought together in common cause more than 50 countries and

governments with almost a dozen of the major online service providers. That assembly of Call supporters is bolstered further by an Advisory Network that includes dozens of civil society organizations from around the world. In only its second year of existence, the Christchurch Call forum has quickly become an essential convening ground for government, technology companies, academics, and civil society as they work together to eliminate terrorist activity and content online.

The organization of which I am the Executive Director, the Global Internet Forum to Counter Terrorism, or GIFCT, is similarly postured to carry forward this multi-stakeholder work to counter terrorism, and specifically its online dimensions. GIFCT was initially formed in 2017 by YouTube/Google, Facebook, Microsoft, and Twitter for the purpose of bringing together key technology companies to collaborate across traditionally competitive company lines to pursue the shared objective of preventing terrorists and violent extremists from exploiting the internet. GIFCT also maintains a robust connection to civil society and government through its own International Advisory Committee (IAC), its multi-sector thematic Working Groups that convene to address hard problems at the nexus of technology and terrorism, and to the academic world through its research and scholarship arm, the Global Network on Extremism and Technology.

Both of these organizations are still early in their development and are testing the limits of what is ultimately possible. Over the last year, I have experienced firsthand how worthwhile this trial effort to utilize multi-stakeholder approaches to public policy challenges can be. What these fora have already proven is that they can be essential convening bodies for discussions about the nature of the evolving terrorist threat, the set of common objectives that should be pursued to mitigate that threat environment, and about measures of success in the overall effort to counter terrorism online.

Reaching consensus around big questions such as these is no small feat and represents an important step forward in efforts to craft whole-of-society approaches to one of our most pressing national security challenges. Participation in these multi-sector processes and fora also helps create accountability as each participant is expected to speak clearly to the work they are doing and the results that their work is producing. Driving real progress and delivering concrete CT results that mitigate and reduce the threat from terrorism, while striving to be inclusive of critical diverse voices and committing to be more transparent in our processes, is the next challenge on the horizon.

Crossing Back Over: Time to Reform Legal Culture and Legal Practice of the “War on Terror”

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When the United States went to war after 9/11, it crossed into new legal territory, and in so doing placed executive branch lawyers in an extraordinary role. The president’s war powers are vast and tend to be exercised in secret. They are often deemed unreviewable by the courts and are almost always under-supervised by Congress. This means that U.S. government lawyers often find themselves the *de facto* arbiters of the boundaries of presidential power. Their judgment is regulated less by the other branches of government and more by institutional positions within the executive branch, the views of allies and outside experts and (in those relatively rare cases where it is mobilized) public opinion.

This absence of strong checks and balances was never ideal from a rule of law perspective. For 20 years, however, the political leadership, national security legal community and public have lived with that situation. We speculate that this is for one of three possible reasons – perhaps out of respect for the weight of law and lore regulating the use of force, perhaps out of a sense that the professionalism of executive branch lawyers is an effective bulwark against the imprudent exercise of war powers, or perhaps because of a belief that there are no better alternatives.

We disagree on all three counts. As the nation turns the corner into the third decade of the war on terror, with no end in sight, we challenge certain myths underlying these justifications and argue that it is time to revisit the fundamental legal and bureaucratic culture within which decisions about war and peace are made.

Myth: The President’s war-making powers are already sufficiently constrained by law.

Reality: In practice, these constraints are pliant and unreliable.

In theory the use of military force is governed by the Constitution, the 1973 War Powers Resolution, the limits imposed by authorizing statutes where applicable, and international law. In practice, however, the executive branch has over time often found ways to bend and stretch these constraints to suit its needs.

First, although Article I of the Constitution vests in Congress the power to declare war, the executive branch has taken a very broad view of the President’s unilateral war-making powers under Article II’s Commander-in-Chief clause. According to the Department of Justice’s Office of Legal Counsel (OLC), there are some notional checks on this power: Namely, the president must be able to establish that the use of force serves a national interest and that the nature, scope and duration of the anticipated hostilities will not rise to the level of “war in the constitutional sense”. The former test, however, has been deemed to include everything from self-defense to regional stabilization, rendering it close to meaningless. The latter test is meant as a safeguard against unilateral military action that by its nature, scope, and duration implicates, in the executive branch’s view, Congress’s Article I war powers, but it has been unevenly applied and seemingly cast aside in some contexts. In the run up to the Afghanistan and Iraq invasions, for example, OLC issued opinions suggesting that President Bush would have unilateral authority even in the absence of statutory authority to launch those wars. Both opinions appear to remain on the books.

Second, the 1973 War Powers Resolution, which was supposed to reinvigorate congressional war powers in the wake of the Vietnam War, has been largely gutted by aggressive executive branch interpretation, adverse court decisions, and congressional acquiescence – all described in greater detail in this piece that Steve wrote with Tess Bridgeman. To be sure, the statute still notionally requires the president to withdraw U.S. forces introduced into hostilities within 60 days absent congressional authorization to continue fighting. But executive branch lawyers have read “hostilities” very narrowly – for example not to include waves of combat sorties flown against targets in Libya in 2011 – and also showed a creative capacity to delay counting to 60, as they did during the Tanker Wars of the 1980s.

