NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 18-5297

In the United States Court of Appeals for the District of Columbia Circuit

ABDUL RAZAK ALI,
Petitioner-Appellant,

v.

DONALD J. TRUMP, *et al.*,
Respondent-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE* HUMAN RIGHTS FIRST IN SUPPORT OF PETITIONER-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1)(A), counsel certifies as follows:

A. Parties and Amici. Except for *amici curiae* Human Rights First, Tofiq Nasser Awad al Bihani and Abdul Latif Nasser, and Professor Eric Janus, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Petitioner-Appellant.

B. Rulings Under Review. References to the rulings under review appear in the Brief for Petitioner-Appellant.

C. Related Cases. All related cases of which counsel is aware are listed in the Brief for Petitioner-Appellant.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amicus curiae* Human Rights First hereby submits the following corporate disclosure statement:

Human Rights First is a not-for-profit organization. It has no parent corporations, it does not issue stock, and no publicly held corporation owns any portion of Human Rights First.

STATEMENT REGARDING CONSENT TO FILE, AUTHORITY TO FILE, AND AUTHORSHIP

Pursuant to Federal Rule of Appellate Procedure 29(a)(4), *amicus curiae* Human Rights First states as follows:

All parties to this appeal have consented to the filing of this Amicus Brief.

This Amicus Brief is filed upon the authority of the Board of Directors of Human Rights First. Counsel for Human Rights First authored this Amicus Brief in its entirety. No counsel for any party to this appeal has authored this Amicus Brief, in whole or in part, nor has any party to this appeal or their respective counsel contributed money to fund the preparation or submission of this Brief. No entity or person, other than Human Rights First, has contributed funds to cover the costs of the preparation and submission of this Amicus Brief.

CERTIFICATE REGARDING SEPARATE AUTHORSHIP

Pursuant to D.C. Circuit Rule 29(d), counsel hereby certifies that a separate *amicus curiae* brief is necessary because of the specialized nature of Human Rights First's perspective and expertise with respect to the Periodic Review Boards at the United States military base in Guantanamo Bay, Cuba. To counsel's knowledge, Human Rights First is the only *amicus curiae* focusing on the deficiencies of the Periodic Review Boards and the reasons why this Court should not accept the government's argument that the existence of the Periodic Review Boards renders Guantanamo detainees' ongoing law of war detention consistent with due process.

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STATEMENT OF INTEREST

Amicus Curiae Human Rights First is a nonprofit, nonpartisan human rights organization that has worked since 1978 to challenge the United States to live up to its founding ideals.[1] For more than a decade, Human Rights First has been an instrumental voice in advocating for sound, lawful, and humane national security policies, including with respect to the detention, transfer, trial, and treatment of Guantanamo detainees. As part of this mission, Human Rights First has served as an independent observer of the Periodic Review Board ("PRB") since 2014, shortly after the PRB first began providing a limited administrative review of the continued detention of detainees at the United States military base at Guantanamo Bay, Cuba. In the more than five years since the PRB proceedings began, Human Rights First has tracked and observed the proceedings from the Pentagon firsthand, analyzing trends and raising awareness of the proceedings and the human rights concerns associated with the continued detention of detainees at Guantanamo Bay.

SUMMARY OF ARGUMENT

The Periodic Review Board's discretionary administrative review of the continued detention of detainees at Guantanamo Bay is inherently limited, deeply flawed, and, under the current administration, a dysfunctional process that only

[1] Human Rights First is grateful for the outstanding work of the law students without whom this brief would not have been possible: Annie Himes, Alexa Potter, and Ingrid Schulz.

renders decisions in favor of continued detention. This Court should not accept the government's argument that the existence of such a process renders Petitioner's continued detention—for nearly seventeen years—consistent with the requirements of due process.

By design, the PRB proceedings are discretionary administrative reviews that are limited in scope both procedurally and substantively. The PRB was created to assess whether continued detention of an individual is necessary for national security. It is not charged with reviewing the legality of an individual's continued detention under the 2001 Authorization for Use of Military Force or laws of war, let alone the Constitution, and is expressly not intended to affect the jurisdiction of the federal courts to determine the legality of detention. There is no mechanism for judicial review of a PRB determination, and a detainee has no avenue for enforcing the PRB's determination.

Compounding its inherently limited scope, the implementation and operation of the PRB process have been deeply flawed since its inception. The Board considers evidence that may have been derived from torture and other cruel, inhumane, and degrading treatment. Counsel for detainees are typically unable to review, let alone challenge, the underlying evidence against their clients. Further, the PRB determines whether the detainee should continue to be held based on the vague standard of whether the detainee poses a "significant threat to the security of

the United States."[2] Even if the PRB determines that an individual's detention is not necessary to protect against a significant threat to national security, the Secretary of Defense may override that determination.

The procedural and substantive shortcomings in the design and implementation of the PRB process have been exacerbated under the current administration, which has neither approved any detainees for transfer nor actually transferred any who were previously approved. The PRB process currently works only as a rubber-stamp in favor of detention—continuing to go through the motions of hearings and file reviews, but showing little regard for timeliness and providing detainees with no realistic prospect of approval for transfer. Even if the PRB were to approve a detainee for transfer, his fate would surely be no different from that of the five detainees still held at Guantanamo despite being approved for transfer years ago, because the current administration has dismantled the executive machinery for effectuating transfers.

