

# United States Senate

WASHINGTON, DC 20510

November 14, 2022

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

Dear Secretary Austin:

We are writing to request that the Department of Defense (DoD) act quickly to make sure that all military families living in DoD housing are provided the protections guaranteed by the DoD tenant bill of rights, which was required by Congress under the fiscal year 2020 *National Defense Authorization Act* (NDAA).<sup>1</sup>

We are concerned that a recent Department of Defense Inspector General (DoD IG) report revealed that five private military housing providers are still failing to implement key rights, including providing service members and their families their homes' maintenance histories, the right to enter a dispute resolution process, and the right to withhold basic housing allowance payments to the landlord while a dispute resolution process is ongoing.<sup>2</sup>

The vast majority of the military housing providers have voluntarily agreed to uphold these rights,<sup>3</sup> and it is time to address the remaining bad actors. As DoD noted, "tenants whose landlords refused to retroactively apply the provisions to existing legal agreements do not have the same tenants' rights" as other military families.<sup>4</sup> We urge DoD to exercise its authority, including any available change clauses and rights to cure, to bring these companies into compliance and provide the military families that are paying them rent with the full suite of protections offered by the DoD tenant bill of rights. If those companies – Boyer Hill Military Housing, Burlington Capital Real Estate, JL Properties, Miller-Valentine Group, and United Communities<sup>5</sup> – continue to refuse to provide these rights we urge DoD to exercise its right to terminate these agreements.

Congress created the DoD tenant bill of rights in the fiscal year 2020 *National Defense Authorization Act*<sup>6</sup> after press reports revealed military families' homes failed to meet even basic

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<sup>1</sup> National Defense Authorization Act for Fiscal Year 2020 (Public Law 116-92), Sections 3011, <https://www.congress.gov/116/plaws/publ92/PLAW-116publ92.pdf>.

<sup>2</sup> Department of Defense Inspector General, "Evaluation of the Department of Defense's Reform of Privatized Military Family Housing Oversight Related to Health, Safety, and Environmental Hazards," September 29, 2022, p. 2, [https://media.defense.gov/2022/Oct/03/2003089512/-1/-1/1/DODIG-2022-139\\_REDACTED.PDF](https://media.defense.gov/2022/Oct/03/2003089512/-1/-1/1/DODIG-2022-139_REDACTED.PDF).

<sup>3</sup> *Id.*, p. 9.

<sup>4</sup> *Id.*, p. 18.

<sup>5</sup> *Id.*, p. 9.

<sup>6</sup> National Defense Authorization Act for Fiscal Year 2020 (Public Law 116-92), Section 3011, <https://www.congress.gov/116/plaws/publ92/PLAW-116publ92.pdf>.

housing standards,<sup>7</sup> and after a detailed investigation revealed numerous failures by the private military housing providers and by the officials responsible for DoD oversight of the Military Housing Privatization Initiative (MHPI) program.<sup>8</sup> The NDAA – in order to help address the systemic failures of the private landlords to respond to families’ needs and provide safe and sanitary housing – required that military families who live in on-base housing be provided with maintenance histories of the homes they rent, alternate dispute resolution processes, and the right to withhold payments to landlords during disputes.<sup>9</sup> And when DoD failed to include these rights in its first draft of the tenant bill of rights Senate Armed Services Committee leaders made clear on a bipartisan basis that they were non-negotiable, noting that their exclusion created “glaring holes” and went “directly against the promises made by the Department and the housing companies that they would work to regain the trust of our military families.”<sup>10</sup>

DoD has repeatedly indicated that private housing companies could voluntarily agree to implementation.<sup>11</sup> And organizations representing military housing companies heralded the requirement to provide maintenance history as “unprecedented transparency” and a “top priority” for its member companies.<sup>12</sup> DoD predicted tenants would have this information by May 2020<sup>13</sup> since all of the companies agreed with the need for these protections.<sup>14</sup>

Indeed, most housing providers appear to have complied. But almost two and a half years after the May 2020 deadline, the DoD IG report and a previous Government Accountability Office (GAO) report show five companies—which provide over 10,000 military family housing units—are not providing service members and their families with all of the rights they deserve under the law.<sup>15</sup> Specifically, five companies have not provided the right to enter a dispute resolution

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<sup>7</sup> Reuters, “Ambushed at Home,” Deborah Nelson and M.B. Pell, November 1, 2018, <https://www.reuters.com/investigates/special-report/usa-military-contractors>.

