



STATEMENT OF

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For a Hearing on:

**“‘Targeted Killing’ and the Rule of Law:
The Legal and Human Costs of 20 Years of U.S. Drone Strikes”**

Before the

Senate Judiciary Committee

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Introduction

Chairman Durbin, Ranking Member Grassley, and Members of the Committee, thank you for the opportunity to testify on behalf of the American Civil Liberties Union, and for holding this important hearing.

I was in the room almost ten years ago, when Congress last held a hearing on some of the issues before you today. Thanks to Senator Durbin and then-Ranking Member Cruz, that hearing was before this Committee, and a young Yemeni democracy activist named Farea al-Muslimi testified. He described himself as a cultural ambassador for America because of the rich life experiences and scholarships our country provided him. But then American airstrikes started killing Yemeni civilians and traumatizing entire communities, including in his home village, where a U.S. drone struck just six days before Mr. Al-Muslimi testified. He explained, “when they think of America they think of the terror they feel from the drones that hover over their heads ready to fire missiles at any time. What violent militants had previously failed to achieve, one drone strike accomplished in an instant: there is now an intense anger. . . . The drone strikes are the face of America to many Yemenis.”¹ Mr. al-Muslimi pleaded for an end to what everyone then called the U.S. targeted killing program. He explained that it was unnecessary, unwise, and counter-productive. But the program continued, and contributed to the humanitarian catastrophe that life in Yemen became.

Presidents George W. Bush and Obama started using drones strikes in Yemen without Congress or the American public ever even having a conversation about it. Successive Presidents have unilaterally claimed the power to use secretive war-based rules to kill terrorism suspects in multiple other countries around the world where we were not, or are not, at war. Despite widespread, credible reports of terrible civilian deaths and injuries, and lacking any strategic assessment of costs and consequences, or an end goal, the Executive Branch has kept expanding this program geographically, and in the categories of groups and people who could be killed based only on a President’s say-so. The legal justifications are vague and ever-shifting, and virtually no other country agrees with them. If any other country launched this program, we would rightly call it an unlawful, extrajudicial, and arbitrary use of force. Yet it is a core component of what Americans now call our forever or endless wars.

Even in congressionally-authorized wars, like in Afghanistan, our country has failed to live up to its civilian protection obligations. The ACLU and our partners represent the survivors of the 10 Afghan civilians, including seven children, killed by the August 29 U.S. drone strike in Kabul. I’ve heard from my clients who are fathers the horror of having to gather up their children’s body parts. I’ve listened to my client, Anisa Ahmadi, struggle to breathe through her despair at the death of her husband, an aid worker for the American NGO Nutrition and

¹ See *Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing: Hearing Before the Subcomm. on Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 113th Cong. 876 (2013) <https://www.c-span.org/video/?312317-1/senate-committee-examines-legality-us-drone-strikes>; see also *Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing: Hearing Before the Subcomm. on Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 113th Cong. 876 (2013) (statement of Farea Al-Muslimi) <https://www.judiciary.senate.gov/imo/media/doc/04-23-13Al-MuslimiTestimony.pdf>.

Education International, three of her sons, and one of her grandchildren. My clients' grief is compounded by the fact that, for 19 days, our government kept up false and stigmatizing allegations about their loved ones, wrongly asserting the strike was "righteous" and "successful" against ISIS operatives. The Pentagon later withdrew those justifications and admitted the strike was a mistake, but the damage is done. The falsehoods are still widespread in Afghanistan today and my clients remain in daily and imminent danger. Months ago, our government promised to evacuate them. They are still waiting.

For most Americans, this kind of fear, danger, horror, and life-long grief are unimaginable. To hundreds of thousands of civilians in Afghanistan, Syria, Iraq, Yemen, Pakistan, Somalia, and elsewhere, it has been their daily life.

This is because for more than two decades, Presidents of both parties have adopted a costly war-based approach to national security and counterterrorism policy that still has no clear endgame in sight. They have wrongly used wartime legal justifications to use lethal force in countries where we were not or are not at war, often in secret. In doing so, the Executive Branch has crossed the lines between wartime and peacetime powers that are essential to maintain the rule of law, democratic accountability, and the right to life. In countries where the United States is or has been at war, the Executive Branch has all too often failed to comply with the laws of war, which are meant to protect both civilians and American troops. Taken as a whole, this shortsighted strategy has violated the constitutional separation of powers, and has damaged the rule of law, international cooperation, and our country's reputation. It has set a dangerous precedent for other nations; fueled conflicts and massive human displacement that has in turn contributed to refugee crises and destabilization of entire regions; and diverted limited resources from more effective approaches.

The American people have long grown tired of this war-centered approach.² In the last election, the Presidential candidates for both parties promised to end America's "endless wars."³ In the words of the executive director of one veterans' group, "We are tired of our country using military force as a tool of first resort and the enormous physical and psychological toll this has caused for servicemembers, as well as civilians harmed by our country's actions abroad. An entire generation of veterans and lost civilian lives later, it's past time for a new way forward."⁴

² James Carden, *A New Poll Shows the Public Is Overwhelmingly Opposed to Endless US Military Interventions*, *The Nation* (Jan. 9, 2018), <https://www.thenation.com/article/archive/new-poll-shows-public-overwhelmingly-opposed-to-endless-us-military-interventions/>.

³ Leo Shane III, *Trump's Second-Term Plan Includes Stopping 'Endless' Wars, Boosting Military Support*, *Military Times* (Aug. 24, 2020), <https://www.militarytimes.com/news/pentagon-congress/2020/08/24/trumps-second-term-plan-includes-stopping-endless-wars-boosting-military-support/>; Joseph R. Biden, Jr., *Why America Must Lead Again*, *Foreign Affairs*, Mar.-Apr. 2020, <https://www.foreignaffairs.com/articles/united-states/2020-01-23/why-america-must-lead-again>.

⁴ *110+ Organizations to Biden: End U.S. Program of Lethal Strikes Abroad*, *ACLU* (June 30, 2021), <https://www.aclu.org/press-releases/110-organizations-biden-end-us-program-lethal-strikes-abroad>.

And indeed, we need not remain in this harmful, counterproductive, and costly state. Our nation has a robust array of diplomatic, law enforcement, peacebuilding, development, and other resources to mitigate actual security concerns abroad and at home. To help pull us out of this endless war-based spiral and its human, legal, and policy costs, I lay out below suggestions for a new path forward. There are three actions Members of this Committee can take.

- 1. First, you can use your oversight powers to demand that Executive Branch officials testify about their legal and policy justifications for using lethal force in countries where Congress did not authorize it, and make public any legal and policy opinions that seek to justify such drastic and extralegal measures.** Demanding this transparency from the Department of Justice and the White House is within this Committee's jurisdiction. **Require the Executive Branch to make public the countries where it uses force and the groups against which that force is used, based on its unilateral interpretations of 20-year old congressional AUMFs.** Secret law is anathema, as is secret lethal force, and there is no place for them if our country is to live up to the values it professes. This is important not only for civilians, but for the troops who need to trust that what Presidents and commanders ask them to do is lawful. **In oversight hearings, I urge you to question officials about specific strikes that appear to violate the laws of war and possible war crimes that have occurred in the last 20 years.**
- 2. Second, use your core Article I power of the purse to deny funding for unauthorized and unlawful use of force.** You already have this power under existing law, and can use annual appropriations legislation to withhold funds for use of force that is not specifically authorized by Congress. Congress used this power to accelerate the end of the Vietnam War and could take similar action now for unauthorized uses of force.
- 3. Third, help restore our constitutional system of checks and balances, and reverse the Executive Branch's power grab on matters of war and peace.** Under Article I of the Constitution, only Congress has the authority to declare war, except in truly exceptional circumstances of defense against an attack or imminent peril, when a President can exercise their Article II Commander-in-Chief power to act. The framers vested the extraordinary decision to use force and go to war in our system's deliberative body to ensure democratic accountability. Yet over decades, through unilateral Executive Branch legal opinions and actions, successive Presidents have written Congress out of this life and death equation. And Congress has gone along with it. Fortunately, legislation in both houses of Congress seeks to restore the constitutional equilibrium.⁵ Among other important provisions, it includes an automatic funding cut-off in the event that, after responding to a genuine emergency, a President fails to come to Congress for continuing authority to use force.