ARGUMENT

The PRB process is inherently limited in scope, deeply flawed in design and practice, and, under the current administration, a dysfunctional rubber-stamp for continued detention that provides no meaningful process. This Court should not

[2] Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, Exec. Order No. 13,567, 76 Fed. Reg. 13,277, at sec. 2 (Mar. 7, 2011) (hereinafter "E.O. 13,567").

accept the government's argument that the PRB's existence renders "fully consistent with due process"[3] the Petitioner's detention for nearly seventeen years without charge or trial.

I. The Periodic Review Board Process Is a Discretionary and Inherently Limited Administrative Review.

By design, the PRB proceedings are discretionary administrative reviews that are so limited in scope, both procedurally and substantively, that they cannot provide meaningful review to Guantanamo detainees.

In 2011, President Obama signed Executive Order ("E.O.") 13,567, instituting the Guantanamo Bay Periodic Review Board process.[4] E.O. 13,567 instructs a board of senior executive agency officials to review whether continued detention of certain Guantanamo detainees remains "necessary to protect against a significant threat to the security of the United States."[5] The PRB makes this

[3] Resp't's Opp. to Pet'r's Mot. for Order Granting Writ of Habeas Corpus at 37, 40-41, *Al Bihani v. Trump*, No. 1:04-cv-01194 (Feb, 16, 2018), available at https://ccrjustice.org/sites/default/files/attach/2018/02/2018-02-16_AlBihani_et_al_v_Trump_GovernmentOpposition.pdf (hereinafter "Al Bihani Opp.").

[4] E.O. 13,567 at sec. 3.

[5] *Id.* sec. 2.

determination for designated "law of war" detainees—those whom the government does not intend to prosecute in federal court or in the military commissions system.

The PRB does not consider the factors that a court would in assessing whether detention comports with due process.[6] For example, the Board neither addresses nor determines the legality of a detainee's continued detention under the 2001 Authorization for Use of Military Force or laws of war, let alone the Constitution.[7] Nor does a PRB determination consider the length of an individual's detention. There is no mechanism for judicial review of a PRB determination, and a detainee approved for transfer by the PRB has no avenue for enforcing the PRB's determination. Further, PRB proceedings are expressly not intended to affect the jurisdiction of the federal courts to determine the legality of detention.[8]

II. The Periodic Review Board Process Is Deeply Flawed.

The PRB process should not be viewed as rendering Petitioner's detention consistent with due process because the PRB process itself is deeply flawed and inadequate. Although courts routinely prohibit the use of evidence derived from torture or cruel, inhumane, or degrading treatment, the PRB reviews compendiums of classified documents, the contents of which may have been obtained through

[6] *Id.* sec. 1(a).

[7] U.S. Dep't of Def., *The Periodic Review Board*, https://www.prs.mil/About-the-PRB.

[8] E.O. 13,567 at sec. 1(b).

these methods. Detainees' ability to know and rebut the allegations against them is severely curtailed. Detainees' counsel receive only a redacted version of the compendium, even though they hold the requisite security clearances, and the detainees themselves can only access an unclassified summary of the compendium. The substantive criteria for release remain opaque, and the PRB's emphasis on "candor" and remorse may incentivize false confessions. Finally, the Secretary of Defense has complete discretion to override a PRB determination, which confirms the illusory nature of the PRB process and negates the suggestion that the PRB can provide any semblance of due process.

A. The PRB Considers Evidence That May Be Derived From Torture.

The PRB's implementing guidelines expressly prohibit the PRB from relying on information obtained through torture or cruel, inhumane, or degrading treatment. Courts sitting in habeas review have routinely rejected the reliability of such information.[9] Nevertheless, the record the PRB reviews in determining the necessity of continued law of war detention may contain torture-derived information. The PRB's actual practice thus fails to follow its own procedures and permits the PRB to rely on the type of information that courts have found unreliable.

[9] *See, e.g.*, *Abdah v. Obama*, 708 F. Supp. 2d 9, 14-15 (D.D.C. 2010); *Al-Hajj v. Obama*, 800 F. Supp. 2d 19, 26-27 (D.D.C. 2011) (Lamberth, C.J.).

The PRB reviews a record comprised of materials provided by the Periodic Review Secretariat ("PRS").[10] These materials include a detainee compendium,[11] compiled by the intelligence community; the work product of any prior PRB; and the detainee disposition recommendations produced by the Guantanamo Task Force established under Executive Order 13,492.[12] Although E.O. 13,567 allows for summaries only in "exceptional circumstances where it is necessary to protect national security,"[13] in practice, the compendiums often consist only of short summaries of the underlying intelligence reports, rather than the reports themselves.[14]

As written, the PRB Implementing Guidelines prohibit the PRB from relying on "information obtained as a result of torture or cruel, inhumane, or degrading

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[10] *See* Deputy Sec'y of Def., *Policy Memorandum, "Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay per Executive Order 13567"*, Attachment 3, "Periodic Review Procedures and Process," at para. 3 (Mar. 28, 2017) (hereinafter "PRB Procedures").

