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NEW YORK
CITY BAR

**RECOMMENDATIONS RESPECTFULLY SUBMITTED TO THE
BIDEN ADMINISTRATION REGARDING
PRINCIPAL ACTIONS AFTER INAUGURATION RELATED TO THE RULE OF LAW**

We write on behalf of the Task Force on the Rule of Law, Federal Courts Committee, Immigration and Nationality Law Committee, Task Force on the Independence of Lawyers and Judges, International Human Rights Committee, and the Military and Veterans Affairs Committee of the New York City Bar Association. We submit this report to the Biden-Harris Transition to summarize the principal actions that we hope President Biden and his Administration can take promptly after his inauguration.

Recognizing that the President cannot, as a practical matter, implement all of these recommendations simultaneously, we strongly urge you to prioritize proposals A, B and C below, which will: restore the Department of Justice (DOJ) as an agency that serves the public; instill respect and independence for Inspectors General throughout the executive branch and its agencies; restore an appropriate use of the pardon power; and provide needed support for our judicial system and those who serve it with dedication. Each of these steps is necessary to assure the American people that we remain a nation governed by law and not the whim of either elected or appointed officials. It is also important to reassure the world of this commitment. To that end, proposals D, G, and H below identify three domestic actions (two requiring legislation) that we believe would advance this goal: (D) removing our Immigration Court from DOJ and reconstituting it as an Article I court under the Constitution; (G) reconstituting the Guantanamo military court into a special branch at Guantanamo of the federal district court for the Southern District of New York; and (H) rescinding the Trump Administration's executive order sanctioning personnel of the International Criminal Court.

Because of the tragic events in Washington during the past week, we cannot submit this report without urging the Biden Administration to prioritize and to vigorously pursue any and all necessary investigations and prosecutions arising out of those events, as further discussed below.¹

¹ Statement of the New York City Bar Association Calling for the Removal of Donald Trump as President (January 11, 2021), https://s3.amazonaws.com/documents.nycbar.org/files/TrumpImpeachmentRemoval_1.10.21.pdf. (All sites last visited January 12, 2021.)

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world. www.nycbar.org

We appreciate your consideration of our proposals and hope that President Biden will adopt them with the broader understanding, which he has eloquently articulated, that both our laws and our Constitution must be accompanied by a visible commitment to truth, respect for the dignity of all people, and good faith protection of our democracy by those entrusted with the leadership of our nation.

A. RESTORE CONFIDENCE IN THE DEPARTMENT OF JUSTICE

The Biden Administration must prioritize restoring the public's confidence that the Department of Justice (DOJ) can administer equal justice to all people in our nation instead of serving as a vehicle for the president's personal agenda. This Association welcomes the nominations of Merrick Garland, Lisa Monaco, Vanita Gupta, and Kristen Clarke, who are all lawyers of unquestioned integrity, outstanding professional qualifications, and demonstrated commitment to equal justice under law, to assist in this monumental task.

As our Association has documented, the Trump Administration and former-Attorney General William Barr repeatedly undermined the core function of DOJ by placing the President's personal interests over the fair and impartial administration of justice, and sought to undermine the professional judgments of DOJ attorneys who failed to adhere to Mr. Barr's goal of protecting the President's personal interests.² In the wake of these egregious assaults on the rule of law, DOJ must change course by making clear that the President's personal and political interests have no place at DOJ, that the White House will not interfere with DOJ's investigations and prosecutorial decisions, and that the array of abuses summarized above will never be tolerated. To the extent that renewed guidelines or other policy mechanisms will help ensure such forbearance, they should be a priority.

