

## USE OF FORCE, ARMS CONTROL, AND NON-PROLIFERATION

*United States Grapples with Aftermath of Withdrawal from Afghanistan*

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On August 31, 2021, President Joseph R. Biden, Jr. announced that the war in Afghanistan was over.<sup>1</sup> Before departing, U.S. forces evacuated roughly 120,000 people, including U.S. citizens, diplomats, local U.S. embassy staff, and Afghan interpreters, in a massive airlift effort, and Biden declared the mission an “extraordinary success.”<sup>2</sup> However, questions arose about numerous aspects of the withdrawal, especially the speed of the Taliban takeover and an erroneous airstrike on August 29 that killed ten civilians, including seven children.<sup>3</sup> Congress and the executive branch launched investigations to understand these outcomes. The Biden administration is also working to resettle evacuated Afghans, while continuing to assist U.S. nationals and others in danger in Afghanistan with efforts to leave the country and attempting to deliver humanitarian aid, both of which require navigating relations with the Taliban.

Congress has held numerous hearings to question executive branch officials about the rapid Taliban takeover of Afghanistan, and executive branch officials have admitted their surprise at the speed of the Afghan government’s collapse. Secretary of Defense Lloyd J. Austin III told the Senate Armed Forces Committee that “[t]he fact that the Afghan army . . . simply melted away—in many cases without firing a shot” surprised Pentagon officials,<sup>4</sup> and he admitted that the U.S. military “did not fully comprehend” the impact on Afghan forces of corruption, poor leadership, and the Trump administration’s 2020 Doha agreement for withdrawal of U.S. troops.<sup>5</sup> In remarks before the same committee, Chairman of the Joint Chiefs of Staff General Mark A. Milley agreed with Secretary Austin that “the speed, scale and scope of the collapse was a surprise.”<sup>6</sup> Secretary of State Antony Blinken blamed faulty intelligence, telling the House Committee on Foreign Affairs, “Even the most pessimistic assessments did not predict that government forces in Kabul would collapse while U.S. forces remained.”<sup>7</sup> Director of National Intelligence Avril D. Haines reiterated this point, acknowledging that events “unfolded more quickly than we anticipated, including in the intelligence community.”<sup>8</sup>

<sup>1</sup> Kristen E. Eichensehr, *Contemporary Practice of the United States*, 115 AJIL 714, 745 (2021).

<sup>2</sup> Joseph R. Biden, Jr., Remarks on the End of United States Military Operations in Afghanistan, 2021 DAILY COMP. PRES. DOC. 693, at 1 (Aug. 31, 2021).

<sup>3</sup> Eichensehr, *supra* note 1, at 748–52.

<sup>4</sup> U.S. Senate Armed Services Comm., Secretary of Defense Lloyd J. Austin III Prepared Remarks Before the Senate Armed Services Committee (Sept. 28, 2021), *available at* <https://www.armed-services.senate.gov/imo/media/doc/20210927%20-%20SecDef%20Written%20Testimony%20-%20AFG%20hearings.pdf> [<https://perma.cc/4FPS-UVB9>].

<sup>5</sup> *Id.*

<sup>6</sup> U.S. Senate Armed Services Comm., Statement of Gen. Mark A. Milley (Sept. 28, 2021), *available at* <https://www.armed-services.senate.gov/imo/media/doc/Printed%2028%20Sep%20SASC%20CJCS%20Written%20Statement.pdf> [<https://perma.cc/KV3W-5Y9E>].

<sup>7</sup> U.S. House Comm. on Foreign Affairs, Opening Remarks by Secretary Antony J. Blinken (Sept. 13, 2021), *at* <https://www.state.gov/opening-remarks-by-secretary-antony-j-blinken-before-the-house-committee-on-foreign-affairs> [<https://perma.cc/URC7-YDX9>].

<sup>8</sup> Julian E. Barnes, *Intelligence Agencies Did Not Predict Imminence of Afghan Collapse, Officials Say*, N.Y. TIMES (Aug. 18, 2021), *at* <https://www.nytimes.com/2021/08/18/us/politics/afghanistan-intelligence-agencies.html>.

