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

Introduction

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

The current administration has exacerbated preexisting trends by controversially and unnecessarily using the U.S. military in a number of domestic contexts. This includes deploying U.S. military personnel to the U.S.-Mexico border to reinforce Customs and Border Protection's (CBP) implementation of harmful immigration policies against asylum seekers;[3] increasing the flow of military equipment and other key Department of Defense (DoD) resources to federal, state and local law enforcement agencies under the so-called "1033 program," "1122 program," and Homeland Security grants;[4] and using the military and highly militarized federal law enforcement personnel to police racial justice protests in Washington, DC,

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

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

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

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

Portland, Oregon, and elsewhere.[5] Several of these policy choices have exacerbated, rather than mitigated, tensions between local authorities and the citizens they vow to serve and protect,[6] while increasing the politicization of an otherwise proudly and appropriately non-partisan military.[7] As retired Admiral Michael Mullen—the 17th Chairman of the Joints Chiefs of Staff—stated in response to the recent deployment of military personnel to address racial justice protests: "[t]oo many foreign and domestic policy choices have become militarized; too many military missions have become politicized."[8]

The reasons for reform are compelling. From a pragmatic standpoint, the trend of militarized policing undermines public and officer safety. Research demonstrates that militarized law enforcement not only "fails to enhance officer safety or reduce local crime" but also "may diminish police reputation in the mass public."[9] Analysis of the limited data available to researchers on police violence against the public has found "a positive and strategically significant relationship between . . . transfers [of military-grade weapons to law enforcement] and fatalities from officer-involved shootings."[10]

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

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

> *We must reject any thinking of our cities as a "battlespace" that our uniformed military is called upon to "dominate." At home, we should use our military only when requested to do so, on very rare occasions, by*

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

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

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

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

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

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

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

[12] *Id.* at p. 9183.

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

> *state governors. Militarizing our response, as we witnessed in Washington, D.C., sets up a conflict—a false conflict—between the military and civilian society. It erodes the moral ground that ensures a trusted bond between men and women in uniform and the society they are sworn to protect, and of which they themselves are a part. Keeping public order rests with civilian state and local leaders who best understand their communities and are answerable to them.*[14]

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

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

Recommendations

☑ End the Federalized and Militarized Response to Protests

- **Establish transparent criteria for deploying federal law enforcement personnel under 40 U.S.C. § 1315 and other authorities and prohibit federal law enforcement agents from unlawfully being used to respond to or otherwise interfere with First Amendment-protected activities.**[16] In 2020, the Trump administration used federal law enforcement personnel, including members of CBP and the obscure Federal Protective Service, to physically confront peaceful protesters exercising their constitutionally protected rights. In several well-documented instances, these federal agents assaulted protestors,[17] indiscriminately fired crowd-control munitions and tear gas into non-violent crowds (including one containing Portland Mayor Ted Wheeler[18]), and

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

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

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

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

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

detained individuals without probable cause.[19] The next administration should use existing executive authority to prohibit federal law enforcement agents from being used in unwarranted circumstances, including responding to or otherwise interfering with First Amendment-protected activities. The administration should also develop a transparent methodology for how the Secretary of Homeland Security might invoke 40 U.S.C. § 1315 and other authorities for deploying federal law enforcement while protecting these rights.

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

Whenever federal law enforcement agents are used in such a manner, the administration should provide the public, Congress, and state and local authorities with a full factual, legal, and policy justification for their presence, as well as information on the expected scope and duration of their activities. The administration should also clearly state whether circumstances exist under which law enforcement elements meant to protect federal property are permitted to conduct law enforcement activity outside the immediate vicinity of the property in question. The next administration should also support legislation that prohibits the use of federal law enforcement agents or funds to counter or intimidate peaceful protests and assemblies. For situations where certain law enforcement activity may be appropriate, the next administration should support passage of legislation codifying limits, using a 2020 proposal by federal lawmakers from Oregon as a guide.[20]

- **Require federal law enforcement agents and military personnel to wear clearly identifiable agency insignia, as well as some other unique identifier such as a name plate or badge number when operating domestically.** While responding to protests during the summer of 2020, some federal law enforcement agents were deployed clad in camouflage, military-style uniforms with no identifiable agency insignia or any other unique identifier, such as a name plate or badge number. In some instances, these unidentifiable agents used unmarked vehicles to patrol the city and apprehend protestors.[21] The use of anonymous law enforcement personnel to confront predominantly peaceful protests increases the likelihood of violence by creating a heightened state of fear and anxiety. Protestors confronted by unidentifiable armed individuals might reasonably mistake them for non-state militia members or other non-state actors.[22] Additionally, officers who cannot be identified cannot be held accountable for their actions, which in turn renders unlawful uses of force

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

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

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

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

more likely.[23] The next administration should therefore require federal law enforcement agents and military personnel to wear clearly identifiable agency insignia and a name plate or badge number when operating domestically. It should also prohibit the use of unmarked vehicles for the purpose of transporting detained individuals. These requirements should apply to federal employees regardless of the invoked legal authorities—e.g., the Insurrection Act, another statute, or some other form of authority. Finally, to further differentiate U.S. military from law enforcement personnel, the administration should prohibit federal law enforcement agents from wearing military-style camouflage when deployed domestically.