[11] The detainee compendium includes information about the detainee, noting inconsistent intelligence reporting where appropriate. *Id.* para. 5(f)(1).

[12] *Id*. para. 3; *see* Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009). The Task Force created under E.O. 13,492 consisted of the Attorney General; the Secretaries of Defense, State, and Homeland Security; the Director of National Intelligence; and the Chairman of the Joint Chiefs of Staff. The Task Force was tasked with immediately assembling all relevant information from the U.S. federal government pertaining to the detainee at issue and his proper disposition, then determining as promptly as possible whether the detainee held at Guantanamo should be transferred or released, prosecuted in a U.S. federal court, or dispositioned by other lawful means.

[13] E.O. 13,567 at sec. 3(a)(5).

[14] *See, e.g.*, Reprieve, *Justice Denied: No Charge, No Trial, No Exit*, at 25 (Jan. 11, 2019), https://reprieve.org.uk/wp-content/uploads/2019/01/2019_01_14_PUB-PRB-Report-1.pdf.

treatment" ("CIDT") to support a determination for continued law of war detention.[15] To avoid the use of such information, a Department of Justice-led Interagency Screening Team[16] reviews the compendium for information that may implicate CIDT concerns.[17] The Screening Team should then remove any such information that supports the conclusion that the detainee poses a threat to national security.[18] By contrast, the Screening Team will identify, but not remove, potentially mitigating information that may implicate CIDT concerns.[19]

This screening process is critically flawed because the Screening Team reviews the *compendium*—which as noted above, often consists of summaries of evidence and intelligence reports—rather than the reports themselves. The Screening Team therefore may not be able to determine whether the summaries in the compendium contain information that implicates CIDT concerns. Similarly, the PRB's lack of access to the underlying evidence and intelligence reports that comprise the detainee compendiums prevents it from ensuring that a detainee's PRB record remains untainted by such information.[20]

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[15] PRB Procedures at para. 6(k)(1); *see also* U.S. Dep't of Def., *The Periodic Review Board*, https://www.prs.mil/About-the-PRB.

[16] PRB Procedures at para. 6(b)(2).

[17] *Id*. para. 6(b)(2)(a).

[18] *Id*. para. 6(b)(2)(b).

[19] *Id*.

[20] *See, e.g.*, Reprieve, *supra* note 14, at 25; Katie Taylor, *The Rigged System That's Keeping Detainees at Guantánamo Indefinitely*, Reprieve ("The Board relies . . . on date-less classified evidence from anonymous sources. The only party able to

Unsurprisingly, given this critical flaw in the screening procedure, the PRB process appears to have relied on evidence derived from torture and CIDT despite its nominal prohibition.[21] For example, private counsel for Guled Hassan Duran urged that "the core evidence that the government presents in support of his detention consists of intelligence reports from the CIA that appear largely to include statements made by Mr. Duran . . . while he was subject to torture and other unlawful abuse by the CIA in secret detention."[22] In addition, there are instances when the Senate Intelligence Committee's report on the CIA detention and interrogation program confirms that a detainee was subjected to torture or CIDT, yet the PRB does not disclose this in the compendium given to the detainee.[23]

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verify that the source material did not originate from tortured persons is the government that denied its now infamous torture program for over a decade until it was exposed."), https://reprieve.org.uk/update/the-rigged-system-thats-keeping-detainees-at-guantanamo-indefinitely%E2%80%AF-%E2%80%AF/ (last visited May 22, 2019).

[21] *See, e.g.*, Reprieve, *supra* note 14, at 19 (stating that "much of the evidence against detainees either comes from involuntary statements tortured out of them, or from statements given by other detainees who were either abused themselves or seeking extraordinary benefits for themselves through cooperation.").

[22] Letter to Periodic Review Board from Counsel for Guled Hassad Duran at 2 (Oct. 25, 2018), available at https://www.prs.mil/Portals/60/Documents/ISN10023/SubsequentReview1/20181025_U_ISN_10023_OPENING_STATEMENTS_OF_DETAINEES_REPRESENTATIVES_PUBLIC.pdf.

[23] *See, e.g.*, Reprieve, *supra* note 14, at 24-25 (explaining the PRB's failure to disclose evidence of torture and CIDT to detainee Ahmed Rabbani, whose torture is confirmed in the Senate Intelligence Committee report).

In habeas litigation, the U.S. District Court for the District of Columbia has excluded this type of evidence. For example, Judge Kennedy declined to rely on the June 2004 statements of Sharqawi Ali al-Hajj because there was "unrebutted evidence in the record that, at the time of the interrogations at which [he] made the statements, [al-Hajj] had recently been tortured."[24] In the detainee profile considered by the PRB, however, the government stated that prior to late 2004, al-Hajj provided his interrogators with a wealth of intelligence and listed various alleged ties to members of al-Qaeda.[25] His statements prior to late 2004 would have been made at the time when courts have found al-Hajj was severely tortured.[26]

In addition, courts have recognized that the lasting physical and psychological effects of torture raise serious concerns regarding the feasibility of separating testimony influenced by torture and CIDT from "clean" testimony provided later, which in turn calls into question the ability of the Screening Team to detect and remove such testimony from the PRB compendiums.[27] In al-Hajj's habeas case, then-Chief Judge Lamberth stated that, due to the government's

[24] *Abdah v. Obama*, 708 F. Supp. 2d 9, 14-15 (D.D.C. 2010).