Congressional and executive investigations have also centered on an August 29 airstrike that killed a U.S. aid worker, Zemari Ahmadi, along with nine other civilians, including seven children.<sup>9</sup> The Pentagon initially claimed that what it called a “righteous strike” targeted an ISIS-K-related car that posed a threat to the Kabul airport,<sup>10</sup> where days before a suicide bomber killed at least 170 people.<sup>11</sup> As the *New York Times* later noted, “Almost everything senior defense officials asserted in the hours, days and weeks after the drone strike turned out to be false.”<sup>12</sup> Congressional leaders expressed concern with both the strike itself and Pentagon statements in the aftermath.<sup>13</sup> House Intelligence Committee Chairman Adam Schiff (D-CA) issued a press release noting his concern with the “accuracy and completeness” of those public statements.<sup>14</sup>

Facing pushback from Congress and the press, which investigated on the ground in Kabul,<sup>15</sup> the Pentagon completed an initial investigation and acknowledged on September 17 that the strike was a “horrible mistake.”<sup>16</sup> In a statement confirming the civilian deaths, Austin apologized and promised that the U.S. military would “endeavor to learn from” the error.<sup>17</sup> Austin called for a review of the initial Defense Department investigation to determine whether it “considered all available context and information, the degree to which accountability measures need to be taken and at what level, and the degree to which strike authorities, procedures and processes need to be altered in the future.”<sup>18</sup>

Air Force inspector general Lt. Gen. Sami Said conducted a separate investigation into the strike to determine if anyone should be held accountable and if policies and procedures should change.<sup>19</sup> In November, Said released the results of the investigation, which “found no violation of law” but did identify “execution errors,” including “confirmation bias and communication breakdowns.”<sup>20</sup> Said acknowledged that surveillance video showed

<sup>9</sup> Matthieu Aikins, *Times Investigation: In U.S. Drone Strike, Evidence Suggests No ISIS Bomb*, N.Y. TIMES (Sept. 10, 2021), at <https://www.nytimes.com/2021/09/10/world/asia/us-air-strike-drone-kabul-afghanistan-isis.html>.

<sup>10</sup> *Id.*

<sup>11</sup> Helene Cooper, Eric Schmitt & Thomas Gibbons-Neff, *As U.S. Troops Searched Afghans, a Bomber in the Crowd Moved in*, N.Y. TIMES (Aug. 27, 2021), at <https://www.nytimes.com/2021/08/27/us/politics/marines-kabul-airport-attack.html>.

<sup>12</sup> Helene Cooper & Eric Schmitt, *Video Footage Showed at Least 1 Child Near Site Minutes Before Drone Strike in Kabul*, N.Y. TIMES (Nov. 3, 2021), at <https://www.nytimes.com/2021/11/03/us/politics/drone-strike-kabul-child.html>.

<sup>13</sup> Amanda Macias, *Pentagon Admits Killing 10 Civilians, Including Up To 7 Children, in Kabul Drone Strike Last Month*, CNBC (Sept. 17, 2021), at <https://www.cnbc.com/2021/09/17/us-airstrike-in-kabul-last-month-killed-10-civilians-including-seven-children-pentagon-says.html>.

<sup>14</sup> U.S. House Permanent Select Comm. on Intelligence, Chairman Schiff Statement on August 29 Kabul Strike (Sept. 17, 2021), at <https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=1157> [<https://perma.cc/G4UN-BKAR>].

<sup>15</sup> Aikins, *supra* note 9.

<sup>16</sup> U.S. Dep’t of Defense Press Release, Statement by Secretary of Defense Lloyd J. Austin III on the Results of Central Command Investigation into the 29 August Airstrike (Sept. 17, 2021), at <https://www.defense.gov/News/Releases/release/article/2780404/statement-by-secretary-of-defense-loyd-j-austin-iii-on-the-results-of-central> [<https://perma.cc/7DVW-PTDE>].

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Alex Horton, *Air Force Inspector General Will Review Kabul Drone Strike That Killed 10 Civilians*, WASH. POST (Sept. 21, 2021), at <https://www.washingtonpost.com/national-security/2021/09/21/drone-strike-inspector-general>.

