

Congress of the United States

Washington, DC 20515

July 9, 2024

Honorable Lloyd J. Austin III
Secretary
Department of Defense
1200 Defense, Pentagon
Washington, DC 20301

Dear Secretary Austin:

We write in regard to our ongoing concerns that the Department of Defense (DoD) has failed to protect military families who live in military housing that is operated by private companies. A recent Project On Government Oversight (POGO) investigation¹ revealed that many military families have been forced to endure poor living conditions, including toxic mold, and have faced serious difficulties trying to report these conditions and get help. And a March 2024 invocation of the federal “enclave doctrine” was used to strip military families of their right to access the courts when faced with unsafe and unsanitary housing, raising new concerns about accountability for the private contractors that provide on-base housing. Given these new challenges, DoD and Congress must act.

Long-Standing Problems with Privatized Military Housing

For years, we have raised concerns about problems in privatized military housing. In 2019, Senator Warren led an investigation into these companies that provide this housing which revealed serious hazards, including toxic mold, lead-based paint, water damage, and infestations,² issues that were later confirmed by an Army Inspector General report in late 2019.³ In 2022, Senator Warren sent a letter to the Department of Justice exposing the federal government’s failure to suspend or disbar Balfour Betty from future government contracts after it defrauded the U.S. government of millions of dollars.⁴ As Chair of the Permanent Subcommittee on Investigations, Senator Ossoff led an eight-month bipartisan investigation into the mistreatment of military families in privatized housing in 2022. Senator Ossoff also sent follow-

¹ Project on Government Oversight, “From Toxic Mold to Rampant Fraud: How Privatizing Military Housing Became a Nightmare for Soldiers,” René Kladzyk, May 7, 2024, <https://www.pogo.org/investigations/from-toxic-mold-to-rampant-fraud-how-privatizing-military-housing-became-a-nightmare-for-soldiers>.

² Letter from Senator Elizabeth Warren to SEC ARMY Mark Esper, SEC NAV Richard Spencer, and SEC AIR FORCE Heather Wilson, April 30, 2019, <https://www.warren.senate.gov/imo/media/doc/2019.04.30%20Military%20Housing%20Letter%20to%20Armed%20Services%20Branch%20Chiefs.pdf>.

³ U.S. Government Accountability Office, “Military Housing Privatization: Preliminary Observations on DoD’s Oversight of the Condition of Privatized Military Housing,” December 3, 2019, <https://www.gao.gov/products/gao-20-280t>.

⁴ Letter from Senator Elizabeth Warren to DOJ Attorney General Merrick Garland and DOJ Deputy Attorney General Lisa Monaco, August 11, 2022, <https://www.warren.senate.gov/imo/media/doc/2022.08.10%20Letter%20to%20DOJ%20on%20use%20of%20suspension%20and%20debarment%20authority.pdf>.

up inquiries to the Army, pushing for its own investigation and further oversight of privatized military housing in the months after the investigation.⁵ To address many of these failures, Senator Warren introduced the *Military Housing Oversight and Service Member Protection Act*.⁶ Congress, in turn, has repeatedly acted to protect military families from abusive landlords, passing historic reforms like the Tenant Bill of Rights and the requirement that DoD create a public complaint database for military housing.⁷

However, as POGO's investigation makes clear, poor housing conditions for military families persist. In May 2024, POGO's investigation found that many of these same housing problems from years past remain, and that military families are often still left without recourse, DoD is trapped by long-standing, substandard agreements with private companies,⁸ and a new obstacle to relief has emerged: the enclave doctrine. All these factors combine to create a nightmarish military housing experience for service members and their families. In fact, "hundreds of service members and their families have joined lawsuits against military housing companies after their lives were turned upside down by substandard and in some cases hazardous housing conditions like dangerous mold, lead-based paint, and rodent and insect infestations."⁹ A recent letter from DoD, provided in response to an inquiry led by Senator Warren, explained that in 2023, there were at least 4,588 reports of mold in privatized housing from the Air and Space Forces alone.¹⁰

DoD's Difficulties Enforcing New Protections for Families in Private Military Housing

POGO's investigation highlights a problem that many of us have discussed before: DoD's decades-old, terrible deals with private companies to provide military housing. "Contracts obtained by the Project On Government Oversight as part of a year-long investigation reveal the devil's bargain the Defense Department struck when it handed over the responsibility for military housing to the private sector in order to offload the expensive burden of maintaining these homes. These agreements include provisions that make them nearly impossible to terminate and that allow companies to evade some environmental, tenant rights, and consumer protection laws."¹¹

