



**Answers to Questions for the Record of
The Senate Judiciary Committee**

Hina Shamsi

Director, National Security Project
American Civil Liberties Union

For a Hearing on:

**“‘Targeted Killing’ and the Rule of Law:
The Legal and Human Costs of 20 Years of U.S. Drone Strikes”**

April 11, 2022

Questions from Senator Patrick Leahy

1. At the hearing you confirmed that the Ahmadi family who were impacted by the August 29th drone strike in Kabul is a client. While your focus is on preventing civilian casualties, we are also concerned about ex gratia payments. These payments are left to the discretion of field commanders.
 - a. **Has the Ahmadi family received any ex gratia payments? If so, what is the amount? Is that amount sufficient for the loss of income and medical expenses?**

Reply: The family member survivors of the August 29, 2021 drone strike in Kabul have not received payments or amends at this point. Their focus and ours has been on their urgent need for safe evacuation from Afghanistan, which still has not happened despite repeated requests and efforts. Every day our clients remain in Afghanistan is a day they are in imminent danger and suffering untreated trauma. Months ago, the Biden administration promised to evacuate them, and it needs to follow through on its promise immediately.

- b. **In your experience, do the factors that field commanders use to authorize or deny ex gratia payments under the National Defense Authorization Act give commanders too much discretion?**

Reply: There are two fundamental problem with ex gratia payments (and other forms of amends): first, there is no standardized policy across the Department of Defense; second, there is no clearly articulated high-level commitment to offering amends for harm, including through ex gratia payments. The lack of both is a serious impediment to making ex gratia payments and other forms of amends and redress for civilians who are grievously harmed as a result of U.S. operations abroad.

The Defense Department should establish amends guidance, in consultation with civil society, that articulates why amends are important and makes clear that addressing civilian harm concretely and materially as appropriate is a U.S. government priority. The guidance should start with acknowledgement of civilian harm as a minimum requirement and provide a range of additional options in accordance with survivors' and victims' needs and preferences, including: public and private apologies and explanation; ex gratia payments; livelihood assistance; restoration of damaged public infrastructure; and other appropriate measures. To this end, flexibility for commanders that is based on victims' needs, preferences, and cultural sensitivities can be an important part of a comprehensive amends policy. The current policy, which relies entirely on commanders' discretion without this kind of guidance, is not working. Indeed, the Defense Department has largely failed to use the ex gratia authority granted by Congress while leaving many thousands of civilians without acknowledgement or redress for deaths and life-altering injuries and harms.

2. During your testimony you discussed the secret body of law successive administrations have relied on following September 11th 2001 to justify lethal strikes. Legal terms from those documents that have been made public include terms without precise definitions that field commanders may use when evaluating whether to seek approval before launching a strike. Recent reporting from the New York Times exposed incidents when field commanders invoked a collective self-defense justification to avoid White House approval and interagency vetting of the proposed targets.

a. Is there evidence the collective self-defense justification has been abused to avoid interagency vetting of targets?

Reply: So far, the best evidence we have about abusive invocations of the “collective self-defense” justification comes from the patterns identified in reporting from the New York Times.¹ It bears emphasis that U.S. military and intelligence officials themselves raised concerns about these abusive invocations and no meaningful investigation resulted from the alarms they raised. There is an urgent need to investigate how prevalent this practice was and has been across theaters of operations in Syria, Iraq, Afghanistan, and elsewhere. Any such investigation needs to account for the fact that the “collective self-defense” justification is a novel and deeply controversial (to say the least) legal theory, which does not comport with the international legal regime that the United States helped to establish in order to maintain global peace and security.² If adopted and invoked by other nations, this novel and broad justification would not only cause further civilian harm but also further undermine the rule of law.

b. Do the novel interpretations of legal terms, such as collective self-defense and partner forces by field commanders lead to increased civilian casualties?

Reply: There should be no question that executive branch lawyers’ novel legal and policy interpretations over more than two decades have resulted in increased civilian casualties for which there has been no meaningful accountability. This is true not only of terms like “collective self-defense” (addressed above) but also of

¹ Dave Philipps et. al., *Civilian Deaths Mounted as Secret Unit Pounded ISIS*, N.Y. Times, Dec. 12, 2021, <https://www.nytimes.com/2021/12/12/us/civilian-deaths-war-isis.html>; Azmat Khan et. al., *The Civilian Casualty Files: Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes*, N.Y. Times, Dec. 18, 2021, <https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html>; Azmat Khan, *The Human Toll of America’s Air Wars*, N.Y. Times, Dec. 19, 2021, <https://www.nytimes.com/2021/12/19/magazine/victims-airstrikes-middle-east-civilians.html>; Azmat Khan et. al., *Documents Reveal Basic Flaws in Pentagon Dismissal of Civilian Casualty Claims*, N.Y. Times, Dec. 31, 2021, <https://www.nytimes.com/2021/12/31/us/pentagon-airstrikes-syria-iraq.html>.