<sup>20</sup> U.S. Dep’t of Defense Press Release, Pentagon Press Secretary John F. Kirby and Air Force Lt. Gen. Sami D. Said (Nov. 3, 2021), at <https://www.defense.gov/News/Transcripts/Transcript/Article/2832634/pentagon-press-secretary-john-f-kirby-and-air-force-lt-gen-sami-d-said-hold-a-p> [<https://perma.cc/5Y2N-6RE7>].

the presence of a child prior to the strike, but said the footage was “100 percent not obvious” and “[y]ou have to be like no kidding looking for it.”<sup>21</sup> In remarks to the *New York Times*, Said also noted that military officials erred in believing they had located an ISIS-K safe house from which attacks were to be launched—information that led to the strike.<sup>22</sup> Commentators have criticized the Defense Department for failing to provide more transparency about the investigation and resulting report, as well as accountability for the errors that led to the strike.<sup>23</sup>

U.S. Undersecretary of Defense for Policy Colin Kahl met with the U.S. charity that employed Ahmadi, and according to a Pentagon spokesman, “Dr. Kahl noted that the strike was a tragic mistake and that Mr. Zemari Ahmadi and others who were killed were innocent victims, who bore no blame and were not affiliated with ISIS-K or threats to U.S. forces.”<sup>24</sup> The Pentagon also promised the United States would make *ex gratia* condolence payments to the victims’ family,<sup>25</sup> which has requested U.S. assistance in relocating outside of Afghanistan.<sup>26</sup>

The erroneous August 29 strike has put additional focus on the U.S. use of drone strikes, and some lawmakers are pressing the Biden administration to revise U.S. policies. In a joint statement on September 27, Senators Richard Durbin (D-IL) and Patrick Leahy (D-VT) urged President Biden to “take immediate steps to end war-based lethal force policies outside of armed conflict; prevent lethal strikes from causing civilian casualties; and, where such casualties do tragically occur, ensure appropriate transparency, accountability, and redress.”<sup>27</sup> Upon taking office, the Biden administration launched a review of use of force policies, including drone strikes, and reportedly paused such strikes outside conventional battlefields without presidential approval.<sup>28</sup> Press reports suggest that although the review is not yet complete, the administration is considering a return to the Obama-era policy of “centralized interagency vetting of proposed strikes,” while maintaining the Trump-era approach of giving greater flexibility to commanders with respect to countries, such as Somalia and Afghanistan, where strikes are more routine.<sup>29</sup> President Biden has indicated that the United States intends to continue “over-the-horizon” strikes as part of its continued counterterrorism operations in Afghanistan.<sup>30</sup>

<sup>21</sup> *Id.*

<sup>22</sup> Eric Schmitt, *Military Can't Find ISIS Safe House That Prompted Kabul Drone Strike*, N.Y. TIMES (Nov. 8, 2021), at <https://www.nytimes.com/2021/11/08/us/politics/isis-military.html>.

<sup>23</sup> See, e.g., Cooper & Schmitt, *supra* note 12 (quoting criticism from American Civil Liberties Union National Security Project director Hina Shamsi); Eugene R. Fidell, *The Missing Kabul Drone Strike Report*, JUST SECURITY (Nov. 5, 2021), at <https://www.justsecurity.org/78914/the-missing-kabul-drone-strike-report>; Luke Hartig, *Reexamining the Fundamentals of the Drone Strike Program After the Kabul Strike*, JUST SECURITY (Nov. 10, 2021), at <https://www.justsecurity.org/79168/reexamining-the-fundamentals-of-the-drone-program-after-the-kabul-strike>.

<sup>24</sup> Adela Suliman, *U.S. Plans to Make Condolence Payments to Families of Afghans Killed in Mistaken Drone Strike*, WASH. POST (Oct. 16, 2021), at <https://www.washingtonpost.com/world/2021/10/16/pentagon-payment-afghanistan-drone>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> U.S. Senate Comm. on the Judiciary, Durbin, Leahy Urge President Biden to End Lethal Force Outside of War Zones, Revise Nation's Counterterrorism Policies (Sept. 27, 2021), at <https://www.judiciary.senate.gov/press/dem/releases/durbin-leahy-urge-president-biden-to-end-lethal-force-outside-of-war-zones-revise-nations-counterterrorism-policies> [<https://perma.cc/TA52-ARTW>].

<sup>28</sup> Kristen E. Eichensehr, *Contemporary Practice of the United States*, 115 AJIL 527, 572 (2021).

<sup>29</sup> Charlie Savage, *Afghanistan Collapse and Strikes in Somalia Raise Snags for Drone Warfare*, N.Y. TIMES (Aug. 28, 2021), at <https://www.nytimes.com/2021/08/28/us/politics/biden-drones.html>.