² Mr. Barr used DOJ as a personal tool of the President, egregiously misrepresenting the contents and conclusions of the Mueller report and refusing to provide an unredacted version to the public, *see* http://documents.nycbar.org/files/Exercising_Congressional_Oversight_AG_Barr_01082020.pdf; fired US Attorneys who were conducting investigations into Trump Administration officials and activities and, in the case of Geoffrey Berman, US Attorney for the Southern District of New York, lied about attempting to do so, *see* <https://s3.amazonaws.com/documents.nycbar.org/files/2020740-BarrBermanConcern.pdf>; interfered with charged cases for political and other improper purposes, including undercutting the criminal cases against Roger Stone and Michael Flynn, *see* <https://www.nycbar.org/media-listing/media/detail/prosecution-of-roger-stone-and-related-actions-by-the-department-of-justice>; refused to comply with his statutory duty to refer whistleblower complaints to Congress, *see* <https://www.nycbar.org/media-listing/media/detail/attorney-general-barr-should-recuse-himself-from-department-of-justice-review-of-ukraine-matter>; sought to undermine Congressional subpoenas and other requests for documents, information, and testimony, in support of President Trump's personal and political interests, *see* https://www.washingtonpost.com/powerpost/house-democrats-consider-holding-barr-in-contempt-of-congress/2019/05/01/a291313a-6c22-11e9-a66d-a82d3f3d96d5_story.html; helped direct the improper and unlawful use of federal forces at Lafayette Square, *see* <https://s3.amazonaws.com/documents.nycbar.org/files/2020726-LafayetteSquareInvestigationCongress.pdf>; advanced wholly inappropriate personal religious and political perspectives on law enforcement, *see* <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/request-for-formal-congressional-inquiries-into-conduct-of-attorney-general-william-p-barr>; turned a blind eye to police brutality, and failed to enforce the Hatch Act barring political activities by federal employees, *see* <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/investigation-of-mike-pompeos-apparent-hatch-act-violation>.

We also strongly believe that DOJ must promptly and thoroughly investigate and — where adequate evidence of chargeable criminal conduct exists — prosecute those responsible for the violent uprising at the Capitol on January 6.³ Such investigation must include not only culpable individuals who were physically present at the Capitol, but also those responsible for inciting the criminal acts. The investigation also should include potentially criminal acts stemming from President Trump’s January 2 phone call with Georgia state officials and other similar communications and actions designed to cause the fraudulent manipulation of valid election results.

As part of this inquiry, we urge DOJ to carefully scrutinize the law enforcement response on January 6 given the abject failure, despite the heroism of many individual police officers, to secure the premises, bar entry to the building, and arrest perpetrators, and the significant delays in fortifying the law enforcement response with additional federal, military, and local officers. DOJ must also investigate the reasons for what appeared to be a tepid law enforcement response to an overwhelmingly White mob openly espousing racist ideology at the Capitol on January 6 as compared to highly aggressive federal law enforcement actions during mostly peaceful protests by largely Black and minority demonstrators across the country following the death of George Floyd.

The disparate treatment of different racial groups that was so apparent at the Capitol last week is part of a larger breakdown of civil rights enforcement in this country — a breakdown that must also be an urgent priority of the Biden Administration. In recent years, DOJ has abandoned consent decrees that monitor police departments, provided explicit and tacit support for police brutality against minority populations, and failed to prosecute civil rights offenses, all of which has corroded DOJ’s mission to ensure that arbitrary and discriminatory local law enforcement is subject to federal oversight and correction, and that federal law enforcement is pursued appropriately and without discrimination. Fixing these problems should be a top priority of DOJ.

Finally, DOJ’s historic role in the pardon process should be expressly acknowledged and respected. While the President’s pardon authority is plenary, the recent abandonment of DOJ’s role has tarnished its reputation and lent credence to the public’s understandable view that proximity to power and the President’s personal protection have become the essential ingredients for a pardon.⁴

B. REAFFIRM A COMMITMENT TO THE ROLE AND INDEPENDENCE OF INSPECTORS GENERAL

Federal Inspectors General play a vital role in identifying and rectifying fraud, waste, and abuse, and in ensuring that Executive Branch departments, along with their leadership and employees, comply with applicable laws. The Inspector General Act of 1978 recognized the need

³ *Supra* note 1.