What's more, there is no real enforcement mechanism to stop a war other than Congress refusing to appropriate funds or mustering a veto-proof majority to pass a resolution of disapproval. With regard to the former, funding provisions are often ensnared in complex spending bills, and in any event members have historically been highly reluctant to deny funds to ongoing missions for fear that the military will claim that American troops are being left undefended. With regard to the latter, as we saw with efforts to curtail U.S. involvement in the Yemen conflict and bar war with Iran during the Trump administration, a veto override is a nearly insurmountable hurdle. Against this backdrop, it is hard to place much faith in the War Powers Resolution as a bulwark against executive power.

Third, the authorizing statute for the war on terror – i.e., the 2001 Authorization for Use of Military Force (2001 AUMF) – has through aggressive interpretation been transformed into a deep well of new unilateral authority for the executive branch. While on its face the statute approves the use of force against groups the president determines to have “planned, authorized, committed, or aided” the September 11 attacks, or those who harbored such groups or persons, successive administrations have looked past the statutory language requiring a nexus to 9/11. Through a gloss on the AUMF initially created by the executive branch, and in time ratified by other branches of government, groups can be unilaterally added as new enemies if they constitute “associated forces” and sometimes, as was the case with ISIS, even if they do not meet the requisite test (see below discussion). Administrations do not always make public which groups they have determined to be associated forces. The Biden administration has not yet done so.

Fourth, the president is also regarded to enjoy certain organic powers, shaped by the National Security Act, to use force covertly upon a finding that doing so is “necessary to support identifiable foreign policy objectives of the United States, and is important to the national security of the United States.” Because the law defines covert action as activity where the hand of the United States is intended to remain unseen, such actions are only rarely publicly disclosed and only reported to a limited circle in Congress. This authority can thus be used to initiate, shape, or expand conflict without effective checks or balances.

Fifth, the U.S. government has tended to take an envelope-pushing and sometimes entrepreneurial approach to international law to create the operational flexibility that it needs. For example, under international law measures taken in self-defense must be both necessary to address the threat and proportionate. Scholars have criticized both the Trump and Biden administrations for justifying counter-strikes against Iran-backed militias in and around Iraq on the basis of self-defense, even

though there was not always compelling evidence that the use of force was in fact necessary to address the threat to the United States. As Ryan Goodman describes [here](#), the U.S. has tended to justify counterstrikes that follow an attack or series of attacks on the basis of that they are broadly speaking necessary to deter future such activity. But whatever the merits of this theory, deterrence can be hard to establish, and sometimes the facts surrounding an operation seem inapposite. This was a glaring problem with the [justification](#) for the Trump administration’s strike against General Soleimani, which instead of deterring armed activity prompted retaliatory ballistic missile attacks on U.S. forces. (Some accounts have [suggested](#) that this claim was [pretextual](#) and the real reason for the strike was nakedly [political](#).)

Myth: Strong executive branch processes and highly trained lawyers ensure compliance with the best reading of the law.

Reality: For all of these institutional strengths, there are nevertheless structural features that pull lawyers toward approving operations and enlarging executive powers.

As a practical matter, government lawyers often provide the last word in adjudicating how and where war can be waged. Of course policymakers within the administration drive the policy decision, but even then, the lawyers are generally required to vet proposals before they ever make it to the president’s or the cabinet secretaries’ desks. The normalization of war as the tool by which the United States advances its counterterrorism policies has thus placed an extraordinary weight on the shoulders of those lawyers. We both served in the State Department’s legal office, collectively spanning all four administrations that have waged the war on terror, and we both prize our time in government and respect and admire our former colleagues. Still, we see this anniversary as an opportune moment to reflect on the culture in which they are required to take decisions of enormous gravity. In particular, the following features bear consideration.

First, executive branch lawyers are for the most part not required (with the exception of OLC) to confine their advice to the “[best understanding](#)” of the law. Instead, without explicit standards for rendering legal advice, lawyers across the government often default to whether a position is “legally available.” In a field like national security law where there are elastic standards, and where the executive

branch has a history of unilaterally claiming the legality of novel theories to address emergent situations, this can make it difficult for dissenting lawyers to successfully shout down arguments that might be contrary to the weight of authority, scholarly opinion, or even the United States' own prior positions.

The “legally available” standard may have contributed to the Obama administration’s decision to deem ISIS covered by the 2001 AUMF. A former official who participated in the surrounding discussions recently told one of us that none of the senior lawyers regarded this to constitute the best interpretation of the statute. Moreover, Secretary Kerry’s congressional testimony at the time appeared to omit the Justice Department/OLC (who as noted are bound by this standard) from the list of administration lawyers who approved of the legal interpretation.

Second, there is an emphasis on achieving consensus that can mask continuing disagreement and sometimes neutralize viewpoints that might inhibit operational flexibility. At one level, the emphasis on process and consensus is positive: When the Obama administration embraced collaborative national security lawyering among the agencies in 2009, it was an important step beyond the tendency, particularly during the early years of the Bush administration, to stovepipe national security decisions among the more hawkish legal offices and tune out moderating voices from less operational agencies. But while consensus has benefits in bringing new voices into the legal discussion, there can still be a group bias toward solutions that afford operating agencies the flexibility they are seeking. In these circumstances, dissenting voices may find themselves accommodated through formulations that allow them to maintain points of principle, even as they are losing as a practical matter.