<sup>30</sup> Biden, *supra* note 2, at 4.

As investigations into the withdrawal from Afghanistan continue, U.S. officials face the ongoing challenge of resettling evacuated Afghans. The United States began evacuations in late July 2021, transporting some of the 18,000 Afghans who had applied for special immigrant visas (SIVs) to U.S. military bases.<sup>31</sup> By the end of August, the United States had evacuated more than 123,000 people,<sup>32</sup> but even with this effort, some U.S. citizens and a number of Afghans who aided U.S. forces were left behind and at risk.<sup>33</sup>

Evacuees face an arduous path to resettlement in the United States. Many left on military and charter flights to transit hubs in third countries, including Qatar, Germany, and Italy.<sup>34</sup> In these countries, evacuees have been housed on U.S. military bases, where they undergo “biometric and biographic security screenings” in addition to COVID-19 and other health screenings.<sup>35</sup> Press reports indicate that several dozen have been red-flagged for “apparent records of violent crime or links to Islamist militants,” and were transferred to a NATO base in Kosovo to await further decisions.<sup>36</sup> Afghans who receive security and health clearances can travel to the United States.<sup>37</sup> Private airlines have donated hundreds of millions of frequent flier miles to provide evacuees with free tickets to the United States.<sup>38</sup> Most evacuees have landed at Dulles International Airport in Virginia, with some then going to live with family and many others transported to domestic military bases.<sup>39</sup> Although private companies like Airbnb committed to provide temporary housing for 20,000 evacuees,<sup>40</sup> tens of thousands have waited at U.S. bases for weeks or months as resettlement agencies struggle to place them in more permanent housing.<sup>41</sup> The White House has estimated that a total of 95,000 Afghans will relocate to the United States.<sup>42</sup>

To obtain safe passage out of Afghanistan for those who wish to leave and to facilitate the reopening of the Kabul airport, the United States has maintained “regular contact” with the

<sup>31</sup> Eichensehr, *supra* note 1, at 749.

<sup>32</sup> U.S. Dep’t of State Press Release, Secretary Antony J. Blinken’s Remarks on Afghanistan (Aug. 30, 2021), at <https://www.state.gov/secretary-of-antony-j-blinken-remarks-on-afghanistan> [<https://perma.cc/7FA9-NHXR>].

<sup>33</sup> Eichensehr, *supra* note 1, at 750.

<sup>34</sup> Kristina Cooke & Mica Rosenberg, *Evacuated Afghans, Hoping to Resettle in U.S., Face Extended Limbo in Third Countries*, REUTERS (Sept. 2, 2021), at <https://www.reuters.com/world/asia-pacific/evacuated-afghans-hoping-resettle-us-face-extended-limbo-third-countries-2021-09-02>.

<sup>35</sup> White House Press Release, *Delivering for the American People and Meeting Urgent Needs in the New Fiscal Year* (Sept. 7, 2021), at <https://www.whitehouse.gov/omb/briefing-room/2021/09/07/delivering-for-the-american-people-and-meeting-urgent-needs-in-the-new-fiscal-year> [<https://perma.cc/XCR7-9F6D>].

<sup>36</sup> Charlie Savage, *U.S. Struggles with Afghan Evacuees Weeded Out, and Now in Limbo*, N.Y. TIMES (Oct. 23, 2021), at <https://www.nytimes.com/2021/10/23/us/politics/afghan-evacuees-kosovo.html>.

<sup>37</sup> White House, *supra* note 35.

<sup>38</sup> White House, *Fact Sheet: Private Sector Leaders Are Stepping Up to Welcome Afghans* (Oct. 26, 2021), at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/26/fact-sheet-private-sector-leaders-are-stepping-up-to-welcome-afghans> [<https://perma.cc/KA8G-62FZ>].

<sup>39</sup> Michelle Hackman, *Afghan Refugees in the U.S.: How They’re Vetted, Where They’re Going and How to Help*, WALL ST. J. (Sept. 15, 2021), at <https://www.wsj.com/articles/afghan-refugees-in-the-u-s-how-theyre-vetted-where-theyre-going-and-how-to-help-11630677004>.

<sup>40</sup> White House, *supra* note 38.