<sup>8</sup> Office of Senator Elizabeth Warren, “Senator Warren Releases Her Investigation of the Pentagon’s Substandard Military Base Housing Program,” May 1, 2019, <https://www.warren.senate.gov/oversight/letters/senator-warren-releases-her-investigation-of-the-pentagons-substandard-military-base-housing-program>.

<sup>9</sup> National Defense Authorization Act for Fiscal Year 2020 (Public Law 116-92), Sections 3011, <https://www.congress.gov/116/plaws/publ92/PLAW-116publ92.pdf>.

<sup>10</sup> Senate Armed Services Committee, “Inhofe-Reed: DOD’s Tenant Bill of Rights Does Not Go Far Enough to Protect Our Military Families,” press release, February 26, 2020, <https://www.armed-services.senate.gov/press-releases/inhofe-reed-dods-tenant-bill-of-rights-does-not-go-far-enough-to-protect-our-military-families>.

<sup>11</sup> Department of Defense Inspector General, “Evaluation of the Department of Defense’s Reform of Privatized Military Family Housing Oversight Related to Health, Safety, and Environmental Hazards,” September 29, 2022, p. 11, [https://media.defense.gov/2022/Oct/03/2003089512/-1/-1/1/DODIG-2022-139\\_REDACTED.PDF](https://media.defense.gov/2022/Oct/03/2003089512/-1/-1/1/DODIG-2022-139_REDACTED.PDF).

<sup>12</sup> Military Housing Association, “7-year maintenance history gives privatized military housing residents unprecedented transparency,” May 14, 2021, <https://www.militaryhousingassociation.org/blog/7-year-maintenance-history-gives-privatized-military-housing-residents-unprecedented-transparency/>.

<sup>13</sup> Military Times, “Maintenance records for military housing tenants could be available by May 1,” Karen Jowers, March 6, 2020, <https://www.militarytimes.com/pay-benefits/2020/03/06/maintenance-records-for-military-housing-tenants-could-be-available-by-may-1/>.

<sup>14</sup> Military Times, “Key missing protections for military family tenants coming soon, defense official says,” Karen Jowers, March 2, 2020, <https://www.militarytimes.com/pay-benefits/2020/03/04/key-missing-protections-for-military-family-tenants-coming-soon-defense-official-says/>.

<sup>15</sup> Department of Defense Inspector General, “Evaluation of the Department of Defense’s Reform of Privatized Military Family Housing Oversight Related to Health, Safety, and Environmental Hazards,” September 29, 2022, p. 2, [https://media.defense.gov/2022/Oct/03/2003089512/-1/-1/1/DODIG-2022-139\\_REDACTED.PDF](https://media.defense.gov/2022/Oct/03/2003089512/-1/-1/1/DODIG-2022-139_REDACTED.PDF); Government Accountability Office, “Privatized Military Housing: Update on DOD’s Efforts to Address Oversight Challenges,” March 31, 2022, p. 16, <https://www.gao.gov/assets/gao-22-105866.pdf>.

process and the right to have the basic allowance held in escrow during disputes.<sup>16</sup> Failing to provide these rights continues to give these companies carte blanche to ignore significant maintenance failures and safety issues, forcing military families to live in inadequate housing. Three companies have not made units' seven-year maintenance history available.<sup>17</sup> During previous congressional investigations families testified that access to that history would have dissuaded them from living in excessively unsafe housing conditions.<sup>18</sup> Without the maintenance history, tenants are unable to determine whether health and safety systems like smoke alarms have been maintained or whether "prior tenants submitted recurring work orders."<sup>19</sup>

The DoD IG found numerous other military housing requirements of the 2020 NDAA that have not yet been implemented: specifically, housing providers are not meeting requirements that they close work orders only after both the tenant and the head of the installation's military housing sign off, and are not sharing or providing appropriate guidance on test results related to the health, environmental, and safety condition of housing; installation commanders are not meeting requirements that they conduct a physical inspection of vacant units upon move-in and move-out; and the Secretary's office has not yet prepared a report on whether shortages in the civilian workforce are contributing to military housing oversight deficiencies, and has not yet developed a uniform checklist to validate the completion of all maintenance work.<sup>20</sup> Full implementation in some cases is still years away. For example, the GAO reported that uniform safety inspections will not be completed until September 30, 2024.<sup>21</sup>

