

United States Senate

WASHINGTON, DC 20510

April 22, 2022

The Honorable Lloyd J. Austin III
Secretary of Defense
1000 Defense Pentagon
Washington, D.C. 20301-1000

Dear Mr. Secretary:

We write in response to your January 27, 2022 directive to improve the Administration's efforts to prevent, mitigate, and respond to civilian harm.¹ We appreciate your stated commitment to address the harm caused by U.S. counterterrorism operations and welcome this long overdue step. However, we remain concerned that twenty years of Pentagon pledges to hold itself accountable and correct fundamental flaws that lead to preventable civilian harm have gone unfulfilled.² We therefore urge the Department of Defense (DoD or "the Department") to consider certain issues in its ongoing efforts to address systemic weaknesses in its response to instances of civilian harm.

Civilian deaths, injuries, and other harm caused by U.S. military operations risk our legitimacy overseas, have been shown to fuel the extremism we are fighting against, give other governments an excuse to overlook the harm they cause, and do not align with our embrace of universal values.³ Successive administrations have failed to meaningfully address the civilian harm caused by U.S. military operations and we are eager to see DoD and the rest of the Biden Administration take steps to rectify these failures.⁴

After the *New York Times* brought to light substantial flaws in the U.S. military's procedures to prevent, investigate, and respond to civilian deaths in Iraq, Afghanistan, and Syria, you directed the Department to provide a plan to address civilian harm within 90 days and created a Center of Excellence for civilian protection.⁵ If prioritized and properly implemented, your proposed efforts could be critically important in addressing past incidents and minimizing further harm.

¹ Memorandum from Secretary Austin to DOD personnel, January 27, 2022, <https://int.nyt.com/data/documenttools/dod-improving-civilian-harm-mitigation-and-response/293b9907cfc2580/full.pdf>.

² Airwars, "Tens of thousands of civilians likely killed by US in 'Forever Wars'," <https://airwars.org/news-and-investigations/tens-of-thousands-of-civilians-likely-killed-by-us-in-forever-wars/>.

³ United States Institute of Peace, "Killing Friends, Making Enemies: The Impact and Avoidance of Civilian Casualties in Afghanistan," J Alexander Thier and Azita Ranjbar, July 2008, https://www.usip.org/sites/default/files/USIP_0708_2.PDF.

⁴ Airwars, "Tens of thousands of civilians likely killed by US in 'Forever Wars'," <https://airwars.org/news-and-investigations/tens-of-thousands-of-civilians-likely-killed-by-us-in-forever-wars/>.

⁵ New York Times, "Documents Reveal Basic Flaws in Pentagon Dismissals of Civilian Casualty Claims," Azmat Khan, Haley Willis, Christoph Koettl, Christiaan Triebert, and Lila Hassan, December 31, 2021, <https://www.nytimes.com/2021/12/31/us/pentagon-airstrikes-syria-iraq.html>; New York Times, "Austin Orders U.S. Military to Step Up Efforts to Prevent Civilian Harm," Eric Schmitt, Charlie Savage, Azmat Khan, January 27, 2022, <https://www.nytimes.com/2022/01/27/us/politics/us-airstrikes-rand-report.html>.

We recommend that the following issues be addressed in the forthcoming Department of Defense Instruction, Center of Excellence, or the Civilian Harm Mitigation and Response Action Plan (CHMRAP) being prepared by DoD:

- **Resources and staffing.** Despite the office of the Secretary of Defense’s designation of the Deputy Undersecretary of Defense for Policy as the official responsible for civilian harm mitigation – which was only done in response to a directive from Congress – there is still no official within DoD whose job it is to focus solely on this issue.⁶ Further, DoD currently lacks sufficient dedicated staff with formal training to work on civilian harm generally. We urge the Department to act expeditiously to hire staff and data experts, at sufficiently senior levels, who are solely devoted to civilian harm mitigation policies, including analyzing trends, compiling and dispersing lessons learned, and reviewing investigations.
- **Targeting procedures.** DoD-commissioned studies have found civilians repeatedly misidentified as legitimate targets.⁷ U.S. intelligence has too often missed the presence of civilian bystanders, with devastating consequences. We believe it is crucial to examine targeting procedures to ensure that tactical and operational improvements comply with the Law of Armed Conflict, including the principles of distinction and proportionality.
- **Center of Excellence.** We recommend that the Center be empowered and operationalized as the central hub for many of the issues we have outlined here. The Center of Excellence, reporting directly to you or to the Deputy Secretary, should be resourced and staffed to convene an Interagency Task Force quarterly to assess progress on civilian harm mitigation, track civilian harm data, conduct civilian-harm assessments and investigations, make amends, and engage regularly with civil society.
- **Tracking and analysis.** During the past twenty years of military operations, U.S. officials have not analyzed casualty assessments in aggregate to discern patterns of failed intelligence, decision-making, or execution. *The New York Times* undertook this analysis and found that many allegations of civilian casualties were summarily dismissed by DoD. This casts significant doubt on DoD’s official numbers of civilian casualties. Without accurate data on how many civilians were killed or injured, and assessing the rate over time, the United States cannot meaningfully evaluate the impact of its operations, nor can the U.S. military improve its targeting procedures. We urge the Department to implement a standardized civilian harm reporting process that enables the Department to accurately track and properly analyze civilian harm in the future.
- **Investigations.** The U.S. must ensure that each instance of civilian harm, including those that may have been dismissed in error, is independently and transparently investigated to the fullest extent. Any investigation should be held to the highest standard of applicable international law and be conducted thoroughly and impartially. Those carrying out assessments and investigations should also proactively consult information from civil society and credible media sources, and visit the locations of