<sup>41</sup> *About 35,000 Afghans Are Still Housed at 6 U.S. Military Installations After Frantic Evacuation*, ASSOC. PRESS (Dec. 8, 2021), at <https://ktla.com/news/nationworld/about-35000-afghans-are-still-housed-at-6-u-s-military-installations-after-frantic-evacuation>; Jen Kirby, *Why Thousands of Afghans Are Still on U.S. Military Bases*, VOX (Oct. 28, 2021), at <https://www.vox.com/22728486/afghanistan-evacuation-us-military-bases-refugee-resettlement-fort-bliss-fort-pickett>.

<sup>42</sup> Hackman, *supra* note 39.

Taliban.<sup>43</sup> The State Department hopes to resume regular evacuation flights before the end of 2021,<sup>44</sup> but in the meantime, evacuees have mainly departed on charter flights, while a small subset have escaped via overland routes.<sup>45</sup> According to the State Department, “Since August 31, the United States has directly assisted 479 American Citizens and 450 lawful permanent residents [in addition to their immediate family members] to depart Afghanistan and relocate to the United States.”<sup>46</sup> The United States is also working to evacuate family members of U.S. service members, namely Afghans who assisted U.S. forces, relocated to the United States, obtained legal permanent resident status, and then joined the U.S. military.<sup>47</sup>

Some lawmakers are pushing to expand the SIV program to assist vulnerable Afghans left behind. The SIV program is currently open to Afghans who were employed by or worked on behalf of the U.S. government and who “have experienced . . . an ongoing serious threat as a consequence of their employment.”<sup>48</sup> An estimated 76,000 Afghans moved to the United States on these visas prior to the Taliban takeover,<sup>49</sup> and approximately 7,000 SIV applicants were evacuated during the August airlift.<sup>50</sup> Still, a State Department official told the media that “a majority” of SIV applicants were left behind.<sup>51</sup> Congressional offices saw a “steady stream of requests” for help leaving Afghanistan after the evacuation deadline passed,<sup>52</sup> and in an effort to address these requests, Representatives Jason Crow (D-CO) and Peter Meijer (R-MI) introduced legislation to increase the cap on SIVs by 10,000 and expand eligibility for the program.<sup>53</sup> Compounding the issue, however, is a backlog of SIV requests and the strain the mass evacuation has placed on the program.<sup>54</sup>

Apart from the SIV program, the United States in August expanded refugee status eligibility for Afghans who did not qualify for SIVs. The State Department announced a new “Priority 2”

<sup>43</sup> U.S. Dep’t of State Press Release, Department Press Briefing (Oct. 18, 2021), at <https://www.state.gov/briefings/departments-press-briefing-october-18-2021> [<https://perma.cc/B437-5SS8>].

<sup>44</sup> Jessica Donati, *U.S. Aims to Resume Regular Evacuation Flights From Afghanistan*, WALL ST. J. (Oct. 14, 2021), at <https://www.wsj.com/articles/u-s-to-resume-evacuation-flights-from-afghanistan-11634212800>.

<sup>45</sup> U.S. Dep’t of State Press Release, Department Press Briefing (Oct. 12, 2021), at <https://www.state.gov/briefings/departments-press-briefing-october-12-2021-2> [<https://perma.cc/XDU5-R2A4>].

<sup>46</sup> U.S. Dep’t of State Media Note, *Afghanistan Relocation and Resettlement Update* (Dec. 13, 2021), at <https://www.state.gov/afghanistan-relocation-and-resettlement-update> [<https://perma.cc/7DKD-9DUR>] (brackets in original).

<sup>47</sup> Catie Edmondson, *Lawmakers Press to Rescue Afghan Relatives of U.S. Service Members*, N.Y. TIMES (Oct. 11, 2021), at <https://www.nytimes.com/2021/10/11/us/politics/lawmakers-rescue-afghan-relatives-service-members.html>.

<sup>48</sup> U.S. Dep’t of State Bureau of Consular Affairs, *Special Immigrant Visas for Afghans*, at <https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immig-visa-afghans-employed-us-gov.html> [<https://perma.cc/8WD4-WBLM>].

<sup>49</sup> Lindsay Maizland, *Where Will Afghan Refugees Go?*, CFR (Sept. 8, 2021), at <https://www.cfr.org/in-brief/where-will-afghan-refugees-go>.