We are also concerned that the Department does not have the data and information it needs to oversee how tenants' rights are being protected. Since 2014 DoD has required officials to track all privatized military family housing records in the enterprise Military Housing information management system (eMH).<sup>22</sup> The DoD IG found, however, that 12 percent of Army and Air Force installations had not populated the inventory of privatized military housing units in the system, that military housing providers' software could not share occupancy data for 62 percent of installations, and that military housing providers serving 25 percent of those installations were refusing to share occupancy data.<sup>23</sup> This lack of data makes it impossible for DoD to conduct all required housing program oversight and ensure that service members and their families have access to safe and clean housing.<sup>24</sup>

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<sup>16</sup> Department of Defense Inspector General, "Evaluation of the Department of Defense's Reform of Privatized Military Family Housing Oversight Related to Health, Safety, and Environmental Hazards," September 29, 2022, p. 13, [https://media.defense.gov/2022/Oct/03/2003089512/-1/-1/1/DODIG-2022-139\\_REDACTED.PDF](https://media.defense.gov/2022/Oct/03/2003089512/-1/-1/1/DODIG-2022-139_REDACTED.PDF).

<sup>17</sup> *Id.*

<sup>18</sup> Military Times, "Key missing protections for military family tenants coming soon, defense official says," Karen Jowers, March 2, 2020, <https://www.militarytimes.com/pay-benefits/2020/03/04/key-missing-protections-for-military-family-tenants-coming-soon-defense-official-says/>.

<sup>19</sup> Department of Defense Inspector General, "Evaluation of the Department of Defense's Reform of Privatized Military Family Housing Oversight Related to Health, Safety, and Environmental Hazards," September 29, 2022, pp. 4-5, [https://media.defense.gov/2022/Oct/03/2003089512/-1/-1/1/DODIG-2022-139\\_REDACTED.PDF](https://media.defense.gov/2022/Oct/03/2003089512/-1/-1/1/DODIG-2022-139_REDACTED.PDF).

<sup>20</sup> *Id.*, pp. 21-23.

<sup>21</sup> Government Accountability Office, "Privatized Military Housing: Update on DOD's Efforts to Address Oversight Challenges," March 31, 2022, p. 12, <https://www.gao.gov/assets/gao-22-105866.pdf>.

<sup>22</sup> Department of Defense Inspector General, "Evaluation of the Department of Defense's Reform of Privatized Military Family Housing Oversight Related to Health, Safety, and Environmental Hazards," September 29, 2022, p. 2, [https://media.defense.gov/2022/Oct/03/2003089512/-1/-1/1/DODIG-2022-139\\_REDACTED.PDF](https://media.defense.gov/2022/Oct/03/2003089512/-1/-1/1/DODIG-2022-139_REDACTED.PDF).

<sup>23</sup> *Id.*, p. 10.

<sup>24</sup> *Id.*, p. 15.

There are a host of other problems with the accuracy and completeness of the eMH system. For example, a recent investigation conducted by the Senate’s Permanent Subcommittee on Investigations (PSI) found that, despite finding “visible [mold] growth” in a home at Sheppard Air Force Base, Balfour staff entered multiple maintenance requests as “routine” rather than placing them in the appropriate “mold” category.<sup>25</sup> One military family housing advocate recently testified to PSI that families at F.E. Warren Air Force Base, West Point, Fort Stewart, Fort Leonard Wood, NSB Kings Bay, Fort Carson, Whiteman AFB, Fort Bliss, and Carlisle Barracks were all discouraged from putting maintenance requests into the work system, compromising the ability to evaluate these companies’ performance and the accuracy of unit maintenance histories.<sup>26</sup>

The fiscal year 2020 NDAA also required DoD to create a public complaint database.<sup>27</sup> Creating this database will help DoD monitor complaints in real time and oversee companies’ responsiveness to military families’ housing needs, and provide military families with much needed information on potential housing and landlords. The Senate NDAA for fiscal year 2023 also creates a Military Housing Readiness Council comprised of DoD officials, service members, military families, and military housing experts to ensure ongoing oversight of deficiencies in privatized military housing.<sup>28</sup> The Council will specifically make sure DoD fully implements the tenant bill of rights and completes the public database that DoD has pledged to complete no later than fiscal year 2023.<sup>29</sup>