² See Rita Siemion & Kate Kizer, *How Dangerous—and How New—Is the Defense Department’s “Collective Self-Defense” Theory?*, Just Sec., Oct. 30, 2018, <https://www.justsecurity.org/61273/dangerous-and-new-is-defense-departments-collective-self-defense-theory/>; Brian Finucane & Stephen Pomper, *Crossing Back Over: Time to reform Legal Culture and Legal Practice of the “War on Terror,”* Just Sec., Sept. 10, 2021, <https://www.justsecurity.org/78169/crossing-back-over-time-to-reform-the-legal-culture-and-legal-practice-of-the-war-on-terror/>; Oona Hathaway & Luke Hartig, *Still at War: The United States in Somalia*, Just Sec., Mar. 31, 2022, <https://www.justsecurity.org/80921/still-at-war-the-united-states-in-somalia/>.

expansive claims of war-based authority to use lethal force far beyond what Congress has authorized and in violation of international law. I appreciated the opportunity to submit written testimony for this hearing that elaborates on these important matters and concerns, along with recommendations for steps that Congress—and this Committee—can take to address them and prevent further devastating civilian deaths and injuries.

3. As noted throughout the hearing, the military has undercounted civilian casualties from lethal drone strikes. You testified that the Department of Defense does not consider outside records when investigating civilian harm and that they do not apply the same rigorous methodology that civil society groups do, such as conducting interviews with survivors and witnesses and visiting the sites of lethal strikes

a. Why is it important for the Department of Defense to seek information from outside sources and not rely solely on its own records when investigating civilian harm?

Reply: Research into Defense Department civilian harm investigations makes clear that the Department tends to rely primarily on military commands' own internal records and sources, and rarely seeks or accounts for evidence from witnesses or survivors of attacks. Investigators also rarely, if ever, visit the sites of strikes that result in credible accounts of civilian harm from civil society and reputable media sources. Relatedly, the Defense Department tends to be highly skeptical of external sources of information, such as reports from civil society and reputable media, despite that fact that those groups often undertake in-depth investigations using rigorous methodologies, such as survivor interviews, site visits, and other background documentation.³ Recent investigative reporting by The New York Times also found that the Defense Department repeatedly prematurely dismissed claims of civilian casualties based on flawed reviews of evidence, for example by failing to conduct even simple internet searches.⁴

These fundamental flaws and variations in Defense Department investigative methodologies mean that credible external sources have critical information that the Department lacks or, worse, ignores. When the Department relies only on its own sources in civilian harm investigations, it is essentially using the same information it used to carry out strikes in the first place. This internal bias against credible external sources of evidence not only often conceals the truth of civilian casualties, but also makes it impossible for the Defense Department to know the true impact of lethal operations and learn lessons from them. As a result, thousands of civilian casualties and injuries have not been acknowledged and payments or other methods or amends have not been made.

³ See e.g., Center for Civilians in Conflict & Columbia Law School Human Rights Institute, *In Search of Answers: U.S. Military Investigations and Civilian Harm*, 8-11, (2020), https://civiliansinconflict.org/wp-content/uploads/2021/10/In-Search-of-Answers-Report_Amended.pdf.

⁴ Azmat Khan et. al., *Documents Reveal Basic Flaws in Pentagon Dismissal of Civilian Casualty Claims*, N.Y. Times, Dec. 31, 2021, <https://www.nytimes.com/2021/12/31/us/pentagon-airstrikes-syria-iraq.html>.

b. In your opinion, will the Department of Defense’s proposed civilian protection center of excellence help the military accurately report civilian casualties?

Reply: A serious Defense Department focus on civilian harm protection is long overdue and welcome. Whether the civilian protection center of excellence (“Center”) is effective will depend on the authorities it is given and the actions it takes, which will speak louder than words in plans. For example, the Center could be designated and adequately resourced to be the primary entity tasked with conducting civilian harm assessments and investigations outside of the chain of command that authorized and carried out operations that resulted in civilian deaths and injuries. It could include in its mandate: effective investigative methods, such as conducting interviews with victims and survivors; consulting with civil society organizations on harm prevention best practices and implementing recommendations that have long been made; meaningfully reporting civilian harm and investigation outcomes to Congress and the public, including by publicly releasing all post-strike assessments and investigations; and, offering amends, including ex gratia payments in consultation with civilian victims and survivors, among other responsibilities.

Fundamentally, what’s needed is a truly systemic overhaul of our country’s civilian harm policies to address the structural flaws, likely violations of international law, and possible war crimes that have occurred in the last two decades. Critically, therefore, the Center and the associated Civilian Harm Mitigation and Response Action Plan (“CHMRAP”) must also look back at past incidents of civilian harm for lessons learned, as well as forward in applying those lessons. But the Secretary of Defense’s January 27, 2022 directive leaves unclear whether the Defense Department will ensure acknowledgement and accountability for the many past cases of civilian deaths and injuries that the Department prematurely dismissed. When the Department develops improved policies for the future, it is imperative for the Department to also review the many cases that were likely prematurely dismissed as a result of fault initial assessments and a failure to consider external sources of evidence and information. Finally, any comprehensive review, recommendations, and guidelines also need to address and end unlawful and unaccountable lethal strikes even outside of warzones. We need urgent action to end what is now over 20 years of war-based approaches that have caused devastating harm to Muslim, Brown, and Black civilians around the world.