⁶ Department of Defense, “DoD Directive 5111.01,” June 23, 2020, <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/511101e.pdf?ver=2020-06-23-124431-853>

⁷ RAND Corporation, “U.S. Department of Defense Civilian Casualty Policies and Procedures,” February 2022, https://www.rand.org/content/dam/rand/pubs/research_reports/RRA400/RRA418-1/RAND_RRA418-1.pdf

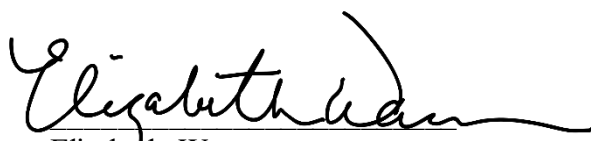
attacks to interview survivors and witnesses whenever possible. We request a briefing and information on new guidance pertaining to improved investigations of civilian casualty incidents.


- **Amends.** Congress has authorized ex gratia and condolence payments for many years. Like Congress, senior Defense officials have repeatedly recognized the importance of such payments to address civilian harm and reduce local anger toward the United States resulting from civilian casualties. Yet despite these authorizations, it appears that the Department has repeatedly failed to offer amends, including ex gratia payments, in cases where DoD confirmed civilian casualties.⁸ Current DoD policies do not offer clear guidance for providing such amends. We recommend a new comprehensive policy that addresses all civilian harm response options and incorporates engagement with affected family members when possible.
- **Lessons learned.** DoD has made strides in analyzing and understanding how civilian harm occurred in the past. Yet, the Department has not implemented or institutionalized many lessons learned. We request an update on how the Department plans to incorporate best practices and apply them to operational planning and learning.
- **Accountability.** The United States should provide meaningful accountability to the families of civilians killed and injured survivors resulting from U.S. military operations through the forthright acknowledgment of any deaths or injuries, providing amends or redress, and holding civilian and military leaders and military commanders responsible to include any and all disciplinary measures or prosecutions, as appropriate. These procedures and mechanisms need to be clearly established, properly resourced, and sustained over time.

We welcome your commitment to addressing civilian harm caused by U.S. military operations. It is imperative that United States Armed Forces uphold the highest standards of conduct, including consistent standards for protecting the lives of civilians and requiring accountability when harm does occur. We request to be briefed following the completion of your 90-day review.

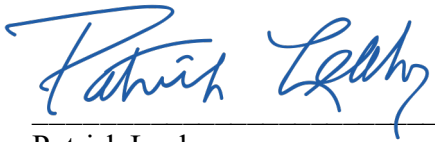
We stand ready to ensure the Department of Defense has the resources it needs to make civilian protection a priority.

Sincerely,


Elizabeth Warren
United States Senator


Edward J. Markey
United States Senator

⁸ Department of Defense, “Annual Report on Civilian Casualties In Connection With United States Military Operations in 2020,” June 2, 2021, pp. 15, <https://media.defense.gov/2021/Aug/05/2002823939/-1/-1/0/ANNUAL-REPORT-ON-CIVILIAN-CASUALTIES-IN-CONNECTION-WITH-UNITED-STATESMILITARY-OPERATIONS-IN-2020-FINAL.PDF>.



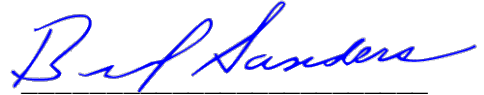
Patrick Leahy
United States Senator



Richard J. Durbin
United States Senator



Jeffrey A. Merkley
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Bernard Sanders
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Chris Van Hollen
United States Senator