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

- **Close the loophole used to deploy out-of-state National Guard troops to Washington, D.C**. Also in June 2020, in response to largely peaceful racial justice protests held across the nation, the Trump administration deployed out-of-state National Guard troops to Washington, D.C.[27] These service members were deployed without the consent of D.C.'s mayor and appear to have been mobilized under federal control, taking orders from the Secretary of Defense. The National Guard troops were engaged in policing activities in direct violation of the bedrock principle, codified in the Posse Comitatus Act, that the federal military should not be

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

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

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

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

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

engaged in domestic policing absent congressional authorized exceptions for extraordinary circumstances.[28] In response to an inquiry from D.C. Mayor Muriel Bowser, who called the deployment of troops to D.C. for law enforcement purposes "an invasion,"[29] Attorney General Barr cited a training provision in Section 502(f) of Title 32 of the U.S. code[30] as the basis for deploying out-of-state National Guard troops to police the District.[31] Under Barr's controversial and troubling interpretation of Section 502(f), the federal government may deploy—under federal control—National Guard troops from one state to another, without the latter state's consent, for any purpose and without complying with the constraints in the Posse Comitatus Act.[32] The next administration should withdraw this troubling interpretation of federal law and work with Congress to amend Section 502(f) to ensure it is never abused in this manner again.[33]

☑ End Militarization within Law Enforcement

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

- **Building from the findings of the Task Force on 21st Century Policing,[35] establish a commission of experts and public officials to study the nationwide problem of militarization and racial injustice in law enforcement and, within one year, present recommendations to both Congress and the president**. Topics covered by these recommendations should include, but not be limited to, recruiting, training, and equipping law enforcement at the federal, state, and local levels. In keeping with applicable law, commission membership should be drawn from individuals of diverse background and experience, and include law enforcement officials and practitioners, human rights and racial justice advocates, and legal and policy experts.
- **Secure federal funding for, or otherwise support, third-party training programs designed to demilitarize and promote racial justice within law enforcement agencies.** According to researchers, many police academies

[28] Senator Tom Udall, Representative Jim McGovern, *Trump and Barr used a loophole to deploy the National Guard to U.S. cities. It's time to close it*, NBC (Aug. 7, 2020) available at https://www.nbcnews.com/think/opinion/trump-barr-used-loophole-deploy-national-guard-u-s-cities-ncna1236034?cid=sm_npd_nn_fb_ma&fbclid=IwAR2xuJHDl53Ht-5oIyU4aTTtoHPm24NJitiffi5ViUh5cd-qbJNrU99R408.

[29] Lakes, Cooper, *supra* note 27.

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

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

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

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

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

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

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

☑ Directly Confront Racism and Bigotry within the Military

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

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

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

  To ensure longevity of the policy, the next administration should also urge Congress to pass legislation requiring the military to take similar action. Legislation on this issue has passed as part of the Fiscal Year 2021 National Defense Authorization Act (NDAA) process, but it is not yet clear whether it will remain in the final bill

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

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

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

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

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

That is signed into law.[41] In replacement, the next administration should consider renaming these entities after the many diverse heroes in United States history who represent the U.S. military's values.[42]

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

☑ End the Flow of Military Resources to Law Enforcement

The next administration should put an end to the flow of military equipment provided to local law enforcement, including under the decades-old so-called "1033 program." This program has rightly come under scrutiny in the wake of the heavily militarized police response to recent racial justice protests. A product of the 1997 National Defense Authorization Act (NDAA), the 1033 program authorizes the Defense Logistics Agency (DLA) to transfer surplus military equipment to federal, state, and local law enforcement agencies at virtually no cost.[45] Since the program's enactment, DLA has used 1033 authority to transfer more than $7.4 billion worth of excess military equipment—including bayonets, rifles, armored vehicles, and aircraft—to more than 8,000 law enforcement agencies around the country.[46] Immigration and Customs

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

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

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

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

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

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

Enforcement (ICE) and CBP—both of which were involved in recent protest responses—are also substantial beneficiaries of this program.[47]

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

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

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

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

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

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

[51] *Id.* at p. 4.