Given the failure of multiple military housing companies to comply with NDAA requirements, we are concerned that the Department appears to be unwilling to use its authority to modify or end agreements with housing providers that refuse to implement the tenant bill of rights. As a matter of policy Federal Acquisition Regulation (FAR) type contracts “contain a changes clause that permits the contracting officer to make unilateral changes, in general areas, within the general scope of the contract.”<sup>30</sup> Even if this authority is not explicitly provided in DoD’s military housing agreements, that authority should already be provided under the *Christian* doctrine. That doctrine, established by the courts after a military housing contractor’s protest of the government’s decision to terminate an agreement, found “deeply ingrained” parts of public procurement policy are enforceable,<sup>31</sup> including change clauses and the right to terminate

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<sup>25</sup> Senate Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations, “Mistreatment of Military Families in Privatized Military Housing,” April 26, 2022, pp. 39-42, <https://www.hsgac.senate.gov/imo/media/doc/2022-04-26%20PSI%20Staff%20Report%20-%20Mistreatment%20of%20Military%20Families%20in%20Privatized%20Housing.pdf>.

<sup>26</sup> Testimony of Rachel Christian, Chief Legislative Officer, Armed Forces Housing Advocates, before the Homeland Security and Governmental Affairs Committee (HSGAC) Permanent Subcommittee on Investigations (PSI), April 26, 2022, p. 2, <https://www.hsgac.senate.gov/imo/media/doc/Christian%20Testimony1.pdf>.

<sup>27</sup> National Defense Authorization Act for Fiscal Year 2020 (Public Law 116-92), Section 2894a, <https://www.congress.gov/116/plaws/publ92/PLAW-116publ92.pdf>.

<sup>28</sup> S. 4543, James. M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Sec. 2822, <https://www.congress.gov/bill/117th-congress/senate-bill/4543/text>.

<sup>29</sup> S. 4543, James. M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Sec. 2822, <https://www.congress.gov/bill/117th-congress/senate-bill/4543/text>; Mr. Brendan Owens’ response to Senator Warren’s Questions for the Record, August 1, 2022[On file with the Office of Senator Elizabeth Warren].

<sup>30</sup> 48 CFR § 43.201(a).

<sup>31</sup> *G. L. Christian & Assocs. v. United States*, 312 F.2d 418 (Ct. Cl. 1963) <https://law.justia.com/cases/federal/appellate-courts/F2/312/418/53812/>; Congressional Research Service, “Selected

agreements, even if not explicitly included in the agreement.<sup>32</sup> We urge DoD to exercise this authority to requires military housing providers that are not complying with statutory and DoD policies to protect military families’ health and safety.

In addition, DoD has the authority to terminate agreements for default when a company fails to meet requirements.<sup>33</sup> Initiating this process would put companies on notice that DoD is serious about protecting military families’ rights and provide them the opportunity to come into compliance to keep receiving taxpayer dollars.<sup>34</sup> Terminating these agreements for default could also be grounds for suspending or debarring these companies from receiving future government contracts.<sup>35</sup> Several housing companies reported that the conditions for default in their agreements “include, but are not limited to, compliance with: applicable environmental and health and safety laws and regulations.”<sup>36</sup> The refusal of a military housing contractor to adopt the required tenant bill of rights to protect the health and safety of military families clearly fulfills this requirement.

Finally, we remain concerned that DoD’s unnecessary application of controlled unclassified information (CUI) policies and related agreements with private military housing contractors hinders oversight and accountability. Most recently, the new DoD IG report redacted companies’ explanations for their failure to comply with the law.<sup>37</sup> Military families deserve to know why DoD continues to tolerate inconsistent implementation of their rights to live in a safe home. The explanations provided in the CUI version of the DoD IG report should be made available to the public.

Congress did not intend for military housing companies’ compliance with the tenant bill of rights and other important provisions of the 2020 NDAA to be optional. Congress put mandates in place to protect military families, and DoD must use all tools at its disposal to enforce these mandates. Allowing military families’ rights to be subject to the whims of private military housing contractors creates an unacceptable level of inequity.