[25] *See* Guantanamo Detainee Profile, Detainee ISN: YM-1457 (Nov. 12, 2015), https://www.prs.mil/Portals/60/Documents/ISN1457/151112_U_ISN_1457_COMPENDIUM_PUBLIC_V1.pdf.

[26] *See Abdah*, 708 F. Supp. 2d at 14-15; *Al-Hajj v. Obama*, 800 F. Supp. 2d 19, 21-22, 26-27 (D.D.C. 2011) (Lamberth, C.J.).

[27] Reprieve, *supra* note 14, at 25.

failure "to establish that the effects of coercion had dissipated by the time of petitioner's interviews in June and July 2004, the Court will grant petitioner's motion to strike with respect to any statements he made while in custody at Bagram."[28] The effects of torture are so severe and lasting that Judge James Pohl of the Guantanamo military commissions chose to exclude evidence obtained through "clean" FBI interrogations of detainees previously tortured by the CIA.[29] The exclusion of such material from the evidentiary record in both habeas and military commissions cases, while no adequate mechanisms filter it from use in PRB proceedings, underscores the PRB's deficiencies.

B. Detainees and Defense Counsel Have Limited Access to the Evidence Considered by the PRB.

Although the PRB process provides detainees with advance notice of hearings and assistance from advocates, these measures are severely limited. The most essential information necessary to allow for meaningful PRB review is withheld from the detainees, and in many instances from their advocates as well. As a result, detainees and their counsel are generally unable effectively to rebut the credibility of the intelligence reporting used to justify continued detention.

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[28] *Al-Hajj*, 800 F. Supp. 2d at 26.

[29] Ruling, *United States v. Khalid Sheikh Mohammed, et al.*, AE 524LL, at 35-36 (Military Commissions Aug. 17, 2018), https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE524LL(RULING)).pdf. The government asked the military commission to reconsider Judge Pohl's ruling, and this issue is currently being litigated before a different judge due to Judge Pohl's retirement.

Each detainee is entitled to advance notice of the PRB review and the assistance of a government-provided personal representative.[30] The personal representative "shall advocate on behalf of the detainee" and is responsible for "challenging the government's evidence and introducing information on behalf of the detainee."[31] The detainee may also secure private counsel, at no cost to the government, to assist the personal representative and the detainee in his proceedings.[32]

The PRS must provide the detainee's personal representative and private counsel with access to the record the PRB will consider in making its determination.[33] Despite the personal representative and private counsel holding the necessary security clearance to review the PRB record, the originating department or agency may determine that access to underlying information is not possible due to purported national security, law enforcement, or privilege concerns.[34] In other words, a personal representative or private counsel with a "secret" security clearance may nonetheless be prohibited from reviewing "secret" information underlying the PRB record. The same is true for personal

[30] E.O. 13,567 at sec. 3(a).
[31] *Id*. sec. 3(a)(2).
[32] *Id*.; PRB Procedures at para. 5(g).
[33] E.O. 13,567 at sec. 3(a)(5).
[34] *Id*.

representatives and private counsel with "top secret" security clearances and underlying information classified as "top secret."

In such instances, the government will provide the detainee's personal representative and private counsel with a "sufficient" substitute or summary of the information being withheld from them, even though the government is providing that information to the PRB.[35] The originating department or agency will prepare the substitutes and summaries and the PRS will ensure they provide the personal representative or private counsel "with a meaningful opportunity to assist the detainee during the review process."[36] These substitutions and summaries often remove the intelligence sources, making it impossible to evaluate or impeach the credibility of a source.[37] Credibility concerns are especially grave in this context, given the U.S. government's documented use of pay-outs and torture in amassing this intelligence.[38]

Detainees are further restricted in the information they may access. Prior to the PRB hearing, a detainee is provided an unclassified summary of the factors and information the PRB will consider in evaluating whether the detainee meets the

[35] *Id.*
[36] PRB Procedures at para. 6(b)(4), (c)(1).
[37] Reprieve, *supra* note 14, at 25.
[38] *See id.*

standard for continued detention.[39] Private counsel and the personal representative may not divulge classified information to the detainee.[40] The detainee is, therefore, unable to confront any underlying intelligence or intelligence sources considered by the PRB, or, in certain circumstances, to meaningfully participate in the preparation or presentation of his case.