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

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

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

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

- **Freeze the 1033 and 1122 programs.** The next administration should immediately issue an executive order halting the transfer of property by DLA to state, local, and federal law enforcement entities. This freeze of the 1033 and 1122 programs should remain in place pending an executive branch review of the impact of the program. Before any version of the program is restored, the executive branch should significantly restrict the type of equipment that can be transferred, and establish robust reporting requirements that will obligate participants in the 1033 and 1122 programs to provide written, public justifications for their transfer requests, as well as updates on how the equipment is used.
- **Work with Congress to codify legal restrictions on the 1033 and 1122 programs.** There is clear bipartisan support for curtailing the flow of military equipment to law enforcement. In considering possible legislative action, the administration should look to Congressman Hank Johnson's previously proposed legislation restricting the 1033 program as a model for the types of transfer restrictions and oversight measures it should work with Congress to enact.[59] Likewise, the next administration should support passage of the Stop Militarizing Law Enforcement Act,[60] which has already passed in the House of Representatives with bipartisan support as part of the George Floyd Justice in Policing Act.[61] Though a bipartisan bill in the Senate aimed at reforming the 1033 program recently secured a majority vote, it failed to meet a 60-vote threshold despite endorsements from the Law Enforcement Action Partnership (LEAP) and several prominent conservative groups.[62]

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

[56] Ackerman, *supra* note 4.

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

[58] Barrett, *supra* note 46.

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

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

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

[62] Full Endorsements, NDAA Amendment 2252, 1033 Reform and Oversight, available at https://www.schatz.senate.gov/imo/media/doc/Full%20Endorsements,%20NDAA%20Floor%20Amendment%202252%20-%201033%20Reform,%207-14-20.pdf.

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

☑ End the Military's Role in Immigration Enforcement

In 2018, the current administration deployed active-duty military forces to the U.S.-Mexico border to address a claimed threat posed by a peaceful "caravan" of asylum-seekers.[63] The U.S. military's presence at the border remains to this day.[64] Beyond politicization of the military, this action amounts to a direct militarization of immigration enforcement. It has unnecessarily kept military service members away from their families and diverted funding and personnel from overseas missions, jeopardizing morale.[65] The next administration should immediately end the deployment of active-duty military forces to the U.S.-Mexico border and the military's involvement in immigration enforcement more generally. To do so, it should:

- **Commit to not using military personnel to police the southern border.** The next administration should pledge not to deploy active-duty military personnel for immigration enforcement purposes. The next administration should also establish a policy against federalizing (under Title 10) or funding (under Title 32) the National Guard for border operations, and it should discourage state governors from using the National Guard for border operations. If the administration needs to bolster support for CBP on the U.S.-Mexico border, it should provide a publicly available review of additional needs and rely on the appropriate personnel and resources, including humanitarian organizations or local law enforcement, instead of the military.
- **Reduce the size of the so-called "border zone."** Pursuant to 8 U.S.C. § 1357(a)(3), immigration officials have enhanced power to search and detain individuals "within a reasonable distance" of the U.S. border.[66] This has contributed to the militarization of immigration enforcement by enabling agents, border personnel, and active-duty military personnel to claim extraordinary powers within the border zone, and has provided them with legal cover for human and civil rights abuses.[67] To address this problem, the administration should reduce the size of the border zone, which under current regulations extends to anywhere within 100 miles of the

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

[64] Alex Ward, Nicole Narea, *The US Military will stay on the US-Mexico border, even with migration falling*, Vox (Jun. 25, 2020) available at https://www.vox.com/2020/6/25/21303370/us-mexico-border-military-2020-immigration-coronavirus.

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

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

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

border,[68] covering two-thirds of the American population.[69] The next administration should also urge Congress to revise 8 U.S.C. § 1357(a)(3), to, among other reforms, restrict authorization of warrantless searches and interrogations within the border zone.

- **Stop the diversion of DoD funds to the southern border or for any other immigration enforcement purpose.** The current administration has diverted to border wall construction over $10 billion in DoD funds that were intended for, among other things, aircraft, fighter jets, ships, updated Humvees, and new equipment for the National Guard and Reserves.[70] The diversion of DoD funds has drawn bipartisan Congressional criticism[71] and should end. DHS has by far the largest budget of any federal law enforcement agency[72] and has more than enough funds to humanely manage the migration flow on the southern border without the involvement of active-duty military or military-grade equipment. Specifically, the next administration should place restrictions on DoD to prevent it from loaning equipment or using resources for the purposes of immigration enforcement or border security. This should be done in the first instance as an executive action, and as a recommendation to Congress to amend 10 U.S.C. § 374,[73] which authorizes the Department of Defense to maintain and operate equipment to assist with immigration law enforcement, and 10 U.S.C. § 372,[74] which authorizes the DoD to loan equipment and facilities to border security agencies, to prohibit such DoD facilities, equipment, and personnel from being used in immigration enforcement.
- **Prohibit the military from using force against migrants.** There is no valid reason for the military to be involved in routine immigration enforcement actions, let alone enforcement actions that could involve using force. However, the current administration has issued a legal memo of questionable legality authorizing the military to use force against migrants at the border.[75] The next administration should revoke this memo and any other authorizations that could allow the military to use force against migrants.
- **Restrict the Housing of Migrant Children in DoD Facilities.** The Trump administration has repeatedly considered using DoD facilities to detain immigrants and unaccompanied children.[76] This idea is not new—the

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

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

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

[71] Cochrane, *supra* note 70.

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

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

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

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

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

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

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