⁴ *See* New York City Bar Association letter on Roger Stone pardon (July 15, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/letter-to-trump-regarding-pardoning-of-roger-stone>.

for oversight by professionals who combine deep knowledge of the work of federal agencies with structural independence that is helpful in a job that often requires disclosing unfavorable information learned in sensitive investigations. Since the first IG Act, Congress has repeatedly acted to strengthen the independence and capacity of Inspectors General.⁵

Notwithstanding these statutory protections, the Trump Administration engaged in unprecedented, baseless attacks on these independent watchdogs,⁶ removing them from their positions under circumstances strongly suggesting that the President's actions were retaliation for the IGs' disclosure of improper actions by members of the Administration or for an active investigation of a high-ranking Trump Administration official. This Association previously has condemned these retaliatory actions.⁷

We strongly encourage the Biden Administration to support the independence of federal Inspectors General by allowing IGs to do their jobs without interference or influence, and by complying strictly with the mandates of the relevant laws. We also note that legislation is pending to add further protections to the tenure and independence of IGs,⁸ and urge the Administration to support that or any similar legislation that accomplishes this goal.

C. RESTORE RESPECT FOR OUR INDEPENDENT JUDICIARY

An executive branch that fails to demonstrate respect for the co-equal judicial branch of government degrades public trust in our courts and undermines our democracy. In the past four years, President Trump and his administration displayed abject disregard for judicial processes, interfered with military and criminal court outcomes, and launched outright attacks on judges, lawyers and jurors, all in an apparent effort to serve the President's personal interests.

The criminal cases against Roger Stone, Michael Flynn, and Paul Manafort included attacks by the President and his supporters on the integrity of the presiding Judges, the independ-

⁵ See The Inspector General Reform Act, 122 Stat. 4302, Pub. L. 110-409 (2008); The IG Empowerment Act, 130 Stat. 1595, Pub. L. 114-317 (2016).

⁶ President Trump fired or demoted numerous Inspectors General in 2020, including: Michael Atkinson, the IG of the Intelligence Community, who was fired following Atkinson's referral of the Ukraine whistleblower's complaint to Congress; Glenn Fine, who was removed from his position immediately after he was named to oversee management of CARES Act funds as chair of the Pandemic Response Accountability Committee; Christi Grimm, who was removed as the IG of the Department of Health and Human Services after issuing a report documenting significant supply shortages and lengthy testing delays at hundreds of hospitals; Mitch Behm, IG for the Department of Transportation, who was allegedly conducting an investigation into Transportation Secretary Elaine Chao, and Steve Linick, IG for the Department of State, who was fired while investigating abuses by Secretary of State Mike Pompeo.

⁷ See New York City Bar Association, *Independent Inspectors General Are Essential for a Lawful Federal Government* (Reissued May 2020), <https://s3.amazonaws.com/documents.nycbar.org/files/2020696-InspectorsGeneralReport.pdf>.

⁸ See S. 3994, The Securing Inspector General Independence Act of 2020 (introduced June 18, 2020), <https://www.congress.gov/bill/116th-congress/senate-bill/3994>.

ence of the prosecutors, and the results as determined by juries consisting of ordinary American citizens.⁹

President Trump also undercut our military court system by his capricious use of the pardon power. In 2019, President Trump, without any justifiable basis,¹⁰ pardoned three United States Army officers who had been either accused or convicted of war crimes by U.S. military courts — pardons that this Association, and many others, including military commanders and the United Nations High Commissioner for Human Rights, condemned.¹¹ More recently, Trump pardoned four civilians duly convicted by federal courts of war crimes in Iraq, including murder, while they were serving in the Blackwater mercenary forces used by the U.S. following the Second Gulf War, a move widely condemned by the international community and human rights experts.¹² The Biden Administration must take prompt and affirmative steps to assure our military leaders, our citizens, and the world of our nation’s commitment to military justice and international law.

D. MAKE PROMPT IMMIGRATION REFORMS, INCLUDING IMMEDIATE PROCEDURAL CHANGES WITHIN DOJ AND THE REMOVAL OF IMMIGRATION COURTS FROM DOJ, RECONSTITUTING THEM AS ARTICLE I COURTS

The past four years have seen the rule of law upended in the areas of refugee, immigration and nationality law. This Association strongly urges the Biden Administration to take swift action to restore justice and end inhumane practices in these areas.