⁵ See National Security Powers Act of 2021, S.2391, 117th Cong. (2021); see also National Security Reforms and Accountability Act, H.R.5410, 117th Cong. (2021).

With these steps, our country can start to address the legal, policy, and human costs of the last 20 years, and craft a new path forward, one rooted in the rule of law, protection of civilians, and democratic accountability.

I. Because the Executive Branch has repeatedly used lethal force unlawfully over the last 20 years, Congress needs to reverse this executive power grab and re-assert its own constitutional obligation to decide and oversee when, where, and why the nation uses force.

A. Under the Constitution, only Congress has the power to declare war and authorize force except in a truly exceptional and limited emergency.

To safeguard the separation of powers inherent to our system of checks and balances, the Constitution grants only Congress the power to declare war and authorize force.⁶ The President must, therefore, obtain advance authorization from Congress before using force abroad. The only exception to this requirement is if the President exercises Commander-in-Chief authority, under Article II of the Constitution, to use force to repel a sudden attack, or when the nation is in truly imminent peril, and there is no time for the President to seek authorization from Congress. Yet for decades, successive administrations of both parties have used force without Congressional authorization or interpreted authorizations far beyond what Congress intended—while Congress has failed to defend its constitutional prerogative and obligations.

For 50 years, the ACLU has been steadfast in insisting on the necessity of our constitutional system of checks and balances in restraining Presidential war powers—regardless of which party holds power.⁷ We do not take positions on the political decision to go to war, or withdraw troops from it. But we have always urged strict Presidential compliance with the Constitution, as the framers intended, so that Congress makes the ultimate decision to go to war and use force except in response to an attack or a genuine emergency.

⁶ *Power to Declare War*, H. R., <https://history.house.gov/Institution/Origins-Development/War-Powers/> (last visited Feb. 4, 2022).

⁷ See, e.g., *ACLU Says Military Action in Kosovo Violates Constitution and War Powers Act*, ACLU (Apr. 28, 1999), <https://www.aclu.org/press-releases/aclu-says-military-action-kosovo-violates-constitution-and-war-powers-act>; *Letter to Congressional Leadership on Respecting the Limits of [2001] Military Force Authorization*, ACLU, <https://www.aclu.org/letter/letter-congressional-leadership-respecting-limits-military-force-authorization> (last visited Feb. 7, 2022) (“The war powers resolution of September 14 cannot and should not be construed by either the President or Congress as a carte blanche. Rather, Congress must continue to play an important role in the national debate as the size and scope of any possible military engagement evolves over time.”); *ACLU Says Military Action in Iraq Without Congressional Approval Would Be Unconstitutional*, ACLU (Sept. 13, 2002), <https://www.aclu.org/press-releases/aclu-says-military-action-iraq-without-congressional-approval-would-be>; *ACLU Asks Congress to Debate and Vote on President’s Use of Force in Libya*, ACLU (Mar. 25, 2011), <https://www.aclu.org/press-releases/aclu-asks-congress-debate-and-vote-presidents-use-force-libya>; *Letter to President Obama Regarding Congressional Approval Before Using Military Force in Syria*, ACLU (Aug. 30, 2013), <https://www.aclu.org/legal-document/letter-president-obama-regarding-congressional-approval-using-military-force-syria>; *Trump’s Airstrikes On Syria Are Illegal Without Congressional Authorization*, ACLU (Apr. 13, 2018), <https://www.aclu.org/press-releases/aclu-trumps-airstrikes-syria-are-illegal-without-congressional-authorization>.

That is because the momentous decision to go to war vests extraordinary powers in the President, like lethal force or military detention, which can result in wartime curtailment of fundamental civil liberties and rights. In other words, when the country is at war, the President can claim the authority to take actions that are unconstitutional and illegal in a normal peacetime state. These must therefore be exceptional powers, informed by public debate and a Congressional vote to ensure that these life and death decisions are sound, broadly democratic, and accountable to the American people.⁸ This is critically important for the American public, whose rights and tax dollars are at stake, and also for troops who are required to implement war-time and war-based policies, who need to trust that what Presidents and commanders ask them to do is legal and moral.

The ACLU has therefore long insisted on Executive Branch compliance with the Constitution and War Powers Resolution.⁹ But that system is broken. In the last 20 years alone, the extent of the breakdown in structural checks and balances has become starkly clear. We have been in a state of perpetual wars that have exacted a terrible human toll, and that could continue even after the 2021 withdrawal from Afghanistan.

Presidential powers, once claimed, are hard to claw back. The last 20 years show that unless Congress conducts active oversight and imposes constraints, the Executive Branch's power grab will continue to expand, far beyond the original constitutional purpose, and even though it perpetuates enormous and unacceptable human, legal, and strategic costs. The 2001 AUMF, which I discuss further below, is the paradigmatic example. It has been invoked by Presidents who cite it—far beyond Congress's original intent—as the primary legal justification for military operations in multiple parts of the world against an ill-defined or even secret set of opponents, often enmeshing this country in what are local or regional conflicts and inflaming local tensions and resulting rights abuses.

Critically, through this 2001 AUMF interpretation and other unilateral interpretations of law, successive Presidents have claimed the power to authorize secretive killing of people who are deemed terrorism suspects even outside recognized battlefields with no meaningful geographic or temporal limitations, and no meaningful accountability for wrongful deaths and civilian lives lost and injured. If any other country had this program, our political leaders would rightly be condemning it, instead, we're setting a harmful precedent. These claims of Presidential power, this approach of military force as a first instead of last resort, has not only resulted in wrongful killings of civilians, it's contributed to humanitarian crises, with Yemen being an emblematic tragic example, and contributed also to destabilization and mass displacement in fragile states and regions.

It is particularly striking that Presidential claims of power are often laid out by Executive Branch lawyers, in often secret legal opinions and policies governing use of lethal force. Secret laws and policies governing who lives and who dies should be anathema in our country, or any

⁸ See John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (1993); David Golove, *The American Founding and Global Justice: Hamiltonian and Jeffersonian Approaches*, 57 VA. J. Int'l L. 621, 625 (2018).

⁹ *War Powers Resolution*, Pub. L. No. 93-148, 87 Stat. 555 (1973).

democracy. Yet it has taken multiple lawsuits by the ACLU and the New York Times to force disclosure of redacted lethal force rules by the Obama and Trump administrations.¹⁰

Through unilateral legal interpretations and actions, the Executive Branch has exploited terms like “hostilities,” that were not defined in the existing War Powers Resolution, and even the very concept of “imminence,” to expand Presidential power and evade Congressional oversight. But Congress itself has failed to act to defend the power the framers intended it to have.