⁵ The day after Senator Ossoff announced the results of his investigation, the Army launched their own probe into privatized housing conditions at Fort Eisenhower. Senator Jon Ossoff, NEW: Sens. Ossoff, Scott, Rubio Launch Bipartisan Inquiry into Pentagon's Oversight of Military Families' Health in Privatized Housing, press release, March 27, 2023, <https://www.ossoff.senate.gov/press-releases/new-sens-ossoff-scott-rubio-launch-bipartisan-inquiry-into-pentagons-oversight-of-military-families-health-in-privatized-housing/>.

⁶ Military Housing Oversight and Service Member Protection Act, S. 2368, <https://www.congress.gov/bill/117th-congress/senate-bill/2368/text>.

⁷ National Defense Authorization Act of Fiscal Year 2020, Public Law 116-92, section 2890, <https://www.congress.gov/bill/116th-congress/senate-bill/1790/text>.

⁸ Project on Government Oversight, "From Toxic Mold to Rampant Fraud: How Privatizing Military Housing Became a Nightmare for Soldiers," René Kladzyk, May 7, 2024, <https://www.pogo.org/investigations/from-toxic-mold-to-rampant-fraud-how-privatizing-military-housing-became-a-nightmare-for-soldiers>.

⁹ *Id.*

¹⁰ Letter from Secretary of Defense Lloyd Austin to Senator Elizabeth Warren, May 10, 2024, on file with the office of Senator Elizabeth Warren.

¹¹ Project on Government Oversight, "From Toxic Mold to Rampant Fraud: How Privatizing Military Housing Became a Nightmare for Soldiers," René Kladzyk, May 7, 2024, <https://www.pogo.org/investigations/from-toxic-mold-to-rampant-fraud-how-privatizing-military-housing-became-a-nightmare-for-soldiers>.

Indeed, because private military housing companies demanded and received incredibly favorable terms in their contracts—many of which last through the 2050s—Congress’s recent efforts to expand military tenant protections have had limited success. For instance, because the 2020 Tenant Bill of Rights (TBOR) asked companies to offer protections beyond what was required by their contracts, these companies did not have to comply.¹² While DoD has indicated that it expects all companies to be compliant with TBOR by the end of this year—years after TBOR’s enactment—progress has been exceedingly slow: “[i]n September 2022, the Department of Defense’s inspector general reported that more than a third of housing companies weren’t complying with the Tenant Bill of Rights.”¹³

Even where DoD has certified compliance with TBOR, problems remain. “For example, the Tenant Bill of Rights entitles military families to a ‘formal dispute process,’ providing a third-party mediator if there’s a housing problem that the service member can’t get resolved by working directly with the housing company.”¹⁴ But a GAO report “found widespread confusion across military branches about the mediation process for housing disputes; the number of families who had actually used the process was in the single digits for most branches of the military as of November 2022.”¹⁵

New Invocations of the Federal Enclave Doctrine Presents Additional Enforcement Challenges for DoD

DoD’s recent problems with enforcing provisions designed to protect families in military housing are now further exacerbated by the federal enclave doctrine, which is denying families the ability to sue to vindicate their rights.

Every state has tenant protection laws. For instance, under Texas landlord-tenant laws, “Texas landlords must provide rentals that are safe and fit for human habitation” and they are “required to make a diligent effort to repair or remedy a condition” when put on notice and “the condition materially affects the physical health or safety of an ordinary tenant or arises from the landlord’s failure to provide hot water.”¹⁶ Additionally, “when a tenant [in Texas] gives a landlord notice about a problem that affects health or safety, but the landlord doesn’t fix it within a reasonable amount of time (usually *seven* days), the tenant might have the option to: [1] terminate the lease, [2] if the cost of repair doesn’t exceed the greater of \$500 or one month’s rent, repair the problem and deduct the cost from the rent, or [3] sue the landlord.”¹⁷

¹² National Defense Authorization Act of Fiscal Year 2020, Public Law 116-92, section 2890, <https://www.congress.gov/bill/116th-congress/senate-bill/1790/text>.