The government’s inclusion of “substantial support” to an enemy group as a basis for detention in the March 13, 2009 brief in Guantanamo litigation is an example. The State Department saw the term as inconsistent with international law. Its lawyers hoped that language in the brief that pledged to interpret the government’s detention authority through an international legal lens would allow them to continue pushing back against reliance on it. But in reality they had little control over how the “substantial support” concept was applied. Lawyers sitting at Foggy Bottom would wrangle over whether it could be cited as a basis for detention in Guantanamo habeas briefs, and then go to conferences with special forces lawyers, or sit in on detention tribunals at Bagram, and realize that the term had been widely operationalized in ways that they would never be able to track or influence.

Third, as Rebecca Ingber has described, government decisions that are taken with hindsight, to rationalize actions that have already happened, can be among the most distorting. The implications of conceding error – e.g., accepting that killings once deemed lawful are in fact unlawful – are more than operating agencies, in the main, are willing to tolerate. Under those circumstances, there can be enormous pressure on the national security legal collective to adopt new and seemingly more tendentious legal positions to justify the past.

For example, the government decided to deem Al Shabaab an associated force of al Qaeda and thus targetable as a group under the 2001 AUMF after press reports revealed that U.S. forces in Somalia had for more than a year been ordering strikes in what they described as “collective self-defense” of partner forces. (Others we have spoken to in researching a forthcoming report for Crisis Group have described the strikes as more akin to close air support for offensive operations.) Regardless, the U.S. government had failed to report these strikes under the War Powers Resolution, which would have been required if they had they been conducted pursuant to the president’s Article II authority. The State Department’s lawyers had long resisted deeming Al Shabaab an associated force, believing many of its members to be focused on local concerns, and unaware that some of their leaders had affiliated themselves with Al Qaeda. Nevertheless, faced with the need to provide a retroactive legal rationale for the newly discovered operations, this resistance essentially melted away and the U.S. went to full-on war with Al Shabaab.

Myth: The current situation may not be perfect but there are no realistic alternatives.

Reality: The U.S. government has better options.

Essential decisions about the nation’s wars – with whom it is fighting, and where – should not routinely be taken in classified conference rooms by unelected executive branch officials. Often the only real accountability for these decisions comes when deliberations leak to an enterprising reporter and become fodder for back and forth in the press. In order for there to be real accountability, which is essential both for purposes of democratic governance and as a check on imprudent war-making, these

decisions must be shared with the public, and elected officials need to be on the hook for them. This will require a reset of the framework in which decisions about war and peace are taken by the political branches. Here are the key principles we would recommend to guide reform:

Only Congress Should Authorize Wars. Congress must reclaim from the president and the lawyers who advise him or her the power to decide with whom the United States is at war.

First, Congress should replace the 2001 AUMF with a more narrowly targeted law that identifies the specific groups with which the U.S. is at war, the locations where that war is occurring, and the mission that the war is seeking to achieve. The revised statute should remove the capacity of the executive branch to change the scope of the war by adding new “associated forces” without first obtaining congressional permission, and – to ensure that elected officials are required to examine whether the conflict is actually achieving its stated objectives – include a date no more than two or three years into the future by which the statute will lapse absent reauthorization. (Other features worth considering for the revised AUMF are included [here](#).)

Second, taking the longer view, Congress should replace the 1973 War Powers Resolution with a revised statute that narrows the executive branch’s discretion to wage unilateral war to the realm of true self-defense. The bipartisan draft [National Security Powers Act](#) introduced over the summer by Senators Lee, Murphy and Sanders would be a good place to start. In addition to common sense changes (such as changing the 60-day withdrawal clock to a 20-day clock that would be more difficult to manipulate), the Act would clearly define “hostilities,” effectively narrow the realm for unilateral executive branch war-making to true self-defense, and deny funding should the executive branch seek to wage war without Congress’s approval.

The U.S. Should Not Fight Secret Wars. A little advertised feature of the war powers provisions in the National Security Powers Act is that they would apply to operations undertaken by both “deployed military and paramilitary personnel.” The reference to “paramilitary personnel” suggests that the statute may be intended to pull sustained operations conducted by irregular forces under the president’s covert authorities into the overt world. If that is indeed the purpose it is a laudable one. [Reported accounts](#) suggest that the executive branch has at times relied on covert authorities to conduct sustained use of force operations beyond the scrutiny of both the public

and most members of Congress who lack requisite clearance. While there may be a legitimate national security interest for taking short term action on this basis, over the longer term that interest must be overtaken by the importance of transparency and democratic oversight and accountability.

OLC Should Rescind Overreaching Opinions. While new legislation is needed for any meaningful reset of executive branch lawyering, the executive branch should also take some steps to put its own house in order. Although some dismiss as dead letters the Bush-era opinions that claimed vast unilateral powers with respect to countering terrorism and weapons of mass destruction, that is not a good excuse for allowing them to remain on the books. Indeed, the failure of successive administrations to rescind these opinions (and potentially other non-public opinions) could send a tacit signal that the executive branch wishes to preserve the room for maneuver that those legal opinions afford. If the Biden administration has not already withdrawn them, it should do so publicly now as prior administrations have done with other opinions, including some of the more egregious OLC torture memos.