If checks and balances are to have meaning, surely, they need to robustly apply to one of the most momentous decisions our nation can make. Yet we have a system in which a tactic—use of force, lethal force—has become an entire strategy, with little to no meaningful accounting for human costs and consequences. We urgently need Congress to reassert its role.

Fortunately, there is legislation in both houses that, if passed, would represent a generational effort to recalibrate a healthy separation of powers and put the United States on stronger democratic, legal, and rights-respecting footing as it faces the global challenges of the next twenty years.¹¹ The ACLU appreciates that Senator Lee is a co-sponsor of the Senate bill. This legislation:

- Defines the President’s authority by limiting it to uses of force “necessary to repel a sudden attack... or the concrete, specific, and immediate threat of such a sudden attack” and there is not time to provide Congress with a briefing necessary to inform a vote to obtain prior authorization within 72 hours. Outside of those narrow circumstances, the President would need to come to Congress to seek authorization to use lethal force abroad—as the Constitution requires. Moreover, this provision would require the President to come to Congress quickly even when force was deemed necessary, reining in unilateral assertions of power and protecting against indefinite wars.
- Defines terms, like “hostilities,” to address ambiguities in current law with which the Executive Branch has repeatedly played fast and loose for decades.

¹⁰ See, e.g., *ACLU V. DOD - FOIA Case Seeking Trump Administration's Secret Rules for Lethal Strikes Abroad*, ACLU, <https://www.aclu.org/cases/aclu-v-dod-foia-case-seeking-trump-administrations-secret-rules-lethal-strikes-abroad>; *ACLU V. DOJ - FOIA Case for Records Relating to Targeted Killing Law, Policy, And Casualties*, ACLU, <https://www.aclu.org/cases/aclu-v-doj-foia-case-records-relating-targeted-killing-law-policy-and-casualties>.

¹¹ *ACLU Support for The National Security Powers Act of 2021*, ACLU (July 20, 2021), <https://www.aclu.org/letter/july-20-2021-aclu-support-national-security-powers-act-2021>; *ACLU Support For The National Security Reforms And Accountability Act*, ACLU (Sep. 30, 2021), <https://www.aclu.org/letter/sep-30-2021-aclu-support-national-security-reforms-and-accountability-act>.

- Reduces the “termination clock” under the War Powers Act from 60 days to 20 days in order to reduce the risk that supposedly defensive uses of force escalate into more indefinite or permanent conflicts, and to incentivize the Executive Branch to engage in far more meaningful consultation with Congress before commencing military operations in order to secure support and to keep Congress fully informed once any hostilities begin.
- Imposes an automatic cut-off of congressional funds in the event that the Executive Branch does not comply with the provisions of the new law, utilizing Congress’s most potent oversight tool to reassert its place in the momentous decision to use force.
- Enacts meaningful reporting and transparency requirements.

The ACLU urges Congress to pass this legislation to restore our system of checks and balances, the rule of law, and democratic accountability for perhaps the most consequential decision this nation can make: war or peace.

B. The Executive Branch has interpreted the 2001 and 2002 AUMFs far beyond Congress’s purpose, and Congress should reject these interpretations and repeal these stale and abused authorities.

Successive Presidents of both parties have relied upon the 2001 and 2002 Authorizations for Use of Military Force (AUMF) far beyond Congress’s original purpose in enacting them. Congress has largely stood on the sidelines while the Executive Branch’s continued reliance on the 2001 and 2002 AUMFs for far-flung military and other operations nearly two decades after their enactment has resulted in mission creep, eroded public support, and siphoned limited resources from other national priorities.¹²

The 2001 AUMF authorized military force against those who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.¹³” Twenty years later, this AUMF has been used by the United States as the primary legal justification for military operations against a number of different groups in at least 19 different countries around the world,¹⁴ including—through overbroad Executive Branch legal interpretation—against “associated forces” and assorted “successor entities” of

¹² Rita Siemion, Scott Roehm, Hina Shamsi et al., *Toward a New Approach to National and Human Security: End Endless War*, Just Sec. (Sept. 11, 2020), <https://www.justsecurity.org/72371/toward-a-new-approach-to-national-and-human-security-ending-endless-war/>.

¹³ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

¹⁴ Matthew Weed, Cong. Rsch. Serv. (Feb. 16, 2018), <https://sgp.fas.org/crs/natsec/pres-aumf.pdf>.

those responsible for the 9/11 attacks.¹⁵ In essence, the Executive Branch has claimed power Congress refused to grant President George W. Bush in 2001.¹⁶

Successive administrations have also claimed that the 2001 AUMF and the 2002 AUMF (which authorized force against the Saddam Hussein regime in Iraq) provide authorization for using force against the Islamic State in Iraq and Syria (ISIS).¹⁷ The Trump administration even went so far as to attempt to claim that Iran and groups affiliated with the Iranian regime are covered by the 2002 AUMF, including by citing it as one of that administration's legal bases for the targeted killing of Iranian general Qassimi Soleimani in January 2020.¹⁸

After the withdrawal from Afghanistan, there should be no question that Congress should rescind these stale and wrongly interpreted AUMFs while examining how they have been applied and eroded democratic accountability, the rule of law, and individual rights.

Most immediately, however, Congress can ensure that these AUMFs are rescinded and any new AUMF includes safeguards against future similar unilateral Executive expansion.

¹⁵ These legal justifications were derived from a variety of Executive Branch interpretations of its authorities, including in litigation, speeches, Justice Department Office of Legal Counsel opinions, agency interpretations or applications of those opinions. *See, e.g.*, Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay, In re: Guantánamo Bay Detainee Litigation, Misc. No. 08-0442, at 1 (D.D.C. 13 March 2009); Jeh Johnson, Sec'y Homeland Sec., Lecture at Yale Law School on National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012), in 31 *Yale L. & Pol'y Rev.* 141 (2012); Stephen Preston, Gen. Couns. Dep't of Def., Address at American Society of International Law: Legal Framework for the United States' Use of Military Force Since 9/11" (Apr. 10, 2015); *see also* Appendix, *Am. Civil Liberties Union v. DOJ*, No. 15-1954 (S.D.N.Y. Aug. 28, 2015), <https://www.aclu.org/legal-document/aclu-v-doj-aclu-waiver-table>; April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 *Op. O.L.C. slip op.* (2018), <https://www.justice.gov/olc/opinion/file/1067551/download> (OLC broadly defining "national interests" that the President could unilaterally invoke to justify use of force includes range of interests, including "promoting regional stability" and "assistance to allies").

¹⁶ Richard Grimmett, *Authorization for the Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History*, Cong. Rsch. Serv., Jan. 16, 2007 (describing Bush administration's initial request for authority to use force against groups unconnected to the 9/11 attacks, which Congress rejected).

¹⁷ *See* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. 107-243, 116 STAT. 1498 (2002); *see also* Respondent's Response to Petitioner's Response to Factual Return, *Doe v. Mattis*, 288 F.Supp.3d 195 (D.D.C. 2018) (No. 17-cv-2069).

