

# 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.