Agency Counsel Should Reconsider “Legally Available” Lawyering. Even comprehensive war powers reform will leave the president with some discretion in the use of force, particularly with respect to “one-off” strikes premised on self-defense such as the strike on Iranian General Qassem Soleimani (for which the Trump administration claimed a combination of Article II self-defense and statutory authority as well as self-defense under international law). The ultimate safeguard against presidential abuses of war power is political, namely electing a president who will take seriously his or her constitutional commitment to “take Care that the Laws be faithfully executed.” But general counsel offices in the national security agencies should consider helping their clients in implementing this constitutional obligation by providing the best interpretation of law, not merely an interpretation that they could (however uncomfortably) defend.

As a check on this process, Congress could empower a bipartisan board of national security law experts with appropriate security clearances to periodically review internal executive branch legal advice on matters of war and peace, and publish its assessment. Although it serves a different purpose, the membership of the State Department’s Advisory Committee on International Law (ACIL) may provide a model for the composition of such an outside panel of experts. Rebecca Ingber’s useful and complementary suggestions for improving the internal bureaucratic architecture for national security lawyering can be found [here](#).

Conclusion

The war on terror has taken on dimensions that members of Congress could scarcely have imagined twenty years ago. As the conflict has grown and changed, responsibility for these changes has too often been thrust on the shoulders of executive lawyers. Much of the time, the burden of these decisions does not belong there. At this moment of reflection, we hope that leaders in the executive and legislative branches will consider measures that both return responsibility for war-making decisions to the Congress where it is primarily meant to reside, and create an organizational culture in which administration lawyers are fully supported in offering their best reading of the law in this vitally important arena of public affairs.

Paradigm Shift: The Consequences of Choosing a War Path, and Leaving It

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There is perhaps no choice made in the aftermath of the September 11, 2001 attacks that has been more consequential than the decision to respond to those attacks with war. It may be hard to fathom after 20 years of military conflict, but there was a clear alternative path at the time: treating the 9/11 attacks as a criminal act, as most terrorist acts by non-state actors, domestic and international, had been conceived of to that point. As Bec Hamilton writes in her counterfactual narrative on the opening day of this symposium, “[t]here was nothing necessary or inevitable about the U.S. government’s decision to respond to 9/11 through the lens of war.” Once a war path was chosen, the most consequential choices have been to stay on it and to lead with military force to confront the terrorist threats. There was nothing inexorable about those choices either.

As a legal matter, one mainstream view in 2001 held that responding with armed force to the 9/11 attacks was not even a lawful option, given the actions were conducted by non-state actors that looked more like a transnational criminal network than an army, without the trappings that generally accompany armed conflict. A few years earlier, a UN court had just reaffirmed the common understanding that “isolated acts of terrorism may not reach the threshold of armed conflict,” which requires instead protracted violence. Another reason the attacks did “not fit neatly in prevailing conceptions of ‘war’ or ‘armed conflict’” is that those responsible were not vying to take control of any particular territory or of the U.S. government, although they did believe themselves to be at war (but then again, so did Oklahoma City bomber Timothy McVeigh).

That said, the UN Security Council invoking “the inherent right of...self-defense” in its resolution 1368 on Sept. 12, 2001 quickly started to undercut the view that the war model was not a legally justified response option.

And regardless of whether the attacks on 9/11 themselves triggered a state of armed conflict, the U.S. military response certainly did. The decision to use armed force not just in Afghanistan but across the globe, the early and ugly decisions to flout the rule of law in an amorphous “war on terror,” and the entrenchment of the armed conflict paradigm by subsequent administrations even as they reined in the worst abuses, have had profound consequences on our society, on our government, on foreign populations directly impacted by the war, and on the international order itself.

The United States is poised to further entrench this paradigm today, in part by force of the massive bureaucratic inertia of war formed over two decades, in part because of domestic politics, and in part as a reaction to the recent tragic events that unfolded as the United States and coalition partners pulled out of Afghanistan. We owe it to the next generation to grapple now with the consequences of remaining at war – as well as the consequences of choosing not to be – lest we find ourselves reflexively handing this decades-long legacy of perpetual war to them.

The Legal Consequences of War

Let’s first briefly discuss the overarching legal structure of what it means to be at war before turning to detailed examples. A state of armed conflict makes lawful a range of actions that would be illegal outside of war and springs to life whole bodies of law not applicable in peacetime. International humanitarian law (IHL), or the law of armed conflict (LOAC), applies only during war and regulates its conduct. A host of extraordinary authorities in domestic law become available to the president during war, some of which also apply to other types of declared “national emergencies.” States of emergency also make it possible to derogate from certain international human rights laws, and as a practical matter it is easier for states to assert those powers in an emergency characterized as war.