<sup>50</sup> U.S. Dep’t of Defense Press Release, *Pentagon Press Secretary John F. Kirby and Major General Hank Taylor, Deputy Director of the Joint Staff For Regional Operations* (Aug. 28, 2021), at <https://www.defense.gov/News/Transcripts/Transcript/Article/2756150/pentagon-press-secretary-john-f-kirby-and-major-general-hank-taylor-deputy-dire> [<https://perma.cc/4CNJ-XPFF>].

<sup>51</sup> Jessica Donati, *Majority of Interpreters, Other U.S. Visa Applicants Were Left Behind in Afghanistan*, WALL ST. J. (Sept. 1, 2021), at <https://www.wsj.com/articles/majority-of-interpreters-other-u-s-visa-applicants-were-left-behind-in-afghanistan-official-says-11630513321>.

<sup>52</sup> Edmondson, *supra* note 47.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*



refugee status designation for individuals “at risk due to their U.S. affiliation but” ineligible for SIVs “because they did not have qualifying employment, or because they have not met the time-in-service requirement to become eligible.”<sup>55</sup> The Priority 2 program is open to certain employees of the U.S. government, U.S. government-funded programs or projects, and U.S.-based media organizations or non-governmental organizations.<sup>56</sup>

Beyond contacts to facilitate departures, questions remain about whether the United States and the Taliban might work together to address threats from ISIS-K. The group has launched a number of deadly attacks in Afghanistan, including on mosques in Kabul and Kunduz in early October,<sup>57</sup> and on a Kabul military hospital on November 2.<sup>58</sup> In testimony before the Senate Armed Services Committee, Undersecretary Kahl said the intelligence community estimates that ISIS-K “could build the capacity to plan and conduct international operations within six months if unchecked.”<sup>59</sup>

Although there were early suggestions of possible coordination,<sup>60</sup> the new Taliban government has publicly resisted working with the United States to address ISIS-K.<sup>61</sup> Following the first direct talks with the United States since the fall of Kabul, Taliban spokesperson Suhail Shaheen said that while the Taliban assured the United States that they will combat ISIS-K, the Taliban “are able to tackle [ISIS-K] independently.”<sup>62</sup> Aziz Ahmad Tawakol, a senior Taliban intelligence official, went on to say, “We already defeated the United States, so we believe we can defeat [ISIS-K] as well and in less time.”<sup>63</sup>

The Taliban is also seeking formal international recognition. The Taliban has requested Afghanistan’s UN seat, but on December 6, the UN General Assembly, following a recommendation from the UN Credentials Committee, deferred action on the credentials of the Afghan representative.<sup>64</sup> In “a rare instance of unity,” the United States, Russia, and

<sup>55</sup> U.S. Dep’t of State Press Release, U.S. Refugee Admissions Program Priority 2 Designation for Afghan Nationals (Aug. 2, 2021), at <https://www.state.gov/u-s-refugee-admissions-program-priority-2-designation-for-afghan-nationals> [https://perma.cc/G2RP-ZC33].

<sup>56</sup> *Id.*

<sup>57</sup> Thomas Gibbons-Neff & Wali Arian, *ISIS Bomber Kills Dozens at Shiite Mosque in Northern Afghanistan*, N.Y. TIMES (Oct. 8, 2021), at <https://www.nytimes.com/2021/10/08/world/asia/afghanistan-mosque-attack.html>.

<sup>58</sup> Thomas Gibbons-Neff, Sami Sahak & Taimoor Shah, *Dozens Killed in ISIS Attack on Military Hospital in Afghanistan’s Capital*, N.Y. TIMES (Nov. 2, 2021), at <https://www.nytimes.com/2021/11/02/world/asia/afghanistan-kabul-hospital-attack.html>.

<sup>59</sup> Karen DeYoung, *Pentagon Officials, Unable to Secure Basing Near Afghanistan, Warn of Terrorist Threat*, WASH. POST (Oct. 26, 2021), at [https://www.washingtonpost.com/national-security/colin-kahl-afghanistan-testimony/2021/10/26/4e4cb786-368a-11ec-91dc-551d44733e2d\\_story.html](https://www.washingtonpost.com/national-security/colin-kahl-afghanistan-testimony/2021/10/26/4e4cb786-368a-11ec-91dc-551d44733e2d_story.html).

<sup>60</sup> Robert Burns & Lolita C. Baldor, *Milley: US Coordination with Taliban on Strikes “Possible,”* ASSOC. PRESS (Sept. 1, 2021), at <https://apnews.com/article/politics-taliban-islamic-state-group-461d2382cbe3ca7f70dbd4b870434e49>.