The net effect of these varying levels of access and multiple versions of the record is to severely limit the detainee's ability to respond to the evidence against him. The detainee's unclassified summary intentionally keeps him in the dark as to the details and sources of the allegations against him. And while his personal representative and private counsel are provided some additional information, they cannot disclose it to the detainee, and thus cannot adequately counsel him or prepare him to answer the PRB's questions about that information. The PRB, meanwhile, has more information than the detainee or his advocates, and may well ask questions to which the detainee cannot adequately respond because he and his advocates do not understand or know the information underlying the inquiry. As a result, the PRB hearings are sorely lacking as a substitute for a meaningful review.

[39] E.O. 13,567 sec. 3(a)(1).

[40] PRB Procedures at para. 5(e)(3)(a), (g)(4)(c).

C. The PRB's Standard for Continued Detention Is Vague and Incentivizes False Confessions That May Then Be Used Against the Detainee.

The intended purpose of the PRB is to conduct a hearing to determine whether a detainee's law of war detention remains "necessary to protect against a significant threat to the security of the United States."[41] The PRB, however, does not have clear or consistent criteria to determine when a detainee poses a "significant threat." E.O. 13,567 provides no guidance or factors for the PRB to follow or consider. The PRB Implementing Guidelines state that the PRB may consider the detainee compendium, which includes "baseline threat information," and "information pertaining to the detainee's potential threat if transferred or released."[42]

Although the Implementing Guidelines list several examples of types of information that the PRB may consider,[43] the factors actually considered and cited by the PRB have varied greatly—including even within an individual detainee's hearing. For example, Khalid Qasim was prevented from speaking to past government allegations at his hearing because the PRB considered them irrelevant to the question of whether he posed a significant future threat, but the PRB then

[41] E.O. 13,567 at sec. 2.
[42] PRB Procedures at para. 3.
[43] *Id.*

denied his release based on "the same assertions he had been told were irrelevant."[44] The PRB has also indicated that a detainee's compliant behavior in the prison will be looked on favorably, only to later deny release because it suspected a detainee's compliant behavior was motivated by "an attempt to obtain transfer eligibility rather than due to a genuine change in mindset."[45] Similarly, although the PRB has placed an emphasis on hearing about a detainee's plans for his future post-release, it has not consistently evaluated such plans; but when it does consider them, a detainee's future plans can have a significant effect on the PRB's final determination.[46]

Further demonstrating that the PRB's standard of review is opaque and arbitrary, the PRB has often emphasized a detainee's "candor" or honesty—a

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[44] Reprieve, *supra* note 14, at 15; *see also* Unclassified Summary of Final Determination for Khalid Ahmed Qasim, Periodic Review Secretariat (Mar. 6, 2015) (citing "significant derogatory information regarding the detainee's past involvement in activities in Afghanistan"), https://www.prs.mil/Portals/60/Documents/ISN242/150318_U_ISN242_FINAL_DETERMINATION_PUBLIC.pdf.

[45] Unclassified Summary of Periodic Review Board Determination for Uthman Abd al-Rahim Muhammad Uthman, Periodic Review Secretariat (Apr. 24, 2018), https://www.prs.mil/Portals/60/Documents/ISN027/SubsequentFullReview1/20180424_U_ISN027_FINAL_DETERMINATION_PUBLIC.pdf.

[46] *See, e.g.*, Transcript from Detainee Session for Yassim Quasim Mohammed Ismail's Full Review, Periodic Review Secretariat at 76-78 (Nov. 8, 2016), http://www.prs.mil/Portals/60/Documents/ISN552/FullReview/20161108_U_ISN522_TRANSCRIPT_OF_DETAINEE_SESSION_PUBLIC.pdf; Unclassified Summary of Final Determination Yassim Qasim Mohammed Ismail, Periodic Review Secretariat (Dec. 8, 2016) (favorably noting that the detainee's "responses were thoughtful and showed an effort to consider the future"), https://www.prs.mil/Portals/60/Documents/ISN522/FullReview/161208_U_ISN522_FINAL_DETERMINATION_PUBLIC_v1.pdf.

metric whose relation to "necessary to protect against a significant threat" is unclear.[47] In practice, the "candor" sought by the PRB typically refers to a detainee's willingness to confess to the government's allegations, regardless of their accuracy, as well as a willingness or ability to show remorse.[48] For example, one observer noted that a PRB final determination stated that the Board "considered the detainee's . . . failure to acknowledge or accept responsibility for past activities" and "welcomes seeing the detainee's file in six months with greater candor."[49] The PRB regularly cites a detainee's failure to acknowledge or accept responsibility for actions alleged by the government in its determination to deny release.[50] This may encourage detainees who maintain their innocence to give false confessions to the PRB. Such a confession, however, could then be used against

[47] *See* Reprieve, *supra* note 14, at 29 ("[C]andor has been mentioned in 42 of the 65 initial reviews (65%)[.]").

[48] *See, e.g.*, Taylor, *supra* note 20 ("The Board has made it very clear to detainees that their only hope of a positive ruling is to confess to some portion of the allegations against them—even if any many cases they deny the allegations—and to show remorse for those alleged actions."); Andrea Harrison, *Periodic Review Boards for Law-of-War Detention in Guantanamo: What Next?*, 24 ILSA J. Int'l & Comp. L. 541, 574 (2018) ("It is clear from current practice that the Board spends an undue amount of attention on getting the detainee to 'confess his crimes' or to express remorse for the past." (citation omitted)), *available at* https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1985&context=ilsajournal.