In practice, when the president is exercising war powers, the executive branch tends to receive an enormous degree of deference from the courts and acquiescence in its activities by Congress (despite the Constitution delegating the majority of the war powers to Congress). As Brian Finucane and Steve Pomper write in this symposium: “When the United States went to war after 9/11, it crossed into new legal territory,” which should have meant the other two co-equal branches of government stepping up to serve their constitutional roles and providing checks and balances. In most cases, they did not. “The president’s war powers are vast and tend to be exercised

in secret. They are often deemed unreviewable by the courts and are almost always under-supervised by Congress,” Finucane and Pomper explain. In sum, the president’s power is vastly greater, and exercised much more freely, when the nation is at war.

The resort to these extraordinary authorities, and the ease with which the President may do so in war, are intended to be exceptions to normal order. But 20 years of exercising these powers, bending their frameworks to the particulars of the post-9/11 counterterrorism problem set, and of building entire institutions of government reliant on their continued invocation, have created a new normal of sorts. There is enormous political and institutional pressure to continue a war that has become such a giant commitment and a settled way of doing business. And it has also become almost unthinkable to many in the policy apparatus that the executive branch might forgo exercising these tremendous powers voluntarily (or to be seen as having ceded them if they might be needed to respond to new threats in the future). Presidents live in fear of a successful terrorist strike and having to explain why every military option was not taken to prevent it (even if the truth is that those military efforts would not have made us safer or would have risked being counterproductive).

But as Nick Rasumussen aptly observed in his [article](#) for this symposium, there is a need “to consider with an open mind whether the strategy and policy approaches we have been relying on in the past two decades are well-suited to the evolving challenges we face.” In the rest of this essay, I will examine the most fundamental of these policy approaches, the war approach, in three contexts – prosecution, detention, and targeted killing – that highlight the clear choices before us 20 years after the longest American war began.

Prosecution

Going to war after 9/11 put the option of military commissions on the table. But it did not require using them or foregoing the peacetime criminal justice system. The civilian federal court system in the United States has, of course, remained open and operating throughout the post-9/11 period. And these courts have been used to try and convict hundreds of terrorist suspects before and since 9/11, including [Zacarias Moussaoui](#) (sometimes called the “20th hijacker”), who was [indicted](#) in 2001 and pled guilty in 2005 to helping plan the 9/11 attacks.

Nevertheless, as part of its pivot to the war path, the Bush administration chose to stand up military commissions at Guantanamo Bay, at first through a [military order](#) issued just months after the 9/11 attacks. That order, and the commissions still ongoing at Guantanamo Bay today under the Military Commissions Act (MCA) later passed by Congress, directly rely on choosing the “war” paradigm, since they are a type of military tribunal used in a time of war to try offenses against the laws of war. (They are not to be confused with courts martial, which are used to try service members for violations of the Uniform Code of Military Justice regardless of whether the nation is at war.)

In U.S. practice, military commissions have historically been used at times and in places where it would be impracticable to use civilian courts. While initial arguments for the post-9/11 commissions relied on the difficulty of trying these international terrorism-related cases in civilian courts, it is military commissions that have proven to be ill-equipped for the task, even as civilian courts have consistently been a useful part of a holistic counterterrorism strategy. Compared to their civilian counterparts, the military commissions at Guantanamo are less adept at handling classified evidence, less experienced with trying complex capital cases (like the 9/11 and USS Cole bombing cases), have less clarity as to what substantive or procedural law applies (including basic constitutional guarantees), have fewer offenses available for charging (the MCA [authorizes prosecutions](#) for certain offenses committed during a “conflict subject to the laws of war”), are plagued by high turnover of judges, and by virtue of their location on an island outside of the U.S. mainland are much more expensive to administer and harder to participate in or observe.

It is no wonder that the civilian court system has secured many hundreds of convictions in terrorism-related cases (by one [count](#), over 660 as of 2018, including over 100 individuals “captured overseas”) as compared to only a handful in the military commissions, several of which were [overturned on appeal](#) (including three in which defendants had pleaded guilty). But the most important cases, including the case of those accused of involvement in the 9/11 attacks themselves, remain mired in pre-trial proceedings that seem unlikely to end anytime soon.

Some of the biggest problems with the Guantanamo military commissions, of course, are unique to the trajectory of the armed conflict during which they were convened. Most important, many of the current defendants were not just “battlefield captures” of soldiers (or spies) caught violating the laws of war, but men who were taken captive and tortured by the United States before they were charged with crimes. As Ian Moss explains in his [article](#) for this symposium on how to close Guantanamo:

It is open and obvious to any casual observer of the military commission system that much of the reason why trials have been illusive revolves around the issue of torture and mistreatment of detainees in U.S. custody. Torture is the U.S. government's original sin with regard to the detention of terrorism suspects now at Guantanamo, and it pervades each of the pending military commission cases. In the words of my former boss, the first Special Envoy for Guantanamo Closure Ambassador Dan Fried, "torture is non-biodegradable."

While the torture problem would not go away completely if the cases now pending before military commissions were tried in civilian courts, those courts would at least have predictable and time-tested rules for handling the issues that arise as a result. And as Moss notes, it is also possible to wind down the current commissions and resolve the pending cases through negotiated plea agreements; "resolutions present an opportunity to sidestep the most significant issues that have vexed the military commissions while also providing for some measure of accountability."