First, the Administration should establish a family separation task force to: 1) find and reunify families in the U.S. to allow them to live in freedom, not detention, and to provide them protection from deportation; 2) provide pathways to permanent status for separated children and parents; 3) provide reparations and settle Federal Tort Claims Act complaints; 4) make systemic

⁹ See New York City Bar Association amicus curiae brief in *In re: Michael Flynn* (June 1, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/in-re-michael-t-flynn-amicus-brief>. In the Stone case, President Trump even launched a baseless attack on the foreperson of the jury on two separate occasions; this kind of juror intimidation has no place in our justice system, and undermines the public’s commitment to jury service.

¹⁰ Reportedly, President Trump wanted the pardoned officers to join him on the campaign trail. See Sarah Gray and David Choi, *Trump wants convicted or charged war criminals on the campaign trail with him, report says*, Business Insider (Nov. 26, 2020), <https://www.businessinsider.com/trump-wants-pardoned-convicted-war-criminal-on-campaign-trail-report-2019-11>.

¹¹ See New York City Bar Association, *Report Condemning Presidential Pardons of Accused and Convicted War Criminals* (April 2020), <https://s3.amazonaws.com/documents.nycbar.org/files/2020671-ReportonPardonedWarCriminals.pdf>.

¹² See United Nations Human Rights Office of the High Commissioner, *US Pardons for Blackwater Guards an ‘Af- front to Justice’ – UN Experts* (Dec. 30, 2020), <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=26633&LangID=E>.

changes to end family separations, including by ending family detention; and (5) adopt accountability measures.¹³

The Administration also must restore and expand programs that ensure access to legal representation in immigration proceedings, including legal counsel for children and non-citizens in detention.¹⁴ The administration should restore and expand the Legal Orientation Program and the Immigration Court Help Desk Program, further develop the National Qualified Representative Program, which provides representation to individuals who lack capacity to represent themselves, and reduce barriers to *pro bono* and nonprofit representation programs.

We also urge the Administration to address the many bureaucratic and procedural changes instituted by the Trump Administration that have effectively destroyed paths to immigration and refugee status by circumventing Congress and rendering statutory protections meaningless. This means restoring: docket management tools in immigration court,¹⁵ prosecutorial discretion,¹⁶ reasonable application fees,¹⁷ prior public charge policies,¹⁸ firewalls between immigra-

¹³ See New York City Bar Association, *Criminal Prosecution, Separation, and Detention of Families Seeking Asylum* (July 06, 2018), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/criminal-prosecution-separation-and-detention-of-families-seeking-asylum>.

¹⁴ New York City Bar Association, *Ensuring Right to Counsel For Minors Facing Removal Proceedings: Testimony* (Dec. 19, 2018), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/ensuring-right-to-counsel-for-minors-facing-removal-proceedings-testimony>; New York City Bar Association, *Letter to Mayor de Blasio Regarding Due Process, Universal Representation, and the New York Immigrant Family Unity Project* (June 1, 2017), <https://www.nycbar.org/member-and-career-services/committees/immigration-and-nationality-law-committee>; New York City Bar Association, *City Bar Welcomes NERA Report Finding Appointed Immigration Counsel Would Pay for Itself* (May 30, 2014), <https://www.nycbar.org/media-listing/media/detail/city-bar-welcomes-nera-report-finding-appointed-immigration-counsel-would-pay-for-itself>; New York City Bar Association, *The Right to Counsel for Detained Individuals in Removal Proceedings* (Aug. 2009), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/the-right-to-counsel-for-detained-individuals-in-removal-proceedings-august-2009>.

¹⁵ See New York City Bar Association, *Report on the Independence of the Immigration Courts* (October 21, 2020), <https://www.nycbar.org/member-and-career-services/committees/immigration-and-nationality-law-committee>.

¹⁶ *Id.*

¹⁷ See New York City Bar Association, *Opposition to Fee Increases for USCIS Applications: Comments* (December 19, 2019), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-fee-increases-for-uscis-applications-comments>; New York City Bar Association, *Comment Letter Urging EOIR to Withdraw Rule That Would Dramatically Increase Fees for Immigration Court Filings and Appeals* (March 30, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-drastic-eoir-fee-increases-comments>; New York City Bar Association, *Comment on DHS Proposed Change to Fee Waiver Rule* (November 27, 2018), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/comment-on-dhs-proposed-change-to-fee-waiver-rule>.

