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“Hoping Beyond Hope: The Promises and Doubts of President Biden’s CAT Policy”

US President Joe Biden recently released his Conventional Arms Transfer policy, which dictates which countries may purchase US weapons and how the arms transfer process should function.¹ Almost every new presidential administration releases one. Former President Donald Trump, for example, issued the previous Conventional Arms Transfer policy in 2018, and it primarily focused on the economic benefits from weapons transfers.² The Biden administration, at least in writing, is attempting to actually change US arms transfer policies.

The Biden administration’s Conventional Arms Transfer policy makes two notable changes. First, it adds text about not infringing norms and human rights. Specifically, it notes that the US should “prevent arms transfers that risk facilitating or otherwise contributing to violations of human rights or international humanitarian law.” Second, the new policy allows the State Department to stop sales that it determines will “more likely than not” be used to violate human rights, while under the previous Conventional Arms Transfer policy, only “actual knowledge” these weapons would be used to violate human rights could stop them.³ This, therefore, lowers the threshold required before the State Department can intervene to stop a problematic sale.

Overall, the fact that the Biden administration is analyzing the risks of US weapons being used to violate human rights is admirable.⁴ With that said, the administration does have a mixed record on this issue so far. It has sent billions of dollars’ worth of weapons to human rights abusers like Saudi Arabia, the United Arab Emirates, the Philippines, Egypt, and Turkey. Biden’s decision to prioritize the human rights effects of US weapons transfers comes at the perfect time. Recent trends in arms transfer policies have placed profits over risk or even strategy. Furthermore, while Congress has long struggled to exert influence over the process, in recent years it has attempted to claim more power.

The Increasing Role of Economics in Arms Transfers

There are two main motivations for transferring US arms—strategic and economic—and one primary reason to abstain—risk. When considering a sale, policymakers should prioritize strategic objectives, including improving interoperability, strengthening allies, offsetting domestic defense spending costs, and deterring adversaries.⁵ The State Department, Defense Department, and Commerce Department all have multiple

¹ Joseph R. Biden, “Memorandum on United States Conventional Arms Transfer Policy,” The White House, February 23, 2023, <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/23/memorandum-on-united-states-conventional-arms-transfer-policy/>.

² Donald J. Trump, “National Security Presidential Memorandum on United States Conventional Arms Transfer Policy,” The White House, April 19, 2018, <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/23/memorandum-on-united-states-conventional-arms-transfer-policy/>.

³ Joseph R. Biden, “Memorandum on United States Conventional Arms Transfer Policy.”

⁴ Previous scholarship suggests that this has not been the case. For example, see Jordan Cohen and A. Trevor Thrall, “What Is the Cost of Selling Arms?,” Inkstick Media, April 1, 2022, <https://inkstickmedia.com/what-is-the-cost-of-selling-arms/>.

⁵ For example, see Keren Yarhi-Milo, Alexander Lanoszka, and Zack Cooper, “To Arm or to Ally? The Patron’s Dilemma and the Strategic Logic of Arms Transfers and Alliances,” *International Security* 41, no. 2 (October 1, 2016): 90–139, https://doi.org/10.1162/ISEC_a_00250; Geoffrey Kemp, “The Continuing Debate over U.S. Arms Sales: Strategic Needs and the Quest for Arms Limitations,” *Annals of the American Academy of Political and Social Science* 535 (1994): 146–57, <https://doi.org/10.1177/0002716294535001011>; Jennifer Spindel, “Arms for Influence? The Limits of Great Power Leverage,” *European Journal of International Security*, February 28, 2023, 1–18, <https://doi.org/10.1017/eis.2023.3>; David Kinsella, “Nested Rivalries: Superpower Competition, Arms Transfers, and Regional Conflict, 1950–1990,” *International Interactions* 21, no. 2 (March 1, 1995): 109–25,

teams that are designed to help the president and Congress choose where to send weapons and how to most efficiently do so—and this is to say nothing of the various federally funded research and development corporations, in-house government think tanks, and research services that provide assistance.⁶ Thus, while one can question the long-term logic of sending weapons to so many partners, it is nonetheless the reality that Washington considers what strategic benefits can be gained from selling weapons abroad.

