

United States Senate

WASHINGTON, DC 20510

September 27, 2021

President Joseph R. Biden, Jr.
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear President Biden:

As the nation reflects on the end of the longest war in American history and the 20th anniversary of the September 11, 2001 attacks, it is critical that we consider the moral and strategic consequences of our nation's post-9/11 counterterrorism policies. The use of lethal strikes, including by armed drones, merits particular scrutiny.

The United States' most recent publicly reported missile strike in Afghanistan on August 29 tragically illustrates what is at stake. Just days after a horrific attack at the Hamid Karzai International Airport that claimed the lives of 13 U.S. service members, the Department of Defense claimed that it had successfully targeted an ISIS facilitator¹ who posed an imminent threat.² However, the Pentagon acknowledged on September 17 that it had mistakenly targeted Zemari Ahmadi, a longtime aid worker for a U.S.-based nongovernmental organization, killing him and nine other civilians.³ The strike on Mr. Ahmadi's car as he arrived home from work reportedly killed three of his children, his cousin, three of his brother's children, and two three-year-old girls as the children gathered around his car in his densely-populated residential neighborhood.⁴

¹ Lloyd Austin, Mark Milley & John Kirby, *Press Briefing on the End of the U.S. War in Afghanistan*, U.S. DEPARTMENT OF DEFENSE (Sept. 1, 2021), <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/2762169/secretary-of-defense-austin-and-chairman-of-the-joint-chiefs-of-staff-gen-mille/>.

² U.S. Central Command *Statement on Defensive Strike in Kabul*, U.S. CENTRAL COMMAND PUBLIC AFFAIRS (Aug. 29, 2021), <https://www.centcom.mil/MEDIA/STATEMENTS/Statements-View/Article/2756293/update-us-central-command-statement-on-defensive-strike-in-kabul/>.

³ Eric Schmitt & Helene Cooper, *Pentagon Acknowledges Aug. 29 Drone Strike in Afghanistan Was a Tragic Mistake That Killed 10 Civilians*, N.Y. TIMES (Sept. 21, 2021), <https://www.nytimes.com/2021/09/17/us/politics/pentagon-drone-strike-afghanistan.html?smid=tw-nytimes&smtyp=cu>; Christoph Koettl, et al., *How a U.S. Drone Strike Killed the Wrong Person*, N.Y. TIMES (Sept. 10, 2021), <https://www.nytimes.com/video/world/asia/100000007963596/us-drone-attack-kabul-investigation.html>.

⁴ Matthieu Aikins, *Times Investigation: In U.S. Drone Strike, Evidence Suggests No ISIS Bomb*, N.Y. TIMES (Sept. 21, 2021), <https://www.nytimes.com/2021/09/10/world/asia/us-air-strike-drone-kabul-afghanistan-isis.html>.

The tragic killing of Mr. Ahmadi and nine other civilians is just the latest incident of civilian casualties caused by the United States government. By some estimates, the United States has killed tens of thousands of civilians⁵ in our post 9/11 wars. Far too many people are erroneously labeled as targets based on faulty or inadequate intelligence, as happened to Mr. Ahmadi. Many of these civilian deaths go uncounted— in both pre- and post-strike collateral damage assessments.⁶ Accurate assessments are essential for ensuring a strike is lawful under the laws of war.

These failures fuel resentment toward the United States and boost terrorist recruitment, undermining the central goal of counterterrorism over both the short and long-term. It is firmly in our nation's interest to reduce the number of civilian casualties we cause and respond to civilian harm wherever it happens through rigorous investigations, public acknowledgement, and amends, including through condolence payments. The Congress has been calling for this for many years and the Administration should address it as a priority.

In April 2013, Senator Durbin held the Senate's first hearing on the constitutional implications of targeted killings overseas in the Senate Committee on the Judiciary's Subcommittee on the Constitution, Civil Rights and Human Rights.⁷ At this hearing, important questions were raised about the legal bases and consequences of lethal strikes. With the strike that killed Mr. Ahmadi and his family as a tragic coda to a twenty-year war, we must ask these questions anew. These include pressing questions about the costs and consequences of lethal strikes, particularly as technological advancements continue to impact the way the U.S. conducts military operations; the legal and evidentiary basis for the strikes; who is deemed a lawful target; what evidentiary standard must be met to establish that a lawful target is actually present; who must approve the use of lethal force; how any resulting civilian harm must be investigated; what redress and amends are made after civilians are harmed; how to ensure meaningful transparency with the public as well as family members of those killed; and the traumatic impact of these strikes on our service members who we have asked to carry them out.⁸

While lethal force against combatants in an armed conflict is permissible when conducted in compliance with the laws of war and other applicable laws, for the past 20 years successive

⁵ Imogen Piper & Joe Dyke, *Tens of Thousands of Civilians Likely Killed by US in 'Forever Wars,'* AIRWARS (Sept. 6, 2021), <https://airwars.org/news-and-investigations/tens-of-thousands-of-civilians-likely-killed-by-us-in-forever-wars/>.