¹⁸ See New York City Bar Association, *DHS Comment: Inadmissibility on Public Charge Grounds* (December 11, 2018), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/dhs-comment-inadmissibility-on-public-charge-grounds>; New York City Bar Association, *"Public Charge" Rule Change Impact on NYC: Updated Testimony* (September 03, 2019), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/public-charge-rule-change-impact-on-nyc-updated-testimony>; New York City Bar Association, *Impact of Proposed "Public Charge" Rule on NYC: Testimony* (November 15, 2018), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/impact-of-proposed-public-charge-rule-on-nyc-testimony>; New York City Bar Association, *Statement Opposing Proposed Changes to Broaden "Public Charge" Rule* (October 24, 2018), <https://www.nycbar.org/member-and-career->

tion and local law enforcement,¹⁹ the National Association of Immigration Judges union, and a culture that takes pride in customer service and America's immigrant history. In addition, the discriminatory travel bans and dangerous Migrant Protection Protocols and Asylum Cooperative Agreements should be rescinded,²⁰ and the COVID-19 pandemic no longer misused to sidestep important humanitarian obligations.²¹

Finally, the last four years have shown that the United States is long overdue for the establishment of Article I immigration courts to protect judicial independence and integrity.²² While this last issue will require legislation, the Administration should work with Congress to push for this important reform. This Association has issued a comprehensive report endorsing this reform²³ and stands ready to assist in reviewing any legislative proposals to this effect.

E. AMEND THE NATIONAL EMERGENCIES ACT

We urge the Biden Administration to support amending the National Emergencies Act to establish better checks and balances between the Executive and Legislative Branches in the declaration of a national emergency and the invocation of the powers that flow from such a declaration.²⁴

[services/committees/reports-listing/reports/detail/statement-opposing-proposed-changes-to-broaden-public-charge-rule.](#)

¹⁹ See New York City Bar Association, *ICE Courthouse Arrest Case: Amicus Brief* (March 13, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/ice-courthouse-arrest-case-amicus-brief>; New York City Bar Association, *Federal Immigration Enforcement in NYS Courthouses: Recommendations* (July 11, 2018), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/federal-immigration-enforcement-in-nys-courthouses-recommendations>.

²⁰ See New York City Bar Association, *Opposition to Proposed Third-Country Asylum Agreements: Comments* (December 19, 2019), https://s3.amazonaws.com/documents.nycbar.org/files/2019622-AsylumCooperativeAgreements_FINAL_12.19.19.pdf.

²¹ See New York City Bar Association, *Opposition to the Use of the COVID-19 Pandemic to Undermine Asylum Law and Protections for Unaccompanied Children* (July 08, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/using-covid-19-to-undermine-asylum-for-children>; New York City Bar Association, *Opposition to Asylum Regulations Threatening Public Health* (August 07, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-covid-19-regulations-for-asylum>.

²² See New York City Bar Association, *Report on the Independence of the Immigration Courts* (October 21, 2020), <https://www.nycbar.org/member-and-career-services/committees/immigration-and-nationality-law-committee>; New York City Bar Association, *The State of Judicial Independence & Due Process in U.S. Immigration Courts: Written Testimony* (January 29, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/the-state-of-judicial-independence-and-due-process-in-us-immigration-courts-written-testimony>.

²³ See New York City Bar Association, *Strengthening & Reforming America's Immigration Court System: Written Testimony* (April 18, 2018), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/strengthening-and-reforming-americas-immigration-court-system-testimony>.

²⁴ See New York City Bar Association, *Report Urging Senate to Revise National Emergencies Act by Passing ARTICLE ONE Act* (April 22, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/national-emergencies-act-urging-passage-of-article-one-act>.