The other main motivation for arms sales is economic. The economic incentive for arms transfers centers around the reality that US arms sales annually make up of four to five percent of all US exports; thus, the defense industry is a major employer and sustainer of the US economy. During the presidencies of Bill Clinton and Donald Trump, the value of the sale of weapons motivated the policies on them. Clinton noted in 1995 that the benefits for US industry and the defense industrial base “would be a key criterion for his administration’s decision-making.”⁷ His Policy Decision Directive 34, which outlined Clinton’s arms sales policy, included a statement that US weapons sales should “enhance the ability of the US defense industrial base to meet US defense requirements and maintain long-term military technological superiority at lower costs.”⁸ Defense lobbyists called this statement “the most positive statement on defense trade that has been enumerated by any administration.”⁹

This rationale can be seen in the Trump administration’s version of the Conventional Arms Transfer policy where it asserts that “when a proposed transfer is in the national security interest, which includes our economic security, and in our foreign policy interest, the executive branch will advocate strongly on behalf of United States companies.”¹⁰ Trump’s record number of sales suggest that he stuck to this policy.¹¹

It is becoming increasingly clear that the strategic and economic motivations have always outweighed the drawback of risk. Factors of risk from the sale of arms include levels of corruption in a recipient state, government instability and inability of the receiving state to control weapons it receives, states that abuse human rights, and states engaged in conflict. Unfortunately, policymakers have mostly ignored these factors since the start of the Cold War, and the problem is getting worse.¹²

<https://doi.org/10.1080/03050629508434862>; and Richard A. I. Johnson, “Decision-Making in the Arms of a Dependent Relationship: Explaining Shifts in Importer Acquisition Patterns of Major Weapon Systems, 1955–2007,” *Defence and Peace Economics* 31, no. 7 (October 2, 2020): 851–68, <https://doi.org/10.1080/10242694.2019.1618651>.

⁶ See Jordan Cohen and A. Trevor Thrall, “Arms Sales,” in *Cato Handbook for Policymakers*, 9th ed. (Cato Institute, 2022), 305–19, <https://www.cato.org/cato-handbook-policymakers/cato-handbook-policymakers-9th-edition-2022/arm-sales>; Peter Tompa, “The Arms Export Control Act and Congressional Codetermination over Arms Sales,” *American University International Law Review* 1, no. 1 (January 1, 1986), <https://digitalcommons.wcl.american.edu/auilr/vol1/iss1/14>; A. Trevor Thrall and Caroline Dorminey, “Risky Business: The Role of Arms Sales in U.S. Foreign Policy,” *Cato Institute Policy Analysis* Number 836 (March 13, 2018); and Margaret M. Murphy, “All for Nothing?: Executive Authority and Congressional Evasion on Arms Sales,” *Catholic Law Review* 70, no. 1 (Winter 2021).

⁷ William J. Clinton, “Presidential Decision Directive 34, Conventional Arms Transfer policy,” The White House, February 17, 1995, <https://fas.org/irp/offdocs/pdd34.htm>.

⁸ Clinton, “Policy Decision Directive 34, U.S. Policy on Conventional Arms Transfer.”

⁹ Lora Lumpe, “Bill Clinton’s America: Arms Merchant to the World,” *Resist Newsletter* 4, no. 8 (October 1995),

¹⁰ Trump, “Conventional Arms Transfer Policy.”

¹¹ William D. Hartung, *Peddling Arms, Peddling Influence: Exposing the Arms Export Lobby*, World Policy Institute Report (New York: World Policy Institute, October 1996), <http://worldpolicy.org/>; and Robert Levinson, Sopen Shah, and Paige K. Conner, *Impact of Defense Spending: A State-by-State Analysis* (New York: Bloomberg, 2011).

¹² See Jordan Cohen and A. Trevor Thrall, “The 2022 Arms Sales Risk Index,” *Cato Institute*, *Forthcoming*; and Trevor Thrall and Jordan Cohen, “2021 Arms Sales Risk Index,” *Cato Institute*, January 18, 2022, <https://www.cato.org/study/2021-arms-sales-risk-index#salw-sales-risk-amplifying-violence-conflict>.