¹⁸ Letter from Amb. Kelly Craft, U.S. Permanent Representative, U.S. Mission to the United Nations to Amb. Dang Dinh Quy, President of the United Nations Security Council (Jan. 8, 2020), <https://www.justsecurity.org/wp-content/uploads/2020/01/united-states-article-51-letter-soleimani.pdf>; Memorandum for John A. Eisenberg, Legal Advisor to the Nat'l Sec. Council, Re: January 2020 Airstrike in Iraq Against Qassem Soleimani, Office of Legal Counsel, Justice Department, (Mar. 10, 2020) <https://s3.documentcloud.org/documents/21012045/redacted-olc-memo-justification-of-soleimani-strike.pdf>; Notice on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, <https://www.justsecurity.org/wp-content/uploads/2022/01/section-1264-report-on-soleimani-strike.pdf> (issued pursuant to Section 1264 of the 2018 National Defense Authorization Act); Adil Ahmad Haque, U.S. Legal Defense of the Soleimani Strike at the United Nations: A Critical Assessment, *Just Sec.* (Jan. 10, 2020), <https://www.justsecurity.org/68008/u-s-legal-defense-of-the-soleimani-strike-at-the-united-nations-a-critical-assessment/>; Brian Finucane, Time for the Biden Administration to Disavow the Dangerous Soleimani Legal Opinions, *Just Sec.* (Jan. 3, 2022), <https://www.justsecurity.org/79700/time-for-the-biden-administration-to-disavow-the-dangerous-soleimani-legal-opinions/>.

Several such safeguards have garnered bipartisan support and reflect an effective approach to drafting an AUMF that permits the United States to address legitimate and exceptional security concerns while applying the hard lessons learned from overbroad and harmful interpretations of the 2001 and 2002 AUMFs.¹⁹ These include:

- *Clearly Defining the Opponent and Mission Objectives.* Specifying the nation or group(s) against which force is authorized and the objectives or purpose—i.e., the mission—for which force is authorized ensures that congressional intent and the will of the American people cannot be overridden by subsequent, unintended Executive Branch interpretations and expansions of the use of force authority.
- *Specifying the Geographic Scope of the Authorization.* Explicitly limiting war authorities to declared theaters of actual armed conflict helps ensure compliance with U.S. obligations under the U.N. Charter system that our nation helped establish, and provides public clarity regarding with whom the nation is at war and where.
- *Requiring Robust Transparency and Reporting.* Regular and specific reporting requirements promote democratic accountability, ensure compliance with the Constitution and our laws, as well as binding international law, and allow Congress to fulfill its oversight responsibilities by staying informed about conflict. Reporting requirements in an AUMF would also provide a critical safeguard against endless war, and public transparency that is crucial to public oversight and accountability.
- *Requiring Compliance with International Law.* Any new AUMF should contain an explicit statement that its authorities may only be exercised in compliance with U.S. international legal obligations. The United States is already bound by international law regardless of whether an explicit statement is included in an AUMF, but its inclusion will help restore domestic and global confidence in the United States as a nation that complies with the rule of law.
- *Including a Supersession or Sole Source of Authority Provision.* Given prior administrations' assertions that the 2001 AUMF and 2002 Iraq AUMF authorized the use of force against ISIS—even though those authorizations were passed by Congress before ISIS even existed—if Congress does not repeal both of these AUMFs, any new AUMF should make clear it is the sole, superseding source of authority to use force against the nation or entity to which it applies. Without this clarifying language, a next administration could read the new authorization as expanding its administration's war-making powers, rather than limiting them.
- *Setting an Expiration Date.* Sunset clauses, which have been included in nearly one-third of prior AUMFs as well as several post-9/11 national security statutes, set a date for Congress and the Executive Branch to reexamine the AUMF in light of current conditions and, if necessary, refine or narrow the legislation in response.

¹⁹ See, e.g., National Security Reforms and Accountability Act, H.R.5410, 117th Cong. (2021).

The ACLU urges Congress to ensure these safeguards in any future use of force authorization.

C. The Executive Branch’s program of lethal strikes outside of armed conflict is unlawful and must end.

Over the last two decades, a core component of this country’s war-first approach has been the policy of secretive and unaccountable killings of terrorism suspects.²⁰ This policy has expanded in intensity and geographic scope since the George W. Bush administration launched the first airstrike in Yemen in 2002, and in the categories of people who could be killed based on suspicion, alleged association, or affiliation—all based solely on the President’s say-so.

Over now five administrations, our government has sought to justify this lethal strikes program, which takes place outside of recognized armed conflict and has exacted an appalling toll on Muslim, Brown, and Black civilians in different parts of the world. It is now abundantly clear that Executive Branch legal or policy justifications for this program do not comply with the Constitution or binding international law; indeed, they fundamentally undermine the rule of law.²¹

Congress has not authorized the Executive Branch to use force in any country in which the program operates or has operated—including Pakistan, Yemen, Libya, Somalia, Niger and elsewhere.²² In response to concern about this lethal strikes program from allies abroad, public controversy, advocacy, and litigation, the Obama administration secretly adopted Presidential Policy Guidance in 2013, imposing internal bureaucratic constraints within the Executive Branch and civilian casualty safeguards outside what the administration called “areas of active hostilities.” That Guidance, which only became public in 2016 after litigation, contained a few meaningful civilian protection measures, such as a preference for capture and a requirement of near certainty that no civilians would be harmed in the locations where the policy applied.²³ But

²⁰ See Rita Siemion, Hina Shamsi, Dan Mahanty et al., *Toward a New Approach to National and Human Security: End Unlawful, Secret, and Unaccountable Use of Lethal Force*, Just Sec. (Sept. 11, 2020), <https://www.justsecurity.org/72375/toward-a-new-approach-to-national-and-human-security-end-unlawful-secret-and-unaccountable-use-of-lethal-force/>.

²¹ See Hina Shamsi, *Trump’s Secret Rules for Drone Strikes and Presidents’ Unchecked License to Kill*, Just Sec. (May 3, 2021), <https://www.justsecurity.org/75980/trumps-secret-rules-for-drone-strikes-and-presidents-unchecked-license-to-kill/>; Rebecca Ingber, *Legally Sliding into War*, Just Sec. (Mar. 15, 2021), <https://www.justsecurity.org/75306/legally-sliding-into-war/> (discussing executive branch lawyering that interprets presidential power ever more broadly at expense of congressionally-imposed limits and public debate).

²² See Hina Shamsi, *Trump pledged to End ‘Endless Wars.’ His Executive Order Suggests Just the Opposite.*, Wash. Post (Mar. 12, 2019), <https://www.washingtonpost.com/opinions/2019/03/12/trump-pledged-end-endless-wars-his-executive-order-suggests-just-opposite/>; see also *Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations*, U.S. Nat’l Sec. Council (Apr. 2018); *Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations*, U.S. Nat’l Sec. Council (2020); Alan Blinder & Thomas Gibbons-Neff, *‘I Cry Every Day’: Families of Soldiers Killed in Niger in 2017 Are Still Waiting for Answers*, N.Y. Times (Apr. 26, 2019).

²³ See *ACLU V. DOJ - FOIA Case for Records Relating to Targeted Killing Law, Policy, And Casualties*, ACLU, <https://www.aclu.org/cases/aclu-v-doj-foia-case-records-relating-targeted-killing-law-policy-and-casualties>; *Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities*, U.S. Nat’l Sec. Council, 2013; see also *Background Briefing by Senior Administration Officials on*

overall, in the name of flexibility and threat prevention, the administration entrenched an architecture for a near-global lethal program with little transparency, no accountability, and no endgame in sight for the precedent it unleashed.