<sup>61</sup> Kathy Gannon, *Taliban Says U.S. Will Provide Humanitarian Aid to Afghanistan*, ASSOC. PRESS (Oct. 10, 2021), at <https://apnews.com/article/afghanistan-business-taliban-islamic-state-group-united-states-0f386a9d22bafa86601c8a6251b02bc6>.

<sup>62</sup> *Id.*

<sup>63</sup> Susannah George, Joby Warrick & Karen DeYoung, *Pakistan Using Informal Intelligence Channels to Prop Up Taliban Fight Against ISIS*, WASH. POST (Oct. 23, 2021), at <https://www.washingtonpost.com/world/2021/10/23/afghanistan-isis-pakistan-intelligence>.

<sup>64</sup> *General Assembly Defers Decision on Afghanistan and Myanmar Seats*, UN NEWS (Dec. 6, 2021), at <https://news.un.org/en/story/2021/12/1107262>; Rick Gladstone, *U.N. Seats Denied, for Now, to Afghanistan’s Taliban and Myanmar’s Junta*, N.Y. TIMES (Dec. 6, 2021), at <https://www.nytimes.com/2021/12/01/world/americas/united-nations-taliban-myanmar.html>; see also Jack Detsch & Colum Lynch, *Afghanistan’s U.N. Envoy Heads for the Exit*, FOR. POLY. (Dec. 16, 2021), at <https://foreignpolicy.com/2021/12/16/afghanistan-united-nations->

China agree that recognition will not happen soon, but that it can be leveraged to obtain Taliban concessions on human rights and counterterrorism.<sup>65</sup> The United States has taken the position that, as Blinken explained, while “[t]he Taliban seeks international legitimacy and support[,] . . . any legitimacy and any support will have to be earned.”<sup>66</sup>

The Taliban takeover and U.S. withdrawal have fueled concern about a humanitarian crisis in Afghanistan, but existing U.S. sanctions and financial restrictions on the Taliban complicate aid delivery. In August, the United States froze about \$9.5 billion in assets from Afghanistan’s Central Bank to prevent the Taliban from accessing the funds.<sup>67</sup> The United States has also left in place longstanding sanctions on the Taliban and the Haqqani network, a designated foreign terrorist organization headed by the Taliban’s acting interior minister, Sirajuddin Haqqani.<sup>68</sup>

Nonetheless, the United States and international community are attempting to facilitate humanitarian aid delivery to address the growing crisis. Blinken pledged in September that the United States would

continue to support humanitarian aid to the Afghan people. Consistent with our sanctions on the Taliban, the aid will not flow through the government, but rather through independent organizations, such as UN agencies and NGOs. And we expect that those efforts will not be impeded by the Taliban or anyone else.<sup>69</sup>

On December 22, the UN Security Council unanimously adopted a resolution creating an exception to existing UN sanctions on Afghanistan for “humanitarian assistance and other activities that support basic human needs in Afghanistan,” as well as financial transactions needed to facilitate such aid.<sup>70</sup>

Through the end of October, the United States pledged a total of “nearly \$474 million in 2021” for “humanitarian aid in Afghanistan and for Afghan refugees in the region,” all of which “will flow through independent humanitarian organizations.”<sup>71</sup> At a UN donor

[envoy-us-china-taliban](#) (reporting the resignation of Ghulam Isaczai, the Afghan ambassador appointed by the Ghani government).

<sup>65</sup> David Wainer, *Rival Claims to Afghanistan’s UN Seat Pose Dilemma for the World*, BLOOMBERG BUSINESSWEEK (Nov. 5, 2021), at <https://www.bloomberg.com/news/articles/2021-11-05/taliban-ousted-afghanistan-government-both-claim-un-seat>.

<sup>66</sup> U.S. Dep’t of State, *supra* note 32.

<sup>67</sup> Saleha Mohsin, *U.S. Freezes Nearly \$9.5 Billion Afghanistan Central Bank Assets*, BLOOMBERG (Aug. 17, 2021), at <https://www.bloomberg.com/news/articles/2021-08-17/u-s-freezes-nearly-9-5-billion-afghanistan-central-bank-assets>.