During the Cold War, this lack of concern led to scandals like Turkey's creation of a refugee crisis in Cyprus using US weapons, President Ronald Reagan arming of Nicaraguan Contras who then used US weapons to commit human rights atrocities, and the use of US weapons by Columbian policy in the mid-1990s to harm their own population.¹³ Since 9/11, weapons sales have armed individuals who use US weapons to kill American soldiers, allowed authoritarian governments to arrest their own civilians, and undermined both global human rights and US foreign policy.¹⁴ By placing more importance on human rights considerations, however, if implemented Biden's Conventional Arms Transfer policy could actually reduce this very risk, as recipients abusing human rights often goes hand-in-hand with the same factors that cause things like dispersion and blowback.¹⁵

Regardless of any potential benefits, it is implausible to think that policymakers will ever universally prioritize risk-avoidance in US arms sales policy to the same degree as they do with strategic and economic motivations. All sales come with risk. Therefore, if policymakers did prioritize risk-avoidance over strategic and economic motivations, the vast majority of sales simply would not happen. Nonetheless, some level of change is necessary, and such changes can only come from the White House.

Why Change in US Arms Sales Policy Must Come from the Executive Branch

Ultimately, only the executive branch can make significant and overarching changes—like instituting a greater concern from human rights—to the arms-sale process for three reasons. First, the Foreign Military Sales (FMS) process begins in the executive branch, and all sales, regardless of classification, are initially and primarily vetted through executive branch departments. Moreover, regardless of whether these sales are FMS, Direct Commercial Sales (DCS), or private sales regulated through the Commerce Department, the legislative branch is not involved whatsoever until after a sale has already been agreed to in principle.¹⁶ Thus, from a policy standpoint, any significant changes are most likely to come from the president.

Second, laws governing US arms transfer policies do not empower Congress enough to stop specific sales. Namely, the Foreign Assistance Act of 1961 and the Arms Export Control Act of 1976 provide Congress with authority to stop, pause, and evaluate specific sales, but all of these mechanisms also have flaws.¹⁷

The major element of the Foreign Assistance Act that empowers Congress is known as Section 502B, which allows the Senate Foreign Relations Committee or House Foreign Affairs Committee to request that the State Department issue a human rights report on a US weapons recipient. It then has two provisions that allow Congress to stop or pause sales. If, after thirty days, Congress has not received this report from the State Department, the sale is automatically suspended. The problem is that this is essentially a legislative veto, or when the legislative branch vetoes the president, which rests on shaky legal ground. The Supreme Court ruled in *Immigration and Naturalization Service v. Chadha* that the president must be given the opportunity to use his

¹³ See Robert David Johnson, *Congress and the Cold War* (New York: Cambridge University Press, 2006); "A Secret War for Nicaragua," *Newsweek*, November 8, 1982, pp. 42; and Winifred Tate, *Drugs, Thugs, and Diplomats: U.S. Policymaking in Colombia*, Anthropology of Policy (Stanford, California: Stanford University Press, 2015).

¹⁴ See Thrall and Dorminey, "Risky Business."

¹⁵ A. Trevor Thrall, Jordan Cohen, and Caroline Dorminey, "Power, Profit, or Prudence? US Arms Sales since 9/11," *Strategic Studies Quarterly* 14, no. 2 (Summer 2020): 100–126.

¹⁶ Paul K. Kerr, "Arms Sales: Congressional Review Process," *Congressional Research Service*, CRS Report RL31675, June 10, 2022, <https://sgp.fas.org/crs/weapons/RL31675.pdf>.