¹³ Project on Government Oversight, “From Toxic Mold to Rampant Fraud: How Privatizing Military Housing Became a Nightmare for Soldiers,” René Kladyk, May 7, 2024, <https://www.pogo.org/investigations/from-toxic-mold-to-rampant-fraud-how-privatizing-military-housing-became-a-nightmare-for-soldiers>.

¹⁴ *Id.*

¹⁵ *Id.*; U.S. Government Accountability Office, “Military Housing: Strengthened Oversight Needed to Make and Sustain Improvements to Living Conditions,” September 27, 2023, p. 12, <https://www.gao.gov/assets/gao-23-107038.pdf>.

¹⁶ Tex. Prop. Code § 92.052 (2024); NOLO, “Overview of Landlord-Tenant Laws in Texas,” Ann O’Connell, <https://www.nolo.com/legal-encyclopedia/overview-landlord-tenant-laws-texas.html>.

¹⁷ Tex. Prop. Code § 92.056, 92.0563(2024); NOLO, “Overview of Landlord-Tenant Laws in Texas,” Ann O’Connell, <https://www.nolo.com/legal-encyclopedia/overview-landlord-tenant-laws-texas.html>.

However, under the federal enclave doctrine, state and local laws—such as the Texas tenant protections above—that are adopted after the land is transferred from the state to the federal government generally do not apply to the transferred land, or enclave,¹⁸ creating a shield from responsibility for corporate landlords that fail to maintain safe and healthy living conditions for military families. Sadly, this has stripped service members and their families of the right to terminate housing agreements and sue landlords for violations, protections afforded to their civilian and military tenant-counterparts who live off base and are protected by state and local landlord-tenant laws.¹⁹

This is not a theoretical concern. Recently, “the Eastern District of Virginia applied the federal enclave doctrine and dismissed service members’ claims under the Virginia Consumer Protection Act and Virginia Residential Landlord and Tenant Act against military housing providers at Fort Belvoir” after military families were forced to move out of the houses “due to reprehensible housing conditions that rendered their units unlivable.”²⁰ The military families were moved to temporary housing and required to continue paying full rent for the substandard housing²¹ while the corporate landlord repeatedly “sen[t] maintenance workers who would use the cheapest and quickest fixes without performing any root cause assessments...[corporate landlords] inform[ed] the families that their homes [were] safe, and the families return[ed] only to find that the problem had not been resolved.”²² After the court dismissed the claims citing the federal enclave doctrine, these service members were left with no remedy and no mechanism to seek relief.²³

Conclusion and Questions

Ultimately, because the private companies operating in the Military Housing Privatization Initiative (MHPI) are not being held accountable for their failures, DoD and Congress must step in to protect these families.

In the FY 24 NDAA, Congress directed DoD to establish the Military Family Readiness Working Group for Military Housing to allow military families and DoD senior leaders to

¹⁸ FindLaw, “Why Do Federal Enclaves Matter?” Robyn Hagan Cain, March 21, 2019, <https://www.findlaw.com/legalblogs/tenth-circuit/why-do-federal-enclaves-matters/>.

¹⁹ “Following national media attention about substandard housing conditions for military families in 2019, Congress took steps to address the issue by adding protections in the 2020 and 2021 National Defense Authorization Acts (NDAA), including a ‘Tenant Bill of Rights’ for service members.” Project on Government Oversight, “From Toxic Mold to Rampant Fraud: How Privatizing Military Housing Became a Nightmare for Soldiers,” René Kladzyk, May 7, 2024, <https://www.pogo.org/investigations/from-toxic-mold-to-rampant-fraud-how-privatizing-military-housing-became-a-nightmare-for-soldiers>; The White House, “FACT SHEET: Biden-Harris Administration Announces New Actions to Protect Renters and Promote Rental Affordability,” January 25, 2023, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/25/fact-sheet-biden-harris-administration-announces-new-actions-to-protect-renters-and-promote-rental-affordability/>.

²⁰ Virginia Lawyers Weekly, “State Claims vs. Military Housing Providers Dismissed,” Nick Hurston, March 17, 2024, <https://valawyersweekly.com/2024/03/17/state-claims-vs-military-housing-providers-dismissed/>; Fischer v. Fort Belvoir Residential Cmtys., Civil Action 1:22-cv-286 (RDA/LRV) (E.D. Va. Feb. 16, 2024).

²¹ Virginia Lawyers Weekly, “State Claims vs. Military Housing Providers Dismissed,” Nick Hurston, March 17, 2024, <https://valawyersweekly.com/2024/03/17/state-claims-vs-military-housing-providers-dismissed/>.