[49] Amos Barshad, *Guantánamo. Forever*, The Marshall Project (Feb. 28. 2018), https://www.themarshallproject.org/2018/02/28/guantanamo-forever.

[50] Reprieve, *supra* note 14, at 30 ("[O]f the detainees who were denied release in their Initial Review, lack of 'candor' was mentioned as a negative attribute in 64% of their Final Determinations.").

the detainee in a habeas challenge or in further proceedings in a detainee's home country or other jurisdiction.[51]

D. The Secretary of Defense Must Approve, and May Override, a PRB Determination.

A PRB determination that an individual's detention is not necessary to protect against a significant threat to national security is no guarantee of release, because it has no independent effect, and instead it may be ignored or overturned.

First, E.O. 13,567 provides that a committee composed of the Director of National Intelligence, Chairman of the Joint Chiefs of Staff, Attorney General, and Secretaries of State, Defense, and Homeland Security will review a PRB determination at the request of any member of the committee.[52] Second, the National Defense Authorization Act for Fiscal Year 2012 grants the Secretary of Defense the power to overrule any PRB determination to release or transfer a detainee.[53] The Act states that the Secretary "shall consider the recommendation of a periodic review board . . . but shall not be bound by any such recommendation."[54] If the Secretary chooses to allow the release of a detainee, she

[51] Harrison, *supra* note 48, at 574.

[52] E.O. 13,567 at secs. 3(d), 9(d).

[53] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112–81, 125 Stat. 1564 (2011), § 1023(b)(2), https://www.govinfo.gov/content/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf.

[54] *Id*.

must give Congress thirty days' notice prior to the transfer.[55] The Secretary's discretionary and final authority over PRB determinations introduces the potential for political influence in detainee release determinations.[56] This power to overrule final PRB determinations also ensures that the PRB is neither a truly independent nor a direct decision-making body.[57]

III. The PRB No Longer Provides a Meaningful Prospect of Release.

The preceding sections have shown how the PRB both was designed, and has been implemented, in a woefully inadequate manner. In addition to those inherent and systemic flaws, recent experience under the current administration has shown that the PRB has become a dysfunctional process that now only facilitates continued detention.

Although the PRB was created to determine whether a person held at Guantanamo should continue to be detained without charge or trial or be approved for release with appropriate security precautions as necessary, the PRB under the current administration has issued timely determinations only when those determinations favor continued detention. Other detainees have waited years after their hearings or reviews without any determination, and no detainee has been

[55] *Id*., 125 Stat. 1567 (2011), § 1028(a)(1).

[56] *See* Reprieve, *supra* note 14, at 16; Inter-Am. Comm'n H.R.. *Towards the Closure of Guantanamo* ¶ 264 (2015); Harrison, *supra* note 48, at 576.

[57] *See* Inter-Am. Comm'n H.R., *supra* note 56, ¶ 264; Harrison, *supra* note 48, at 576.

approved for transfer under the current administration. The current administration has effectively halted the process by refusing to transfer detainees who were previously cleared for release.

The Trump administration has also dismantled the State Department's Office of the Special Envoy for Guantanamo Closure—part of the executive machinery for effectuating transfers—without adequate replacement. Under these circumstances, no detainee can anticipate being released, even in the event the PRB approves his transfer, and therefore the PRB does not and cannot provide detainees any measure of fair or adequate process.

A. The PRB Fails to Issue Timely Decisions.

The PRB is required to issue "prompt" determinations,[58] but some detainees have seen years elapse between a PRB hearing and a final determination. This is at least partially because the PRB requires "unanimous consensus" to reach a final determination, and the process contains multiple layers of internal review in the event that unanimity cannot be reached.[59]

E.O. 13,567 mandates that each detainee receive an initial full review consisting of a hearing before the PRB.[60] Following a full review, any detainee not

[58] E.O. 13,567 at sec. 3(a)(7).
[59] PRB Procedures at para. 6(*l*).
[60] E.O. 13,567 at sec. 3(a).

approved for release will receive a file review semiannually and a subsequent full review triennially to determine the necessity of his continued detention.[61] Each full review requires notification, a PRB hearing, and a final determination as to whether continued law of war detention is necessary.

Once a final determination is made, it is forwarded to the Review Committee,[62] which has thirty days to seek review or concur with the PRB's determination.[63] If the Review Committee concurs, the PRB must provide the detainee with an unclassified written summary, which should be provided within thirty days of the PRB's determination when practicable.[64]

If the PRB cannot reach a unanimous consensus, however, it will send a written determination to the Review Committee, and each member of the Review Committee will review the same record available to the PRB members to determine the need for continued law of war detention.[65] If the Review Committee cannot come to a consensus determination, a further review will occur during a

[61] *Id.* sec. 3(b)-(c).

[62] As noted previously, the Review Committee is composed of the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, the Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff. E.O. 13,567 sec. 9(d); PRB Procedures at para. 6(*l*)(1).