The Obama administration did not define “areas outside of active hostilities,” a term that has no basis in U.S. or international law, but it was commonly understood to mean locations outside of recognized battlefields, where the laws of war clearly apply. Afghanistan, Iraq, and Syria were (and are) armed conflict zones under the laws of war, and the U.S. government asserted it would adhere to its law-of-war obligations in those conflicts. The Obama-era rules were understood to apply to the rest of the world, and more specifically, at various points, in Pakistan, Yemen, Somalia, and Libya.²⁴

For those “areas outside of active hostilities,” the Obama administration cobbled together a set of made-up rules that cherry-picked from a variety of legal frameworks that are intended to safeguard individual life and international peace and security—the laws of war, human rights law, and the law and doctrines governing states’ use of extraterritorial force in self-defense.²⁵ In doing so, as rights groups, United Nations experts, and scholars have explained, the U.S. government has invoked war-based rules to permit killing that under our laws and international law is prohibited and constitutes extrajudicial execution.²⁶ Even as it sought to justify unilateral executive use of lethal force, the Obama framework tried to impose policy limits based loosely on a combination of proxies for geographic scope, who could be killed, and with what precautions. In doing so, it entrenched a bureaucratized framework for this unlawful use of lethal force, vastly expanded the program, and under devolved authority for carrying out strikes to regional military commands under certain circumstances.²⁷

In 2017, the Trump administration secretly replaced those rules with its own set, the “Principles, Standards, and Procedures.” It took litigation and four years for those rules to

the President’s Speech on Counter-terrorism, White House (May 23, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/background-briefing-senior-administration-officials-presidents-speech-co>.

²⁴ See *supra* note 21; see also *Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations*, White House (Dec. 5, 2016).

²⁵ See *supra* note 21.

²⁶ See, e.g., Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Study on Targeted Killings*, U.N. Doc A/HRC/14/24 (May 28, 2010), <https://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>; UN Human Rights Expert Questions Targeted Killings and Use of Lethal Force, U.N. (Oct. 20, 2011), <https://news.un.org/en/story/2011/10/392402-un-human-rights-expert-questions-targeted-killings-and-use-lethal-force>; *Study on Armed Unmanned Aerial Vehicles* (2015), <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/more/drones-study/drones-study.pdf>; Rebecca Ingber, *Legally Sliding into War*, Just Sec. (Mar. 15, 2021), <https://www.justsecurity.org/75306/legally-sliding-into-war/>;

²⁷ *Principles, Standards and Procedures for U.S. Direct Action Against Terrorism Targets*, Nat’l Sec. Council (2017), <https://www.aclu.org/foia-document/psp-foia-document-april-30-2021>.

become public in 2021—albeit still in redacted form.²⁸ The Trump rules further scrambled—and surely created greater uncertainty about—what legal constraints applied where, and to whom. Unlike the Obama rules, the public Trump rules contain no mention of “areas outside of active hostilities.” The rules do not even bother referring to “affiliate forces” of ISIS or Al Qaeda in identifying potential targets of operations—referring instead to their purported networks “across the globe.” As a result, the Trump rules potentially applied to all parts of the world outside the United States, including countries in which there is recognized armed conflict.

According to media reports, the Trump administration weakened even the limited Obama-era constraints by, among other changes, eliminating the senior-level interagency review process for approving strikes and the requirement that the individual targeted pose an “imminent” threat to Americans.²⁹ And it remained unclear whether, and where these weakened constraints even continued to apply. The result was even greater secrecy, more civilian deaths and injuries, and further erosions of any meaningful limits on the use of lethal force.³⁰

The Biden administration has not publicly or reportedly issued a new set of lethal force rules, and it is not clear what rules it is applying or will apply. In 2021, the ACLU joined an unprecedented 113 organizations from the United States and around the world in calling President Biden to end this program of lethal strikes outside recognized battlefields, including through the use of drones. These groups came together from a variety of perspectives, including: human rights; civil rights and civil liberties; racial, social, and environmental justice; humanitarian approaches to foreign policy; faith-based initiatives; peacebuilding; government accountability; veterans’ issues; and the protection of civilians.³¹

Many of these and other civil society groups have spent the last two decades considering fact- and evidence-based rights-respecting alternatives to the force-first approach our country has taken.³² At future hearings, Congress should hear from and question government and civil society witnesses about these alternatives.

²⁸ *Principles, Standards and Procedures for U.S. Direct Action Against Terrorism Targets*, Nat’l Sec. Council (2017), <https://www.aclu.org/foia-document/psp-foia-document-april-30-2021>.

²⁹ See Charlie Savage, *Will Congress Ever Limit the Forever-Expanding 9/11 War?*, N.Y. Times (Oct. 28, 2017), https://www.nytimes.com/2017/10/28/us/politics/aumf-congress-niger.html?smid=tw-share&_r=0; see also Rita Siemion & Kate Kizer, *How Dangerous—and How New—Is the Defense Department’s “Collective Self-Defense” Theory?*, Just Sec. (Oct. 30, 2018) <https://www.justsecurity.org/61273/dangerous-and-new-is-defense-departments-collective-self-defense-theory/>.

³⁰ See, e.g., Missy Ryan, *Trump Administration Increased Strikes and Raids in Yemen, Watchdog Finds*, Wash. Post, (Oct. 28, 2020), https://www.washingtonpost.com/national-security/us-airstrikes-yemen-civilian-deaths/2020/10/27/97016ce0-1856-11eb-bb35-2dcfdab0a345_story.html; Airwars, *U.S. Forces in Somalia, Civilian Deaths by U.S. President*, <https://airwars.org/conflict-data/?belligerent=us-forces&country=somalia>.

³¹ *Coalition Letter Calls for End to U.S. Lethal Strikes Abroad*, ACLU (June 30, 2021), <https://www.aclu.org/letter/coalition-letter-calls-end-us-lethal-strikes-abroad?redirect=letter/110-groups-letter-president-biden-calling-end-us-program-lethal-strikes-abroad>.

³² See, e.g., Jason Calder & Lauren Van Meter, *Strengthening Democracy is a Better Counterterrorism Strategy*, *Foreign Policy* (Jan. 24, 2022), <https://foreignpolicy.com/2022/01/24/democracy-governance-counterterrorism-violence-extremism/>.

II. The Executive Branch has used lethal force in official secrecy, with little or no accountability to civilian victims, Congress, or the public.

Secrecy concerning lethal force justifications and use fundamentally undermines the rule of law, democratic accountability, and the right to life under both our laws and international law. Over 20 years, administrations of both parties have provided varying degrees of transparency about their rules for lethal force abroad, but all have fallen far short.

As a result, perhaps the most visible, consequential, and controversial aspect of American foreign policy over the past twenty years has taken place under cover of secrecy, deniability, and misinformation. As I discussed above, the U.S. lethal strikes program outside of armed conflict has dramatically expanded. The United States has conducted such strikes in Yemen, in Pakistan, in Somalia, and in Libya—but successive administrations have kept almost every aspect of these uses of force secret, including often even from Congress.