²² Fischer v. Fort Belvoir Residential Cmtys., Civil Action 1:22-cv-286 (RDA/LRV) (E.D. Va. Feb. 16, 2024).

²³ Virginia Lawyers Weekly, “State Claims vs. Military Housing Providers Dismissed,” Nick Hurston, March 17, 2024, <https://valawyersweekly.com/2024/03/17/state-claims-vs-military-housing-providers-dismissed/>; Fischer v. Fort Belvoir Residential Cmtys., Civil Action 1:22-cv-286 (RDA/LRV) (E.D. Va. Feb. 16, 2024).

“review and make recommendations to the Secretary of Defense on policies for covered military housing, including inspections practices and resident surveys.”²⁴ Congress has given DoD new tools to enhance oversight, but we remain concerned that DoD is either unable or unwilling to hold these companies accountable. The stress and uncertainty that military families face with the multiple moves and transitions between locations and assignments that the military requires is amplified and worsened by systemic housing problems. Military families should not lose their right to a safe, healthy home, or the ability to seek redress, simply because they live on-base.

To ensure military families who support our nation are able to obtain safe and sanitary housing, and that private companies are held accountable when they fail those families, and to address the new challenges facing DoD accountability efforts, we seek more information on how DoD plans to strengthen oversight in the MHPI. We ask that you provide answers to the following questions no later than July 30, 2024:

1. What is the process for DoD to enter into housing agreements with private companies?
 - a. Who oversees the contracting process?
 - b. What are the safety measures to ensure service members and military families are protected if they are placed in privatized military housing?
 - i. Do these agreements contain habitability clauses?
 - ii. What inspection requirements and standard of living thresholds exist?
 - c. Why are these agreements made outside of the traditional defense acquisitions and contracting guidelines?
 - d. Do these agreements contain change clauses that allow alterations to the agreements to be made? If so, under what conditions?
 - e. Has DoD explored modifying these agreements so that military families are better protected? If so, how? If not, why not?
 - f. What is the process for terminating these agreements?
2. Do “hazardous housing conditions like dangerous mold, lead-based paint, and rodent and insect infestations”²⁵ violate DoD’s existing housing agreements with private companies?
3. How is DoD ensuring private companies’ compliance with the service members’ Tenant Bill of Rights?
4. How does DoD intend to overcome the challenges to ensuring MHPI accountability given the recent invocation of the federal enclave doctrine to strip military families of their day in court?

²⁴ National Defense Authorization Act for Fiscal Year 2024, Public Law 118-31, sec. 2821, <https://www.congress.gov/118/plaws/publ31/PLAW-118publ31.pdf>.

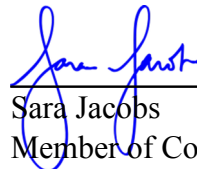
²⁵ Project on Government Oversight, “From Toxic Mold to Rampant Fraud: How Privatizing Military Housing Became a Nightmare for Soldiers,” René Kladzyk, May 7, 2024, <https://www.pogo.org/investigations/from-toxic-mold-to-rampant-fraud-how-privatizing-military-housing-became-a-nightmare-for-soldiers>.

- a. Is DoD concerned that the federal enclave doctrine is preventing military families from vindicating rights afforded to similarly situated tenants under state and local law?
 - b. Is there anything that prohibits DoD from applying concurrent state and local laws regarding tenant protections to military families who reside in privatized military housing?
5. In the National Defense Authorization Act for Fiscal Year 2024, Congress directed DoD to create the Military Family Readiness Working Group for Military Housing to ensure oversight and accountability on safe housing conditions for service members and military families.²⁶ Please provide an update on DoD's implementation of this provision.

Sincerely,



Elizabeth Warren
United States Senator



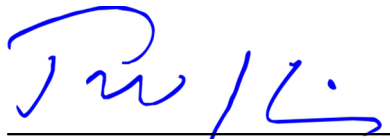
Sara Jacobs
Member of Congress



Jon Ossoff
United States Senator



James C. Moylan
Member of Congress



Tim Kaine
United States Senator



Ro Khanna
Member of Congress

²⁶ National Defense Authorization Act for Fiscal Year 2024, Public Law 118-31, sec. 2821, <https://www.congress.gov/118/plaws/publ31/PLAW-118publ31.pdf>.