⁶ Larry Lewis & Ryan Goodman, *Civilian Casualties: We Need Better Estimates—Not Just Better Numbers,* JUST SECURITY (Mar. 22, 2018), <https://www.justsecurity.org/54181/civilian-casualties-estimates-not-numbers/>.

⁷ *Targeted Killing of Terrorist Suspects Overseas,* C-SPAN (Apr. 23, 2013), <https://www.c-span.org/video/?312317-1/senate-committee-examines-legality-us-drone-strikes>.

⁸ Ryan Goodman, et al., *Questions to Investigate U.S. Drone Strike in Kabul: An Alleged Killing of 10 Civilians,* JUST SECURITY (Sept. 13, 2021), <https://www.justsecurity.org/78198/we-drafted-questions-to-investigate-u-s-august-29-drone-strike-in-kabul-an-alleged-killing-of-10-civilians/>.

administrations have also claimed the authority to engage in lethal targeting outside of areas where the United States is engaged in armed conflict. Such a policy dangerously expanded the exceptional rules for using lethal force in wartime into situations where stronger constraints on lethal force normally apply. While the Obama administration placed some policy constraints on such strikes, the Trump administration weakened those already limited safeguards. Your administration is reportedly considering a new policy that would incorporate these weakened constraints and perpetuate a troubling bureaucratic architecture for using lethal force outside of armed conflict.⁹

It is long past time to make a decisive shift away from lethal force policies and legal interpretations that erode fundamental human rights and America's moral standing, perpetuate endless conflict, and routinely cause tragedies like the killing of Mr. Ahmadi and nine other civilians on August 29. As your administration rightfully seeks to end the endless wars of the last two decades and restore American leadership on human rights, it should 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.

We owe it to the Ahmadi family – and to the many others like them who have endured unbearable suffering at the hands of our government – to do better. We understand the U.S. Secretary of the Air Force has ordered the U.S. Air Force Inspector General to investigate the specifics of the strike that killed Mr. Ahmadi and his relatives¹⁰, and we look forward to those results. As the practice of these strikes as a policy is broader than the scope of that investigation, and so that Congress can understand what your administration is doing to prevent these tragedies from occurring on your watch, please respond to the following questions by October 12.

1. Please describe the steps your administration is taking to shift the nation away from war-based lethal force policies, including how your administration will end the use of lethal force outside areas where the United States is engaged in armed conflict.
2. Please describe any steps your administration is taking to ensure that when lethal force is used in armed conflict, it is in full compliance with the laws of war and human rights law. In particular, what steps are currently taken to ensure that targets are accurately identified, the risk of harm to civilians is properly assessed before any strike is authorized, and any resulting civilian casualties are expeditiously and thoroughly

⁹ Charlie Savage, *Afghanistan Collapse and Strikes in Somalia Raise Snags for Drone Warfare Rules*, N.Y. TIMES (Aug. 28, 2021), <https://www.nytimes.com/2021/08/28/us/politics/biden-drones.html>.

¹⁰ Alex Horton, *Air Force Inspector General Will Review Kabul Drone Strike That Killed 10 Civilians*, WASH. POST (Sept. 21, 2021, 2:35 PM), <https://www.washingtonpost.com/national-security/2021/09/21/drone-strike-inspector-general/>.

investigated, and appropriate amends and redress are provided pursuant to established guidelines and procedures?


3. As your administration seeks to chart a new course after 20 years, are you comprehensively assessing the impacts of the lethal force policies over the past two decades, including their toll on civilians? Is your administration also assessing how other tools and resources (e.g., diplomacy, development and peacebuilding, law enforcement cooperation and extradition, and financial and other sanctions) can be better utilized as you develop a more sustainable approach to counterterrorism going forward? If yes, please share the results of these assessments.
4. With respect to the August 29 strike that killed Mr. Ahmadi and his family, please explain what steps your administration is taking to investigate the strike, provide amends to Mr. Ahmadi's family and the other victims' families, and implement reforms to existing policies and procedures based on the lessons learned from that strike to prevent such unacceptable wrongs in the future.

Thank you for your time and consideration.

Sincerely,



Richard J. Durbin
Chair, Senate Committee on the Judiciary



Patrick Leahy
Chair, Senate Committee on
Appropriations