Over the last century, Congress has increased the President’s authority with respect to national emergencies not involving war or other military conflict. Congress has done little to police these grants of authority, which have no or few explicit limitations. Moreover, emergencies and the granting of emergency powers are rarely reconsidered, leaving in place a significant potential for abuse of authority by a future President. For this reason, this Association generally supports the ARTICLE ONE Act (S.764), which changes the framework for terminating emergencies. Instead of an emergency continuing until it is terminated by a resolution enacted into law, the ARTICLE ONE Act provides that any authority the President invokes during an emergency terminates after 30 days unless a joint resolution of approval is enacted. There would also be a general prohibition on amending the resolution, and a timeline would be set forth to ensure the resolution’s timely consideration.²⁵

The ARTICLE ONE Act leaves unchanged the President’s war-making authority, which is governed by a different regime, and does not impact other authorities residing in the Executive Branch. The Act simply rebalances the nation’s emergency powers system to more properly reflect the necessary involvement of both policy-making branches of government in these important decisions, and we recommend that the Administration support it.

F. FILL ALL VACANCIES AT THE USPS BOARD OF GOVERNORS AND CALL UPON THE BOARD TO REMOVE POSTMASTER GENERAL LOUIS DEJOY

After the significant delays and other service problems associated with the mail in a year containing both a global pandemic and a Presidential election with record vote-by-mail turnout, it is evident that the Biden Administration must work to reestablish public confidence in the United States Postal Service (USPS). The USPS has a constitutional and statutory duty to “to provide trusted, safe and secure communications and services between our Government and the American people, businesses and their customers, and the American people with each other.”²⁶ As this Association described in detail in our statement of September 25, 2020,²⁷ Postmaster General (PG) Louis DeJoy’s actions have been wholly inconsistent with the USPS’s unique mission.

Upon his appointment, PG DeJoy directed the USPS to implement operational changes on a nationwide basis without following statutorily mandated procedures. Despite the clear harm that ensued from these actions, PG DeJoy is appealing the preliminary injunctions issued by federal courts prior to the election halting his actions, and claims that the changes will be resumed.²⁸

²⁵ We recommend one change to the ARTICLE ONE Act: namely, we recommend that the International Emergency Economic Powers Act (IEEPA) not be excluded (although we support removing the emergency authority under IEEPA to impose tariffs), because the IEEPA has been the statute most often invoked as the basis for emergency authority in recent years.

²⁶ USPS Mission Statement, April 1, 2020 (Mission statement), <https://about.usps.com/who/profile>.

²⁷ See New York City Bar Association, *Statement on Operational Changes at the United States Postal Service* (Sept. 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/us-postal-service-operational-changes-mail-in-ballots>.

²⁸ See Eric Katz, *DeJoy, USPS Look to Strike Down Court Restrictions Blocking Reform Efforts*, Government Executive (Dec. 10, 2020), <https://www.govexec.com/management/2020/12/dejoy-usps-look-strike-down-court-restrictions-blocking-reform-efforts/170687/>.

The USPS Board of Governors has been called upon to “reverse any and all changes put in place by PG DeJoy that degrade or delay postal operations and the delivery of the mail,”²⁹ but has to date resisted calls to remove PG DeJoy. This Association calls upon the Biden Administration to fill the remaining three seats on the Board, and to urge the Board to remove PG DeJoy for his serious dereliction of duty.

G. CLOSE THE MILITARY COMMISSIONS AT GUANTANAMO BAY, CUBA AND TRANSFER THOSE CASES TO ARTICLE III COURT FOR ADJUDICATION

After nearly 15 years, the U.S. Military Commissions at Guantanamo Bay have garnered a mere eight convictions. The Commissions are fundamentally flawed and have proven to be an inadequate vehicle for fairly adjudicating the charges against the Guantanamo detainees, many of whom have been held for years without any formal charges or proceedings. While there is no perfect solution for this serious blot on our nation’s commitment to international law and fundamental due process, we believe the best approach at this time is for the remaining Guantanamo cases be transferred to and adjudicated by an Article III court, either established on the military base at Guantanamo Bay or incorporated into the Southern District of New York (or other appropriate district).³⁰ This would require legislative action, which we urge the Biden Administration to support. Unlike the Commissions at Guantanamo, traditional Article III courts have secured more than 660 terrorism convictions since 9/11, with a more than 90 percent conviction rate, few reversals, and no notable scandals.