Question from Senator Amy Klobuchar

As you stated at the hearing “if our country is to live up to the values it professes, there can be no place for secret law or secret lethal force.” I am concerned about an executive order the previous administration issued in March 2019, which rolled back the requirement that the government make information public about civilian casualties caused by U.S. drone strikes.

- **How have you seen the previous administration’s executive order make it more difficult for non-governmental organizations to help keep the American people informed and to obtain accurate information about the nature and impact of drone strikes?**

Reply: In 2019, President Trump revoked Section 3 of President Obama’s Executive Order 13732, issued in 2016, which required the intelligence community to report on aggregate civilian casualties in “areas outside of active hostilities.”⁵ This had a significant negative impact on transparency about lethal strikes even as the Trump administration dramatically increased the number of those strikes abroad, with devastating human and strategic costs. The Trump administration publicly defended the move by pointing to a provision in the 2018 National Defense Authorization (“NDAA”) that required certain civilian casualty reporting by the Defense Department. But as many critics pointed out at the time, those NDAA provisions did not require reporting on “areas outside of active hostilities” by any agencies other than the Defense Department, such as the CIA, whose involvement with the lethal strikes program is both universally known and officially secret. That said, the transparency requirements have never been strong enough; the 2016 Executive Order required aggregate reporting, and it did not meaningfully define and distinguish between “combatants” and “civilians.” Independent media and civil society groups have for years shown that the number of civilians killed in lethal strikes overseas is many times higher than successive administrations have acknowledged—or investigated.

Notably, Section 1723 of the 2020 NDAA re-imposed the transparency requirement by mandating that the Director of National Intelligence and the Secretary of Defense jointly submit to Congress an annual report for 2020 – 2022 on the number of strikes undertaken by the United States “outside areas of active hostilities” during the preceding calendar year, as well as assessments of combatant and civilian deaths resulting from those strikes. However, any such report has not been made public, and we have no evidence that it was completed for these years.

We strongly welcome legislation to provide truly meaningful transparency about lethal strikes abroad and their impacts; without it, there cannot be meaningful Congressional and public oversight, or accountability and amends.

⁵ See Exec. Order No. 13732, 81 Fed. Reg. 44483-44487 (2016); Exec. Order No. 13862, 84 Fed. Reg. 8789-8790 (2019)

Questions for the Record from Senator Charles E. Grassley

1. Do terrorist organizations hide within civilian populations or utilize civilians as a shield from drone strikes?

Reply: Although terrorist organizations’ practices can vary and require evidence-based analysis that is beyond the scope of my testimony, it is important to emphasize that use of civilians as “human shields” is universally prohibited. In the context of recognized armed conflict, the prohibition against the use of human shields is a norm of customary international law, and the laws of war govern actions that nations may lawfully take in response.¹

2. Would requiring certainty that no civilians are present in order to target a terrorist combatant incentivize terrorists to employ human shields?

Reply: Although terrorists’ and combatants’ incentives can vary and require evidence-based analysis that is beyond the scope of my testimony, it is important to emphasize that use of civilians as “human shields” is universally prohibited. When the laws of war are properly applied, they account for and govern both the prohibition against the use of human shields and the standard of certainty military commanders must meet in making use-of-force decisions.

3. Are ISIS and Al Qaeda still targeting Americans at home and abroad?

Reply: This question is outside the scope of my testimony. In order to help answer it and ensure democratic accountability, Congress should not only require from the Executive Branch evidence-based and specific assessments and analyses to make the consequential decisions addressed at the hearing, it should also make assessments and analyses public to the fullest extent possible—with only legitimately classified information properly withheld. As described in my testimony, Congress has a critical role to play in ensuring that this nation abides by the Constitution and its international law obligations in matters of war and peace—and also uses its robust array of diplomatic, law enforcement, peacebuilding, development, and other resources to mitigate actual security concerns at home and abroad.

4. Would ISIS and Al Qaeda members kill Americans if they could?

Reply: Please see response to Question 3.

¹ See, e.g., Rule 97, ICRC, Customary IHL Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule97 (also stating: “International human rights law does not prohibit the use of human shields as such, but this practice would constitute, among other things, a violation of the non-derogable right not to be arbitrarily deprived of the right to life.”).

5. Is it your contention that all drone strikes are unwarranted regardless of circumstances?

Reply: As detailed in my testimony, my contention is that this nation's use of lethal force abroad (whether through drones or any other weapon or weapons platform) must be governed by the constitutional separation of powers, the rule of law, and international law by which this nation is bound and which it historically helped establish to protect international peace and security and safeguard the right to life, both in and outside of recognized armed conflict.