¹⁷ This is true regardless of the enforcement mechanism. In the case of arms sales, the policies are flexible, designed to serve vast U.S. interests, and when it does happen, restraint and end-use monitoring faces implementation challenges. See Jennifer L. Erickson, "Demystifying the 'Gold Standard' of Arms Export Controls: US Arms Exports to Conflict Zones," *Global Policy* 14, no. 1 (2023): 131–38, <https://doi.org/10.1111/1758-5899.13181>.

veto power on any bill before it is enacted into law, rendering any legislative veto—including 502B’s 30-day legislative veto—unconstitutional.¹⁸

The other way that Section 502B allows Congress to stop a sale has the same pitfalls as the Arms Export Control Act: it must face the presidential veto. If the information contained in the State Department’s human rights report is overly alarming, Section 502B allows Congress to issue a Joint Resolution of Disapproval in a privileged vote, which means that any Senator can discharge the resolution from committee after ten days. If a majority in each chamber agrees to stop a sale, the sale will be ended—pending no presidential veto. Similarly, the Arms Export Control Act governs much of the US arms sales congressional review process and, in theory, allows Congress to stop any Foreign Military Sale via a Joint Resolution of Disapproval if it determines that such a sale goes against US interests.¹⁹ Nonetheless, because it is the executive branch that agrees to all major sales, it is unlikely that it would simply allow Congress to stop it; it would therefore veto the congressional resolution. This is a large reason why Congress has never effectively used Section 502B or the Arms Export Control Act to stop an arms sale.²⁰

Not only has Congress never been able to stop an individual sale, but it has also historically been reluctant to even attempt to pass legislation that would protect human rights in arms transfers. Utilizing the data on Congress.gov, I identified fifty-eight times since 1961 where Congress successfully enacted legislation that restricted the president’s use of arms transfers as a tool of foreign policy. Since 9/11, there have only been eleven such instances.²¹ Out of these eleven, only two were stand-alone pieces of legislation and not amendments to previous legislation or annual authorizations and appropriations bills. Out of these two pieces of legislation, neither placed any restrictions regarding human rights concerns. Out of the eleven pieces of legislation since 9/11, the human rights provisions are only found in appropriations and authorization acts, which, due to their very nature, are more likely to see limited policy riders instead of sweeping legislation to vastly change existing policy.²² Thus, at best, there is only a limited history of Congress protecting human rights in arms sales and, since 9/11, it is largely nonexistent.

Thus, it is almost impossible for Congress to stop individual sales, even if the weapons are going to known human rights abusers. Historically, Congress has also rarely passed legislation that forces the president to include human rights considerations in his arms transfer policies. Thus, it is up to the executive branch to make such a change. Consequently, Biden’s decision to use his Conventional Arms Transfer policy to signal greater considerations for human rights in arms transfers is welcome and could lead to major policy improvements if appropriate legislation follows.

¹⁸ See E. Donald Elliott, “Ins v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto,” *The Supreme Court Review* 1983 (1983): 125–76, <https://doi.org/10.1086/scr.1983.3109476>; and Jordan Cohen and Jonathan Ellis Allen, “Congress is Gearing up for Fight over US Arms Transfers,” *Federal Times*, April 18, 2023.

¹⁹ See Kerr, “Arms Sales.”

²⁰ Colby Goodman, “Holes in the Net: US Arms Export Control Gaps In Combatting Corruption,” *Transparency International Defense & Security Program*, 2019, https://www.transparency.org.uk/sites/default/files/pdf/publications/US_Arms_Export_Gaps_in_Combatting_Corruption_v2d_digital.pdf.

²¹ “Congress.Gov | Library of Congress,” legislation, <http://www.congress.gov/>.

²² For more information on this data collection and reasoning for these limited policy riders, see Jordan Cohen, “Deal or No Deal: Explaining Congressional Restrictions on Arms Transfers” (PhD diss, George Mason University, 2023). Also, for information on policy riders, see Shannon P. Carcelli, “Congressional Polarization and Limitation Riders in Foreign Aid Appropriations,” *International Politics* 59, no. 5 (October 1, 2022): 898–924, <https://doi.org/10.1057/s41311-021-00324-1>.