We request answers to the following questions no later than December 14, 2022:

1. Do DoD’s legal agreements with private military housing companies include explicit change clauses?
  - a. What clauses or other options does DoD have to adjust the terms of legal agreements unilaterally?

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Tools for Maintaining Government Contractor Accountability,” David H. Carpenter, September 16, 2018, p. 11, <https://www.crs.gov/reports/pdf/R45322>.

<sup>32</sup> JD Supra, “What is the Christian Doctrine & Does It Apply to Subcontractors?” Kristi Morgan Aronica, June 17, 2022, <https://www.jdsupra.com/legalnews/what-is-the-christian-doctrine-does-it-9528777/>.

<sup>33</sup> Congressional Research Service, “Selected Legal Tools for Maintaining Government Contractor Accountability,” David H. Carpenter, p. 11, <https://sgp.fas.org/crs/misc/R45322.pdf>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Information provided by military housing companies to the Office of Senator Elizabeth Warren.

<sup>37</sup> Department of Defense Inspector General, “Evaluation of the Department of Defense’s Reform of Privatized Military Family Housing Oversight Related to Health, Safety, and Environmental Hazards,” September 29, 2022, pp. 13-14, 17, [https://media.defense.gov/2022/Oct/03/2003089512/-1/-1/1/DODIG-2022-139\\_REDACTED.PDF](https://media.defense.gov/2022/Oct/03/2003089512/-1/-1/1/DODIG-2022-139_REDACTED.PDF).

- b. Absent such clauses, has DoD sought an opinion from the Office of General Counsel on the applicability of the *Christian* doctrine to allow the Department to require such changes?
2. What provision in the military housing agreements allow termination for cause? Under these provisions, would the failure to implement the tenant bill of rights and other key NDAA provisions be considered due cause for termination?
3. What other agreement provisions would allow DoD to fine or otherwise penalize private military housing companies who fail to implement the tenant bill of rights? Has DoD considered the use of such fines and penalties?
4. What is the status of DoD's negotiations with the five companies that have not fully implemented the tenant bill of rights?
5. Will noncompliance be considered in determining whether these companies are considered responsible companies for future contract awards?
6. Is DoD aware of any companies providing maintenance history data for periods shorter than seven years?
  - a. How many instances is DoD aware of?
  - b. Where did those instances occur?
  - c. What actions did DoD take in response?
7. What is the status of DoD's negotiations with companies that have refused to provide vendor data to eMH? What agreement provisions are in place to require that companies provide such data?
8. How does DoD measure whether eMH data is accurate and complete?
9. Does DoD have a unifying policy to ensure that installation commanders are conducting a physical inspection of vacant units upon move-in and move-outs?
  - a. If not, when does DoD estimate that policy will be in place?
10. Is DoD aware of instances in which housing companies instructed families not to enter maintenance request orders into the work system?
  - a. How many instances is DoD aware of?
  - b. Which housing companies were responsible for these actions?
  - c. Where did those instances occur?
  - d. What actions did DoD take in response?
11. When will DoD fully implement sharing testing results?
12. How does DoD validate completion of maintenance work?
  - a. Does DoD have a uniform checklist in place to validate completion of work?

- b. If not, when will that checklist be finalized?
- 13. Are all housing providers meeting NDAA requirements that they close out work orders only after the tenant and head of the installation sign off?
  - a. If not, which housing providers are failing to meet this requirement?
  - b. What actions is DoD taking to ensure compliance with this requirement?
- 14. Are all housing providers meeting NDAA requirements that they share or provide appropriate guidance on test results related to the health, environmental, and safety condition of housing?
  - a. If not, which housing providers are failing to meet this requirement?
  - b. What actions is DoD taking to ensure compliance with this requirement?
- 15. When will DoD provide Congress its overdue report<sup>38</sup> on civilian personnel shortages impacting military housing oversight?

Sincerely,



Elizabeth Warren  
United States Senator



Thom Tillis  
United States Senator



Mazie K. Hirono  
United States Senator



Jeanne Shaheen  
United States Senator

<sup>38</sup> National Defense Authorization Act for Fiscal Year 2020 (Public Law 116-92), Sections 3041, <https://www.congress.gov/116/plaws/publ92/PLAW-116publ92.pdf>.



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Jon Ossoff  
United States Senator