<sup>68</sup> See U.S. Dep’t of Treasury Press Release, *Treasury Issues General Licenses and Guidance to Facilitate Humanitarian Assistance in Afghanistan* (Sept. 24, 2021), at <https://home.treasury.gov/news/press-releases/jy0372>; Rachel Pannett, *Who Leads Afghanistan’s New Government? Here’s What We Know About the Taliban’s Top Officials*, WASH. POST (Sept. 8, 2021), at <https://www.washingtonpost.com/world/2021/09/08/taliban-leaders-afghanistan-government-women>.

<sup>69</sup> U.S. Dep’t of State, *supra* note 32; see also U.S. Dep’t of Treasury, *supra* note 68.

<sup>70</sup> SC Res. 2615, para. 1 (Dec. 22, 2021); UN Press Release, *Security Council Unanimously Adopts Resolution 2615 (2021), Enabling Provision of Humanitarian Aid to Afghanistan as Country Faces Economic Crisis* (Dec. 22, 2021), at <https://www.un.org/press/en/2021/sc14750.doc.htm>.

<sup>71</sup> White House Press Release, *Statement by NSC Spokesperson Emily Horne on the United States Providing Humanitarian Assistance to the People Affected by the Ongoing Humanitarian Crisis in Afghanistan* (Oct. 28, 2021), at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/28/statement-by-nsc-spokesperson-emily-horne-on-the-united-states-providing-humanitarian-assistance-to-the-people-affected-by-the-ongoing-humanitarian-crisis-in-afghanistan> [<https://perma.cc/72A6-UNCR>].

conference in September, governments and other donors pledged \$1.2 billion in humanitarian funding.<sup>72</sup>

The humanitarian situation remains precarious. The United Nations estimates that since the start of 2021, over half a million Afghans have been internally displaced, and “a potential worst-case scenario envisages over 515,000 newly displaced refugees fleeing across the borders” through the end of 2021.<sup>73</sup> These totals would add to the 2.6 million existing Afghan refugees across the world, 2.2 million of whom reside in Iran and Pakistan.<sup>74</sup>

#### IMMIGRATION AND MIGRATION

##### *Biden Administration Continues Efforts to Change Immigration Policy Amidst Surges of Migrants and Court Losses*

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After quickly reversing a number of Trump-era policies related to immigration, the Biden administration has struggled to deal with large numbers of migrants arriving at the border and has faced legal challenges and setbacks. The administration’s continued use of a public health law to expel migrants prompted particular outcry when used to return thousands of migrants to Haiti, which is struggling with political instability and natural disasters. The administration also lost and has appealed cases related to the establishment of the Deferred Action for Childhood Arrivals (DACA) program and to its termination of the Migrant Protection Protocols (MPP). Nonetheless, the administration has succeeded in making some changes, including doubling the 2022 refugee cap, expanding a program to allow certain children from Northern Triangle countries to apply for refugee status, and reopening U.S. borders to most vaccinated travelers. Biden’s more fundamental proposal for overhauling the U.S. immigration system remains stalled in Congress.

Upon taking office, the Biden administration immediately reversed a number of Trump administration border and immigration-related policies, including revoking travel bans imposed disproportionately on Muslim-majority countries and halting construction of the border wall.<sup>1</sup> Biden also ordered the attorney general and secretary of homeland security to “preserve and fortify” DACA—an Obama-era initiative that “deferred the removal of certain undocumented immigrants who were brought to the United States as children.”<sup>2</sup> In 2020,

<sup>72</sup> Jamey Keaten & Edith M. Lederer, *Donors Pledge \$1.2 Billion in Emergency Funds for Afghans*, ASSOC. PRESS (Sept. 13, 2021), at <https://apnews.com/article/europe-afghanistan-geneva-united-nations-taliban-e719ed118ce0bdc4fe31aeb1bf3d8047>.

<sup>73</sup> UN High Commissioner for Refugees, *Afghan Situation Regional Refugee Preparedness and Response Plan: Summary & Inter-Agency Funding Requirements July–Dec. 2021*, at 1, at <https://data2.unhcr.org/en/documents/details/88385>.

<sup>74</sup> UN High Commissioner for Refugees, *Afghanistan*, at <https://www.unhcr.org/en-us/afghanistan.html>.

<sup>1</sup> Kristen E. Eichensehr, *Contemporary Practices of the United States*, 115 AJIL 340, 340–43 (2021).

<sup>2</sup> Presidential Mem., 86 Fed. Reg. 7,053 (Jan. 20, 2021).