For example, during the Obama administration, the Justice Department refused to provide Congress with the Office of Legal Counsel (OLC) memoranda that authorized the intentional killing of a U.S. citizen, and others that addressed the administration’s legal analysis concerning where and under what circumstances it could use of lethal force abroad outside of war zones. It took a threatened filibuster by Senator Wyden of President Obama’s nominee to lead the CIA, John Brennan, as well as lengthy litigation by the ACLU and the New York Times, to force disclosure of the memo.³³

As another example, it took almost six years for the Obama administration to release—in response to Freedom of Information Act litigation brought by the ACLU and the New York Times—its “Presidential Policy Guidance,” setting out President Obama’s rules for using lethal force abroad “outside areas of active hostilities.” Late in President Obama’s second term, he issued an executive order announcing a new Executive Branch policy on pre- and post-strike measures to address civilian casualties in U.S. lethal force operations. While the order did not go as far as was necessary, it did appear to crack the nearly absolute seal of secrecy surrounding uses of lethal force outside armed conflict, by requiring an annual estimate of the civilian deaths, and total strikes, aggregated across government agencies.³⁴ But civilian harm reporting has remained woefully inaccurate—and an undercount.³⁵

The Trump administration rolled back the provision of Obama’s executive order that required reporting on aggregate casualties in “areas outside of active hostilities.” The

³³ Greg Miller, *Legal Memo Backing Drone Strike That Killed American Anwar Al-Awlaki Is Released*, Wash. Post (June 23, 2014) https://www.washingtonpost.com/world/national-security/legal-memo-backing-drone-strike-is-released/2014/06/23/1f48dd16-faec-11e3-8176-f2c941cf35f1_story.html.

³⁴ Jonathan Hafetz, *U.S. Citizen, Detained Without Charge by Trump Administration for a Year, Is Finally Free*, ACLU (Oct. 29, 2018), <https://www.aclu.org/blog/national-security/detention/us-citizen-detained-without-charge-trump-administration-year>.

³⁵ See, e.g., Annie Shiel & Chris Woods, *A Legacy of Unrecognized Harm: DoD’s 2020 Civilian Casualties Report*, Just Sec. (June 7, 2021) <https://www.justsecurity.org/76788/a-legacy-of-unrecognized-harm-dods-2020-civilian-casualties-report/> (includes citations to similar assessments for 2019, 2018 and 2017)

administration publicly defended the latter move by pointing to a provision in the 2018 NDAA that required certain civilian casualty reporting by the Defense Department. But as many critics pointed out at the time, the NDAA provisions did not require any reporting on “areas outside of active hostilities” or by any agencies other than the Defense Department, including the CIA, whose involvement with the lethal strikes program is both universally known and officially secret.

In yet another example, it was not until the ACLU challenged the military detention of a U.S. citizen in Iraq in 2017 that the Executive Branch finally—in response to litigation—provided its analysis for use of force in Iraq and Syria, before setting our client free after months in military detention.³⁶

In short, it has been difficult if not impossible for members of Congress and the public to know *where* the Executive Branch is claiming the authority to use force, let alone its justifications, because successive administrations have not consistently or fully disclosed this information and evaded Congressional and public oversight. Congress must demand that the Executive Branch publicly disclose all policy positions and legal interpretations, along with underlying legal and policy analysis including Office of Legal Counsel memoranda, on how it (and previous administrations) defines and interprets legal and policy constraints on the use of force abroad. This includes where the standards apply, to whom, and under what circumstances. Specifically, Congress—and this Committee—should demand:

- Disclosure of all Justice Department legal opinions that the Biden administration and past administrations have relied upon for use of force in counterterrorism operations abroad, and any Defense Department or CIA legal or policy opinions that have relied on any such Justice Department opinions;
- The names of all groups against which the Biden administration and past administrations believe force can be used in reliance on each of the 2001 and 2002 AUMFs;
- Any country in which the Biden administration (and past administrations) is using or has used force in reliance on each of the 2001 and 2002 AUMFs; and
- Every partner force on whose behalf the U.S. believes it can use force relying on a theory of “collective” or “unit” self-defense, and the countries in which each such partner force operates.

³⁶ *ACLU Secures Release of American Citizen Unlawfully Detained by Trump Administration*, ACLU (Oct. 29, 2018), <https://www.aclu.org/press-releases/aclu-secures-release-american-citizen-unlawfully-detained-trump-administration>.

III. The Executive Branch has failed to comply with this nation’s legal obligations to protect civilians, and caused extraordinary harm without acknowledgement or amends.

Even in what should be exceptional—actual war governed by the international law this nation helped establish to protect peace and security, civilians, and U.S. forces—the law must be followed. Secretary of Defense Austin recently recognized that protection of civilians in armed conflict is “a strategic and moral imperative,” and asserted that the Defense Department “has built a strong foundation of compliance with the law of armed conflict.”³⁷ Yet all too often over the last 20 years, as civil society groups, international organizations, and independent media have documented, our country has failed to abide by these obligations.

One of the defining characteristics of war—and the binding law of armed conflict that governs it—is that it permits attacks only against lawful military objectives, such as enemy fighters or weapons and ammunition. Civilians may not be attacked, unless they are “directly participating in the hostilities,” which is generally understood to mean people who are currently engaged in fighting, and individuals actively planning or directing military operations.³⁸ A specific attack on a military objective is only lawful if it comports with the requirements of distinction (between civilians and legitimate targets), proportionality, military necessity, and humanity. The United States, like other countries that are party to an armed conflict, has a duty to investigate serious violations of the laws of war. The Geneva Conventions state that “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” Where there is credible evidence that an attack has violated the laws of war, the responsible party is obligated to investigate for possible war crimes and appropriately prosecute if there is evidence of wrongdoing.³⁹

As a coalition of rights and humanitarian groups recently wrote to Secretary of Defense Austin, there are national and indeed global concerns about the Defense Department’s civilian harm policies and practices and their impact, as evidenced most recently by the August 29 drone strike in Kabul that killed my clients’ loved ones; the Air Force Inspector General’s investigation into that strike; and a *New York Times* report in November 2021 that the U.S. military hid the effects of a 2019 airstrike in Baghuz, Syria that killed dozens of civilians and was flagged as a possible war crime by at least one Defense Department lawyer:

Over twenty years, the Department of Defense has failed to adopt solutions well within its grasp; learn and implement identified lessons; exercise meaningful leadership on civilian protection issues; or assign adequate resources to address civilian harm. Indeed, the recommendations outlined in the Air Force Inspector General’s public summary of his investigation into the Kabul strike — to address confirmation bias, improve situational awareness, and review pre-strike procedures to assess the presence of civilians

³⁷ Marco Sassóli, Antoine Bouvier & Anne Quintin, *How Does Law Protect in War: Conduct of Hostilities*, Int’l Comm. of the Red Cross (2022), <https://casebook.icrc.org/law/conduct-hostilities>.

³⁸ *Id.*

³⁹ See, e.g., *Frequently Asked Questions on the Rules of War*, Int’l Comm. of the Red Cross (Oct. 19, 2016), <https://www.icrc.org/en/document/ihl-rules-of-war-FAQ-Geneva-Conventions>.

— have been issued countless times by civil society groups and in the U.S. military’s own studies, yet never implemented. A 2013 Joint Staff study, for example, identified misidentification of a target as the “primary cause of [civilian casualties] in Afghanistan,” particularly due to “perceived hostile intent” from individuals who were later revealed to be civilians. Understood in this context, the airstrikes in Kabul and Baghuz are not unique tragedies, but the latest in a long pattern of apparent negligence and consistent disregard for civilians’ lives, predominantly those in countries where the populations are majority Muslim, Brown, and/or Black.⁴⁰

To date, Airwars, an independent, credible, and widely-cited non-profit that monitors and tracks conflict-related civilian harm conservatively estimates that up to 48,000 civilians have been killed by U.S. forces in Afghanistan, Iraq, Syria, Pakistan, Yemen, Somalia, and Libya alone.⁴¹ Each of those many tens of thousands killed represents a devastating tragedy for families and their communities. Civil society groups, the media, & even the Department of Defense’s own studies have consistently documented these harms and the repeated failures that cause them, and yet the U.S. government has taken no meaningful action to stop them from happening or to respond to these harms.⁴² This is an unacceptable and violent policy failure. Despite numerous Executive Branch efforts to impose safeguards to guard against the loss of civilian life, those efforts have largely involved tinkering at the edges of a systemic problem.