Reasons to Remain Skeptical

Despite the fact that Biden’s Conventional Arms Transfer Policy signals the importance of human rights in future arms sales, there are two reasons to remain skeptical. First, Biden is not the first president to declare human rights as important in US arms transfers. In his Presidential Directive 13, his review of US Conventional Arms Transfer policy, President Jimmy Carter noted that “arms transfers are an exceptional foreign policy implement, to be used only in instances where it can be clearly demonstrated that the transfers contribute to our national security interests.” He further wrote that they should only be conducted “in a manner which will promote and advance respect for human rights in recipient countries.”²³ Nonetheless, under Carter, Congress only enacted five pieces of legislation that dealt with arms transfers, of which only one—the 1978 update to the Foreign Assistance Act—did anything to prevent US weapons being transferred to human rights abusers.²⁴ The reasons for this are unclear. But given this historic lack of accountability for human rights abuses stemming from US arms transfers and the fact that this was not the first time that a US president used a stated policy to express their desire for change, there is reason to remain skeptical. Relatedly, Biden’s State Department released a new military sales policy in May 2023 that will actually expedite sales, taking away power from Congress by giving them less time to get involved in limiting aspects of a sale between when they are notified and the weapons transfer is complete.²⁵

Second, despite making proclamations to uphold human rights, Biden has not been afraid to announce sales to human rights abusers since taking office. Since 2021, the United States has issued over \$6.5 billion in new notifications and authorizations of arms sales to Saudi Arabia, over \$6.1 billion to Egypt, and over \$3.8 billion to the Philippines.²⁶ All of these countries have poor human rights records.²⁷ Thus, given the double-digit billions of dollars in weapons that the Biden administration has already announced it is selling to human rights abusers, this raises doubts to whether or not actual action will follow the unveiling of his Conventional Arms Transfer policy.

Unfortunately doubts surrounding Biden’s Conventional Arms Transfer policy are warranted. Since the end of the Second World War, outside of a handful of major pieces of legislation, almost all arms sales policy has been conducted out of the executive branch in ways that consistently prioritize strategic and economic rationale over humanitarian concerns. Biden’s Conventional Arms Transfer policy says the right things regarding human rights. For the betterment of global humanity, we can only hope that this rhetoric and the related risk-avoidance will be matched by future action.

²³ Jimmy Carter, “Presidential Directive/NSC-13: Conventional Arms Transfer Policy,” May 13, 1977, <https://www.jimmycarterlibrary.gov/assets/documents/directives/pd13.pdf>.

²⁴ Senator John J. Sparkman, “S.3075, An Act to Amend the Foreign Assistance Act of 1961 and the Arms Export Control Act to Authorize International Security Assistance Programs for Fiscal Year 1979, and for Other Purposes,” September 26, 1978, <https://www.congress.gov/bill/95th-congress/senate-bill/3075?q=%7B%22search%22%3A%5B%22%5C%22foreign+assistance+Act%5C%22%22%5D%7D&s=3&r=2>.

²⁵ “FMS 2023: Retooling Foreign Military Sales for An Age of Strategic Competition,” *United States Department of State*, <https://www.state.gov/fms-2023-retooling-foreign-military-sales-for-an-age-of-strategic-competition/>.

²⁶ Arms sales data is from Security Assistance Monitor, “Arms Sales Table,” accessed May 16, 2023, <https://securityassistance.org/>.

²⁷ For example, see Elinor Buys and Andrew Garwood-Gowers, “The (Ir)Relevance of Human Suffering: Humanitarian Intervention and Saudi Arabia’s Operation Decisive Storm in Yemen,” *Journal of Conflict and Security Law* 24, no. 1 (April 1, 2019): 1–33, <https://doi.org/10.1093/jcsl/kry019>; Amr Hamzawy, “Can Egypt’s Democratic Hopes Be Revived?,” *Journal of Democracy* 30, no. 4 (2019): 158–69, <https://doi.org/10.1353/jod.2019.0059>; and Salvador Santino F Regilme, “Visions of Peace Amidst a Human Rights Crisis: War on Drugs in Colombia and the Philippines,” *Journal of Global Security Studies* 6, no. 2 (March 1, 2021): ogaa022, <https://doi.org/10.1093/jogss/ogaa022>.