Twenty years after 9/11, the inability to bring to trial those responsible for the attacks (or even successfully conclude a plea agreement) is a glaring example of how choosing the war paradigm had grave unintended consequences. It is also an example of where charting a new course does not require exiting the armed conflict paradigm altogether. That is, even if the United States remains at war with some terrorist armed groups, it can responsibly wind down the use of military commissions at Guantanamo and, as it has done for several years already, try any new terrorism-related defendants in civilian courts.

Detention

Unlike prosecution, where a state of war does not necessarily require the resort to the use of military commissions, some amount of detention is likely to be required in a large-scale armed conflict. However, it may not be the case that it is the United States that needs to be the detaining power even in conflicts in which it participates – for example, after only a transitory period in U.S. custody, Iraq detained the vast majority of ISIS suspects initially captured by the United States in the recent conflict there, as did non-state partner groups such as Kurdish forces on the other side of the border in Syria (the United States did sometimes exercise detention authority for a short time period before handing detainees over to its partners, who had their

own troubles handling detention operations). Moreover, aside from Afghanistan and Iraq, most of the so-called “global war on terror” has not been fought with boots on the ground and battlefield captures, but with drones or other remotely operated weapons. But with those caveats, let’s turn next to what a state of war permits in terms of detention and U.S. detention practice in its post-9/11 conflicts.

First, what is wartime detention? The fundamental purpose of detention in armed conflict is to “prevent captured individuals from returning to the field of battle and taking up arms once again” (see *Hamdi v. Rumsfeld*). The ability to detain does not depend on any wrongful conduct by the detainee – quite the opposite, in international armed conflicts where soldiers have a duty to fight for their country’s side in war, a prisoner of war may have broken no domestic or international laws. Instead, detention is based solely on the status of the individual as a combatant (or in a few other circumstances that can be bracketed here, as a civilian who has participated in hostilities or must otherwise be interned if for security reasons it is “absolutely necessary”). The duration of wartime detention matches its purpose – it may last no longer than active hostilities, and in certain cases (such as when detainees are seriously sick or wounded, or “gravely and permanently diminished” in mental or physical health), it must end sooner. Prisoner releases and exchanges are also relatively common in war.

The primary distinction between the purpose of detention in an armed conflict and in the criminal law context is that the former is preventive and the latter is punitive (with the caveat of temporary pretrial detention). It must be recognized, then, that the flip side of the ability to detain a combatant *who has broken no laws* during war is that the same person likely could not be detained to face criminal charges (whether during wartime or not). In the immediate aftermath of 9/11, while the U.S. criminal code could no doubt have reached those most responsible for the attacks (whether they would eventually have been extradited or rendered to the United States to face trial is a harder question), “foot soldiers” who had not taken part in violent acts against the United States and remained abroad would have remained outside of the reach of U.S. criminal laws (query, of course, whether this meant it was truly necessary to detain them). After 9/11, when Congress amended criminal laws against supporting terrorism or designated foreign terrorist organizations to make them apply extraterritorially, the reach of the criminal justice paradigm is much broader.

With that background, what has U.S. practice been with respect to post-9/11 detention? Hina Shamsi, Priyanka Motaparthy, and Scott Roehm write for this symposium that the years following 9/11 were characterized by the “Bush administration’s turn to ‘the dark side,’” which when combined with subsequent administrations’ failure to seek accountability, helped ensure the failure of U.S.

policies. Nowhere is this more the case than with respect to detention policy. From the CIA's black sites and rendition of terrorist suspects to torture by other countries, to the shocking abuses at Abu Ghraib, to the early claims that Guantanamo detainees were beyond the reach of any legal paradigm and the purported legalization of torture and other forms of cruel treatment by Justice Department attorneys, post-9/11 detention practices involved a "repudiation of U.S. values, not by extremist outsiders but by our own hand." This "betrayal of America's professed principles was the friendly fire of the war on terror."

Alongside the abuses of the CIA's "rendition, detention and interrogation" (RDI) program and among some of those detained after capture on the battlefield, throughout the entire 9/11 period, the United States also engaged in lawful and appropriate detention – both in the armed conflict setting and through its criminal justice system.

Some individuals detained through one of these modes were transferred into others, and some merged over time – for example, those who were not released from the RDI program were shunted into "law of war" detention at Guantanamo Bay, where some of the battlefield captures from Afghanistan were also sent. And as noted above, the United States also engaged in short-term detention, primarily in Afghanistan and Iraq, before handing detainees over to partner forces.

The Bush administration also experimented in two post-9/11 cases with military detention of individuals initially arrested within the United States. It did not go well. As my former colleagues Christopher Fonzzone and Josh Geltzer succinctly summarized in *Just Security*: "Jose Padilla and Ali al-Marri – were suspects captured in the United States and transferred to military custody. In both cases, years of contentious litigation over the Government's ability to hold the detainees in military custody ensued, before the Government ultimately transferred both men back to federal courts for prosecution."