[63] PRB Procedures at para. (6)(*l*)(1).

[64] *Id.* sec. 3(a)(7).

[65] *Id.* para. (6)(*l*)(2).

Principals Committee meeting.[66] A detainee cannot appeal a final determination once it is made.

Between February 2017 and August 2018, the PRB conducted twelve full reviews, and in nine cases it published its final determination—all in support of continued law of war detention—an average of thirty-two days after the PRB hearing.[67] However, as of October 2018, the other three detainees had been waiting more than 268 days for their determinations.[68] As of today, two of those detainees are still awaiting the PRB's final determination regarding their continued law of war detention. Moath Hamza Ahmed Al-Alwi had his full hearing on March 27, 2018, and has yet to receive a determination nearly fourteen months later.[69] Omar Muhammad Ali al-Rammah had his full hearing on February 9, *2017*, and still has not received a final determination from the PRB more than *two years later*.[70]

Detainees like Mr. Al-Alwi and Mr. al-Rammah have few, if any, options to challenge the PRB's failure to provide them with a "prompt" final determination. Moreover, the lack of any final PRB determination then freezes the clock on any

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[66] *Id.* para. (6)(*l*)(2)(d).

[67] Benjamin R. Farley, *Who Broke Periodic Review at Guantanamo Bay*, Lawfare (Oct. 15, 2018), https://www.lawfareblog.com/who-broke-periodic-review-guantanamo-bay.

[68] *Id.*

[69] *See* https://www.prs.mil/Review-Information/Subsequent-Full-Review/.

[70] *See* https://www.prs.mil/Review-Information/Full-Review/.

further reviews to which the detainee would otherwise be entitled.[71] Thus, for those detainees as to whom the PRB cannot quickly reach a "unanimous consensus," the PRB process not only fails to provide a meaningful review, but precludes such detainees form the possibility of receiving meaningful review in the future.

B. The Executive Branch Has Not Followed Through on Determinations of Release.

Even if the PRB process were still functioning properly and issuing timely determinations that included approvals for transfer, it would remain highly unlikely that a detainee would in fact be transferred. This is because under the current administration, not only have none of the detainees reviewed by the PRB under this administration been cleared for transfer, but the transfers of several individuals who were previously cleared for release from Guantanamo have not been effected.

If the PRB determines that continued detention is not necessary, the Secretaries of State and Defense must ensure that "vigorous efforts are undertaken to identify a suitable transfer location" abroad for the detainee.[72] The Secretary of State, in consultation with the Secretary of Defense, must obtain and evaluate security and humane treatment assurances regarding any detainee to be transferred to another country and must then determine, in consultation with members of the

[71] Farley, *supra* note 67.
[72] E.O. 13,567 at sec. 4(a).

PRB Review Committee, that it is appropriate to proceed with the transfer.[73] The Review Committee must annually review the sufficiency and efficacy of detainee transfer efforts, including the status of transfer efforts for any detainee who has been subject to a PRB hearing, whose continued detention has been determined to not be warranted, and who has not been transferred more than six months after the date of such determination.[74]

Five detainees have been approved for transfer but continue to be held at Guantanamo Bay. Two of these detainees were cleared for release through the PRB process, while the other three have been cleared since 2009 as a result of the Guantanamo Task Force established under Executive Order 13,492.[75] Little is known regarding the government's ongoing efforts, if any, to effectuate the release of these men.

The PRB cleared Abdul Latif Nasser for release on July 11, 2016.[76] As Moroccan security assurances arrived less than thirty days prior to then-Secretary of Defense Carter's last day in office, he chose to leave the final determination of

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[73] *Id*. sec. 4(b).

[74] *Id*. sec. 5(a).

[75] *See* Al-Bihani Opp. at 9-10; Reprieve, *supra* note 14, at 16; Carol Rosenberg, *Two Guantánamo Detainees Refused to Leave. Now They're Stuck There, Commander Says*, McClatchy (Oct. 17, 2018), https://www.mcclatchydc.com/news/nation-world/national/national-security/guantanamo/article220126165.html.

[76] Unclassified Summary of Final Determination (July 11, 2016), https://www.prs.mil/Portals/60/Documents/ISN244/20160711_U_ISN244_FINAL_DETERMINATION_PUBLIC.pdf.

approval to his successor.[77] No decision has been made as to whether to proceed with Nasser's transfer, and the government has provided no explanation for this delay.

The Guantanamo Task Force cleared Tofiq al Bihani and twenty-nine others for release to Yemen, provided certain security measures were met.[78] Nine years later, twenty-nine of these men, including al Bihani's brother, have been transferred out of Guantanamo Bay, while al Bihani remains detained. The government has stated that al Bihani has not been transferred due to various concerns regarding his circumstances, some unrelated to al Bihani himself.[79] When delays in release occur, there is no mechanism for a detainee like Nasser or al Bihani to enforce the PRB's final determination authorizing release.[80]

Recently, detainees have increasingly declined to participate in the PRB process, citing the lack of any new evidence against them, the emptiness of the review process, and the unenforceability of a favorable PRB determination.[81]

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[77] Al-Bihani Opp. at 9-10.