For this reason, the ACLU has joined 103 groups from the United States and around the world in calling on President Biden to recognize structural flaws in how our government mitigates, investigates, and responds to civilian deaths and injuries in its operations, and to:

- Publicly commit to a detailed plan for how the U.S. government will address the systemic shortcomings raised by civil society groups, the media, and the Defense Department’s own studies;
- Prioritize the protection of civilians in your ongoing review of U.S. counterterrorism operations and use of force policy and ensure meaningful civil society consultation in that review;
- Ensure full, independent, and transparent investigations of *all* credible reports of civilian harm, including past reports that may have been erroneously dismissed. Investigations should meet international standards for independence, thoroughness, and impartiality, and

⁴⁰ *NGO Letter to US Secretary of Defense Demands Accountability and Reform After 20 Years of Civilian Harm*, Ctr. For Civilians in Armed Conflict (Dec. 1, 2021), <https://civiliansinconflict.org/press-releases/ngos-demand-reform/>.

⁴¹ Imogen Piper & Joe Dyke, *Tens of thousands of Civilians Likely Killed by US in ‘Forever War’*, Airwars (Sept. 6, 2021), <https://airwars.org/news-and-investigations/tens-of-thousands-of-civilians-likely-killed-by-us-in-forever-wars/>.

⁴² See e.g., Michael J. McNerney et al., *U.S. Department of Defense Civilian Casualty Policies and Procedures*, RAND Corp. (2022), https://www.rand.org/pubs/research_reports/RRA418-1.html (Congressionally-mandated report found “considerable weaknesses” in Defense Department’s evaluation of and response to civilian deaths and injuries, including weaknesses in carrying out investigations, identifying root causes, and implementing lessons that would prevent civilian harm.).

should evaluate conduct according to the applicable international human rights and international humanitarian law standards; and

- Provide meaningful accountability to civilian victims and survivors of U.S. operations by publicly and transparently acknowledging deaths and injuries, providing amends or redress, and appropriately holding civilian leaders and military commanders responsible for their actions, including by addressing findings of wrongdoing through disciplinary measures or prosecutions.

Recent *New York Times* investigations have shed additional and important light on U.S.-caused civilian deaths and injuries, and significant shortcomings in how the Executive Branch prevents, investigates, and responds to them, in Afghanistan, Iraq, and Syria, wars in which our country is supposed to adhere to international humanitarian law.⁴³ I would like to focus also on decades of civilian deaths and injuries in Pakistan, Yemen, Somalia, and other places where U.S. uses of force outside of armed conflict are unlawful and have also wreaked havoc and death. Human rights groups have for years extensively documented.⁴⁴ The accounts include both physical harms, as well as appalling psychological trauma, displacement, and multiple ways in which U.S. lethal strikes contribute to and perpetuate cycles of violence. Generations of children are growing up in fear of death from the sky. For example, a Yemeni mother explained to Mwatana for Human Rights, a leading Yemeni rights organization, that “My six-year-old son wanted to go to the bathroom but then returned without going. When I asked him the reason, he

⁴³ Dave Philipps, Eric Schmitt & Mark Mazzetti, *Civilian Deaths Mounted as Secret Unit Pounded ISIS*, N.Y. Times (Dec. 12, 2021), <https://www.nytimes.com/2021/12/12/us/civilian-deaths-war-isis.html>; Azmat Khan, Lila Hassan, Sarah Almkhtar, & Rachel Shorey, *The Civilian Casualty Files: Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes*, N.Y. Times (Dec. 18, 2021), <https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html>; Azmat Khan, *The Human Toll of America’s Air Wars*, N.Y. Times (Dec. 19, 2021), <https://www.nytimes.com/2021/12/19/magazine/victims-airstrikes-middle-east-civilians.html>; Azmat Khan, Haley Willis, Christoph Koettl, Christiaan Triebert & Lila Hassan, *Documents Reveal Basic Flaws in Pentagon Dismissal of Civilian Casualty Claims*, N.Y. Times (Dec. 31, 2021), <https://www.nytimes.com/2021/12/31/us/pentagon-airstrikes-syria-iraq.html>.

⁴⁴ For some of the many detailed reports of civilian casualties in these countries, see *Between a Drone and Al Qaeda: Civilian Costs of U.S. Targeted Killings in Yemen*, Hum. Rts. Watch (2013), https://www.hrw.org/sites/default/files/reports/yemen1013_ForUpload_1.pdf; *Will I be Next? U.S. Drone Strikes in Pakistan*, Amnesty Int’l (Oct. 2013), <https://www.amnestyusa.org/files/asa330132013en.pdf>; *A Wedding That Became a Funeral: U.S. Drone Attack on Marriage Procession in Yemen*, Hum. Rts. Watch (Feb. 2014), https://www.hrw.org/sites/default/files/reports/yemen0214_ForUpload_0.pdf; *After the Dead Are Counted: U.S. and Pakistani Responsibilities to Victims of Drone Strikes*, Open Soc’y Found. (Nov. 2014), <https://www.opensocietyfoundations.org/uploads/9d5fe847-7060-43bd-b362-62b0150152c5/after-dead-are-counted-20141120.pdf>; Spencer Ackerman, *41 Men Targeted but 1,147 People Killed: U.S. Drone Strikes—the Facts on the Ground*, Guardian (Nov. 24, 2014), <https://www.theguardian.com/us-news/2014/nov/24/-sp-us-drone-strikes-kill-1147> (citing data analysis of U.S. lethal strikes in Pakistan and Yemen by human rights group Reprieve); *Death by Drone: Civilian Harm Caused by U.S. Targeted Killings in Yemen*, Mwatana for Hum. Rts. & Open Soc’y Just. Initiative (2015), <https://www.justiceinitiative.org/uploads/1284eb37-f380-4400-9242-936a15e4de6c/death-drones-report-eng-20150413.pdf>; *Somalia: Zero accountability as civilian deaths mount from US air strikes*, Amnesty International (Apr. 1, 2020), <https://www.amnesty.org/en/latest/news/2020/04/somalia-zero-accountability-as-civilian-deaths-mount-from-us-air-strikes/>.

said, ‘I don’t want you all to die without me if the drone hits.’⁴⁵ Another community member told Mwatana that his community held a protest against U.S. drone strikes after a 67-year-old Yemeni house painter and farmer, was killed, explaining. “We are desperate in trying to get our voices heard. We are being killed in cold blood.”⁴⁶

In every country where the U.S. uses lethal force—but particularly when it does so outside of recognized armed conflict—it is difficult or impossible for civilians to report harm to the U.S. government—and consequently, difficult or impossible for them to get acknowledgment or redress for their devastating losses. Although the Defense Department has created a civilian harm reporting “portal,” it has proven to be largely a failure. The portal is a website with several email addresses listed, little information on how to effectively submit reports, and no explanation of any further actions that will be taken once any information is submitted. US AFRICOM’s online portal has been an example of the inadequacies. The portal is difficult to access let alone navigate for Somalis, particularly those in al-Shabab controlled areas, who have no internet access. It has featured erroneous translations, apparently using flawed Google translations to communicate with Somalis.⁴⁷ There is no physical place where Somali civilians harmed by U.S. lethal actions can go, no telephone hotline they can call to report harm, seek acknowledgment, or receive amends.