Today, the United States no longer runs detention operations in Afghanistan or Iraq. President Obama did not seek meaningful accountability for the CIA's post-9/11 detention practices, but he did ensure that it would no longer be in that detention business. The last detainee brought to Guantanamo was in 2008. Neither Obama nor Trump (despite his campaign vow to "load it up") brought a new detainee there. Instead, both used the criminal justice system to prosecute suspected terrorists, including those who planned or attempted attacks against the United States (although it very rarely used war authorities to capture them), and worked with partner countries to boost their counterterrorism prosecution

capacity. The post-9/11 terrorism detention picture now consists of the 39 men still at Guantanamo, many more convicted terrorists serving sentences in U.S. federal prisons (including one serving a life sentence, [Ahmed Khalfan Ghailani](#), brought for federal trial from Guantanamo before Congress barred transfers even for trial), and an active docket of terrorism-related cases in the civilian federal courts.

To be sure, the detention of some individuals in terrorism-aligned cases pursuant to criminal process, and in the [immigration](#) system pending removal, is not without [controversy](#) or abuse (including the well-documented [abuse](#) of “material witness” arrest warrants immediately after 9/11). But these systems, for all of their flaws, are heavily regulated by the U.S. Constitution and other domestic laws, and must also comport with U.S. international human rights law obligations. And while enforcement of those obligations is not always what it should be, there is a greater degree of transparency and accountability for abuses than in armed conflict settings.

Against this backdrop, what, if anything, must change when it comes to detention if the United States were to pivot away from its current wartime footing? The obvious answer is that Guantanamo must close. There can be no “law of war” detainees who are not facing criminal charges (but criminal proceedings, in either the military commissions or federal courts, may continue when a war ends). Given even the Bush administration, as well as Obama and now Biden, have endeavored to close the facility in any event, this change can only be seen as long overdue and all for the better. But what is crystal clear is that it should not be the tail that wags the dog – staying at war to hang onto detention at Guantanamo would be a new round of friendly fire in post-9/11 counterterrorism policy and a misuse of our military. And there is a way to close it responsibly [if we try](#).

The rest depends, in large part, on whether the United States ever again intends to engage in ground combat operations. In the context of explaining his decision to withdraw from Afghanistan, President Biden has made clear that he intends to use “[over-the-horizon](#)” strike capabilities as the war continues, stating explicitly that “we just don’t need to fight a ground war” to defeat terrorists militarily. And Biden has justified this approach in part by explaining that it is already how the United States fights other wars, against al Shabaab in Somalia or al-Qaeda in the Arabian Peninsula (AQAP) in Yemen, for example. While this simplified overview of U.S. counterterrorism operations beyond Afghanistan elides the fact the United States does, in fact, have special operators “on the ground” in [80 countries](#), they are not there to facilitate U.S. detention operations. In short, even if there will be a continued reliance on drones and commando raids (discussed in the next section below), no ground wars almost surely means no U.S. military detention operations.

“Direct Action” and Targeted Killing

The most stark difference between times of peace and war is that in war the use of lethal force against combatants, and against enemy property, is lawful so long as the rules of IHL are followed. (It is also lawful to target civilians for such time as they take direct part in hostilities.) The foreseeable effects of civilians killed and civilian infrastructure destroyed as “collateral damage” is also something that the laws of war specially permits (if deemed proportionate to the expected military benefits).

When the Bush administration chose to go to war after 9/11, it commenced the decades-long conflicts, with their enormous toll of civilian and combatant casualties, that President Biden is now seeking to end with the withdrawal of U.S. and allied forces in Afghanistan, and soon Iraq. The duration, human toll, and financial expense of those major ground wars have been extraordinary. The decision to go to war also started the United States down a path that led to the use of lethal force beyond the borders of Afghanistan, but ostensibly as part of the same armed conflict. Those “beyond the battlefield” strikes have in many ways defined the post-9/11 era and shone the greatest light on the stark differences between applying a criminal law or a war paradigm.

What has become known as “targeted killing” or “direct action” beyond “areas of active hostilities” (as Obama described it in his [Presidential Policy Guidance](#) governing such activities) began in the years immediately following 9/11 but was ramped up by President Obama, and then again under Trump. According to reports by news and analysis organizations and some U.S. disclosures, it expanded beyond the battlefield of Afghanistan (and later Iraq and Syria), to include [Yemen](#), [Pakistan](#), [Somalia](#), and later [Libya](#) and [Niger](#). (I should emphasize that this is not a comprehensive list of all counterterrorism activity the United States has engaged in based on the existence of an armed conflict, which include air strikes, drone strikes, raids conducted by special operators, train and equip programs, and other assistance and intelligence activities.)

The United States undertook these strikes – as well as the “traditional” battlefield operations in Afghanistan and later Iraq and Syria – based on the premise that it was in an ongoing armed conflict against those it was targeting, even if those groups were located thousands of miles from any “hot battlefield” and even if they were not those who attacked the United States on 9/11 but were “associated” or “successor” forces

of those groups. These remain, to put it mildly, controversial legal positions, even amongst most close U.S. allies (and even within the offices of some U.S. government lawyers themselves at the time). But they have also become remarkably durable across U.S. administrations of both political parties.

A thorough cataloguing of the legality of the U.S. position on the scope of the armed conflict since 9/11 – and in turn, who it may kill and where – is well beyond the scope of this essay. Let us turn instead to the question of what the consequences would be with respect to lethal targeting if the United States were to pivot away from the post-9/11 wars.