H. RESCIND THE EXECUTIVE ORDER IMPOSING SANCTIONS ON OFFICIALS OF THE INTERNATIONAL CRIMINAL COURT

By Executive Order no. 13928,³¹ President Trump ordered the imposition of sanctions, particularly asset freezes and travel bans, against certain International Criminal Court (“ICC”) officials. Two individuals were designated for sanctions—ICC Prosecutor Fatou Bensouda and ICC official Phakiso Mochochoko. The Executive Order also more broadly covered rendering “services” or “material assistance,” which could include NGOs that cooperate with the ICC and even U.S. academics who work with the ICC. For many reasons articulated in past statements by this Association,³² the U.S. should not be imposing sanctions on personnel of a judicial institution, particularly one supported by almost all major U.S. allies and whose work largely aligns

²⁹ See Lucien Bruggeman, *Controversial Postal Chief Poised to Remain in Biden Administration*, abcnews.com (Dec. 1, 2020), <https://abcnews.go.com/Politics/controversial-postal-chief-poised-remain-biden-administration/story?id=74469137>.

³⁰ New York City Bar Association, *Converting Guantánamo Bay Military Commission into an Article III Court*, (May 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/converting-guantanamo-bay-military-commissions-into-an-article-iii-court>.

³¹ Executive Order on Blocking Property of Certain Persons Associated with the International Criminal Court, June 11, 2020, <https://www.whitehouse.gov/presidential-actions/executive-order-blocking-property-certain-persons-associated-international-criminal-court/>

³² See, e.g., *Statement by the New York City Bar Association Against U.S. Sanctions on Persons Working with or for the International Criminal Court*, (July 2020), <https://s3.amazonaws.com/documents.nycbar.org/files/2020750-OppositiontoEOonICC.pdf>.

with U.S. interests (e.g., prosecuting crimes in Darfur committed in Uganda by the so-called “Lord’s Resistance Army,” and against the Rohingya). While the U.S. is not a party to the ICC’s Rome Statute—and therefore owes no formal obligation to cooperate with the ICC, which is examining the conduct of U.S. nationals in Afghanistan as well as crimes by the Taliban and Afghan Armed Forces—it is highly inappropriate to impose sanctions against career officials of a judicial institution. The sanctions have been widely denounced by, in addition to this Association, the American Bar Association,³³ the Philadelphia Bar Association,³⁴ and over seventy UN Member States,³⁵ as well as 188 U.S. lawyers and academics³⁶ including past U.S. War Crimes Ambassadors from both Republican and Democratic administrations. In addition, Judge Katherine P. Failla of the Southern District of New York recently granted a preliminary injunction against the enforcement of the ICC regulations, holding that they violated the First Amendment rights of those who would work with the ICC on its important investigations.³⁷ For these reasons, as well as additional reasons expressed in prior Association statements, the Biden Administration should rescind Executive Order no. 13928 at the earliest possible opportunity.

³³ ABA President Judy Perry Martinez statement Re: U.S. sanctions of International Criminal Court personnel, June 12, 2020, <https://www.americanbar.org/news/abanews/aba-news-archives/2020/06/aba-president-judy-perry-martinez-statement-re--u-s--sanctions-o/>.

³⁴ Philadelphia Bar Association Resolution Supporting Independence of the International Criminal Court and Freedom from Sanctions and Freedom to travel of its Members, June 24, 2020, http://www.philadelphiabar.org/page/ResJune20_2?appNum=1.

³⁵ Over 70 ICC nations support court and Oppose US Sanctions, Nov. 2. 2020, <https://abcnews.go.com/US/wireStory/70-icc-nations-support-court-oppose-us-sanctions-73981352>

³⁶ Opinion Juris, “Statement against US Sanctions on ICC Investigations (Updated),” <https://opiniojuris.org/2020/06/30/statement-against-us-sanctions-on-icc-investigations/>.

³⁷ *Open Society Justice Initiative et al. v. Trump*, 20 Civ. 8121 (KPF) (Jan. 4, 2021).

We greatly appreciate your consideration of these recommendations and hope they will prove helpful as our nation confronts the extraordinary challenge of rebuilding public trust in a government committed to respecting and enforcing the rule of law.

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January 2021

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