The investigations the Defense Department does conduct do not apply the same rigorous methodology to investigating civilian harm that NGOs and the media use. For example, the Pentagon rarely conducts interviews with survivors and witnesses and rarely visits the site of lethal strikes. Instead, despite the rigor of many civil society investigations, the U.S. military tends to rely solely on its own internal records and sources when assessing civilian harm, and rarely seeks information from outside sources. In other words, the U.S. government is often using the same sources of data that led it to carry out the civilian casualty-causing strike or raid in the first place. For example, Mwatana for Human Rights, a leading Yemeni NGO, and the Columbia Law School Human Rights clinic, submitted more than 150 pages of evidence to the U.S. military detailing 38 civilian deaths and 7 injuries in 12 U.S. lethal force operations in Yemen. After many months, the military admitted only one new civilian casualty, and dismissed allegations with little or no explanation. Despite the extensive evidence the rights groups provided, the military conducted no new investigations of its own, looking only at internal records and previous evidence.⁴⁸

The Executive Branch’s record on *ex gratia* payments authorized by Congress is similarly abysmal. *Ex gratia* payments are one form of “making amends,” the practice of

⁴⁵ *Death Falling from the Sky: Civilian Harm from the United States’ Use of Lethal Force in Yemen*, Mwatana for Hum. Rts. (Mar. 2021), <https://mwatana.org/wp-content/uploads/2021/03/Death-Falling-from-the-Sky-22.pdf>.

⁴⁶ *US Military Admits Killed Civilian in Yemen after NGO Investigations but Refuses to Provide Remedy*, Columbia Law School (June 3, 2021), <https://web.law.columbia.edu/human-rights-institute/US-military-admits-killed-civilian-yemen>.

⁴⁷ Abdifatah Hassan Ali, *AFRICOM’s Improved Civilian Casualty Reporting System Still Leaves Gaps for Somalia*, Just Sec. (Aug. 6, 2020), <https://www.justsecurity.org/71854/africoms-improved-civilian-casualty-reporting-system-still-leaves-gaps-for-somalia/>.

⁴⁸ See *supra* note 46.

recognizing and/or providing assistance to civilians that have been harmed in military operations. In the 2020 NDAA, Congress authorized \$3 million in annual funding for *ex gratia* payments for damage, personal injury, or death caused by US forces, a coalition including the United States, or a military organization supporting the United States or a coalition involving the United States, with no geographic limitations. But in the Defense Department’s 2020 civilian casualties report to Congress, the Pentagon confirmed that it did not offer or make any *ex gratia* payments during that year. It has failed to make payments even for cases in which the Department has confirmed civilian casualties and has the information necessary to contact survivors. In fact, using the \$3 million Congress appropriated for *ex gratia* payments annually, the Defense Department could offer an amends amount for every single civilian it confirmed killed or injured in 2020, and at the highest payment amount—\$15,000 for each civilian death—authorized in the Department’s interim *ex gratia* policy, have a whopping \$2,505,000 left over.⁴⁹

Civilians killed or injured over 20 years in covert strikes carried about by the CIA virtually never receive any acknowledgment, let alone investigation or amends. And trauma is not limited to civilians killed or injured in lethal strikes abroad— U.S. forces engaged in lethal airstrikes also suffer.⁵⁰ There is a growing literature and effort to grapple with the “moral injury” service members can experience, as described by two leading experts:

In traumatic or unusually stressful circumstances, people may perpetrate, fail to prevent, or witness events that contradict deeply held moral beliefs and expectations....Individuals may also experience betrayal from leadership, others in positions of power or peers that can result in adverse outcomes. Moral injury is the distressing psychological, behavioral, social, and sometimes spiritual aftermath of exposure to such events. A moral injury can occur in response to acting or witnessing behaviors that go against an individual's values and moral beliefs.⁵¹

In light of this, and what one study has called a “suicide epidemic” among post-9/11 veterans and active duty military personnel,⁵² it is little wonder that veterans’ groups are also urging political leaders to decisively end the program of lethal strikes outside recognized battlefields, including through the use of drones: “We are tired of our country using military

⁴⁹ Madison Hunke, *Making Amends: A Guide to US Law and Policy on Post-Harm Amends*, Ctr. for Civilians in Conflict (Jan. 7, 2021), <https://civiliansinconflict.org/blog/making-amends-a-guide-to-us-law-and-policy-on-post-harm-amends/>; see also Memorandum from James H. Anderson, Acting Under Sec’y of Defense, to Secretaries of the Mil. Dep’t’s, Chairman of the Joint Chiefs of Staff, Commanders of the Combatant Commands, on Interim Regulations for Condolence or Sympathy Payments to Friendly Civilians for Injury or Loss That is Incident to Military Operations (June 22, 2020), <https://media.defense.gov/2020/Jun/23/2002320314/-1/-1/1/INTERIM-REGULATIONS-FOR-CONDOLENCE-OR-SYMPATHY-PAYMENTS-TO-FRIENDLY-CIVILIANS-FOR-INJURY-OR-LOSS-THAT-IS-INCIDENT-TO-MILITARY-OPERATIONS.PDF>.

⁵⁰ Eyal Press, *The Wounds of the Drone Warrior*, N.Y. Times (June 13, 2018), <https://www.nytimes.com/2018/06/13/magazine/veterans-ptsd-drone-warrior-wounds.html>.

⁵¹ Sonya B. Norman & Shira Maguen, *Moral Injury*, Nat’l Ctr. for PTSD, U.S. Dep’t of Veterans Affs., https://www.ptsd.va.gov/professional/treat/cooccurring/moral_injury.asp (last visited Feb. 7, 2022).

⁵² Courtney Kube, *Since 9/11, Military Suicides Dwarf the Number of Soldiers Killed in Combat*, NBC News (June 21, 2021), <https://www.nbcnews.com/news/military/9-11-military-suicides-dwarf-number-soldiers-killed-combat-n1271346>.

force as a tool of first resort and the enormous physical and psychological toll this has caused for servicemembers, as well as civilians harmed by our country's actions abroad. An entire generation of veterans and lost civilian lives later, it's past time for a new way forward."⁵³

The Executive Branch and Congress also need to consider carefully the precedent our government is setting for other countries. If the United States takes the position that it is acceptable—even legal—to kill terrorism suspects in other countries outside even of war, abusive regimes around the world can make the same claims, and our government's ability to criticize is severely undercut. Repressive and authoritarian regimes may not need an excuse to label their opponents as "terrorists" and extrajudicially target them—but they should not be able to cite the United States as their justifying example.

The program of lethal strikes outside recognized armed conflict is a legal, moral, and strategic failure. The ACLU urges Congress to take every step in its power to ensure the Executive Branch ends it.

⁵³ *110+ Organizations to Biden: End U.S. Program of Lethal Strikes Abroad*, ACLU (June 30, 2021), <https://www.aclu.org/press-releases/110-organizations-biden-end-us-program-lethal-strikes-abroad>.