It should perhaps go without saying that, much more so than in the prosecution and detention contexts, when it comes to counterterrorism targeting, choosing to step away from the armed conflict paradigm would be a seismic shift. The ability to engage in status-based targeting would be over.

No drone wars. No “decapitation strategy.” No annual tolls of civilian casualties. No levelling of city blocks. The sprawling post-9/11 lethal-action bureaucracy would disappear or be repurposed, as would the funds used to support it. (Of course, strikes outside of ongoing armed conflict, like those Biden has already taken against “Iran-backed militias” in Iraq and Syria, or those the Obama administration took against Houthis in Yemen, could potentially still be taken if there were a valid claim of self-defense under international law and of Article II authority under domestic law.)

The set of questions that lurk on the other side of the ledger are as familiar on the 20th anniversary of 9/11 as they were on the 10th, but they are made more stark by recent events in Afghanistan that could presage a resurgence of its use as a terrorist base of operations. Is “operational disruption” in the form of targeted killing what keeps Americans safe from mass casualty attacks? What should the Biden administration – or a future one – do if it discovers terrorist training camps in unfriendly or ungoverned territory? Are the other instruments of national power the United States (and its partners) have at its disposal up to the task of preventing another 9/11?

These are very real questions, although they can have a tendency to set up false dichotomies (take strikes or “do nothing”) or rely on impossible counterfactuals (does a bombed training camp necessarily avert mass casualty attacks? do mistaken strikes that result in civilian casualties or the wrong person targeted help mobilize adversaries and enemies?). But a major reason why the armed conflict paradigm has

been so hard to shift out of – perhaps why President Obama could not take us off of the “perpetual wartime footing” he spoke out against in 2013 – is that no political leader, or civil servant, wants to be responsible if a successful attack *might* have been averted by the use of military force.

If we are to shift away from perpetual war, we must face that it means accepting that risk and countering it with other proven measures. But we must also keep front of mind the very real risks of staying at war in order to keep status-based targeting on the table. These go well beyond the contours of this brief essay, but include at a minimum weighing the long-term costs for our service members and their families, the risks of legitimizing rights-violating actions of other states in the name of counterterrorism, and the costs to our own democracy. Obama reminded us in 2013 to be “mindful of James Madison’s warning that ‘No nation could preserve its freedom in the midst of continual warfare.’” And there are of course concrete risks to our own security: namely, that a mistaken strike, based on faulty intelligence or other errors, can produce serious blowback and alienate the local populations and countries the U.S. needs to win over most if it is to succeed in the long term. Or that it could escalate a conflict rather than de-escalate (as with Trump’s strike on IRGC Commander Soleimani or Biden’s strikes on “Iran-backed militias”). Or that, as Asha Rangappa describes, a “myopic focus” on “Islamist terrorism” will take too much focus away from the growing threat of white nationalism and other forms of violent extremism here at home.

When it comes to non-military measures to deal with what will likely always be a risk of terrorist attack, as Luke Hartig explains, that means building our resilience and relying on our defenses:

[T]o observe the recent debate around the Afghanistan drawdown, some believe it’s inevitable (only a matter of time) before an Afghanistan-based al-Qaeda tries to strike the United States. Even if that is correct, we must begin to believe, and to understand, that it’s okay to play defense, to rely on our law enforcement professionals, intelligence community, international cooperation, or even armored airliner cockpit doors to prevent terrorist attacks. These capabilities have shown their ability to stop terrorism time and again since 9/11, and we should trust in the defenses and networks we have built to keep threats at bay.

A Paradigm Shift?

The 20 years since 9/11 have been marked not just by being at war, but by the way the war began — both in terms of the horrific nature of the 9/11 attacks themselves, and the profoundly mistaken way the Bush administration responded, including in its expansive conception of the “global war on terror” and the methods chosen to fight it. It has become difficult to disentangle the pathologies of still being at war, entrenched as it has become through multiple administrations of both political parties, from the persistent legacies of its worst abuses.

But with 20 years of hindsight, at least one thing is clear: the Pandora’s box that opened in the aftermath of 9/11 has not been shut and the pull to use the powers of war has become almost inexorable. As President Obama warned in a speech intended both to defend his continuing the war started by his predecessor but also make the case for winding it down, the failure to shift out of the war paradigm, however it is fought, has pernicious effects:

We cannot use force everywhere that a radical ideology takes root; and in the absence of a strategy that reduces the wellspring of extremism, a perpetual war — through drones or Special Forces or troop deployments — will prove self-defeating, and alter our country in troubling ways.

It is no longer September 12th, 2001. As Luke Hartig reminds us, “[i]rregular conflicts — whether related to terrorism or not — do not necessarily demand military responses.” There are other policy strategies that “should be properly resourced and used as tools of first resort.” President Obama could have taken us off the war path, swiftly and decisively, upon taking office. President Trump could have done the same, as he promised. Whether or not Congress exercises its constitutional responsibility to decide whether the nation should remain at war, it remains within the power of the president to change course. The choice of whether to pass perpetual war to a fifth president now falls to Biden.



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