[78] *See* The New York Times, *The Guantanamo Docket: Tolfiq Nassar Ahmed al Bihani*, https://www.nytimes.com/interactive/projects/guantanamo/detainees/893-tolfiq-nassar-ahmed-al-bihani (last visited May 22, 2019).

[79] Al-Bihani Opp. at 9-10.

[80] Reprieve, *supra* note 14, at 16.

[81] *See, e.g.*, Private Counsel Statement for Sharqawi Abdu Ali al-Hajj, ISN 1457, Subsequent Full Review (Feb. 26, 2019 (explaining that Mr. al-Hajj "declined to participate in these proceedings because he does not believe there is more he can presently say or do under the circumstances to make his case"), available at https://www.prs.mil/Portals/60/Documents/ISN1457/SubsequentReview1/20190226_U_ISN_1457_OPENING_STATEMENTS_OF_DETAINEES_REPRESENTA

C. The Executive Branch Has Dismantled the Infrastructure for Effectuating Transfers.

The inability of the PRB to offer detainees a realistic opportunity for review of their continued detention is demonstrated by the fact that the executive branch has dismantled the government offices previously tasked with effectuating transfers of detainees approved for release and transfer by the PRB. The State Department has closed the Office of the Special Envoy for Guantanamo Closure, scattering the office's staff and responsibilities across the Department of State.[82] The Closure Office's primary responsibilities included negotiating the security and humane treatment assurances for each detainee transfer to a third country and playing a leading role in the interagency process to determine whether, when, and to where a detainee is transferred.[83] The Closure Office additionally represented the Department of State in the PRB process and worked closely with U.S.

TIVES_PUBLIC.pdf; Letter to Periodic Review Board from Counsel for Guled Hassad Duran at 2 (Oct. 25, 2018) (explaining why Mr. Duran's participation in the PRB process will be limited an noting that it is "clear that this process offers Mr. Duran no meaningful opportunity to be transferred"), available at https://www.prs.mil/Portals/60/Documents/ISN10023/SubsequentReview1/20181025_U_ISN_10023_OPENING_STATEMENTS_OF_DETAINEES_REPRESENTATIVES_PUBLIC.pdf.

[82] *See* Benjamin R. Farley, *Maybe Dismantling the GTMO Closure Office Wasn't Such a Good Idea*, Just Security (Apr. 23, 2018), https://www.justsecurity.org/55109/dismantling-gtmo-closure-office-wasnt-good-idea/.

[83] Carol Rosenberg, *Trump Closed an Office That Tracked ex-Gitmo Inmates. Now We Don't Know Where Some Went*, McClatchy (Nov. 13, 2018), https://www.mcclatchydc.com/news/nation-world/national/national-security/guantanamo/article220993900.html.

embassies around the world to follow up on the post-transfer status of former detainees.[84]

Former Secretary of State Rex Tillerson closed the Closure Office and instead assigned the Bureau of Western Hemisphere Affairs to handle any problems that arose in the transfers.[85] Shortly thereafter, deals with third countries unraveled and the tracking of released detainees faltered.[86] Additionally, according to a former Senior Adviser to the Special Envoy for Guantanamo Closure, "the government's primary reservoir of expertise on detainee transfer frameworks has been dispersed," the regional bureaus and embassies to which Guantanamo-related issues have been transferred are unfamiliar with the issue set, and the government has lost institutional memory associated with the Office's closure.[87] Former Special Envoy for Guantanamo Closure Lee Wolosky stated that he has been receiving phone calls from foreign envoys concerned that "they have no one to talk to in the U.S. government."[88]

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[84] Testimony of Lee S. Wolosky, Special Envoy for Guantanamo Closure, Hearing on Guantanamo Bay Before the House Foreign Affairs Committee, 114th Cong. (Mar. 23, 2016), https://docs.house.gov/meetings/FA/FA00/20160323/104731/HHRG-114-FA00-Wstate-WoloskyL-20160323.pdf.

[85] *See* Rosenberg, *supra* note 83.

[86] *Id.*; *see* Farley, *supra* note 82.

[87] *See* Rosenberg, *supra* note 83; Farley, *supra* note 82.

[88] Rosenberg, *supra* note 83.

In the absence of continued and concerted efforts within the State Department to effectuate new transfers, monitor previous transfers, and participate fully in the PRB process, the PRB will remain dysfunctional and be unable to provide detainees with even the inherently limited and procedurally deficient review it once provided. It will not mitigate any concerns about whether detainees' ongoing law of war detention at Guantanamo Bay offends due process.

CONCLUSION

Petitioner-Appellant Ali has been detained at Guantanamo Bay, without charge or trial, for nearly seventeen years. The PRB process is inherently limited, procedurally defective, and effectively defunct. It provides no meaningful opportunity for transfer or release, and therefore its existence should not comfort this Court in reviewing the legality of Petitioner's continued detention.

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Respectfully submitted,

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I hereby certify that I caused the foregoing to be electronically served on the parties listed below and filed by using the appellate CM/ECF system. All participants in the appeal are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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